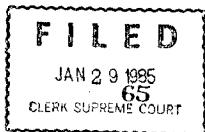


IN THE COURT OF APPEALS OF IOWA



MICHAEL WAYNE & ANITA LOUISE)
BRYANT,)

Plaintiffs-Appellees/Cross-Appellants,)

vs.)

KENNETH L. & DONNA MAULSBY,)

Defendants-Appellants/Cross-Appellees.)

Filed January 29, 1985

4-463
83-1203

Appeal from the Iowa District Court for Marshall County - Carl B. Baker,
Judge

Defendants appeal the adverse judgment rendered by the district court in
this action to establish a boundary. AFFIRMED.

James C. Ellefson of Lundy, Butler & Lundy, Eldora, Iowa, for defendants-
appellants/cross-applees.

William J. Lorenz of Welp, Harrison, Brennecke & Moore, Marshalltown,
Iowa, for plaintiffs-appellees/cross-appellants.

Heard by Oxberger, C.J., Snell, and Schlegel, JJ.

Defendants, Ken and Donna Maulsby, appeal the adverse judgment rendered by the district court in this action to establish a boundary. The Maulsbys contend: (1) that the district court lacked subject matter jurisdiction to determine the boundaries in this case, and (2) the plaintiffs failed, as a matter of law, to meet their burden of proof to establish a boundary different from the boundary shown by survey. The plaintiffs, Michael and Anita Bryant, cross-appeal, contending the trial court erred in failing to award them damages. We affirm.

The dispute in this case involves portions of two lots--lots three and four--which are located on a tract of land in LeGrand, Iowa. Both lots are fronted to the west on Prairie Street. The relevant portions of lot three lie north of lot four.

In 1978, the Maulsbys owned both lots. They decided, however, to sell the home and surrounding yard that were located on the two lots. This parcel of land included only a portion of each lot. They engaged a real estate broker, Donald Rethman, to list the property for sale.

The Bryants saw a sale sign posted on the property and contacted Rethman. Rethman later showed the property to the Bryants. While showing the property, Rethman specifically stated that the south boundary of the property for sale ended at a fence and barn owned by the Maulsbys. Rethman also pointed out that boundary line. The property just north of the boundary contained a rock driveway, fruit and shade trees, and a grape arbor.

On September 29, 1978, the Bryants and Maulsbys signed a contract for the sale of land in question. That date was the first time the Bryants and Maulsbys had any contact with each other. The contract for sale listed the frontage of the property as 173 feet: 60 feet of lot three and 113 feet of lot four. However, the deed to the property listed the frontage as 193 feet: 80 feet of lot three and 113 feet of lot four.

After purchasing the property the Bryants used the rock driveway to park their vehicles. They also picked and used the fruit and grapes growing on the property. Additionally, the Bryants mowed the grass up to the fence that the broker had pointed out as the south boundary of the property. On two occasions Ken Maulsby returned to the property and asked the Bryants for permission to remove sand from a sand pile near the boundary.

In March, 1982, Michael Bryant had a large steel building constructed on the property. He intended to have access to the building by adding an approach that connected to the rock drive. Shortly after the building was completed Ken Maulsby asked Michael Bryant where the driveway to the steel building would go. Bryant stated his intentions, and Maulsby then informed him that he could not put the driveway where intended because it would be on Maulsby's land. That conversation was the first notice the Bryants had that the Maulsbys were claiming land north of the barn and fence line.

At approximately the same time as the steel building was being finished, the Maulsbys were selling the southern part of their remaining portion of lot four. In conjunction with that sale, a survey was commissioned. The survey showed that the north boundary of the Maulsby's portion of lot four was seventeen feet north of the barn and fence line. The Maulsbys then set up a gate denying access to the rock driveway. They also began to mow the grass on the disputed portion of land, and use the grapes that grew there. Further, they attempted to put a new fence at the boundary line established by the surveyor. The Bryants, however, tore down the new fence.

The Bryants then filed suit requesting damages for the Maulsbys' alleged encroachment. The Maulsbys raised the affirmative defense that they owned the land in question. The Bryants later filed a request to have the court appoint an independent surveyor pursuant to Iowa Code section 650.7. A surveyor was appointed and a trial was held. The trial court ruled in favor of the Bryants

regarding ownership of land, but refused to award damages. The Maulsbys have appealed the finding of ownership. The Bryants have cross-appealed the finding of no damages.

I. Scope of Review. Although the original petition did not invoke Iowa Code chapter 650 (1981) (Disputed Corners and Boundaries) as a basis of jurisdiction, the Bryants later requested that a surveyor be appointed under the provisions of that chapter. The Maulsbys also treat this action as one pursuant to chapter 650. We therefore use the standard of review appropriate for such actions.

The Iowa Code states actions brought under chapter 650 are special actions and on appeal are to be heard as ordinary actions. Iowa Code §§ 650.4, .15 (1981). Therefore, this case "comes to us on assigned errors as in a law action." Brown v. McDaniel, 261 Iowa 730, 732, 156 N.W.2d 349, 350 (1968). Our review is not de novo. Rather, the findings of fact by the trial court are binding upon us if supported by substantial evidence. Id. at 732, 156 N.W.2d at 351.

II. Subject Matter Jurisdiction. The Maulsbys claim the trial court lacked subject matter jurisdiction to adjudicate the dispute concerning the boundary. Their argument is based on section 650.12 which states that after the surveyor's report is filed the parties have twenty days to file exceptions to the report, and once exceptions are filed:

... the court shall hear and determine them, hearing evidence in addition to that reported by the commission, if necessary, and may approve or modify such report, or again refer the matter to the same or another commission for further report.

Iowa Code § 650.12 (1981). The Maulsbys interpret this section as providing for automatic judgment enforcing the boundary established by the surveyor's report when no exception is filed. They therefore argue that because the Bryants did not file an exception to the surveyor's report, the trial court lacked jurisdiction to determine the boundary of the property. We find no merit in this argument.

Section 650.13 states, "The corners and boundaries finally established by the court in such proceeding, or on appeal therefrom, shall be binding upon the parties" Iowa Code § 650.13 (1981) (emphasis added). We believe this section conclusively shows that the final decision regarding the disputed boundary is to be made by the court. The surveyor's report does not become an automatic judgment on the issue when no exception is filed. See Mitchell v. Wilson, 70 Iowa 332, 335, 30 N.W. 588, 590 (1886) (surveyor's report does not have force and effect of jury verdict; court can confirm, reject, or modify report).

III. Establishing a Boundary Different from the Boundary Established by Survey. Two surveyors testified at trial. Both stated the boundary listed in the deed was located seventeen feet north of the boundary claimed by the Bryants. The Bryants did not present any evidence contradicting the surveyors' conclusions. The trial court, however, ruled that the boundary should be established at the line asserted by the Bryants. In so ruling, the court relied on Olmstead v. Taylor, 177 Iowa 186, 158 N.W. 587 (1916).

In Olmstead the court refused to enforce a boundary line established by survey because the parties had intended the land to have different boundaries, which were pointed out by the plaintiff when he sold the land. The court stated:

Defendants bought, paid for, and took possession of the land pointed out by the plaintiff to him. It was the understanding of both parties that he purchased to the line pointed out by the plaintiff, and when he paid for it, it was understood by both parties that the payment was made for land to the line pointed out by plaintiff. When he took possession, it was the understanding of both parties that the defendant had purchased to the line pointed out by the plaintiff. They have occupied the land so pointed out and purchased and paid for ever since it was purchased. Plaintiff never claimed north of the line pointed out by him until some three years afterwards, when he made a survey, and claims to have discovered that the south line of Lot 2 was 55 feet north of the line pointed out by him. . . . The land pointed out by the plaintiff was a physical entity. By designating the south line of the land purchased by the defendants, the plaintiff fixed the south line of the land sold to the defendants, and paid for by them. With the

consent of the plaintiff, possession was given of this disputed tract. Possession has ever since been maintained. The plaintiff has never returned, or offered to return, any of the consideration paid. The defendants purchased, paid for, and took possession of the disputed land, and they need no further evidence of title. It was the intention of the plaintiff to sell to this line designated by him, and the intention of the defendants to purchase to this line. There was no mistake as to the physical entity of the land sold and purchased, taken possession of, and paid for.

Id. at 193-94, 158 N.W. at 589 (emphasis added).

The Maulsbys contend that the holding of Olmstead applies only when the buyer and the seller deal directly with each other. They thus argue the trial court erred in applying the Olmstead rule in this case because they had no direct dealings with the Bryants. They also contend that the trial court erred in holding them to the representations of their broker who, they testified, had no authority to point out boundary lines. We cannot agree with either contention.

It is evident to us that Olmstead was concerned with the intentions of the buyer and seller, not with the identity of those negotiating the sale. Therefore, Olmstead controls this case if the Maulsbys intended the boundary to be the fence line.

It is also evident to us that the trial court's opinion did not hold the Maulsbys liable for the representations of their agent, the real estate broker. The case was not tried on an agency theory, and the trial court's opinion does not indicate it was decided on an agency theory. Rather, the trial court relied on the Olmstead case in reaching its decision. In doing so, the trial court simply looked to the broker's statements as evidence of the parties' intent.

The Maulsbys finally contend that the Bryants failed to meet their burden of proof. We cannot agree.

The Bryants had the burden of proving their case by a preponderance of the evidence. Iowa R. App. P. 14(f)(6). The proof considered in establishing a boundary line different from that disclosed by the survey must be clear proof. Cf.

Brown v. McDaniel, 261 Iowa at 733, 156 N.W.2d at 351 (claim of acquiescence under Iowa Code § 650.6). Reviewing this case as an action at law, we must conclude there was substantial evidence supporting the trial court's finding that the parties intended the fence line to be the boundary.

The evidence showed that the broker, an agent of the Maulsbys', pointed out the fence line as the boundary, and that the Bryants relied on the representation when purchasing the land. The evidence also shows that for three and one-half years the Bryants exercised dominion and control over the disputed property without receiving any protest from the Maulsbys. In fact, Ken Maulsby twice asked permission to enter the land and take sand for his own use. It was only near the time that the Maulsbys were contemplating selling a portion of their remaining land and having their property surveyed that they asserted a claim to the disputed land. Admittedly, the Maulsbys did present some evidence that tended to show they did not intend the fence line to be the boundary. Were our review de novo, we might reach a different conclusion. Our review, however, is more restricted. We must therefore affirm the trial court's decision on the proper location of the boundary.

IV. Denial of Damages. The Bryants claim the trial court erred in failing to award damages. They state they presented evidence showing damages from: 1) inability to rent out storage space for antique cars in their steel building; 2) increased costs for putting a cement floor in the steel building; and 3) lost use of the fruit and grapes produced on the disputed land. The Bryants claim that their damages were undisputed and, therefore, the trial court erred in failing to award them. We disagree.

The evidence showed that it was possible for the Bryants to store cars in the steel building. Moreover, evidence need not be believed by the factfinder even when it is not contradicted. Louden v. Hill, 286 N.W.2d 189, 193 (Iowa 1979). We find no error.

AFFIRMED.