FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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| **THE TWENTY-TWO CLUB,** | ) | |
| Plaintiff-Appellant, | ) | Filed April 26, 1983 |
| vs. | ) | |
| **ELOISE REESE, FARMERS NATIONAL COMPANY, and LARRY WHITEHEAD,** | ) | 2-526<br>2-68595 |
| Defendants-Appellees. | ) | |

Appeal from Fremont District Court - Paul H. Sulhoff, Judge.

Plaintiff appeals the trial court's judgment denying its petition for a permanent injunction restraining defendants, who are owners and tenants of property adjacent to plaintiff's property, from constructing a ditch crossing which allegedly would damage plaintiff's existing crossing. AFFIRMED.

G. Rawson Stevens of Shenandoah, for plaintiff-appellant.

Edwin A. Getscher of Hamburg, for defendants-appellees.

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

**DONIELSON, J.**

Plaintiff appeals the trial court's judgment denying its petition for a permanent injunction restraining defendants, who are owners and tenants of property adjacent to plaintiff's property, from constructing a ditch crossing which allegedly would damage plaintiff's existing crossing. Plaintiff urges five arguments on appeal; however, only two issues are raised: (1) Did the trial court err in ruling that the defendants did not place their proposed crossing upon plaintiff's property; and (2) Did the trial court err in finding that the proposed crossing will not impair or destroy plaintiff's property? We affirm the trial court's judgment.

Plaintiff filed this action in equity and thus our scope of review is de novo. Iowa R. App. P. 4.

I.

Plaintiff is the owner of a triangular-shaped piece of property which is bounded on all but the north side by the East Nishnabotna and West Nishnabotna Rivers. In order to obtain access to a county road north of the property, plaintiff commenced an action against the owners of the property immediately north of plaintiff's land to obtain a right-of-way through that property to the county road. In 1959, a court decree was entered which granted to plaintiff a strip of ground 40 feet wide from the county road to plaintiff's property.

Sometime in 1959 or 1960, plaintiff put in an ungraded access road on what it believed was the strip. The access road crosses a ditch, and the crossing over the ditch contains a 36-inch diameter tube for water flow. The tube has been silted in to a considerable extent, and plaintiff's road has been flooded frequently since it was constructed.

The defendants used plaintiff's road for access to their farmland. Defendants then decided to build their own graded access road a short distance

east of plaintiff's road. In locating their road, defendants relied upon posts placed in the ground by plaintiff, which were to mark the boundary line of plaintiff's 40-foot strip. The posts had been placed there as a result of disputes between the parties concerning where defendant Whitehead could plant his beans without encroaching on plaintiff's property.

A recent survey indicated that plaintiff's roadway was not entirely on the 40-foot strip. The posts, therefore, incorrectly marked the boundary, and a portion of defendants' road is on that strip.

The area at issue includes a proposed graded crossing over the ditch. Defendants intend to use two 90-inch diameter tubes in the ditch under their crossing. Plaintiff argues that in the event that the ditch is carrying more water than defendants' tubes can handle, the tubes will accelerate the flow of the water and increase the water erosion damage to its ungraded crossing. Defendants argue that by the time their two tubes reach their capacity, plaintiff's crossing would already be washed out, and that, in any case, the large silt deposits in plaintiff's tube indicates a condition of standing water at flood stage, and that water velocities during floods in that area are insufficient to cause substantial erosion damage.

Plaintiff filed a petition for a permanent injunction restraining defendants from constructing a crossing immediately adjacent to its right-of-way, asserting that such a crossing would irreparably damage plaintiff's property. The trial court entered an order denying plaintiff's request for an injunction. The trial court found that all parties had acquiesced in the location of plaintiff's road since 1959. Thus, it ruled that there was no continuing trespass.

The trial court then determined that the main issue was whether or not defendants' proposed roadway would damage or destroy plaintiff's crossing. The court concluded that because plaintiff's crossing regularly washes out in times of

flood and high water, the construction of defendant's crossing would not increase that hazard.

II.

Plaintiff argues that the trial court did not address the overriding issue in this case. It does not dispute the trial court's finding that in a time of high water or flooding the old crossing would likely wash out with or without defendants' crossing in place; however, it argues that in lesser floods the 90-inch tubes will accelerate the flow of the water and increase the damage to its crossing.

At trial, plaintiff introduced the testimony of an engineer who stated that once the ditch filled up with more water than the two 90-inch tubes could handle, the proposed ramp over the tubes would dam the water, forcing it through the tubes at a sufficiently-increased velocity to wash out plaintiff's crossing. Defendant Whitehead testified that the proposed crossing would not act as a dam because if the water volume was sufficient to fill his two 90-inch tubes, it would overflow the ditch to the south when it started to back up. He further testified that, during normal floods in the area, the water velocity was so slow that it was almost standing water, and that the massive silt deposits were evidence of this. Finally, he gave testimony, supported by statements in the deposition of an engineer, that a "gully washer" sufficient to overload the capacity of the 90-inch tubes would wash out plaintiff's crossing whether or not the ramp and tubes were in place.

Based upon the testimony of plaintiff's expert, it is our opinion that no contention has been made that plaintiff's property will incur any additional damage until the volume of water flowing through the ditch exceeds the capacity of defendants' tubes. Therefore, the overriding issue, which was properly addressed by the trial court, is whether, in circumstances where flooding is severe enough to exceed the capacity of two 90-inch tubes, the resulting hydrolic effects

will increase the damage sustained by plaintiff's right-of-way. The trial court was persuaded by the evidence that it would not.

Although our review is de novo, we give great weight to the findings of fact of the trial court. Jensen v. Schrenk, 275 N.W.2d 374, 383 (Iowa 1979). We do this because generally the trial court is in the best position to determine what the facts are. Plaintiff argues that the trial court's findings of fact are not supported by the evidence, since they rely in good part upon statements made by an engineer contained in a deposition taken outside the presence of the court. Plaintiff asserts that such statements are entitled to no weight. We do not agree.

Generally, where the credibility of a witness is at issue, testimony of the witness contained in a deposition is entitled to less weight than it would be if given in open court. Bohen v. North American Life Insurance Co., 188 Iowa 1349, 1363 (1920). Where credibility of the witness is not disputed there is no reason to discount the weight of his deposition testimony, however. In the present case, the deposition contained testimony of a disinterested expert witness. His credibility was not at issue, and the trial court did not err in relying upon his deposition when it made its findings of fact.

We are convinced upon review of the record that the evidence is sufficient to support the trial court's findings of fact. Since construction of defendants' crossing will not increase the risk or the incidence of damage to plaintiff's crossing, the trial court did not err in denying plaintiff's request for a permanent injunction on this ground.

III.

As an alternative ground for relief, plaintiff alleges that the new crossing will be located on plaintiff's right-of-way, and will constitute a continuing trespass. Plaintiff argues that the trial court erred in applying the law of acquiescence to determine where the boundary is located, and that the boundaries

as established by the recent survey should be applied. Defendants argue that the boundary line ought to be set under the law of estoppel, and that, they claim, is what the trial court did. We are not certain what rule of law the trial court applied; however, we are convinced that its ultimate determination concerning the location of the boundary was correct.

Despite defendants' assertions to the contrary, we do not believe that all of the elements of estoppel are present here. Plaintiff did not stand by without protest and watch defendants make valuable improvements upon the invaded territory. Plaintiff alleged trespass and requested an injunction before defendants began construction of the crossing. Defendants rely on Minear v. Keith Furnace Co., 239 N.W. 584 (Iowa 1931), but that case is not on point here. In Minear, relief was denied a plaintiff who complained of a continuing trespass nearly eight years after defendant constructed its building, the location of which was established with plaintiff's consent and in reliance upon a demarkation of the property line provided by plaintiff.

We agree with plaintiff that the fact that the location of the road has been acquiesced to since 1959 or 1960 is irrelevant in determining the location of the boundary. The road itself was never intended as a boundary. At most, it established the location of the right-of-way, but since the right-of-way is 40 feet wide, and the road no more than 20, the location of the road does not fix the location of the boundaries on either side of it.

However, from 1959 until recently, boundary lines were enforced under the supposition that the old road and crossing were on the right-of-way. During this period, plaintiff routinely pointed out to defendant Whitehead where the boundaries were, and chastised him for planting on both sides of the line. These difficulties culminated in the placing of posts in the ground by plaintiff to insure that defendant Whitehead would not accidentally cross the line. Defendants never challenged the boundaries claimed by plaintiff.

Section 650.14 of the Iowa Code provides that where boundaries have been recognized and acquiesced in for ten years, they become permanently established. There is no requirement that a fence or physical marker be in place for ten years on the alleged boundary. It is sufficient that the conduct of the parties during this period be consistent with the assertions of recognition of a common line.

It is our opinion that the boundary line marked by the posts installed by plaintiff has been recognized and acquiesced in by plaintiff and defendants since 1959. It therefore has become a permanently-established boundary, and the trial court did not err in refusing to issue a permanent injunction on the ground of a continuing trespass.

AFFIRMED.