FILED
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CLERK SUPREME COURT

362

IN THE COURT OF APPEALS OF IOWA

WILBUR W. HOWARD and EWANA HOWARD,

Appellants,

vs.

FRED KNOSBY, RUTH A. KNOSBY, JOHN KNOSBY and MARY KNOSBY,

Appellees.

Filed December 28, 1977

340
2-59851

Appeal from Warren District Court - Van Wifvat, Judge.

Appeal by plaintiffs from trial court's findings in fence line and drainage dispute between adjoining landowners. - Affirmed with modification.

Stephen A. Hall, of Hall, Ewalt & Hall, Indianola, for Appellants.

Kenneth D. Benhart, of Marks, Flagg, Hockett & Marks, Des Moines, for Appellees.

Submitted to Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

This is an appeal by plaintiffs Wilbur and Ewana Howard from the trial court's findings and decision in equity pertaining to a farm fence line dispute. Plaintiffs sought to establish a fence line boundary, damages for loss of crops and repairs on defendants' drainage ditch.

Our review is de novo. Rule 4, Rules of Appellate Procedure. We give weight to the trial court's findings but are not bound by them. Rule 14(f)(7), R. App. P.

Plaintiffs' first issue is that the trial court erred in finding plaintiffs failed to carry the burden of proof to establish the boundary line. The case was not pleaded or tried under chapter 650, nor was it an appeal from a fence line decision under chapter 113. A fence line agreement was made by proceedings of fence viewers in July 1971. Wilbur Howard and Fred Knosby were parties to the agreement which undertook to decide the location of a new drainage ditch and fencing. Howard built his half of the fence on the old fence line. Knosby tried to build his half on the boundary line established by his surveyor as the true boundary. The fences did not come together. At midpoint they were eight and one half feet apart; Knosby was into Howard's land four feet while Howard was into Knosby's land four and one half feet. The gap was closed by fencing. Howard seeks to force Knosby to rebuild on the old boundary line. The trial court found the parties' agreement did not determine whether the new fence was to be constructed on the old line or on the surveyed line. The court found plaintiffs' failed in their proof. Our review leads to the same conclusion.

Plaintiffs argue acquiescence by defendants in the old line. This was not pleaded nor presented at trial and cannot be raised for the first time on appeal. Schnabel v. Display Sign Service Inc, 219 N.W.2d 546 (Iowa 1974).

In April 1972, cattle owned by Fred Knosby got through the fence and destroyed Howards' seedings of oats, alfalfa and orchard grass. The court awarded $178 damages for the cost of seed. Plaintiffs claim total damages of $726.50 based on loss of profits. Plaintiffs produced evidence of the probable yield and its market value of $800. They estimated the cost of harvesting at $73.50. The measure of damage for loss of growing crops is their value in the field at the time of injury or

their value in matured condition less the reasonable expense of maturing and marketing. See Martin v. Jaekel, 188 N.W.2d 331 (Iowa 1971); Eppling v. Seuntjens, 254 Iowa 396, 117 N.W.2d 820 (1962); Brous v. Waubash Railroad Co., 160 Iowa 701, 704, 142 N.W. 416 (1913).

The trial court limited damages on this issue based on plaintiffs' failure to mitigate damages. Since mitigation was not pleaded, defendants are limited to circumstances growing out of plaintiffs' testimony. Ackerman v. Lauver, 242 N.W.2d 342, 346 (Iowa 1976). Plaintiff Wilbur Howard testified the cattle were in the oats field practically every day until the 7th of June. We do not find from plaintiffs' evidence grounds for establishing a failure to mitigate damages. Plaintiffs are entitled to judgment in the amount of $726.50.

Plaintiffs' final assertion is that the trial court should have ordered defendants to clear the drainage ditch and award damages for impeding the drainage of plaintiffs' land. Although the testimony varied as to its size, there was always a low area on plaintiffs land that failed to drain. The trial court in addition to hearing the evidence viewed the area and found defendants' ditch and dike did not substantially increase the extent of this wet area. Findings of fact by the trial court based on competent and relevant evidence are given considerable weight. Farmers State Bank v. Cook, 251 Iowa 942, 103 N.W.2d 704 (1960). Plaintiffs failed to prove any damages regarding this issue.

This case is affirmed as modified and remanded for entry of judgment consistent with this opinion. Costs assessed equally to both parties.