IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
June 4, 2013 Session

BRENDA BENZ-ELLIOTT v. BARRETT ENTERPRISES, LP ET AL.

Appeal from the Chancery Court for Rutherford County
No. 081355CV John D. Wootten, Jr., Judge

No. M2013-00270-COA-R3-CV – Filed August 14, 2015

A property owner ("Seller") who had 91 acres contracted to sell 5.01 acres to Buyers. The contract contained the condition that Buyers would reserve a 60-foot strip of land along the western edge for Seller and that Buyers would construct a road along the 60-foot stretch to enable Seller to access her property from the west. The closing on the property occurred in March 2005, seven months after the contract was signed, but the warranty deed did not carve out the 60-foot strip consistent with the contract. Seller did not realize the deed did not reserve the 60-foot strip until November 2007, when she went to see her attorney. She contacted Buyers' attorney immediately in an effort to have the deed corrected. When that effort was not successful, she filed a complaint alleging breach of contract in September 2008, less than four years after the sale was closed. Buyers argued Seller was barred by waiver and estoppel from succeeding on her contract claim because she sat on her rights for years while Buyers constructed a new building and left no space for a road to be built along the western edge. The trial court disagreed and awarded Seller damages in the amount of $850,000. After the case was on appeal, the defendants had a road constructed that provided Seller access to her property, but it was in a different location than the contract contemplated. The case was remanded to the trial court for the consideration of these additional facts, and the trial court reduced its earlier damages award down to $650,000. The Buyers appealed the trial court's judgment, arguing the trial court erred in ruling Seller was not barred by estoppel, waiver, or laches, from recovering on her breach of contract claim. Buyers also argue the trial court erred in its award of discretionary costs. We affirm the trial court's judgment in all respects.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

ANDY D. BENNETT, J., delivered the opinion of the Court, in which FRANK G. CLEMENT, JR., P.J., M.S., and RICHARD H. DINKINS, JJ., joined.

Peter V. Hall, Murfreesboro, Tennessee, for the appellant, Barrett Enterprises, LP, et al.

G. Sumner R. Bouldin, Jr., Murfreesboro, Tennessee, for the appellee, Brenda Benz-Elliott

OPINION

FACTUAL AND PROCEDURAL BACKGROUND

This appeal returns to us from the Supreme Court for further analysis. We begin with a recitation of the facts taken from our prior decision:[1]

> Brenda Benz-Elliott ("Ms. Elliott") owned approximately 91 acres of property between I-24 and Manchester Pike in Rutherford County. Barrett Enterprises, LP ("BE"), owned a four-acre tract of property adjacent to Ms. Elliott's property; BE's property is located on Miller Lane, a frontage road running along I-24. Ronnie Barrett ("Mr. Barrett") is the general partner of BE and operates a firearms manufacturing business located on BE's property.
>
> Ms. Elliott and Mr. Barrett had known each other for approximately 25 years. In 2004, Mr. Barrett approached Ms. Elliott and her husband about purchasing approximately five acres of her property in order to allow Mr. Barrett to expand his firearms manufacturing business. Although Ms. Elliott was initially reluctant to sell, Mr. Barrett told her to "name your price," and she decided to sell a little over five acres for $82,500.00 per acre.
>
> On August 5, 2004, Ms. Elliott and BE entered into a contract for sale of real estate. The contract includes the following condition:
>
>> Seller to reserve ownership of a sixty feet (60') wide strip along I-24 for extension of Miller Road to connect remaining Seller's property. Buyer agrees to extend Miller Road built to county specifications along I-24 to a point ten (10) feet south of his new south property line.
>
> Under the contract, Ms. Elliott was obligated to pay for the cost of a survey and deed preparation; however, because she did not know any land

[1]In *Benz-Elliot v. Barrett Enterprises, LP*, 456 S.W.3d 140, 142 n.1 (Tenn. 2015), the Tennessee Supreme Court observed that "[t]he parties state in their supplemental briefs that the Court of Appeals' opinion accurately recites the facts."

surveyors, Ms. Elliott agreed for Mr. Barrett to arrange for a survey. By this point, Ms. Elliott and Mr. Barrett had renewed their friendship and frequently socialized together.

Before the contract was signed, Mr. Barrett contacted the Tennessee Department of Transportation ("TDOT") concerning a proposal to move the fence bordering I-24 in order to allow a straight-line extension of Miller Lane. It is undisputed that this arrangement would have been more beneficial to both parties than the extension plan contemplated in the condition in the real estate sale contract. After the contract was signed, the parties continued to work with TDOT to try to work out an acceptable plan. Mr. Barrett and Mr. Elliott met with state officials in December 2004 to discuss moving the fence to allow for the extension of Miller Lane. In February 2005, Mr. Elliott sent TDOT a letter stating that the parties had met with various county and state officials concerning the project and requesting TDOT's authorization of the proposed moving of the fence.

Paul Degges, TDOT's chief engineer, responded with the following letter:

> Thank you for your letter concerning our recent meeting to discuss the possible relocation of the right of way fence along I-24 and the Miller Lane frontage road in Rutherford County. I was glad to read of the support that you have garnered for the expansion of Barrett Arms [the firearms manufacturing company] and the extension of Miller Lane.
>
> As we discussed, the Tennessee Department of Transportation is in support of this economic development for the local area, although this is contingent on the department agreeing to relocate our fence in order to accommodate the extension of the county right of way for Miller Lane, the existing frontage road.
>
> When formal plans are available, we will allow the relocation of the fence to a point to be determined by this department. Also, as you stated, this agreement in no way binds the department to any financial responsibility as regards to the future project.

> We look forward to working with all parties as this project becomes more fully developed.

Based upon this letter, Mr. Barrett began obtaining permits and working with attorney Jeff Reed to prepare for the closing of the property sale.

The sale closed on March 25, 2005. At closing, several provisions of the sale contract were modified in writing, but there was no written modification of the provision requiring the reservation of a 60-foot strip by Ms. Elliott. The deed description did not provide for the reservation of a 60-foot strip by Ms. Elliott.

Over the next two years, Mr. Barrett continued to make efforts to finalize the desired straight-line extension proposal with TDOT and other governmental entities. Construction of the plant expansion began in late 2005 or early 2006. In June 2006, TDOT sent Mr. Barrett a letter with a plan "that meets both your need to accommodate truck traffic to your new facility and our need to preserve the integrity of the interstate right of way." The proposed extension was not, however, the straight-line extension desired by the parties; rather, the TDOT plan showed what the parties have referred to as a "dog-leg" extension (including a curve) of Miller Lane. Under this plan, only a short portion of TDOT's fence would have to be relocated. The TDOT plan would have put part of the road extension in the same location as detention ponds already constructed by BE next to its new building. Mr. Barrett was not willing to go forward with TDOT's plan.

In late November or December 2007, Ms. Elliott decided to contact attorney Thomas Haynes, the same attorney who had advised her in drafting the real estate sale contract, regarding her concerns that the road to access her property had not yet been built. Mr. Haynes reviewed the warranty deed to the property and advised Ms. Elliott that it did not allow for her reservation of a 60-foot strip as stated in the contract.

On September 22, 2008, Ms. Elliott filed suit against BE and Mr. Barrett for breach of contract, negligent misrepresentation, and fraud. Ms. Elliott prayed for specific performance and damages.

Initial trial

The case was tried, without a jury, in October and November 2010. Ms. Elliott was the first witness to testify. She stated that, prior to the filing

of this lawsuit, she never saw the survey of the property she sold to BE. According to Ms. Elliott, at the closing of the sale in March 2005, there was no discussion about dispensing with the contract requirement of the reservation of a 60-foot strip for her. After the closing, there were "a number of discussions about different scenarios, different routes" for the extension of Miller Lane. She further stated that she never indicated in writing or otherwise that she would no longer want to reserve the 60-foot strip if Miller Lane could be extended straight down the right-of-way. At the time of the hearing, Miller Lane had not been extended to allow access to Ms. Elliott's remaining property. Ms. Elliott testified that she and her husband tried to help Mr. Barrett get the fence along the right-of-way moved to allow for the extension of Miller Lane, and that such an extension would have helped her property: "Because a straight-line extension that keeps popping up would have been mutually beneficial to both of us [Ms. Elliott and Mr. Barrett], and it would have enhanced my property and made it worth more."

The next witness was Tom Haynes, the attorney who advised Ms. Elliott in the drafting of the original sale contract and who later met with her to discuss the delays in getting an extension of Miller Lane. After viewing an original draft of the sale contract, Mr. Haynes advised Ms. Elliott to add a provision reserving ownership of a 60-foot-wide strip to ensure access to the remainder of her property.

Cecil "Bud" Elliott testified about his participation in the attempts to get approval for a straight-line extension of Miller Lane.

Russell Parrish, a licensed real estate appraiser, testified on behalf of the plaintiff concerning the appraisal he performed on the property in August 2009. He was asked to determine the diminution in the value of Ms. Elliott's remaining property as a result of Mr. Barrett's failure to extend the road to allow access to her property. Mr. Parrish calculated the 86 acres to be worth $5,332,000 before the sale, and $3,956,000 in March 2009; these figures reflect a diminution in value of $1,376,000, or 25.8%, due to the loss of access to the property.

Roger Morse, an engineer, testified that his firm was hired by Mr. Barrett to perform survey work on the property that was to be sold by Ms. Elliott to BE. Mr. Morse testified about a meeting with Mr. Barrett and Mr. Elliott about the property at issue and a rough sketch done by Mr. Elliott. Mr. Morse never had any contact with Ms. Elliott concerning the project.

Paul Degges, a civil engineer employed by TDOT, testified about the negotiations with Mr. Barrett and the Elliotts concerning the possibility of moving the right-of-way fence to allow the extension of Miller Lane. Mr. Degges testified that, at an initial meeting in January 2005 with Mr. Barrett and Mr. Elliott, he explained that "I didn't feel that we could allow the extension of the road on the interstate right-of-way, but I did feel there would be an opportunity for us to help partner with Rutherford County." He further explained that TDOT "could work with the County and build a public road, provide that access adjacent to the interstate." Mr. Degges also provided the following testimony concerning the options discussed at the initial meeting:

> Q. At this initial meeting with Mr. Elliott and Mr. Barrett, was there also discussed an alternative proposal whereby just a little corner of the right-of-way fence would be removed?
>
> A. Yes. In the discussion we talked about offsetting the road so it wouldn't be on I-24 right-of-way-proper. And Mr. Barrett and Mr. Elliot were concerned about getting 18-wheeler traffic in through here. So we kind of sketched out and, kind of, talked about, to be able to make that turn, that as transportation engineers we would be able to design a road to be able to make those types of turns; and, if necessary, I felt that I might be able to cut a corner off of the fence if I had to. But I just — we just didn't feel that we could build the road down the right-of-way. So the discussion of moving the fence had to do with the cutting the corner off of the fence.

TDOT sent a letter and drawing to Mr. Barrett and Mr. Elliott describing the general concept that the department was willing to approve. Mr. Barrett consistently returned to the straight-line extension down the right-of-way, and Mr. Degges consistently responded that this was not going to be possible. He testified that TDOT never agreed to the straight-line extension plan.

The first witness for the defendants was Wilburn Honeycutt, consulting engineer, who provided design services on the construction of the manufacturing facility on BE's new property. He testified that TDOT's proposal for extending Miller Lane was not workable because the suggested

changes to the detention pond would not, in his opinion, allow for the necessary drainage.

Jeff Reed, the attorney who handled the closing of the real estate sale, testified that he asked Mr. Barrett prior to closing what the parties' intent was with respect to the 60-foot strip. Mr. Barrett told Mr. Reed that the parties had been working with TDOT with regard to moving the right-of-way and that TDOT had agreed to their plan. Mr. Reed recalled presenting the deed to the parties at closing and receiving assurances that they had an arrangement with TDOT to move the right-of-way.

Johnny Sullivan, a real estate appraiser, testified on behalf of the defendants. His estimate of the value of Ms. Elliott's remaining 86 acres of property as of March 2005 was $1,404,000. His estimate of the diminution in value caused by the lack of access was $99,000. Thus, the final value of the property was $1,305,000.

Mr. Barrett was the next witness, and he testified that the parties did not close on the real property sale "until we had assurances and an agreement from TDOT that that [the desired extension of Miller Lane] was going to occur." He stated that he would not have proceeded with the sale with the reservation of the 60-foot strip as the means of establishing access. Mr. Barrett testified that, in signing the contract and proceeding with the new building, he relied upon Ms. Elliott's silence concerning the 60-foot strip and her lack of objections at closing.

Decision of trial court

After hearing all of the proof, the trial court dismissed Ms. Elliott's causes of action for fraud and negligent misrepresentation, but found that she had carried her burden of proof on the breach of contract claim. In reaching these conclusions, the trial court took note of the course of dealings between the parties and their friendship; the court also discussed the fact that Attorney Haynes suggested the insertion of the 60-foot condition in order to prevent Ms. Elliott's remaining property from being landlocked on the interstate side. The court went on to make the following relevant findings of fact:

> This contract was signed in August of 2004; closing was not until March of 2005. There was some testimony about conversations with TDOT. And this Court has seen multiple

> exhibits of e-mails, recollections of conversations, all having to do with maybe how the road ought to be configured. . . .
>
> Now, come March of 2005, what I see is a closing, a presentation of a deed, based upon the metes and bounds description, but there was no survey there. And indeed I note particularly that Mr. Reed said that he presented the deed . . . , but he didn't go over that [the metes and bounds] in particular. . . .
>
> Now, let's go to the next cause of action, under the breach of contract theory. Has the Plaintiff carried her burden of proof with regard to a breach of contract? I said earlier, to me, the gist of this contract, first, just to sell the property but also there's specific therein a reservation of ownership of 60 feet. The contract also says that anything having to do with an alteration or modification has to be in writing. One thing [written modification] was done — it had to do with taxes, but one thing was done. The rest of this has to do with contract — or conversations about the best results that this road might be configured after the contract was signed or even after the closing; and it was all dependent upon third parties, particularly the State of Tennessee. . . . The key document in this case is the contract. As I said earlier, I think it's clear.
>
> Now, is there a breach of contract? Well, there is no road. No road has been built. Number two, there is no reservation of 60 feet. So, yes, there is a breach of contract. I find specifically that the Plaintiff has carried her burden of proof in that regard.

Because the defendants had already constructed an expensive manufacturing facility and there was a detention pond where the extension of Miller Lane would have to be constructed, the trial court concluded that specific performance was not possible. The court awarded Ms. Elliott $850,000 in damages. The court subsequently entered an order awarding her discretionary costs. In response to a motion to alter or amend filed by the defendants, the trial court entered an amended final judgment on March 3, 2011.

> Prior appeal
>
> The defendants appealed the trial court's March 2011 order. While that appeal was pending, the defendants filed a motion to consider post-judgment facts asserting that Ms. Elliott had received access to her property from Miller Lane, thereby rendering her case moot. On June 6, 2012, this court granted the defendants' motion and remanded the case to the trial court for further findings in light of the post-judgment facts.
>
> Decision on remand
>
> On remand, another hearing was held on November 1, 2012. The maps introduced into evidence show that the relocated Miller Lane goes behind BE's property and extends to the southwest corner of Ms. Elliott's property, where it ends in a cul-de-sac. The access road is not adjacent to I-24; rather, it abuts part of Ms. Elliott's property close to her house and outbuildings.
>
> Mr. Parrish testified again, giving his revised opinion about the diminution in value of Ms. Elliott's property in light of the new access road. His revised figure for the total diminution in value was $1,066,496. This figure reflects the diminution in value due to the lack of ingress and egress to Ms. Elliott's property along I-24. The defendants called their appraiser, Mr. Sullivan, back to the stand. He opined that in light of the new access road, there was no diminution in value to Ms. Elliott's property.
>
> The court entered an order on November 29, 2012, reducing the amount of the judgment from $850,000 to $650,000.

Benz-Elliott v. Barrett Enters., LP, No. M2013-00270-COA-R3-CV, 2013 WL 3958386, at *1-6 (Tenn. Ct. App. July 29, 2013), *rev'd Benz-Elliot v. Barrett Enters., LP*, 456 S.W.3d 140 (Tenn. 2015).

<u>Prior Court of Appeals Decision</u>

The defendants appealed the trial court's judgment, and the Court of Appeals ruled that Ms. Elliott's claim was barred by the three-year statute of limitations for actions for injuries to real property. *Benz-Elliott*, 2013 WL 3958386, at *7.

Supreme Court Decision

The Supreme Court "granted permission to appeal to clarify the analysis that should be used to determine the applicable statute of limitations when a complaint alleges more than one claim." *Benz-Elliott*, 456 S.W.3d at 141. The Court concluded that:

> because the legal basis of the claim is breach of contract and the damages sought and awarded are for breach of contract, we conclude that Ms. Elliott's breach of contract claim is governed by the six-year statute of limitations applicable to "[a]ctions on contracts not otherwise expressly provided for." Tenn. Code Ann. § 28-3-109(a)(3).

Id. at 152. The Supreme Court remanded the matter to the Court of Appeals "for resolution of the other issues the defendants raised on appeal." The defendants' remaining arguments are that: (1) the plaintiff's breach of contract claim must fail under principles of waiver or estoppel; (2) the plaintiff was guilty of laches; (3) the trial court erred in entering an award of damages; and (4) the trial court erred in its award of discretionary costs.

STANDARD OF REVIEW

Issues of fact are reviewed de novo with a presumption of correctness unless the evidence indicates otherwise. TENN. R. APP. P. 13(d). Questions of law are reviewed de novo with no presumption of correctness. *Benz-Elliott*, 456 S.W.3d at 147.

ANALYSIS

Waiver

The defendants do not contend the trial court erred in concluding that they failed to comply with the contract's requirement that 60 feet of land be reserved for Ms. Elliott to access her property from Miller Lane, along the western edge of her property. Instead, they contend that Ms. Elliott is estopped from pursuing her breach of contract claim due to the principles of waiver and/or estoppel.

> Waiver occurs where a party "by express declaration; or by acts and declarations manifesting an intent and purpose not to claim the supposed advantage; or by course of acts and conduct, or by so neglecting and failing to act, as to induce a belief that it was [the party's] intention and purpose to waive."

Crye-Leike, Inc. v. Carver, 415 S.W.3d 808, 821 (Tenn. Ct. App. 2011) (quoting *94th Aero Squadron of Memphis, Inc. v. Memphis-Shelby Cnty. Airport*, 169 S.W.3d 627, 636 (Tenn. Ct. App. 2004) (further citation omitted)). To establish waiver, the defendants must show by a preponderance of the evidence that Ms. Elliott "voluntarily relinquished" her right to the 60-foot strip of land. *Id.* In other words, the defendants are required to prove that Ms. Elliott took some action that was "clear, unequivocal and decisive" that evidenced "a purpose to forgo the right or benefit that was waived." *Id.* (quoting *GuestHouse Int'l, LLC v. Shoney's N. Am. Corp.*, 330 S.W.3d 166, 202 (Tenn. Ct. App. 2010) (further citation omitted)).

When Ms. Elliott sold the 5.01 acres to the defendants, there was a fence at the southern end of Miller Lane, where the road terminated at the edge of Ms. Elliott's property. Ms. Elliott made it a condition of the sale that 60 feet along the western edge of the parcel be reserved so that she would be able to access her property from Miller Lane,[2] which ran parallel to I-24. The contract required the defendants not only to reserve 60 feet of the land for Ms. Elliott, but also to extend Miller Lane along I-24 ten feet past the defendants' new property line, so that the road would terminate on the western edge of Ms. Elliott's property, closest to I-24. The contract provided that any amendment "shall be in writing." The defendants concede that there was no written amendment regarding the 60-foot reservation or the defendants' obligation to extend Miller Lane along I-24 to a point ten feet south of the defendants' new property line.

Because of the location of the fence and TDOT's right of way that extended directly south of the fence, the extension of Miller Lane would have to be in a sort of zigzag configuration, turning east from where Miller Lane terminated at the fence before it could continue south along the private property line. Mr. Barrett put a lot of effort into trying to convince TDOT to relocate its fence so that Miller Lane could be extended directly south rather than having to curve east before continuing south. TDOT had a right-of-way directly south of the fence. Thus, TDOT would have had to allow the road to encroach onto its right-of-way if it were to be extended directly south, in a straight line.

Ms. Elliott agreed that a straight-line extension of the road was better than a zigzag configuration, and she assisted Mr. Barrett in his effort to have the road extended in a straight line. The purpose of the 60-foot reservation was to prevent Ms. Elliott's land along I-24 from being landlocked following the sale of the 5.01 acres to the defendants. If TDOT were to permit the road to encroach onto its right-of-way and be extended in a straight line, Ms. Elliott would not have needed the 60-foot reservation, because her land would no longer be landlocked. She testified that it did not matter to her whether she

[2]The parties' contract refers to "Miller Road," but the surveys introduced at trial refer to the street as "Miller Lane." We will refer to the street as "Miller Lane" for the sake of consistency.

obtained access as a result of a straight line or a zigzag extension of Miller Lane, so long as she got access from Miller Lane along the western edge of her property.

The defendants argue on appeal that because Ms. Elliott helped Mr. Barrett in his efforts to have TDOT move its fence and did not address the 60-foot reservation of land after the contract was signed, prior to the closing several months later, that Ms. Elliott waived the contract's condition that the 60-foot strip of land be reserved to her. We do not agree.

Ms. Elliott testified at trial that the parties never amended the contract to delete her 60-foot reservation of land:

> Q: [D]uring this several-month period before the closing, did – were there conversations with Mr. Barrett about eliminating those conditions with respect to the 60-foot reservation and the construction of a road by Mr. Barrett?
>
> A: No.
>
> Q: Ever? At any point up to the closing?
>
> A: No.

Ms. Elliott testified that she was not aware that the warranty deed she signed at the closing did not in fact reserve the 60-foot strip of land to her until 2007, when she went to see her attorney, Tom Haynes. Mr. Haynes obtained a copy of the warranty deed after Ms. Elliott went to see him. Ms. Elliott testified as follows:

> Q: And after you met with Mr. Haynes, were you aware of the fact that there wasn't a 60-foot reservation in that deed?
>
> A: Mr. Haynes informed me.
>
> . . . .
>
> Q: Before that time, did you have any idea that that strip wasn't in there?
>
> A: No.
>
> Q: What, if anything, did you do after you found that out?

A: I called Mr. Reed [Mr. Barrett's attorney and the closing attorney] and told him I wanted a deed correction . . . .

Q: Okay. And that was - - was that shortly after this November of '07 meeting?

A: I called Mr. Reed's office probably that day or the day after and spoke with his secretary or paralegal and told her why I was calling.

The defendants contend that Ms. Elliott assumed Miller Lane would be extended in a straight line before the closing occurred in March 2005 and that she, therefore, did not believe she needed the 60-foot reservation by the time of the closing. Her testimony, however, was otherwise:

Q: Would it be fair to say that in spite of the language that's in your contract, that you and your husband and Mr. Barrett came to the conclusion before closing, that TDOT was going to provide a straight-line extension of Miller Lane?

A: No.

Based on the evidence in the record, we reject the defendants' argument that "[a]lmost immediately after the contract was signed, the parties abandoned any attempt to reserve ownership of a 60 foot wide strip of land or to construct a road thereon." Ms. Elliott never wavered from the condition set forth in the contract that the 60-foot strip of land be reserved for use as a road to provide her access to and from Miller Lane near I-24. She would have been satisfied if her access were obtained by way of a straight line extension of Miller Lane instead of the zigzag configuration, but the defendants have not presented evidence that she ever agreed to give up the 60-foot reservation of land.

The defendants contend Ms. Elliott's husband made "false representations" to Mr. Barrett or that he withheld material facts from Mr. Barrett and that Mr. Elliott's conduct should be imputed to Ms. Elliott to bar her breach of contract claim. The defendants rely on a drawing Mr. Elliott sketched out when Ms. Elliott was first entertaining Mr. Barrett's request to purchase land from her. The drawing is a rough sketch of the portion of Ms. Elliott's 91-acre parcel of land that she was considering selling to the defendants. Mr. Elliott testified that he sketched out the drawing before any contract was drawn up and before Ms. Elliott's attorney suggested that she reserve the 60-foot strip of land to prevent her from being landlocked following the sale. Mr. Elliott testified as follows with respect to this drawing:

Q: Can you tell us, in the sequence of events, was this drawing done before the contract or after the contract, do you know?

A: I'm sure this was done before the - - before the contract, because we had to line out the perimeter of the property, so he would be agreeable to it. And we had to - - evidently, it had to be put in a contract by somebody.

. . . .

Q: Okay. Now, this drawing doesn't have any suggestion of a 60-foot strip that we are talking about in this lawsuit. Do you see that?

A: I do, yes.

Q: And was there a contract - - I think you just told me. Was there a contract yet that even referenced the 60-foot strip when you drew this?

A: As far as I know there was not.

The evidence shows that Ms. Elliott's attorney reviewed an initial draft of a contract and suggested inserting the condition reserving to her the 60-foot strip at issue *after* Mr. Elliott sketched out the drawing upon which Mr. Barrett relies so heavily. The evidence suggests that the drawing Mr. Elliott sketched out early in the negotiations was meant to be used for discussion purposes only. For some reason, Mr. Barrett placed undue reliance on this drawing and caused it to be relied upon by the individual who prepared the survey of the 5.01 acres the defendants were hoping to purchase from Ms. Elliott. The survey was prepared after the contract containing the 60-foot strip condition was executed. The engineer who selected the surveyor testified that Mr. Barrett did not provide him with a copy of the contract and that he was not aware of the 60-foot reservation that was a condition of the sale.

Mr. Elliott testified that he assisted Mr. Barrett in trying to have Miller Lane extended in a straight line because a straight line configuration would be the best way for his wife to access her remaining property. The defendants fail to show, however, that Mr. Elliott made false representations to, or withheld material facts from, Mr. Barrett. We find the evidence does not preponderate against the trial court's conclusion that the defendants failed to prove that Ms. Elliott waived her contractual right to the 60-foot

reservation of land along the western edge of the parcel of land she transferred to the defendants in 2005, either due to her own conduct or that of her husband.

Estoppel

In addition to asserting waiver, the defendants argue Ms. Elliott should be equitably estopped from pursuing her claim for breach of contract. The doctrine of equitable estoppel comes into play when there has been a "false representation or concealment of material facts." *Osborne v. Mountain Life Ins. Co.*, 130 S.W.3d 769, 775 (Tenn. 2004). The defendants, as the parties asserting equitable estoppel, must present evidence of the following with respect to Ms. Elliott:

> (1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) Intention, or at least expectation that such conduct shall be acted upon by the other party; (3) Knowledge, actual or constructive of the real facts.

Id. at 774 (quoting *Consumer Credit Union v. Hite*, 801 S.W.2d 822, 825 (Tenn. Ct. App. 1990)).[3]

Applying these factors to the case at hand, we find that the defendants have failed to present evidence that Ms. Elliott engaged in any conduct that amounted to a false representation or concealment of any material facts, or that was calculated to convey the impression that she was no longer interested in having the defendants provide her access to her property from Miller Lane along the western edge of her property, near I-24. The defendants rely on a letter Ms. Elliott sent to Mr. Degges, from the TDOT, explaining that she was interested in a straight-line extension of Miller Lane, but this does not amount to a false representation or concealment of material facts sufficient to show she should be estopped from pursuing her claim. Because of the contract provision reserving to her the 60-foot strip of land, Ms. Elliott was confident that she would have access to her property. As she testified, Ms. Elliott would have been satisfied to have either the straight-line extension of Miller Lane or the zigzag configuration if the straight-line

---

[3]As the ones asserting equitable estoppel, the defendants would also have to prove the following with respect to themselves:

> (1) Lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) Reliance upon the conduct of the party estopped; and (3) Action based thereon of such a character as to change his position prejudicially.

Osborne, 130 S.W.3d at 774 (quoting *Consumer Credit Union*, 801 S.W.2d at 825).

extension did not end up as an option. In the absence of actionable conduct by Ms. Elliott, the defendants' equitable estoppel argument must fail.

Laches

The defendants next argue Ms. Elliott is guilty of laches. Laches is an equitable defense that is based on a plaintiff's "inexcusable, negligent, or unreasonable delay" in pursuing a claim which results in prejudice to the defending party/ies. *Gleason v. Gleason*, 164 S.W.3d 588, 592 (Tenn. Ct. App. 2004). A court will only find a plaintiff liable for laches where "it would be inequitable or unjust to enforce the claimant's rights." *Id.* Laches generally comes into play when an action is not governed by a statute of limitations, but it may apply within a statutory limitations period when a plaintiff has engaged in "gross laches." *Finova Capital Corp. v. Regel*, 195 S.W.3d 656, 660 (Tenn. Ct. App. 2005). "[G]ross laches requires prejudice to the defendant such as the loss of evidence and witnesses or considerable accumulation of interest resulting from the unjustified delay of the plaintiff." *Id.* (citing *Dennis Joslin Co. v. Johnson*, 138 S.W.3d 197, 201 (Tenn. Ct. App. 2003)). Ms. Elliott's breach of contract claim was filed well within the six-year statute of limitations governing contract actions; thus, the defendants must show Ms. Elliott was guilty of "gross laches" to prevail on their laches argument.

Appellate courts review a trial court's decision regarding laches under an abuse of discretion standard. *Id.* The trial court's decision denying the defendants' argument that Ms. Elliott's action should be barred on the basis of laches will not be reversed '"unless it is clearly shown to be wrong."' *Id.* (quoting *Joslin*, 138 S.W.3d at 200 (further citations omitted)).

The defendants fault Ms. Elliott for not pursuing her breach of contract claim sooner. However, Ms. Elliott testified that she did not observe the defendants' construction of the new building and the creation of the detention ponds that prevented a roadway from being built along the westernmost 60 feet of the property at issue. Ms. Elliott knew Mr. Barrett was eager to break ground on his addition so he could expand his business as quickly as practicable. She explained that she did not expect the defendants to build the road immediately following the closing in March 2005. Ms. Elliott did not know the deed did not contain the 60-foot reservation until she met with her attorney, Tom Haynes, in November 2007. She testified that shortly after meeting with Mr. Haynes and learning that she did not have the 60-foot strip she contracted for, Ms. Elliott spoke with Mr. Barrett to complain. Ms. Elliott testified:

> Q: Now, during this same time frame after your meeting with Mr. Haynes, did you talk to Mr. Barrett about the fact that you didn't have your contractual 60 feet?

A: Yes.

Q: And what was his response?

A: Mr. Reed had contacted him after I contacted Mr. Reed upon the instructions of my attorney, and Mr. Barrett phoned me.

Q: All right. Well, if he phoned you, he must have said something. What was it?

A: He said why didn't you contact me instead of Mr. Reed.

Q: . . . Did he give you any explanation about the 60 feet in this conversation?

A: Nope. I told him that I was simply following the instructions of my attorney, and I said, Ronnie, you will never admit this to me, but you knowingly did this to me.

Q: Did he respond to you in any way?

A: No.

Ms. Elliott's testimony shows that once she realized that she did not have the 60-foot reservation, she contacted Mr. Barrett's attorney and then spoke with Mr. Barrett shortly afterwards. Mr. Barrett's attorney tried to ameliorate the situation in December 2007 by proposing that Ms. Elliott accept a 50-foot easement in place of full ownership of the 60-foot strip of land for which she had contracted, but Ms. Elliott was not receptive to this idea. Ms. Elliott wanted to give Mr. Barrett an opportunity to provide her the access he promised, and she ultimately filed her complaint in September 2008, less than a year after she learned that the defendants had failed to reserve the 60-foot strip for her use. In an e-mail Ms. Elliott sent Mr. Barrett on June 10, 2008, she wrote:

> Whatever you can do to expedite this issue needs to be done immediately.
>
> Friendship set aside, I have to do what is necessary to protect my interest on the remaining property. Therefore, I contacted an attorney this morning regarding the sales contract between you and myself on the terms outlined therein.

> I feel as if I have given ample time of 4 years for this road to be built and access to my remaining interstate property granted.
>
> I really hate to see it come to this, because of burning bridges of what I thought was a friendship. As Bud is aware, I have struggled years over taking this drastic action.
>
> I CANNOT and WILL NOT sit by and let the statute of limitations run out on my options.

The defendants have not presented evidence that they have been prejudiced by a loss of evidence or witnesses due to Ms. Elliott's waiting until September 2008 to file her complaint. *See Gleason*, 164 S.W.3d at 592-93 (finding no gross laches where plaintiff waited twelve years to enforce her right to alimony and defendant suffered no loss of evidence or witnesses and the parties' rights had not changed). Mr. Barrett was aware of Ms. Elliott's growing concern no later than November 2007, when she contacted his attorney and asked for the deed to be corrected to reflect the terms of the parties' contract. The defendants have failed to show this Court that the trial court's decision rejecting their laches argument was "clearly" wrong. Accordingly, we affirm the trial court's decision that Ms. Elliott's claim is not barred due to gross laches.

<u>Damages</u>

The trial court initially awarded Ms. Elliott damages in the amount of $850,000 and then reduced them to $650,000 upon remand after the defendants introduced evidence that Miller Lane had been relocated and Ms. Elliott was provided access to her property. Miller Lane was relocated to the northern edge of Ms. Elliott's property with the result that her access was from the north rather than from the west, close to I-24, as the contract had provided.

Ms. Elliott testified that she was not satisfied with the access to her property from the north because the western portion of her property near I-24 was "the most desirable property to be developed." Ms. Elliott explained that:

> If I want to develop the interstate frontage property, I have to construct and take this road from this cul-de-sac up to I-24, which is the most desirable. Where this cul-de-sac is, they had to put five and a half feet of fill-in . . . , and this is going to be a very expensive project for me to take this road up to I-24 to develop that property.

During the 2012 trial, Ms. Elliott presented a real estate appraiser as a witness who first testified at trial in 2010, before any access road was constructed. In 2010, he testified that the highest and best use of Ms. Elliott's remaining 86 acres was commercial and that a loss of access from the west side of her property, which was visible from and near I-24, resulted in a diminution in value in the amount of $1,376,000. The defendants' real estate appraiser opined in 2010 that only a fraction of Ms. Elliott's 86 acres was able to be developed commercially, and that the highest and best use for the majority of Ms. Elliott's property was residential. The defendants' appraiser testified that a loss of access to Ms. Elliott's property from the west side resulted in a diminution in value in the amount of $99,000. At the conclusion of the trial in 2010, the trial court considered the testimony of both of these experts and explained in an oral ruling how he arrived at a damages calculation of $850,000:

> This Court has heard from two expert witnesses, two appraisers. They vary as widely as perhaps any I have heard in the past. The Plaintiff's expert says that the diminution in value is $1.376 million. The Defendants' expert says the diminution in value is $99,000, all because there's no road frontage.
>
> . . . .
>
> I find problems with the conclusions reached by both experts. . . . But I do believe portions of both of their testimonies. For example, I believe that the highest and best use of a portion of this remaining 86 acres is for commercial development. . . . But I do not believe that the highest and best use, as the Plaintiff's expert says, is for commercial or industrial development for all of the property. . . . I also don't believe the Defendant's expert that all of this property is - - the highest and best use is for residential development. . . .
>
> I can also look at prices. We know that 5 acres sold for $82,500 to Mr. Barrett, and that shouldn't be the be all and end all in how to value the property or to give you a baseline to talk about diminution in value. . . .
>
> I've considered all of the testimony. And I have concluded that the Plaintiff is entitled to damages in the sum of $850,000 for breach of contract in this case. It is not as low as the . . . Defendants' expert says nor as high as the Plaintiff's said. As I said, I don't believe I can buy off on all that either one says. . . .

Then, once the case was remanded to the trial court in 2012, the defendants were able to present additional evidence that a road had been constructed that provided access to Ms. Elliott's property from the north, rather than the west. Ms. Elliott testified that 2.4 acres of her property has been taken by TDOT to construct the access road.[4] Ms. Elliott's expert updated his earlier appraisal of the diminution in value of Ms. Elliott's remaining 86 acres of land and determined that her damages were lessened from the earlier appraisal by $309,504, resulting in a current diminution in value amount of $1,066,496. The appraiser explained:

> This condemnation has in no way, shape, or form made her whole. She does not have the same access. Her access/ingress is still inferior. And all of her development is - - it's already been dictated partially due to this condemnation. Any plan would have to incorporate that new road. However, in saying all of that, I did give credit and say this is a partial cost of cure because there have been infrastructure put on her property that can be utilized for future development.
>
> My estimation for Ms. [Elliott]-Benz's property, the portion of the property along the interstate would be the most likely to sell first and be developed. So this cost and new roadway in no way, shape, or form would help that factor without additional infrastructure. And even with the additional infrastructure, it would be added cost from where she was at the beginning of all of this.

The defendants' expert testified in 2012 as well. According to him, Ms. Elliott no longer has any damages because she has been provided with access and her property is no longer landlocked:

> [Ms. Elliott's property] now has a road and utilities that it didn't have before, so now the prospect of the value increasing is greater than it was at the time that it didn't have the access that it has now. Before it had maybe - - it was going to have 60 foot of right of way access from Miller Lane . . . and now it's got 1,250 [feet] of road frontage that it didn't have before, with utilities. And utilities are an important factor.

After hearing the experts and the parties testify in 2012, the trial court issued an oral ruling that included the following, *inter alia*:

[4]These 2.4 acres are the subject of a separate condemnation proceeding.

> I think, initially, I need to decide, first, has there been a breach of contract. I think I need to do that or re-decide that or at least review it. And I do find that just like I did before, that there was, and is, and remains, a breach of contract. The parties contemplated a reservation of 60 feet along Miller Lane as it existed back in 2004 and 2005. And as I said in my findings of fact a couple of years ago, she still doesn't have that along the interstate fence, if you will. That's the only way I can – or let's call it the front of the property. So there's still been a breach of contract. So does that render the damages I awarded based upon that breach of contract after considering all the proof of the entire record, the valuations given by both Mr. Sullivan and also Mr. Parrish, does that render that $850,000 judgment moot? That's the question, right?
>
> So I find that it does not render it moot. I have listened this morning, and I've seen photographs of the new road. The new road is not where the parties contemplated it was to be. . . . Now she's got the road through the process of eminent domain. She's got the road with substantial amount of road frontage for a portion of her property albeit not where the contract originally contemplated. She's got sewer, but she's lost 2.4 acres. . . . I cannot factor in condemnation, . . . but she has obviously lost property.
>
> . . . This is a court of equity, and I don't think that this Court can impose a windfall for her in light of the fact that this road has been constructed now. I don't think that I can - - but by the same token, I do not think that I could come to the conclusion . . . that there is no damage here. I just don't believe that when people contract in 2004 and 2005 that by lawful means or even by just pure luck or serendipity, . . . that all of a sudden you can escape damages because the plaintiff in this case has access to a certain extent, but that's not what the party contemplated back now eight years ago. But I do - - I do believe in light of the fact that the road is obviously wider, it does give her access to both front, middle, and back, in theory, to her property. I do believe that I have to modify my judgment and I have to go down.

Because Ms. Elliott still suffered damages despite the access to her property that she has now obtained, the trial court reduced its earlier damages amount by $200,000 and awarded Ms. Elliott damages in the amount of $650,000.

When a party appeals a trial court's calculation of damages, we review the trial court's award to determine whether the court "utilized the proper measure of damages." *Memphis Light, Gas & Water Div. v. Starkey*, 244 S.W.3d 344, 352 (Tenn. Ct. App.

2007) (quoting *Beaty v. McGraw*, 15 S.W.3d 819, 829 (Tenn. Ct. App. 1998)). The amount of damages awarded, however, is a question of fact that we review by applying a presumption of correctness, and we will not disturb the trial court's determination of damages unless the preponderance of the evidence is to the contrary. TENN. R. APP. P. 13(d); *Starkey*, 244 S.W.3d at 352-53.

The purpose of awarding damages in a breach of contract action is "to place the plaintiff, as nearly as possible, in the same position [s]he would have had if the contract had been performed." *BancorpSouth Bank, Inc. v. Hatchel*, 223 S.W.3d 223, 228 (Tenn. Ct. App. 2006) (quoting *Wilhite v. Brownsville Concrete Co., Inc.*, 798 S.W.2d 772, 775 (Tenn. Ct. App. 1990)); *see Waggoner Motors, Inc. v. Waverly Church of Christ*, 159 S.W.3d 42, 57 (Tenn. Ct. App. 2004) (goal of damages is to restore injured party to place she would have occupied had wrongful conduct not occurred). In their brief, the defendants acknowledge that the trial court made an effort not to place Ms. Elliott in a better position through an award of damages than she would have been in had the contract been fully performed. We find the trial court applied the proper measure of damages by considering the best use of Ms. Elliott's 86 acres and then determining the diminution in value that resulted from the defendants' breach of the parties' contract.

An award of damages may not be based on "speculation or conjecture." *Waggoner Motors*, 159 S.W.3d at 57 (citing *Overstreet v. Shoney's, Inc.*, 4 S.W.3d 694, 703 (Tenn. Ct. App. 1999)). "[D]amages become too speculative only when the existence of damages is uncertain, not when the precise amount is uncertain." *Id.* (citing *Church v. Perales*, 39 S.W.3d 149, 172 (Tenn. Ct. App. 2000). "Damages need not be calculated with mathematical precision." *Beaty*, 15 S.W.3d at 829. In fact, damages can be awarded in breach of contract cases when it is impossible to prove the exact amount of damages. *ARC LifeMed, Inc. v. AMC-Tenn., Inc.*, 183 S.W.3d 1, 28 (Tenn. Ct. App. 2005) (citing *Cummins v. Brodie*, 667 S.W.2d 759, 765 (Tenn. Ct. App. 1983)). The evidence need only be reasonably certain to establish the amount of damages. *Waggoner Motors*, 159 S.W.3d at 57 (citing *Wright Med. Tech., Inc. v. Grisoni*, 135 S.W.3d 561, 595 (Tenn. Ct. App. 2001)); *see Moore Constr. Co., Inc. v. Clarksville Dep't of Elec.*, 707 S.W.2d 1, 15 (Tenn. Ct. App. 1985) (courts allow damage awards for breach of contract even where exact amount of damages cannot be proved).

The defendants' expert initially testified in 2010 that the diminution in value of Ms. Elliott's 86 acres was $99,000 based on his opinion that a majority of her property was best used for residential purposes. Ms. Elliott's expert initially testified that the diminution in value was $1,376,000 based on his opinion that the best use of her property was commercial. We cannot say that the evidence preponderates against the court's initial determination that Ms. Elliott's damages were $850,000 because that amount falls within the range of values about which the experts testified. After the case was remanded

and additional evidence was introduced, the trial court reduced the damages amount down to $650,000 after concluding, based on the evidence, that the access road coming in from the north only partially ameliorated Ms. Elliott's damages. Again, the evidence presented on remand supports the trial court's reduction in damages such that we cannot say the evidence preponderates against the trial court's ultimate conclusion that Ms. Elliott is now entitled to damages in the amount of $650,000.

Discretionary Costs

The final argument the defendants make on appeal concerns the amount of discretionary costs the trial court awarded Ms. Elliott. Following the first trial, the trial court awarded Ms. Elliott a total of $6,205.92 in discretionary costs. This amount is comprised of the following: $2,187.05 for the court reporter; $840.90 for the expert witness deposition of the engineer Roger Morse; $427.97 for the expert witness deposition of the surveyor Kurt Johnson; and $2,750 for the expert witness fees of Russell Parrish, Ms. Elliott's real estate appraiser.

The award of discretionary costs is governed by Tennessee Rule of Civil Procedure 54.04(2), which provides, in pertinent part:

> Costs not included in the bill of costs prepared by the clerk are allowable only in the court's discretion. Discretionary costs allowable are: reasonable and necessary court reporter expenses for depositions or trials, reasonable and necessary expert witness fees for depositions (or stipulated reports) and for trials, reasonable and necessary interpreter fees not paid pursuant to Tennessee Supreme Court Rule 42, and guardian ad litem fees; travel expenses are not allowable discretionary costs.

As the term "discretionary costs" implies, the trial court has discretion to award these costs to the prevailing party, and we are not inclined to second-guess the trial court's determination without evidence that the trial court somehow abused its discretion. *Mass. Mut. Life Ins. Co. v. Jefferson*, 104 S.W.3d 13, 35 (Tenn. Ct. App. 2002) (citing *Woodlawn Mem'l Park, Inc. v. Keith*, 70 S.W.3d 691, 698 (Tenn. 2002), and *Perdue v. Green Branch Mining Co.*, 837 S.W.2d 56, 60 (Tenn. 1992)). Appellate courts are not permitted to substitute their discretion for that of the trial court, which means that the trial court's decision will be affirmed unless it is clearly unreasonable. *Id.* (citing *Bogan v. Bogan*, 60 S.W.3d 721, 733 (Tenn. 2001), and *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 927 (Tenn. 1998)).

The defendants contest only the costs awarded for the expert witness deposition fees of Mr. Morse and Mr. Johnson on the grounds that they were not identified as

experts or questioned as experts during their depositions. The defendants concede that both Mr. Morse and Mr. Johnson are professionals, and the defendants fail to point to anything in the record establishing that either Mr. Morse or Mr. Johnson testified at their depositions as anything other than as experts.[5]

In her final motion for discretionary costs, Ms. Elliott itemized ten different costs and asked the trial court to award her a total of $15,890.92. The court issued an order awarding Ms. Elliott $6,205.92, and the order contained no explanation for the court's decision. Both of the items the defendants dispute fall squarely within the description of allowable costs contained in Rule 54.04(2). The defendants have failed to carry their burden of showing that the trial court abused its discretion in awarding these deposition fees as discretionary costs. Thus, we affirm the trial court's award of these fees.

CONCLUSION

For the reasons set forth above, we affirm the trial court's judgment in all respects. Costs of this appeal shall be taxed to the appellants, Barrett Enterprises, LP, and Ronnie Barrett, for which execution shall issue if necessary.

____

ANDY D. BENNETT, JUDGE

[5]The record contains an affidavit the defendants' attorney submitted to the trial court in support of their opposition to Ms. Elliott's motion for costs, but the affidavit is insufficient for us to conclude that Mr. Morse or Mr. Johnson did not testify as expert witnesses during their depositions. The record does not contain the deposition transcripts themselves.