IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
August 6, 2009 Session

JOHN C. POLOS v. RALPH SHIELDS, ET AL.

Appeal from the Chancery Court for Blount County
No. 2003-137 Telford E. Forgety, Jr., Chancellor

No. E2008-02425-COA-R3-CV - FILED SEPTEMBER 14, 2009

John C. Polos ("Plaintiff") filed this lawsuit claiming that Ralph and Joann Shields ("Defendants") had constructed a fence that encroached upon Plaintiff's property. Defendants claimed they had adversely possessed the land at issue to the extent the fence encroached upon Plaintiff's property. The Trial Court implicitly rejected Defendants' adverse possession claim and determined that the fence did encroach upon Plaintiff's property and that each party should be responsible for relocating a specified one-half of the encroaching fence posts that encroached six inches or more onto Plaintiff's property. The Trial Court also found that the fence was a partition fence and the parties must share equally the cost of erecting and maintaining the fence. Plaintiff appeals claiming the Trial Court erred when it found that he should be responsible for relocating any of the encroaching fence posts, and in finding that he should be responsible for one-half of the cost of erecting and maintaining the fence. Defendants appeal the implicit rejection of their adverse possession claim. We affirm the judgment of the Trial Court that the encroaching fence posts must be relocated to the boundary line, but modify the portion of the judgment limiting relocation to those fence posts which encroached six inches or more. The judgment of the Trial Court is affirmed in all other respects.

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

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., and JOHN W. MCCLARTY, JJ., joined.

Eugene B. Dixon, Maryville, Tennessee, for the Appellant, John C. Polos.

Andrew N. Wilson, Sevierville, Tennessee, for the Appellees, Ralph Shields and Joann Shields.

OPINION

Background

Plaintiff and Defendants own property in Blount County. Plaintiff's property is contiguous to Defendants' property. In August of 2003, Plaintiff filed suit alleging that:

> [T]he southeast line of the Plaintiff's property is contiguous with the northwest line of the Defendants' property.
>
> Plaintiff would further show to the Court that there has existed a boundary line fence between said properties for at least fifty years and that the Plaintiff and his predecessors in title have possessed the property on his side of the line fence for said period of fifty years previously, notoriously, exclusively and continuously.
>
> Plaintiff would further show to the Court that the parties hereto and their predecessors in title have always recognized said fence line as the boundary line between said properties and that the Defendants previously recognized that said fence line was the dividing line between said properties.
>
> Plaintiff would further show unto the Court that the Defendants have constructed and are presently maintaining a new fence, which construction is several feet into the Plaintiff's side of said line fence and the true line between the properties. Plaintiff alleges that unless the Defendants are restrained from doing so, they will continue to maintain said fence upon the property of the Plaintiff and will alter the old fence line and the evidence thereof as the same now exists upon the ground. Plaintiff alleges that he will suffer irreparable damage unless the Defendants are restrained from constructing and maintaining said new fence and from destroying the old fence and the evidence thereof. . . .
>
> Plaintiff would further show to the Court that the Defendants are maintaining an additional fence along the southeast boundary of Defendants' property and the northwest boundary of Plaintiff's property, which fence is constructed several feet into the [Plaintiff's] property and in violation of the true boundary line between the properties.

Plaintiff further alleged that in 1976, there was a lawsuit between both Plaintiff's and Defendants' predecessors in interest regarding the location of the boundary line between their properties. According to Plaintiff, in that lawsuit a judgment was entered that fixed the boundary line between the properties and survey markers marking the boundaries between the properties were

established. Plaintiff added that Defendants had removed some of these survey markers and threatened to remove the remaining markers. Plaintiff requested the Trial Court issue a restraining order prohibiting Defendants from constructing a new fence and prohibiting Defendants from destroying or removing the established survey markers.

Defendants answered the complaint, generally denying any liability to Plaintiff and denying that their fence encroached upon Plaintiff's property.

Plaintiff filed a motion for summary judgment and filed the affidavit of Herb Pitts ("Pitts"), a licensed surveyor. According to Pitts:

> The boundary line that is the subject of the complaint filed in this case was also the subject of an earlier lawsuit regarding the same boundary line entitled Charles W. Roberts v. John Teffeteller, Blount County Chancery Court No. 2592. I was retained as an expert witness in Roberts v. Teffeteller. The Plaintiff in the earlier action, Charles W. Roberts, is the predecessor in title to John C. Polos, [and] the Defendant in the earlier action, John Teffeteller, is the predecessor in title to Ralph and Joann Shields. In the earlier case of Roberts v. Teffeteller, I established the existing boundary line between the Roberts and Teffeteller properties. The legal description of the boundary line between the Roberts and Teffeteller properties is set forth in the Court Order attached hereto as Exhibit 1.[1]
>
> I have been asked to state my opinion as to the present boundary line between the property of John C. Polos and Ralph and Joann Shields. I have recently observed the properties of Polos and Shields and I have reviewed my survey and other appropriate documents. Based on the above it is my opinion that the boundary line established on June 3, 1977, in the case of Roberts v. Teffeteller is the same boundary line that presently exists between the Polos and Shields properties.
>
> I have also observed the fence erected by Shields between the Shields and Polos properties and found that the Shields fence presently encroaches upon the Polos property. The boundary between Shields and Polos is 659 feet long and most of the Shields' fence encroaches upon the Polos' property along the said boundary.

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[1] If Exhibit 1 was attached to Pitts' affidavit when it was filed with the Trial Court, for some unknown reason this important exhibit was not included in the record on appeal.

Defendants also filed a motion for summary judgment. Accompanying Defendants' motion was the affidavit of Ricky Younger ("Younger"), who also is a licensed surveyor. Younger stated:

> That I was retained by the Defendants, Ralph and Joann Shields early this year to survey an existing fence line between them and the Plaintiff, John C. Polos, to determine if the fence line followed a boundary set forth in an earlier lawsuit between Charles W. Roberts, who was a predecessor in title to the Plaintiff, and John Teffeteller and wife, who [were] predecessors in title to the Defendants.
>
> That based on results of my survey, it is my opinion that the old existing fence row almost exactly follows the iron pins set pursuant to the Order of the [Chancery] Court in Cause No. 2592.
>
> That my years of experience as a surveyor has shown that when a fence line has been in existence for many years, that fence posts lean, that bushes grow up in fence rows and that saplings and trees also encroach as time passes.
>
> That it is apparent that the old fence posts, both wooden and steel, have not been moved and have been there for many years and that said posts, on some occasions, will vary a few inches to the Plaintiff's side of the Court set boundary line and sometimes may vary a few inches to the Defendants' side of said boundary line.
>
> That it is my professional opinion that the barb wires, as strung by the Defendants, follows as nearly as humanly possible the steel posts and the wooden posts which evidently have been in existence as said boundary line for many years.
>
> That there exists variances from the Court set boundary line of only inches both to the Plaintiff's side and to the Defendants' side, but in most places the fence row exactly follows the boundary line.
>
> That attached hereto as an Exhibit to said Affidavit are reduced copies of said survey. . . .[2] (original paragraph numbering omitted)

[2] If the referenced Exhibit was attached to Youngers' affidavit when it was filed with the Trial Court, for some unknown reason, it also was not included in the record on appeal. However, a certified copy of a survey prepared by Pitts dated March 28, 2008, was entered into evidence at trial as Trial Exhibit 1.

The Trial Court partially granted Plaintiff's motion for summary judgment. Specifically, the Trial Court granted Plaintiff's motion insofar as "it pertains to the issue of the location of the boundary line existing between the properties of John Polos and the Defendants, Ralph and Joann Shields." The Trial Court left for resolution at trial the issues of whether the fence erected by Defendants actually encroached upon Plaintiff's property and, if so, the appropriate remedy.

A trial took place in April 2008, with Pitts being called as the first witness. Pitts operated Blount Surveys, Inc., for thirty-five years and recently sold that business to his son. Pitts testified that the survey he prepared was conducted using accepted standards and procedures. Pitts testified that he was hired six years ago by Plaintiff to set calls with stakes on the property line. In so doing, Pitts located several existing pins that he had placed along the property line in 1977, as instructed by the court in the previous lawsuit. Pitts stated that there are approximately seventy fence posts which primarily were made from sheet metal. The fence is roughly six hundred and fifty-nine feet long and encroaches upon Plaintiff's land. Pitts stated that some of the posts were on the property line and encroached only to the extent of one-half of the width of the post. With regard to the other posts, the encroachment was anywhere from 3.6 inches to 1.2 feet.

Plaintiff was the next witness. When asked what relief he sought, Plaintiff stated that he wants the fence that encroaches on his property removed. Plaintiff also wants the court to permanently enjoin Defendants from building a fence that encroaches on his property and to further enjoin them from removing existing markers.

Defendant Joann Shields testified that she inherited the land she lives on from her parents. Ms. Shields testified that her parents were parties to the first lawsuit, and the fence posts were put up as a result of that lawsuit. Ms. Shields testified that she recently has witnessed Plaintiff's girlfriend digging and moving fence posts. Ms. Shields stated that she has seen this activity several times.

The next witness was Trent Shields, who lives next to the property at issue and is the son of Joann and Ralph Shields. Trent Shields testified that in August of 2002, he helped string barbed wire between the posts that had been on the property for thirty years. He took a lunch break and was in his truck eating lunch when Plaintiff and his girlfriend came out of the woods with a bucket of water and some tools used for digging. They tried pulling and shaking the fence post to see if they could loosen it up. He has seen this type of activity by Plaintiff and Plaintiff's girlfriend several times.

The next two witnesses were Ralph Shields, who is married to Joann Shields, and Tim Shields, another son of Ralph and Joann Shields. Both of these witnesses testified consistent with Joann Shields' testimony regarding the attempts by Plaintiff and his girlfriend to move the fence posts. In addition, Ralph Shields explained that the land was being used as farmland and that he raises cattle on the property, as did the previous owners.

Charles Roberts ("Roberts") also was called as a witness. Roberts is the previous owner of the property owned by Plaintiff. Roberts testified that he was a party to the previous

lawsuit involving the boundary line between the properties at issue. Roberts testified that "[o]n the Judge's decree . . . the posts were installed. They were . . . accepted as being the line. . . ."

The final witness was Younger, whose affidavit had previously been filed by Defendants. Younger testified consistent with his affidavit and stated that the fence posts were very close to the property line and any deviation was so minor that it would not cause him any alarm.

Following the trial, the Trial Court entered an order stating as follows:

> 1. The barbed wire fence erected by the Defendants is found and determined to encroach upon the real property of the Plaintiff as set forth by the survey map of Surveyor, Herb Pitts, which survey map is filed as Exhibit No. 1 in this cause;
>
> 2. The barbed wire fence erected by the Defendants is found and determined to be a "boundary line fence" and that the parties accordingly are jointly responsible for the erection and maintenance of the fence;
>
> 3. The barbed wire fence shall not be moved by either party unless the divergence from the property line, as set forth in the aforementioned survey map, is equal to or greater than six (6) inches;
>
> 4. Where the barbed wire fence diverges from the property line, as set forth in the aforementioned survey map, both parties shall assume responsibility for moving the fence in accordance with the following formula: The Plaintiff shall assume responsibility for moving the fence to within six (6) inches of the boundary line as set out in Paragraph Number 3 of this Order, where applicable, on the lower one-half (½) of the fence, beginning on the southeasterly corner at Tuckaleechee Pike and extending to the midpoint of the fence. The Defendants shall assume responsibility for moving the fence to within six (6) inches of the boundary line as set out in Paragraph Number 3 of this Order, where applicable, on the upper one-half (½) of the fence, beginning at the midpoint of the fence and extending to the northwesterly corner of the fence. In the event that the parties cannot agree as to the midpoint of the fence, then Surveyor, Herb Pitts, shall place an iron stake at the midpoint of the fence. . . .

Plaintiff appeals claiming the Trial Court erred when it ordered him to "remove a portion of [Defendants'] encroaching fence from [Plaintiff's] property and declaring that [Plaintiff] was jointly responsible for the erection and maintenance of [Defendants'] encroaching fence." Even though Defendants raise one issue, their brief does not contain the required statement of the issues. *See* Tenn. R. App. P. 27(b). Defendants' issue is their claim that to the extent the fence encroaches

upon Plaintiff's property, they should be declared the owners of that land because they have adversely possessed it for the required period of time.

Discussion

The issues raised on appeal pertain to the Trial Court's rulings following the trial.[3] Accordingly, the factual findings of the Trial Court are accorded a presumption of correctness, and we will not overturn those factual findings unless the evidence preponderates against them. *See* Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). With respect to legal issues, our review is conducted "under a pure *de novo* standard of review, according no deference to the conclusions of law made by the lower courts." *Southern Constructors, Inc. v. Loudon County Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

We first address Defendants' claim that they have acquired the property that encroaches upon Plaintiff's land by adverse possession. Defendants make the following argument in their brief in support of their adverse possession claim:

> [Plaintiff] filed this lawsuit on or about August 29, 2003, which would be approximately twenty-six (26) years and two (2) months after the June 3, 1977 order setting the boundary line and erection of the fence posts accordingly. . . . "When a purchaser of land accidentally or by mistake *encloses* a contiguous strip, believing he is placing the fence on the boundary line, and holds *the enclosed strip* for seven years, his possession is adverse and will avail against the true owner." 1 Tenn. Juris., Adverse Possession, § 8 at 266 (2007). (emphasis added)

The fatal flaw in Defendants' argument is that the area in question was not "enclosed" until August of 2002 when Trent Shields and other family members actually enclosed the area with barbed wire. Until that time, while there were fence posts scattered at various points on the land, there was no enclosed fence. Thus, because there was no enclosure, Defendants cannot be considered to have possessed the land in a manner that was adverse to Plaintiff's interest.

The record does not establish that the issue of adverse possession actually was litigated at trial. However, if it could be deemed to have been litigated, based on the Trial Court's ultimate ruling, it necessarily follows that the Trial Court implicitly rejected that argument. Assuming that adverse possession was actually litigated, we affirm the Trial Court's implicit finding that Defendants failed to establish adverse possession as the evidence does not preponderate against the Trial Court's finding.

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[3] Neither party challenges the Trial Court's award of partial summary judgment to Plaintiff wherein the Trial Court granted Plaintiff's motion insofar as "it pertains to the issue of the location of the boundary line existing between the properties" of the parties.

The facts certainly do not preponderate against the Trial Court's factual finding that Defendants' fence encroached upon Plaintiff's property. The question then becomes whether the remedy ordered by the Trial Court was appropriate. If Defendants had acted unilaterally in placing the original fence posts in their present location and erecting the fence, we would agree with Plaintiff that Defendants should bear the cost of removing and relocating the fence. However, the facts in this case establish that the posts were placed on the land by both Plaintiff's and Defendants' predecessors in interest in their attempt to comply with a court order in the previous lawsuit. It is for this reason that we agree with the Trial Court that Plaintiff should be responsible for a portion of the cost of relocating the fence posts. Having said that, we disagree with the limitation imposed by the Trial Court that the fence posts need to be relocated only in those places where the encroachment is at least six inches. The parties are hereby instructed to relocate all fence posts that encroach upon Plaintiff's property and the fence posts are to be relocated so that each post is as nearly as possible on the boundary line. We affirm the manner in which the Trial Court determined that each party was to be responsible for relocating the fence posts for one-half of the length of the fence.

The next issue is whether the Trial Court erred when it determined that the parties were equally to share the cost of maintaining the fence. As to this issue, the pertinent statutes are Tenn. Code Ann. §§ 44-8-201 and 44-8-202 (2007), which provide as follows:

> **44-8-201. Partition fence defined – Joining fences. –** Partition fences, within the meaning of this part, are fences erected on the line between lands owned by different persons; but no owner of land is compelled to allow a neighbor to join a fence exclusively on that person's own land.
>
> **44-8-202. Fences to be erected and maintained at joint expense. –** Partition fences may be erected and repaired at the expense, jointly, of the occupants or owners; or if a person makes a fence a partition fence, by joining to it or using it as such, that person shall pay to the person erecting it that person's proportion of the expense.

Although this Court was not provided a copy of the judgment in the first lawsuit, based on what is contained in the record before us, it appears that the trial court in the first lawsuit intended to require the parties to establish a partition fence in accordance with these statutes. While the fence posts were put in place, it is unknown why neither party attempted to enclose the fence until many years later. In our opinion, the Trial Court in the present lawsuit was attempting to abide by the judgment in the previous lawsuit when it ordered the parties to be equally responsible for erecting and maintaining the fence.

The parties point this Court to nothing to support a conclusion that the foregoing statutes are not applicable. There is little law discussing these statutes, although we note that in the case of *Lightfoot v. Grove*, 52 Tenn. 473 (1871), the Supreme Court noted that it was "manifest that the statute relates only to agricultural lands, owned or used by farmers, or planters, and that the fences provided for are what are usually denominated 'stock fences,' situate in rural districts. The

statute does not relate to lots situate in towns or cities . . . ." Based on Ralph Shields' testimony that he was using the land as a farm and was raising cattle, it appears and we so hold that these statutes apply to this case. Therefore, we affirm the judgment of the Trial Court that the fence is to be deemed a partition fence and the parties are to share equally the cost of "erection and maintaining of the fence."

In summary: (1) the judgment of the Trial Court requiring each party to be responsible for relocating the fence posts located on a specified one-half of the length of the fence is affirmed; (2) the judgment of the Trial Court requiring only those fence posts to be relocated that encroach six inches or more onto Plaintiff's property is modified and the parties instead are to relocate any fence posts that encroach upon Plaintiff's land and the fence posts are to be relocated so that they are on the boundary line as established by the Pitts survey[4]; (3) the Trial Court's judgment that the fence is to be a "partition fence" and each party is to be equally responsible for the erection and maintenance of the fence is affirmed; and (4) the judgment of the Trial Court implicitly finding that Defendants failed to establish adverse possession is affirmed.

Conclusion

The judgment of the Trial Court is affirmed as modified. This cause is remanded to the Trial Court for collection of the costs below. Costs on appeal are taxed one-half to the Appellant, John Polos, and his surety, and one-half to the Appellees, Ralph and Joann Shields, for which execution may issue, if necessary.

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D. MICHAEL SWINEY, JUDGE

[4] Ideally, if the fence post is placed exactly on the boundary line, one-half of the width of the fence post will encroach upon Plaintiff's land, and the other one-half will encroach upon Defendants' land.