IN THE COURT OF APPEALS OF IOWA

No. 7-330 / 96-0530

000023

LARRY L. ARNOLD and ELAINE B. ARNOLD,

Plaintiffs-Appellees,

vs.

STEVEN G. DAVID and SANDRA L. DAVID,

Defendants-Appellants.

FILED
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CLERK SUPREME COURT

Appeal from the Iowa District Court for Linn County, August F. Honsell, Judge.

Defendants appeal from a district court order requiring them to remove the portion of a wall which encroaches on plaintiffs' property and rejecting their claim for damages due to plaintiffs' breach of an agreement to allow placement of a berm on plaintiffs' property to support the wall. **AFFIRMED.**

Peter C. Riley of Tom Riley Law Firm, P.C., Cedar Rapids, for appellants.

David L. Baker and John Riccolo of Riccolo & Baker, P.C., for appellees.

Heard by Cady, Sackett, Huitink, Streit, and Vogel, JJ., and Habhab, S.J., but decided by Cady, C.J., and Sackett, Huitink, Streit, Vogel, and Mahan, JJ.

SACKETT, J.

Defendants-appellants Steven G. and Sandra L. David appeal from a district court order requiring them to remove the portion of a wall which encroaches on the property of plaintiffs-appellees Larry L. and Elaine B. Arnold and rejecting their claim for damages due to plaintiffs' alleged breach of an agreement to allow them to place a berm on plaintiffs' property to support the wall. Defendants contend the district court erred in (1) ruling plaintiffs were not estopped from complaining of the encroachment; (2) concluding their wall caused a diversion of the natural flow of surface water; and (3) refusing to award damages for breach of the agreement for lateral support of the wall. We affirm.

Defendants own Lot 3 in Henderson's First Addition to Cedar Rapids. Plaintiffs own Lot 3 in Henderson's Second Addition. The south boundary of defendants' lot adjoins a portion of the north boundary of plaintiffs' lot.

In 1989, defendants decided to build an in-ground spa on the south part of their lot and build a brick wall on their south lot line. Defendants obtained a variance allowing them to build the wall up to the southern boundary of their land. Problems arose when water from plaintiffs' land got into the trench defendants were digging for the footing for the wall and plaintiff Larry Arnold told defendant Steven David to stay off his property. Defendants finished the wall on their property, but no berm was built on plaintiffs' side. Defendants also brought in fill dirt to level off their land on their side of the fence.

Plaintiffs sought to construct a driveway in 1991, about two years after defendants completed the wall, and they discovered the southwest corner of defendants' wall encroached on their land.

On July 9, 1993, plaintiffs filed this action claiming defendants' wall encroached on their property and asking that the wall be removed and damages be awarded. Defendants answered asserting affirmative defenses, including estoppel. Defendants also filed a counterclaim alleging plaintiffs' failure to provide support for the wall caused damage to their wall. Plaintiffs later amended their petition to allege the wall altered the flow of surface water from their property.

The district court found defendants' wall encroached on plaintiffs' property and ordered defendants to remove the encroaching portions of the wall. The court also found plaintiffs' property was the dominant estate and defendants' property was the servient estate for purposes of surface water drainage. The court concluded the wall and increased soil height on defendants' side of the wall diverted the natural flow of surface water and asked the parties to submit proposed plans to resolve the issue. The court agreed plaintiffs had given permission to build a berm on their side of the wall but then had withdrawn that permission. The court dismissed defendants' counterclaim. This appeal follows.

We need to first establish our standard of review. Plaintiffs filed the action at law and defendants demanded a jury which later was waived by consent. The parties both originally treated it as a law action. The trial court did not rule on objections.

An appeal is tried in an appellate court in the same manner it is tried in district court. *Davis-Eisenhart Mktg., Inc. v. Baysden*, 539 N.W.2d 140, 142 (Iowa 1995). Injunctive relief was sought. A request for injunctive relief is in equity. *Matlock v. Weets*, 531 N.W.2d 118, 121 (Iowa 1995). We agree with the factual findings of the trial court; consequently, our standard of review is not critical and we accept the parties' assessment at oral argument our review is de novo.

Defendants contend plaintiffs were estopped from complaining about the minimal encroachment because they did not complain until well after the wall was completed. The burden of proof to establish estoppel is on the party asserting it, with strict proof of all the elements being demanded. *Dart v. Thompson*, 261 Iowa 237, 243, 154 N.W.2d 82, 86 (1967). The doctrine of equitable estoppel is applied to prevent fraud and injustice and exists wherever a party cannot in good conscience gainsay his own acts or assertions. *Id.*

The essential elements of equitable estoppel are false representation or concealment of material facts, made to one without knowledge of the real facts, with the intention that it be acted upon, and reliance thereon by the party to whom made, to his prejudice and injury. *Id.* Each element should be proven clearly, convincingly and satisfactorily. *Id.* The doctrine is based upon the grounds of public policy, fair dealing, good faith, and justice, and its purpose is to forbid one to speak against his own act, representations, or commitments, to the injury of one to whom they were directed, and who reasonably relied thereon. *Id.*

Plaintiffs were aware the wall was being built and made no objection to it. They did not make any false representations nor conceal any facts. Plaintiffs made no representation as to the placement of the property line prior to or during construction of the wall. There is no evidence to support a finding plaintiffs knew of the encroachment until they built a driveway two years later. The encroachment of inches was not one readily discernable by the naked eye and is not the type of encroachment that could be discovered without a survey. Defendants failed to meet the burden of proof necessary to establish estoppel. We affirm on this issue.

Defendants next maintain the wall did not divert the surface water. The trial court found plaintiffs' property is the dominant property and defendants' the servient. These findings are supported by the evidence and on our de novo review we arrive at the same conclusion. The general rule is a servient estate cannot block the natural flow of water from the dominant estate. *Sloan v. Wallbaum*, 447 N.W.2d 148, 149 (Iowa App. 1989).

Defendants next advance the court erred in dismissing their counterclaim contending plaintiffs should have provided support for the wall. Defendants contend they had an enforceable agreement with plaintiffs to place a berm on plaintiffs' property.

The trial court found plaintiffs gave defendant Steven David permission to build a berm on their property but the permission was withdrawn when the water from plaintiffs' down spouts caused problems. Plaintiff Larry Arnold denies he gave

permission. Any permission given was withdrawn before any construction commenced, other than trenching. Defendants have failed to show an enforceable agreement. An adjoining property owner owes no duty to provide lateral support above the natural lay of the land. *Pacific Indem. Co. v. Rathje*, 188 N.W.2d 338, 340-41 (Iowa 1971).

We affirm.

AFFIRMED.