

COURT OF APPEALS OF TEXAS, TWELFTH COURT OF APPEALS DISTRICT
AT TYLER

Mondee Stracener v. Doug Stracener, Bernice L. Stracener and Joey
Keith Stracener

No. 12-10-00270-CV · No. No. 12-10-00270-CV · Decided July 13, 2011

SUMMARY

The Texas Twelfth Court of Appeals affirmed a trial court judgment partitioning jointly owned real property in Upshur County and appointing commissioners. The court held that the trial court did not abuse its discretion by refusing to direct that an airstrip be awarded to Mondee Stracener, because conflicting testimony existed regarding who constructed and paid for the airstrip.

CASE DETAILS

COURT	Court of Appeals of Texas, Twelfth Court of Appeals District at Tyler
WRITING FOR THE COURT	James T. Worthen, Chief Justice; Griffith, Justice; Hoyle, Justice
JURISDICTION	Texas
DECIDED	July 13, 2011
DOCKET	No. 12-10-00270-CV
DISPOSITION	affirmed
PROCEDURAL POSTURE	Mondee Stracener appealed the trial court's initial partition decree and appointment of commissioners, challenging the refusal to direct that an airstrip be set aside to him as part of his ownership interest.
STANDARD OF REVIEW	A ruling concerning equitable relief is reviewed for abuse of discretion and will not be disturbed unless it is arbitrary, unreasonable, and unsupported by guiding rules and principles. Implied findings in a nonjury trial are presumed in support of the judgment and may be challenged for legal and factual sufficiency when the record contains the reporter's and clerk's records. The appellate court defers to the fact finder on witness credibility, evidentiary conflicts, and reasonable inferences.
PRECEDENTIAL VALUE	Published opinion
PARTIES	Mondee Stracener v. Doug Stracener, Bernice L. Stracener, Joey Keith Stracener

TOPICS

partition real estate equitable relief appellate procedure standard of review

PRACTICE AREAS

real estate partition appellate procedure equitable remedies

QUESTIONS PRESENTED

1. Whether the trial court abused its discretion by refusing to direct the partition commissioners to set aside the airstrip to Mondee as part of his ownership interest.
2. Whether conflicting testimony concerning the construction and improvement of the airstrip supported the trial court's decision not to award it to Mondee.

HOLDINGS

1. A trial court generally may allot an improved portion of partitioned property to the co-owner who made the improvements when doing so would not prejudice the other owners, but the court is not required to do so when the evidence concerning who made the improvements is disputed.
2. The trial court did not abuse its discretion by refusing to instruct the commissioners to set aside the airstrip to Mondee because reasonable evidence supported competing accounts of its construction and ownership.

KEY QUOTATIONS

“Because we must defer to the trial court as the sole judge of the credibility of the brothers’ testimony, the trial court did not abuse its discretion in refusing to instruct the commissioners to set aside the airstrip to Mondee as a portion of his ownership interest in the property being partitioned.” (Discussion)

“A partition case, unlike other proceedings, has two final judgments, and the first one is appealable as a final judgment.” (Partition)

FACTUAL BACKGROUND

The parties jointly owned real property in Upshur County, with Mondee holding a 68.75 percent interest and Doug and Bernice each holding a 15.625 percent interest. Mondee claimed that he alone built and paid for an airstrip on the property, while Doug and Bernice testified that they helped construct the original drag strip and that the construction materials had been donated. All three brothers used the airstrip. The trial court declined to award the airstrip solely to Mondee or direct that it be set aside as part of his share, instead ordering it partitioned with the other jointly owned property.

PROCEDURAL HISTORY

Mondee sued his brothers for partition of jointly owned real property in Upshur County, Texas. The parties stipulated to most partition issues, but presented conflicting evidence concerning ownership and construction of an airstrip. The trial court determined the parties' ownership interests, awarded Mondee a residence and one acre,

appointed commissioners, and ordered the airstrip partitioned with the remaining jointly owned property. The court of appeals affirmed.

DISPOSITION

affirmed

CASES CITED

- Edwards v. Mid-Continent Office Distributors, L.P., 252 S.W.3d 833, 836 (Tex. App.—Dallas 2008, pet. denied)
- Pharo v. Chambers Co., 922 S.W.2d 945, 948 (Tex. 1996)
- In re W.E.R., 669 S.W.2d 716, 717 (Tex. 1984)
- BMC Software Belgium, N.V. v. Marchand, 83 S.W.3d 789, 795 (Tex. 2002)
- Canal Ins. Co. v. Hopkins, 238 S.W.3d 549, 557 (Tex. App.—Tyler 2007, pet. denied)
- City of Keller v. Wilson, 168 S.W.3d 802, 819-20 (Tex. 2005)
- Griffin v. Wolfe, 610 S.W.2d 466, 466 (Tex. 1980)
- Ellis v. First City Nat'l Bank, 864 S.W.2d 555, 557 (Tex. App.—Tyler 1993, writ denied)
- Yturria v. Kimbro, 921 S.W.2d 338, 342 (Tex. App.—Corpus Christi 1996, no writ)
- Snow v. Donelson, 242 S.W.3d 570, 572 (Tex. App.—Waco 2007, no pet.)
- Price v. Price, 394 S.W.2d 855, 858 (Tex. Civ. App.—Tyler 1965, writ ref'd n.r.e.)

OPINION

PER CURIAM.

NO. 12-10-00270-CV IN THE COURT OF APPEALS TWELFTH COURT OF APPEALS DISTRICT TYLER, TEXAS MONDEE STRACENER, § APPEAL FROM THE 115TH APPELLANT V. § JUDICIAL DISTRICT COURT DOUG STRACENER, BERNICE L. STRACENER AND JOEY KEITH STRACENER, APPELLEES § UPSHUR COUNTY, TEXAS MEMORANDUM OPINION Mondee Stracener appeals the trial court's decree ordering partition of real property in Upshur County, Texas, and appointing commissioners.

On appeal, Mondee argues that the trial court abused its discretion in refusing to instruct the commissioners to set aside an airstrip to him as a portion of his ownership interest in the property being partitioned.

We affirm. Background Mondee filed suit against his brothers, Doug, Bernice, and Joey, seeking partition of real property in Upshur County, Texas, which they jointly owned. At trial, the parties stipulated and agreed to all issues involving the partition of the real property, excepting issues regarding an airstrip located on the property. Then, the parties presented evidence regarding the ownership of the airstrip.

Mondee testified that he, alone, built the airstrip in 1958. Further, he explained that he purchased the road asphalt oil to build it. He stated that it was initially built as a drag strip, and then used as an airstrip.

However, Doug and Bernice controverted Mondee's claim and stated that they helped construct the drag strip. Bernice testified that he operated a maintainer, and that the oil used to build the drag strip had been donated, not purchased as Mondee maintained. Doug testified that he also worked on constructing the drag strip. Mondee, Bernice, and Doug testified that when the drag strip was converted to an airstrip, they all used it to land the airplanes that they piloted.

The trial court approved the stipulations[1] and agreements made by the brothers, stating that the parties each owned an undivided interest in the real property as follows: Mondee – 68.75% Doug – 15.625% Bernice – 15.625% The trial court also found that a residence and one acre of land was Mondee's sole property and ordered that, upon partition, the residence and land be set aside as part of his interest.

Further, the trial court appointed commissioners. However, the trial court specifically denied Mondee's requests that the airstrip be declared his sole property, that the airstrip, upon partition, be set aside as part of his interest, that he be entitled to a unity of use with the acreage he owned adjacent to the property at issue, and that his valuation of improvements to the airstrip be considered by the commissioners as a portion of the value of the property.

Instead, the airstrip was to be partitioned by the commissioners along with the other real property jointly owned by Mondee, Doug, and Bernice. This appeal followed. Standard of Review A trial court exercises broad discretion in balancing the equities involved in a case seeking equitable relief. *Edwards v. Mid-Continent Office Distributors, L.P.*, 252 S.W.3d 833, 836 (Tex.

App.–Dallas 2008, pet denied). We will not disturb a trial court's ruling on a claim seeking equitable relief unless it is arbitrary, unreasonable, and unsupported by guiding rules and principles. *Id.* In a nonjury trial, when, as here, a trial court makes no separate findings of fact or conclusions of law, we must assume that the trial court made all findings in support of its judgment.

Pharo v. Chambers Co., 922 S.W.2d 945, 948 (Tex. 1996). The trial court's judgment must be affirmed if it can be upheld on any legal theory that finds support in the evidence. *In re W.E.R.*, 669 S.W.2d 716, 717 (Tex. 1984). Further, when, as here, the appellate record includes the reporter's and clerk's records, the trial court's implied fact findings are not conclusive and may be challenged for legal and factual sufficiency of the evidence supporting them.

See *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002). The finder of fact is the sole judge of the credibility of the witnesses and the weight to be assigned to their testimony. *Canal Ins. Co. v. Hopkins*, 238 S.W.3d 549, 557 (Tex. App.–Tyler 2007, pet. denied).

The finder of fact is free to believe one witness and disbelieve another, and a reviewing court may not impose its own opinion to the contrary. See *id.* Accordingly, reviewing courts must assume that the finder of fact decided all credibility questions in favor of the findings if a reasonable person could do so. *Id.* If a reasonable finder of fact could have so found, we must assume that the finder of fact chose what testimony to disregard in a way that was in favor of the findings.

Id. A finder of fact “may disregard even uncontradicted and unimpeached testimony from disinterested witnesses” where reasonable. *Id.* (quoting *City of Keller v. Wilson*, 168 S.W.3d 802, 819-20 (Tex. 2005)). In addition, it is within the fact finder’s province to resolve conflicts in the evidence. *Id.* Consequently, we must assume that, where reasonable, the finder of fact resolved all conflicts in the evidence in a manner consistent with the findings.

Id. Where a reasonable finder of fact could resolve conflicting evidence either way, we must presume the finder of fact did so in favor of the findings. *Id.* Where conflicting inferences can be drawn from the evidence, it is within the province of the finder of fact to choose which inference to draw, so long as more than one inference can reasonably be drawn.

Id. Therefore, we must assume the finder of fact made all inferences in favor of the findings if a reasonable person could do so. *Id.* Partition A partition case, unlike other proceedings, has two final judgments, and the first one is appealable as a final judgment. *Griffin v. Wolfe*, 610 S.W.2d 466, 466 (Tex. 1980).

The first decree determines the interest of each of the joint owners or claimants, all questions of law affecting the title, and appoints commissioners and gives them appropriate directions. *Ellis v. First City Nat’l Bank*, 864 S.W.2d 555, 557 (Tex. App.–Tyler 1993, writ denied); see also Tex. R. Civ. P. 760, 761.

The second decree approves the report of the commissioners and sets aside to the parties their separate shares. *Ellis*, 864 S.W.2d at 557. In addition to determining the basic issues of partitionability in kind and the fractional interest of the parties, the trial court also has the power during the initial stage of the partition proceeding to adjust all equities between the parties.

Yturria v. Kimbro, 921 S.W.2d 338, 342 (Tex. App.–Corpus Christi 1996, no writ); see also *Snow v. Donelson*, 242 S.W.3d 570, 572 (Tex. App.–Waco 2007, no pet.) (“The trial court applies the rules of equity in determining the broad question of how property is to be partitioned”). Proof is made to the fact finder at trial of the existence and value of improvements to the property at the time of partition and of other equitable considerations that may warrant awarding a particular portion of the property to one of the parties.

Id. The general rule is that where improvements have been made upon the property sought to be partitioned, the improved portion will be allotted to the part owner who has made the improvements if this can be done without prejudice to the other owners. *Price v. Price*, 394 S.W.2d

855, 858 (Tex. Civ. App.—Tyler 1965, writ ref'd n.r.e.). Discussion At trial, Mondee testified that he, alone, had built the drag strip and bought the road asphalt oil.

Doug and Bernice both insisted that they had worked on building the drag strip, and that the oil used to construct it had been donated. If Mondee's testimony regarding the construction of the airstrip had been uncontroverted, then the trial court would have had no discretion but to award it to him. See Yturria, 921 S.W.2d at 342; Price, 394 S.W.2d at 858.

However, Bernice's and Doug's testimony contradicted Mondee's statements regarding the construction of the airstrip. As an appellate court, we may not impose our opinion on the trial court's determinations of the credibility of the witnesses. See Hopkins, 238 S.W.3d at 557. Further, it was within the trial court's province to resolve this conflict in the evidence.

See *id.* Because we must defer to the trial court as the sole judge of the credibility of the brothers' testimony, the trial court did not abuse its discretion in refusing to instruct the commissioners to set aside the airstrip to Mondee as a portion of his ownership interest in the property being partitioned.

Accordingly, Mondee's sole issue is overruled. Disposition Having overruled Mondee's sole issue, the judgment of the trial court is affirmed. James T. Worthen Chief Justice Opinion delivered July 13, 2011. Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J. (PUBLISH) [1] It was stipulated and agreed between the parties that Joey would receive a one acre tract of land and renounce his claim to any other portion of the real property to be partitioned.