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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001085-MR

W. E. WILLIAMS — APPELLANT

v.

APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
ACTION NO. 03-CI-00609

TEXAS GAS TRANSMISSION, LLC — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON AND ACREE, JUDGES; GUIDUGLI,[1] SENIOR JUDGE.

CLAYTON, JUDGE: W. E. Williams (Williams) appeals from the judgment of the Muhlenberg Circuit Court dismissing Williams' Complaint and Petition for Declaratory Judgment. The trial court held that Williams was equitably estopped from asserting any claim to an interest in the 18-17/32 acres of the Bethel

[1] Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

formation owned and operated by Texas Gas Transmission, LLC (Texas Gas). Furthermore, the court ordered that Williams pay all costs for the action.

PROCEDURAL HISTORY

Since 1969, Texas Gas has owned and operated a natural gas storage field in Muhlenberg County, Kentucky, known as the Midland Field, which covers roughly 22,000 acres. The field contains a natural underground rock formation, known as the Bethel formation. Natural gas is injected into the formation and will remain there until withdrawn. This case involves a tract within Midland Field containing sixty-four acres, which is known as the Peveler sixty-four acres. Within the Peveler sixty-four acres is a tract containing 18-17/32 acres. It is this acreage that is the subject of the law suit.

Williams filed this action against Texas Gas on December 18, 2003. Therein, he alleged, among other things, that he owned an undivided one-fourth interest in the oil, gas, and gas storage rights beneath 18-17/32 acres located within the Midland Field. Further, Williams asserted that Texas Gas should account to him for its use of this acreage since 1973 or thereabouts. Williams acquired his interest by deed, dated June 11, 1987, from Flag Drilling Co., Inc., (Flag Drilling).

Texas Gas filed an answer and counterclaim in which it denied Williams' claim of ownership, and if he did have an ownership interest, Texas Gas asserted that he was prohibited from asserting the title by reason of adverse possession by Texas Gas, by reason of champerty, or by reason of estoppel.

The parties litigated the issues in three distinct phases. Phase I concerned the issue of Williams' record title. On April 18, 2005, the trial court entered a declaratory judgment that Williams, through Flag Drilling's 1988 conveyance, held record title to one-fourth of the oil, gas, and gas storage rights in the Bethel formation beneath the 18-17/32 acres. Additionally, the court ordered that the action would proceed with regard to the various defenses proffered by Texas Gas to Williams' ownership.

Phase II concerned the issues of Texas Gas's counterclaim. For purposes of judicial economy, the issue of adverse possession and champerty was tried before a Muhlenberg County jury and the issue of estoppel before the court, sitting as a chancellor in equity. The trial took place from October 17 through October 20, 2006. The jury denied Texas Gas's claims as to adverse possession and champerty with regards to the 18-17/32 acres in the Peveler tract of the Bethel seam. After this determination, the trial judge considered the same evidence that the jury heard to ascertain whether the disputed facts supported Texas Gas's claim of equitable estoppel by silence and misrepresentation.

On January 5, 2007, the trial court entered a Judgment dismissing Williams' complaint and petition for declaratory judgment. In addition, the trial court's judgment confirmed that equitable estoppel by silence and misrepresentation had occurred and ordered Williams to pay all costs. As a result of the court's decision, Phase III was unnecessary. (It would have resolved the accounting problems between the parties had they been found to be joint owners.)

FACTS

In 1962, Williams was the discovering geologist of the Midland Gas Field. Thereupon, he entered into a partnership with Mr. Charles Baker, Jr. (Baker) for the purposes of acquiring leases and drilling for oil and gas. Williams and Baker, in 1963, formed another company, which they titled Flag Drilling Co., Inc. Williams, Baker, and their spouses were the only shareholders in the company. In 1974, Williams purchased all the Baker shares. He was the sole shareholder from 1974 until 2002, when he sold an interest in the company to Kelly Williams, his son.

During 1963, Williams learned that the T. J. Peveler and M. L. Peveler heirs owned the gas and oil beneath the Peveler sixty-four acre tract. While Williams obtained the oil and gas leases from the M. L. Peveler heirs, the T. J. Peveler heirs leased to William E. Payton and John M. Boggess. Concurrently, Williams hired Mr. Robert Vick (Vick) to examine the title for the Peveler sixty-four acres. Mr. Vick expressed his opinion as to the ownership interests in the Peveler sixty-four acres in a letter dated January 24, 1964. Therein, he stated that the T. J. Peveler and the M. L. Peveler heirs owned the oil and gas beneath this tract. The source deed for the mineral ownership of the Peveler heirs was a deed, dated October 16, 1911, and recorded in Deed Book 80, page 456. Mr. Vick, however, also noted an "adverse conveyance" of a deed, ostensibly conveying the 18-17/32 acres, dated October 10, 1907, and recorded in Deed Book 85, page 581. Regarding this deed, Vick required Williams to obtain the original deed to

ascertain whether it was of the surface or in fee and to obtain information concerning Henry Peveler's involvement in this conveyance. No evidence was introduced at trial that Williams looked for the original deed, but he was on notice that a problem might exist with the Peveler title.

Subsequently, in January 1964, Williams acquired the T. J. Peveler heirs' lease from Payton and Boggess, and transferred to Baker one-half of his interest in the T. J. and M. L. Peveler heirs' leases.

Even though Williams knew of a possible title defect concerning the 18-17/32 acres, he and Baker entered into a gas purchase contract with Texas Gas on August 3, 1964. In the contract, they dedicated the Peveler sixty-four acres, without exception, along with other leasehold tracts, to meet the contract's requirements. At this time, Williams and Baker warranted title to the gas free and clear of any adverse claims, and on that same day granted an option to Texas Gas to acquire the leases dedicated to the gas purchase contract. Again, they represented that they owned the lease involved.

Moreover, on August 26, 1964, Williams and Baker filed an application for a Certificate of Public Convenience and sent a copy to Texas Gas. On page two of the application, Williams and Baker represented that they owned the production and that the acreage was dedicated under the aforementioned gas purchase contract.

Then, in December 1964, Williams met with Gardner Stovall and his sister, Martha Stovall Ely, who claimed to own the oil and gas beneath the

18-17/32 acres. Williams and Baker decided to purchase the interest but first wanted an assurance as to the title. Stovall had Terry Earle (Earle) write a title opinion for him. Earle concluded that Stovall and Ely owned one-half of the oil and gas beneath the 18-17/32 acres by reason of the joinder of M. L. Peveler in the deed, described to Williams by Vick, in the aforementioned original title letter opinion, as an "adverse conveyance." Moreover, in this second title opinion letter, Mr. Earle, based on the lease of M. L. Peveler heirs to Williams **and** the recorded gas purchase contract and option contract between Williams/Baker and Texas Gas, required that Stovalls place Williams/Baker and Texas Gas on notice of their ownership.

Before purchasing the Stovall and Ely oil and gas interest, Williams reviewed Earle's title opinion. Interestingly, the Williams/Baker partnership purchased the Stovall and Ely interest, paid them $6,500 from the partnership account, but put the title in the name of Flag Drilling. And Williams did not follow through with Earle's requirement to place Texas Gas on notice of Flag Drilling's ownership claim.

Next, Vick issued a supplemental title opinion regarding the Peveler sixty-four acre tract for Williams and Baker. In his title opinion, dated January 28, 1965, Mr. Vick stated that Flag Drilling owned an interest in the oil and gas beneath the 18-17/32 acres, but the opinion specifically provided that no action would be required until a decision was made to drill on the 18-17/32 acres. According to undisputed evidence, no well was ever drilled there.

The business relationship between Williams/Baker partnership and Texas Gas changed in 1969. At this time, Texas Gas obtained a Certificate of Convenience and Necessity from the Federal Power Commission granting it permission to acquire, own, and operate the Midland Field. The Williams and Baker partnership held leases, produced, and sold gas to Texas Gas on approximately 500 acres covered by the Certificate including the Peveler tract, wherein lie the 18-17/32 acres, which are the subject of this action.

When negotiations were unsuccessful in obtaining these oil, gas, and storage rights, Texas Gas filed, in October 1969, numerous condemnation suits in Muhlenberg County Court against the T. J. Peveler heirs, the M. L. Peveler heirs, Williams, and Baker to obtain those interests. These condemnation actions sought to acquire the ownership interests of both the "working interest" and also the mineral fee owner of the Bethel Seam, and any oil and gas wells located on the surface of each contiguous tract.

As part of the process, Texas Gas hired Neal & Neal to do a supplemental title search on the Peveler sixty-four acres. Sid Neal evaluated the records from the first Vick opinion (January 24, 1964) and concluded that the T. J. Peveler heirs and the M. L. Peveler heirs owned the oil and gas; the Payton, Boggess' estate, and Ernest Warmbrod owned a total overriding royalty interest of 3/64 x 7/8^{ths}; and, Williams/Baker owned the 7/8^{ths} working interests in the oil and gas leases executed by the Peveler heirs, less the previously mentioned overriding royalty interests.

As part of the condemnation process, the County Commissioners heard the case and found that the T. J. Peveler heirs, collectively, owned one-half the minerals and one-half the royalty, found that the M. L. Peveler heirs, collectively, owned one-half of the minerals and one-half of the royalty, and found that Williams/Baker, collectively, owned the entire 7/8^{ths} working interest, less the overriding royalty interests. Nonetheless Williams and Baker remained silent about Flag Drilling's apparent interests.

All the parties, including Texas Gas, took exceptions to the commissioners' award. These exceptions were filed in the Muhlenberg Circuit Court. In 1973, after several years of litigation, the parties held negotiations to settle the Peveler suit as well as the other condemnation suits that Texas Gas had filed against Williams and Baker. Although Williams is the only living person who participated in these negotiations, letters exist that provide information about the settlement process.

In that regard, after Williams, Baker, and their spouses agreed to settle all issues concerning just compensation for the payment of $1,600,000, Attorney Ridley M. Sandidge (Sandidge) wrote a letter on behalf of Texas Gas, dated June 28, 1973, to Baker and Williams' attorney, William Donan (Donan). In the letter was the following paragraph:

> The rights and interests we are acquiring are those we sought in the various condemnation actions. It would also include any other similar rights and interests that they might hold in Midland Field which have not been covered in any condemnationaction (sic). While I know

> of no such interests, and assume there are none, we would want any such rights included in the conveyance to us.

Donan replied by letter on July 3, 1973. In response to the above statement, he wrote:

> It was our understanding that the rights and interests that you are acquiring are those that you sought in the various condemnation actions and did not include any other similar rights or interests that they might hold in the Midland field which have not been covered in any condemnation action, nor any property that they might acquire in the future in the Midland field.

Then, Sandidge wrote back by letter on July 5, 1973, stating in part:

> 1) It was definitely our understanding that we were offering to buy their interests in the entire field. In order to determine whether or not this presents a major problem, I would appreciate it if you would advise me of what interests your clients presently hold in the field that are not subject to condemnation at this time. I know of no such interests but your letter indicates to me that there may be some.

In that same letter, he wrote:

> In line with the above, it is my thought that your conveyance should include a paragraph to the effect that if any interests in the field have been omitted, you would execute to us an appropriate instrument of conveyance.

In response, Donan wrote on July 6, 1973, stating that he had "talked to Mr. Williams and he advised me that he and Mr. Baker do not have title to any other property in the Midland area." No mention was made by Williams about the interests acquired and owned by Flag Drilling, of which he and Baker, were the sole shareholders.

Following Donan's assurance that Williams and Baker did not have title to any other property in the Midland area, the parties finalized the settlement. On July 10, 1973, Williams, Baker, and their spouses, assigned to Texas Gas their entire interests in twelve separate parcels of land, including the Peveler sixty-four acres. The assignment included the following language:

> It is further understood and agreed that it is in the intention of the parties hereto that all the rights and interests sought to be condemned in said actions are hereby assigned.
>
> It is understood and agreed that this assignment is made in settlement of and includes all interests of First Parties which Second Party is now seeking to condemn in its petitions and condemnation actions now pending in the Muhlenberg Circuit Court, Greenville, Kentucky, at Docket numbers set out above.

No mention is made of the allegedly outstanding interest of Flag Drilling nor does it have any exception regarding the 18-17/32 acres. Thus, by the early 1970's, Texas Gas believed that it had acquired all the interests in the Bethel Formation beneath the Peveler tract, and the entire Midland Field.

Three years later, Williams, after he had received his portion of the settlement, contacted Bill Jenkins, now deceased, at Texas Gas and asserted Flag Drilling's claim. George W. Thompson (Thompson), now deceased, the land manager for Texas Gas, advised Williams that, in his opinion, Flag Drilling only had the surface interest.

To bolster this position, Texas Gas's land files contained the 1964 opinion letter of Vick wherein he opined that the Peveler heirs had reserved the

"coal and mineral rights" in the October 16, 1911 deed, recorded in Deed Book 80, page 456. Furthermore, Texas Gas also had in its files another opinion letter from Russell C. Jones, Esq., dated December 17, 1963, wherein opined that the heirs of T. J. and M. L. Peveler had the right to lease the Peveler sixty-four acres.

Ultimately, after an exchange of correspondence, Texas Gas, believing that it held title to the acreage in question, wrote Williams to contact Sandidge on this matter. No evidence was introduced that Flag Drilling contacted Texas Gas again about this issue.

Nine years later (June 1988) Flag Drilling conveyed its interest in the 18-17/32 acres to Williams and the Baker heirs. Following this conveyance, Vick, on behalf of Williams and the Baker heirs, asked Texas Gas for the basis of its position that his clients had no interest in the 18-17/32 acres. Ralph Wible (Wible), an attorney for Texas Gas, replied to Vick in a letter, dated August 2, 1988, that Williams and the Baker heirs were estopped from asserting their claim. Williams received a copy of this letter from Vick.

Williams next communicated with Texas Gas in 2000 when his attorney asked them to check the title. Finally, in 2003, Williams asked for rent from Texas Gas in the sum of $264,000,000. Upon not receiving this payment, Williams filed this action.

ANALYSIS

1) EQUITABLE ESTOPPEL BY SILENCE

The common law principle of equitable estoppel is firmly established in Kentucky law. *Electric and Water Plant Bd. Of City of Frankfort v. Suburban Acres Development, Inc.*, 513 S.W.2d 489 (Ky. 1974). In *Gray v. Jackson Purchase Production Credit Association*, 691 S.W.2d 904, 906 (Ky. App. 1985), this Court set out the elements of estoppel as follows:

> 1) Conduct, including acts, language and silence, amounting to a representation or concealment of material facts;
>
> 2) the estopped party is aware of these facts;
>
> 3) these facts are unknown to the other party;
>
> 4) the estopped party must act with the intention or expectation his conduct will be acted upon; and
>
> 5) the other party in fact relied on this conduct to his detriment.

We will examine each of these elements individually.

First, we must ascertain whether Williams acted in such a way, either through spoken acts or silence, and that these actions amounted to a representation or concealment of material facts as to Flag Drilling's ownership (ultimately Williams and the Baker heirs' ownership) to the oil and mineral rights under the land in controversy. The record contains numerous examples of tacit misrepresentation or silence on the part of Williams. We will list some of these examples from the facts explicated above:

- Even though Williams knew of the adverse title claim of the Stovalls on the property in question and even after the

title opinion letter from Vick, he did not apprise Texas Gas about the adverse claim to the property.

- When he and Baker entered into a gas purchase contract on August 3, 1964, covering the entire 64 acres without exception, they warranted title to the gas free and clear from any adverse claims.

- On that same day, Williams and Baker granted Texas Gas an option to acquire the leases dedicated to the purchase contract and represented that they owned the leases subject to the option.

- Then, after purchase of the Stovalls' interest for $6,500 in December 1965, which was placed under the ownership of Flag Drilling but paid with checks drawn on the Williams and Baker partnership accounts, Williams did not put Texas Gas on notice of Flag Drilling's ownership interest, as advised in the Earle title opinion.

- In 1969, Texas Gas instituted condemnation proceedings in Muhlenberg County Court for the acreage for the Midland Field including the Peveler sixty-four acre tract. Following several years of negotiation, the parties entered into serious negotiations about the property. Williams stood by while the M. L. Peveler heirs were paid a settlement on the basis that they owned one-half the oil and gas, and gas storage rights, in the Bethel Formation beneath the 18-17/32 acres, when they knew the M. L. Peveler heirs did not own it.

- At this same time, as outlined in the facts, in perhaps the most egregious example of "silence" or misrepresentation in this case, Donan, Williams' attorney, assured Texas Gas in a letter dated July 6, 1973, that Williams and Baker did not have title to any other property in the Midland area. In fact, Williams never mentioned the interests acquired and owned by Flag Drilling, of which he and Baker were the sole shareholders.

Texas Gas contends that not only did Williams have an affirmative duty to advise it of Flag Drilling's acquisition of the mineral rights of the 18-17/32 acres in controversy but also that, in the interests of equity, Williams should not conceal this information. Thus, even without listing every example in the record, it is apparent that Williams, despite his knowledge, concealed and misrepresented pertinent facts about the ownership of the 18-17/32 acres in question. It was not until three years after the 1973 settlement that Williams brought Flag Drilling's interest to the attention of Texas Gas.

The second element for equitable estoppel is that the estopped party must be aware of the facts. The evidence is undisputed that Williams had knowledge regarding the oil and gas mineral ownership of the property. He admitted it.

The third element involves whether or not Texas Gas was aware of the Flag Drilling/Williams interest in the oil and gas rights of the 18-17/32 acres. In the late 1960's and early 1970's Texas Gas acquired what it believed to be all the interests in the Bethel Formation beneath the Peveler Tract. As noted, on several occasions, when Texas Gas so opined or was assured of their ownership, Williams either was silent or concealed the information about Flag Drilling's interest. Moreover, during this time, while Texas Gas was draining the gas under Flag Drilling's interest, Flag Drilling made no complaint about it during the condemnation proceedings. When finally, in 1973, Williams contacted Bill Jenkins, now deceased, at Texas Gas, about Flag Drilling's interest, Texas Gas

believed it held the title, and Williams was mistaken. Texas Gas was not aware of Flag Drilling's ownership interest in this property.

The final element of equitable estoppel is whether or not the other party in fact relied on this conduct to his detriment. Here, Texas Gas purchased the Peveler sixty-four acres, paying Williams and Baker $1,600,000 for their interest in various leases, including the Peveler sixty-four acres. Additionally, Williams and Baker retained the commissioners' award as part of the settlement. Now, Williams is asking for over $200,000,000 for the use of "his property." Texas Gas also paid the M.L. Peveler heirs $20,250. Hence, clearly Texas Gas relied upon the affirmative statements and conduct of Williams, and his silent refusal to notify Texas Gas, to its prejudice. Unquestionably, Texas Gas's actions during the proceedings are illustrative of its determination to acquire the land in a proper fashion and that it would have acted differently had it known about Flag Drilling's ownership interest.

Williams strongly asserts that because Texas Gas could have determined legal title to the property by examining the county real estate records, it is not entitled to the defense of equitable estoppel by silence. *See Cox v. Simmerman*, 243 Ky. 474, 48 S.W.2d 1078 (Ky. App. 1932). That case, however, is not applicable here. Kentucky recognizes an exception to the equitable estoppel rule. Estoppel will apply when a party remains silent under circumstances where the transaction affecting the party's property is deemed consummated in the party's presence and the other party, who is dealing with the property, is ignorant of the

existence of the first party's interest, and acts on the assumption it does not exist. In *McDonald v. Burke,* 288 S.W.2d 363, 368 (Ky. App. 1956) the Court, *citing Virginia Iron, Coal & Coke Company v. Campbell,* 32 Ky. L. Rptr. 40, 105 S.W. 129 (Ky. App. 1907), stated that "[c]onstructive notice does not necessarily prevent a party from relying upon estoppel." *See also United Fuel Gas Co. v. Jude*, 355 S.W.2d 664 (Ky. 1962). In other words, Texas Gas completed the transaction with Williams because it relied upon the prior actions of Williams and the written representation of Williams' lawyer that he and Baker owned no other interests in the Midland area. Essentially, standing by and watching the purchaser pay the wrong person is sufficient conduct to obviate the constructive notice rule.

Another issue proffered by Williams is that the statute of limitations bars the use of equitable estoppel by silence. Kentucky courts are diligent in barring stale claims arising out of transactions or occurrences that have occurred in the distant past. *Munday v. Mayfair Diagnostic Laboratory*, 831 S.W.2d 912, 914 (Ky. 1992), *citing Armstrong v. Logsdon*, 469 S.W.2d 342-43 (Ky. 1971). Yet, notwithstanding the policy to enforce the statute of limitations, there are exceptions to the rule. For example, an estoppel may arise to prevent a party from relying on a statute of limitation by virtue of a false representation or fraudulent concealment. *Resthaven Memorial Cemetery, Inc. v. Volk,* 286 Ky. 291, 150 S.W.2d 908 (Ky. App. 1941). Generally, although proof of fraud requires a showing of an affirmative act by the party charged, silence under circumstances entailing a legally required duty to disclose may be sufficient to justify an equitable tolling of

the statute. *Munday*, 831 S.W.2d at 914. These cases are referring to the statute of limitations being tolled for a party bringing an action.

Winkle v. Jones, 265 S.W.2d 792 (Ky. 1954), *overruled by Armstrong v. Logsdon*, 469 S.W.2d 342 (Ky. 1971), was the first case in which the limitation problem was discussed as it applied to a counterclaim in a tort action. Therein, the Court held that the counterclaim was subject to the same limitations as the filing that governed the original petition. But noting that cases in other jurisdictions have affirmed the broad proposition that if a counterclaim is not barred at the commencement of the action in which it is pleaded, it is not thereafter barred by the lapse of the limitation period prior to the time it is pleaded, the Court overruled *Winkle*. *Armstrong*, 469 S.W.2d at 344. Therefore, justice seems to dictate in cases where the counterclaim arises from the same action as the claim, the counterclaim would be no more stale than the complaint. *Id.*

Thus, the above discussed cases show that estoppel may prevent a party from relying on the statute of limitations because of a false representation or fraudulent concealment. And in cases where the counterclaim arises out of the same incident as the claim, the statute of limitations defense for a counter claim has been allowed. Here, Texas Gas is not bringing an action nor seeking damages from Williams. Its goal is to defend itself against Williams' claim. In *Winkle*, the Court observed that "it is . . . well established in this state that the statute of limitations was not intended to bar the use of the defendant's claim as a matter of pure defense." *Winkle*, *overruled on other grounds,* 265 S.W.2d at 793. The Court

further instructed that, "in the instant case, the appellee had the right to take full advantage of his cause of action, if any, insofar as it constituted a defense but he is denied the right to affirmatively recover damages on account of it." *Id.* This reasoning was later confirmed in *Harvey Coal Corporation v. Smith*, 268 S.W.2d 634 (Ky. 1954), *overruled on other grounds*, *Armstrong*, 469 S.W.2d 342 (Ky. 1971). Similarly, at bar, Texas Gas is not seeking damages based on Williams' actions, but it is seeking to bar Williams' claim to the M. L. Peveler lease, based on estoppel, for his failure to disclose his ownership and affirmatively stating, through his attorney, that he owned no other interest in the Midland Field. As summarized, succinctly by the Court, in *Liter v. Hoagland*, 305 Ky. 329, 204 S.W.2d 219-20 (Ky. 1947):

> The purpose of statutes of limitations is to bar actions rather than to suppress defenses. Such statutes, as a general rule, are not applicable to defenses but are only applicable against assertions of affirmative relief. Thus, so long as the courts will hear the plaintiff's case, time will not bar the defense which might be urged thereto and which grew out of the transaction connected with the plaintiff's claim.

Thus, we hold that the statute of limitations is not a bar to an affirmative defense of equitable estoppel.

2) EFFICACY OF FINDINGS OF FACTS AND CONCLUSIONS OF LAW

Williams argues that the trial court's adoption of Texas Gas's Findings of Fact and Conclusion of Law was an abdication of the trial court judge's fact-finding and decision-making responsibilities under Kentucky Civil

Rules of Procedure (CR) 52.01. Furthermore, Williams makes the novel and interesting suggestion that this Court review the video and make its own Findings of Fact.

Williams cites *Bingham v. Bingham*, 628 S.W.2d 628 (Ky. 1982) for the proposition that the trial court judge abdicated his responsibilities herein. A careful reading of *Bingham* provides the following language: "[h]owever, the delegation of the clerical task of drafting proposed findings of fact and conclusions of law under the proper circumstances does not violate the trial court's responsibility." *Id.* Therein, the Court provides a template for ascertaining the efficacy of a judge's examination of the submitted Findings of Fact:

> Careful scrutiny of the record reveals that the court was thoroughly familiar with the proceedings and facts of this case. The record indicates the trial judge prudently examined the proposed findings and conclusions and made several additions and corrections to reflect his decision in the case.

Id. at 629. Additionally, the Kentucky Supreme Court has held that it was not error for a trial judge to adopt findings of fact without change or correction. *Prater v. Cabinet for Human Resources*, *Com. of Ky.,* 954 S.W.2d 954 (Ky. 1997).

Simply put, the judge in the case at bar did not mechanically adopt the proposed findings of fact and conclusions of law. Indeed, Williams in his twenty-seven page January 16, 2007, Motion to Alter, Amend or Vacate and Make Additional Findings of Fact, lists twelve differences between the submitted Findings of Facts and the trial judge's findings. Furthermore, no where does

Williams demonstrate that the decision-making process was not appropriately handled by the trial judge or that he did not perform the requisite deliberations for these findings and conclusions. Moreover, our review of the record shows that the trial judge heard, read, and reviewed evidence in this case that supported his findings of fact and conclusions of law. Notwithstanding the voluminous, technical, and contentious record, the trial judge exhibited thoughtful, considerate, and pain-staking attention in this action. Hence, we find that the trial judge did meet his responsibilities under CR 52.01.

Furthermore, some cases used by Williams to bolster his position are not actually on point. These cases were remanded to the trial court because of a lack of any written findings of fact. *Standard Farm Stores v. Dixon*, 339 S.W.2d 440 (Ky. 1960); *Elkins v. Elkins*, 359 S.W.2d 620 (Ky. 1962); *Skelton v. Roberts*, 673 S.W.2d 733 (Ky. App. 1984). And while, *G.R.M. v. W.M.S*, 618 S.W.2d 181 (Ky. App. 1981), a termination of parental rights case, did send the case back for the judge to make findings of fact and conclusions of law, a more recent case has been decided by the Kentucky Supreme Court on this matter. In *Prater,* the judge adopted the Cabinet's proposed findings without correction or change, the Supreme Court held it was not error to adopt findings of fact which were merely drafted by someone else. *Prater*, 954 S.W.2d at 956. Again, the Court noted that the underlying principle of CR 52.01 places the burden on the trial judge to find the facts and make legal conclusions based on those facts. But the trial judge

cannot delegate the fact-finding responsibility. Here, Judge Jernigan did not abdicate this responsibility. *Bingham*, 628 S.W.2d at 629.

Regarding Williams' novel suggestion that the Court of Appeals review the video tape of the trial and make its own findings, we remind the appellant that the Court of Appeals does not make findings. Indeed, when an Appellate Court reviews the record, it always gives deference to the trial court's factual findings and ruling. The rationale for this judicial process is that a trial court is in the best position to evaluate the evidence, and videotapes are no substitute for conducting a four-day trial and overseeing the course of the five-year litigation.

3) CLEAR AND CONVINCING EVIDENCE STANDARD

First, we begin by noting that the case was tried by the circuit court sitting without a jury. Hence, it is before this Court upon the trial court's findings of fact and conclusions of law and upon the record made in the trial court. Accordingly, our appellate review of the trial court's findings of fact is governed by the rule that such findings shall not be set aside unless clearly erroneous. A factual finding is not clearly erroneous if it is supported by substantial evidence. *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998); *Uninsured Employers' Fund v. Garland*, 805 S.W.2d 116, 117 (Ky. 1991). Substantial evidence is evidence, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable

person. *Golightly*, 976 S.W.2d at 414; CR 52.01; *Largent v. Largent*, 643 S.W.2d 261 (Ky. 1982).

Williams' assertion that the trier of fact used the "preponderance of the evidence" standard rather than the required "clear and convincing" evidence standard is merely assertion. He provides nothing to support it. Furthermore, when Williams presents six propositions upon which he bases his contention that Judge Jernigan's findings of fact were erroneous, he does not cite to the record or provide any evidence to support this claim. The record shows that Judge Jernigan was aware of the "clear and convincing" evidentiary standard in the case.

Because substantial evidence on the record supports the trial court's findings of fact and Williams has not demonstrated that the findings are clearly erroneous, we uphold the findings of fact and conclusions of law. *See* CR 52.01. Consequently, we must reject Williams' contention that Texas Gas did not establish equitable estoppel by clear and convincing evidence.

4) COSTS

Finally, Williams disputes the trial court's authority to assess him with the costs of the action. Costs are allowed as a matter of course to the prevailing party by CR 54.04. Williams claims that he was the prevailing party because he convinced the trial court that he held record title. This reasoning is analogous to plaintiffs, in a negligence action who succeed in obtaining a liability verdict against a defendant but are not awarded damages, believing that they have prevailed for the purposes of awarding costs. Such a judgment is, in effect,

meaningless unless it is accompanied by an award of damages. Therefore, a plaintiff who proves liability but receives no damages has not succeeded in her ultimate goal and purpose for filing suit. *Lewis v. Grange Mutual Casualty Co.*, 11 S.W.3d 591 (Ky. App. 2000). For the same reason, Williams is not considered to have prevailed because he was successful in defeating Texas Gas's adverse possession claim. Ultimately, Texas Gas was successful when it succeeded on its equitable estoppel defense. *Lewis v. Charolais Corporation*, 19 S.W.3d 671 (Ky. App. 1999).

Significantly, trial courts have great discretion regarding the issue of awarding of costs. The rule itself states "[i]n the event of a partial judgment or a judgment in which neither party prevails entirely against the other, costs shall be borne as directed by the trial court." CR 54.04(1). While Williams may certainly disagree with the court's decision, he must show an abuse of discretion to reverse the trial court's decision regarding costs. *Lewis,* 19 S.W.3d. at 677. Thus, we uphold the trial court's decision regarding costs.

CONCLUSION

Equity will not permit a person in the position of Williams to act in this manner. Insofar as pertinent here, this concept is well analyzed in 28 Am. Jur. 2d *Equitable Estoppel*, § 28 (2000):

> Equitable estoppel is a judicial remedy by which a party may be precluded by its own act or omission from asserting a right to which it otherwise would have been entitled, or pleading or proving an otherwise important fact.

Consequently, in its broadest sense, equitable estoppel in this case prevents Williams from asserting a legal claim to the pertinent 18-17/32 acres because his prior conduct was inconsistent with this claim. Based on fair dealing, good faith, and justice, we affirm the trial court's decision because without it an injustice would result.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR APPELLANT:	BRIEF AND ORAL ARGUMENT FOR APPELLEE:
Daniel N. Thomas Hopkinsville, Kentucky	Frank Stainback Owensboro, Kentucky