IN THE COURT OF APPEALS OF IOWA

No. 6-220 / 94-1430

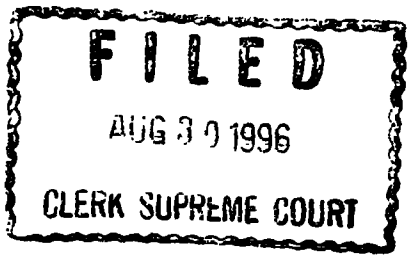
ROSE ANN MANGUNO,

Plaintiff-Appellant,

vs.

CARL BETTS,

Defendant-Appellee.



Appeal from the Iowa District Court for Fayette County, William G. Klotzbach, Judge.

Plaintiff appeals from a district court ruling failing to hold defendant in contempt for his alleged failure to obey an injunction. **AFFIRMED.**

Rose Ann Manguno, Oelwein, pro se.

W. Wayne Saur, of Saur and Saur, Oelwein, for appellee.

Considered by Habhab, P.J., and Huitink and Streit, JJ.

HABHAB, P.J.

This appeal presents the issue of whether appellee should have been found in contempt for violating a temporary injunction. The district court could not find beyond a reasonable doubt that appellee had violated the terms of the injunction order. We affirm.

I. Background. Appellant Rose Manguno and the mother of appellee Carl Betts are adjoining property owners sharing a common driveway area. Betts claims Manguno was parking her car on his mother's property and interfering with his mother's access to her garage. Betts had the property surveyed and arranged for the construction of a fence separating the two properties. Betts claimed the fence was constructed on his mother's side of the property line. Manguno claims the fence interfered with her driveway access.

On July 16, 1993, Manguno filed an application for a writ of injunction requesting the court enjoin Betts from interfering with her use of her property. On the same day the district court issued a writ of injunction:

> enjoining and restraining Carl Betts, at any time or place or in any manner from coming on the premises of the Rose Manguno's place of residence or in any manner or at any time or place interfering with her ability to have access to her driveway and garage and from harassing her and threatening to have her car towed away.

Notice of the injunction was served on Betts at 6:41 p.m. on July 16, 1993. The parties dispute whether construction of the fence was completed prior to service of the injunction on Betts.

On December 27, 1993, Manguno filed a motion to have Betts held in contempt for erecting the fence and blocking her access to her driveway and garage. A hearing was held and the district court entered an order on April 1, 1994. The ruling specified an ultimate determination of the parties' boundary was not encompassed by the proceedings. Instead, the court examined the evidence to determine only if Betts had violated the terms of the injunction. It found the evidence was inconclusive on whether Betts had completed erection of the fence prior to service of notice of the injunction. The ruling did not find Betts in contempt for violation of the injunction. Although the ruling did not find Betts in contempt or render a decision on the parties' boundary, the court did order Betts to remove "said fence or as much as possible to permit petitioner to use her driveway to gain access to her garage until a final determination of the true boundary has been made." The court assessed the court costs against Betts.

Betts filed a motion to enlarge pursuant to Iowa Rule of Civil Procedure 179(b). In his motion, he indicated his willingness to remove the portion of the fence blocking any driveway access on the condition Manguno not use the eastern end of the driveway for parking.

On May 24, 1994, the district court entered a ruling on Betts' rule 179(b) motion. It clarified its prior order had made no finding of contempt because the court could not find beyond a reasonable doubt construction of the fence had started after Betts had been served with notice of the injunction order. The court again stated it

had not made any determination as to the actual boundary between the parties. It stated it had attempted to put the parties back in the positions they were in prior to the erection of the fence to give the parties an opportunity to separately litigate the issues of boundaries and easements. The 179(b) ruling ordered Betts to remove the portion of the fence that blocked the driveway area Manguno had been using to get to the back of her premises and ordered Manguno not to park, although she could drive, on the eastern thirty-five feet of the driveway. The court reassessed the court costs fifty percent to each party. Manguno's untimely post-trial motions were denied and she now appeals.

II. Contempt. When an application for contempt is dismissed, a direct appeal is permitted. *In re B.C.A.K.*, 508 N.W.2d 738, 739 (Iowa App. 1993). Our review is not de novo but on assigned errors only. *Id.* at 739-40. A contempt proceeding is essentially criminal in nature and each element must be established beyond a reasonable doubt. *Id.* at 740. Only willful disobedience of a court order will justify a conviction for contempt. *Id.* In order to show willful disobedience, there must be evidence of conduct which is intentional and deliberate with a bad or evil purpose, or wanton and in disregard of the rights of others, or contrary to a known duty. *Id.*

There was conflicting evidence as to whether Betts had constructed any portion of the fence after being served with the injunction order. The district court, which had the first-hand opportunity to observe the witnesses and assess their credibility, found the evidence was inconclusive. "[D]ecisions regarding contempts

are within the sound discretion of the trial court, and unless this discretion is grossly abused, the decision must stand." *State v. Lipcamon*, 483 N.W.2d 605, 607 (Iowa 1992). Manguno did not carry her heavy burden to prove beyond a reasonable doubt Betts had violated the terms of the injunction. We affirm the decision of the district court in dismissing her contempt action.[1]

III. Request for Judge to Recuse Self. Several times in her appellate briefs Manguno asserts the district court judge should have recused himself from these proceedings. She does not elaborate on her reasons for requesting him to recuse himself. We surmise from the record Manguno had a separate suit pending against the county in which the judge resided and she presumed his status as a resident of the county created an actual or apparent conflict for the judge. It has previously been held a judge is not disqualified merely because of his residency in a municipality which is subject to suit. *Sioux City v. Western Asphalt Paving Corp*, 223 Iowa 279, 301, 271 N.W. 624, 638 (1937); *Laplant v. City of Marshalltown*, 134 Iowa 261, 263, 111 N.W. 816, 817 (1907). Manguno did not carry her burden to establish a basis for the judge to be disqualified from the case.

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[1] Manguno argues the district court's decision resulted in her losing thirty-five feet of her property. It is clear from the district court's rulings it was not establishing the boundaries of the parties' property and its ruling did not take property from Manguno. Nothing in this appellate ruling should be construed any differently. No ruling has been rendered as to where the boundary lies between the parties' driveways.

IV. District Court's Authority. Manguno appears to argue that in ruling on her contempt application the district court exceeded its authority by ordering her not to park on the eastern portion of the driveway. The failure in a brief to state, argue, or cite authority in support of an issue may be deemed waiver of the issue. Iowa R. App. P. 14(a)(3). This issue is waived and we decline to address it on appeal.

Whether this issue is waived or not may not be of importance for it is clear from the court's rulings Manguno is only enjoined from parking on the eastern portion of the driveway. The court's rulings make it clear she is to have unimpeded ingress and egress to her garage. As pointed out earlier in this opinion, there is no adjudication either by the trial court or this court defining the boundary lines between the parties. That determination will have to await another action.

V. Assessment of Costs. Betts has filed a motion to have the costs of producing a supplemental appendix assessed to Manguno. Betts had designated items to be included in the appendix which Manguno failed to include. We find Betts' motion should be granted and the costs of this appeal are assessed to Manguno.

AFFIRMED.