6-29-2009

Flying Elk Investment, LLC v. Cornwall Respondent's Brief Dckt. 35853

IN THE SUPREME COURT OF THE STATE OF IDAHO

FLYING ELK INVESTMENT, L.L.C.,	)	
	)	Supreme Court No. 35853-2008
Plaintiff-Appellant,	)	
	)	
vs.	)	
	)	
DAVID F. CORNWALL,	)	
	)	
Defendant-Respondent.	)	
	)	

RESPONDENT'S BRIEF

On Appeal from the Sixth Judicial District of the State of Idaho, in and for the County of Bannock. The Honorable Ronald E. Bush and Honorable Stephen S. Dunn, District Judges, Presiding

---

Thomas J. Holmes, ISB No. 2448
LAW OFFICES OF JONES, CHARTERED
203 South Garfield
P O Box 967
Pocatello, ID 83204
Telephone: (208) 232-5911
Facsimile: (208) 232-5962

Attorney for Defendant-Respondent
David F. Cornwall

F. Randall Kline, ISB No. 2787
ATTORNEY AT LAW
543 Bannock
P O Box 97
American Falls, ID 83211
Telephone: (208) 226-1230
Facsimile: (208) 226-7612

Attorney for Plaintiff-Appellant
Flying Elk Investment, L.L.C.

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases:

Idaho Code:

Rules:

I. STATEMENT OF CASE

A. Nature of Case.

This is a fence line dispute between Flying Elk Investment, L.L.C. ("Flying Elk") and the adjoining land owner David F. Cornwall ("Cornwall") involving a fence line in place since the 1940's except for some minor changes done prior to 1979.

Cornwall moved for summary judgment based upon affidavits and depositions on file and Flying Elk opposed the same. At oral argument the Court confirmed with both counsel that "both parties agreed that they knew of no additional witnesses, history or other evidence that would support one side or the other. The case is set for trial to the Court..." Memorandum Decision on Defendant's Motion for Summary Judgment, page 2.

Summary judgment was granted to Cornwall and title quieted in favor of Cornwall and against Flying Elk as to the disputed land lying between a fence separating the properties and the legally described line.

Flying Elk appeals from the grant of summary judgment.

B. Course of Proceedings.

October 26, 2006: Flying Elk filed a complaint to quiet title to land lying between Flying Elk's surveyed line and a fence line separating the Flying Elk property from the Cornwall property. (R., pp .1-6.)

November 15, 2006: Cornwall answered. (R., p. 12.)

July 13, 2007: Cornwall was allowed to amend his answer to include a counter claim for quiet title whereby Cornwall sought to quiet title to the same tract of disputed land lying between the fence separating Cornwall from Flying Elk and Flying Elk's legally described boundary. (R., p. 19.)

June 30, 2007: Cornwall moved for summary judgment. (R., pp. 21-22.)

August 23, 2007: The Affidavit of Corwin Pat Whitworth, Flying Elk's predecessor in interest, created questions of fact.

August 30, 2007: Flying Elk filed an objection the Motion for Summary Judgment. (R., pp. 23-26.)

August 30, 2007: Flying Elk answered the Counter Claim. (R., pp. 27-29.)

September 13, 2007: The court, at the hearing on Cornwall's Motion for Summary Judgment on September 6, 2007, ruled the Motion for Summary Judgment was not appropriate and the court extended the discovery deadline. (R., pp. 30-31.)

February 26, 2008: Cornwall renewed the Motion for Summary Judgment. (R., pp. 36-37.)

February 26, 2008: Flying Elk renewed its objection. (R., p. 38.)

September 17, 2008: After oral argument, the court granted Cornwall's Motion for Summary Judgment and rendered its Memorandum Decision on Defendant's Motion for Summary Judgment. (R., pp. 41-64.)

October 10, 2008: The Honorable Ronald E. Bush entered the Memorandum Decision but due to his leaving the bench for the Federal Magistrate position, the Honorable Stephen S. Dunn entered Judgment on finding ownership of the property was granted to Cornwall. Because the record contained no legal description of the disputed tract, title was not quieted to Cornwall. (R., pp. 65-66.)

November 3, 2008: Cornwall supplemented the record and filed a renewed motion for summary judgment for quiet title. (R., pp. 67-68.)

November 10, 2008: Notice of Appeal filed by Flying Elk from the October 10, 2008 judgment entered by the Honorable Stephen S. Dunn based upon the Memorandum, Decision and Order of the Honorable Ronald E. Bush on September 17, 2008. (R., pp. 69-71.)

January 8, 2009: Judgment for Quiet Title was entered by the Honorable Stephen S. Dunn, District Judge. (R., pp. 74-76.)

C. Statement of Facts.

The two farms in question, that owned by Flying Elk and that owned by Cornwall were originally owned by two brothers named Whitworth, Joseph and Harold. (Dwayne Whitworth Affidavit, ¶¶ 3,4,6 and 8.) Cornwall acquired his property from his father-in-law, Joseph Whitworth, in 1972. (Cornwall Affidavit, ¶ 2, Exhibit A). Joseph Whitworth had leased the property from Anna Peoples in the 1940's prior to acquiring it. (Dwayne Whitworth Affidavit, ¶¶ 3 and 4.)

Flying Elk's principal, Robert Bohus ("Bohus"), purchased his property from Corwin Pat Whitworth ("Pat Whitworth") on March 29, 1994. (Kellie Fernandez Affidavit, ¶ 4, Robert W. Bohus Affidavit, ¶ 2.) Bohus transferred the property to Flying Elk October 10, 1999. (Robert W. Bohus Affidavit, ¶ 2, Exhibit B.) Bohus' predecessor in interest, Pat Whitworth, had acquired the property from the Estate of his father, Harold Whitworth on July 14, 1979. (Kellie Fernandez Affidavit, ¶ 3.)

The fence in question had been in place for many years. Pat Whitworth indicated that when he sold the property to Bohus in 1994, there was a fence along the entire boundary between he and Corwall. (Pat Whitworth Deposition, 23:17-20.) Pat Whitworth indicated parts of the fence had been in place for 70 years although some had been more recently repaired. (*Id.*, 23:5, 24:1-6.) While Pat Whitworth stated the fence was never intended to be the boundary and that he and his father knew that the north-south line on the east side of Cornwall's property was off by as much as 250 feet, he conceded that on the other side, Cornwall and his predecessors may have thought the fence formed the boundary. (Pat Whitworth Affidavit, ¶¶ 7 and 9.) David Cornwall testified about a two and one-half to three foot bank along the fence with the ground sloping away on the Flying Elk side showing the long period of farming up to the fence line by Flying Elk's predecessor, Pat Whitworth and his father before him. (Cornwall Deposition, 26:3-8, 44: 2-25, 46:1-19, Exhibits G and H.)

Pat Whitworth's affidavit filed prior to the hearing on the Motion for Summary Judgment created questions of fact; ¶ 6 of his affidavit indicated he had personally moved the fence on

several occasions. He additionally indicated his father, Harold Whitworth, had farmed the property and Pat had helped him farm it while growing up and had leased it from his father for 15 years prior to buying it. (Pat Whitworth Affidavit, ¶ 4.)

The deposition of Pat Whitworth was taken. He recalled moving the fence three times; each relatively minor and all occurring prior to the time he received the property from his father's estate in 1979. Pat Whitworth Deposition Exhibit 2 is a large aerial photo with the section lines imposed and on there Pat Whitworth marked areas where the fence had been moved. He recalled helping his father build the fence on the south side of Cornwall's property in the 1940's. (Pat Whitworth Deposition, 16:18-24.)

The top corner was moved where the fence on the south line of Cornwall's property intersects with the north-south fence running along the east side of the Cornwall property. This corner was moved prior to him buying the ground in 1979 and probably prior to Cornwall buying the adjacent ground in 1972. (Pat Whitworth Deposition, 17:1-16; 18:5-20.)

One part of the north-south fence on the east side of Cornwall's property was moved with his father when he was 10 to 15 years old which would have been between 1942 and 1947 based upon Pat Whitworth's birth date. (Pat Whitworth Deposition 13:18-24; 7:2-4.)

The far north line of the north-south line on the east side of Cornwall's property was moved with his father and brothers before he went into the service and that fence was still in the same spot when he sold it to Bohus. (Pat Whitworth Deposition, 28:2-6; 29:22-25; 30:1-8.)

Pat Whitworth acknowledges he had no idea the east-west fence on the south side of Cornwall's property was not on the boundary line and it was only the north-south fence that formed the easterly boundary of Cornwall's property that he thought was not on the proper line. (Pat Whitworth Deposition 25:13-15.)

Pat Whitworth agrees that both sides farmed up to the fence line. (Pat Whitworth Deposition 27:1-6.)

Cornwall acquired his farm from his father-in-law, Joseph Whitworth, who is deceased. Max Whitworth, a son of Joseph Whitworth, is 68 years old and helped on the farm until 1958. He testified the fence had been there for many years and it had been farmed and livestock grazed over to the fence. (Max Whitworth Affidavit, ¶¶ 8 and 9.) Max Whitworth was also familiar with Cornwall's fish pond and had been up there approximately 14 years prior to his affidavit or approximately 1993. He testified the fence was in the same spot by the fish pond as it was in 1958. (*Id.*, ¶ 10.) Max's brother, Dwayne, was familiar with the farm in the 1940's and recalled the fence when he was young. He recalled that they farmed up to the fence and that it was in the same place. (Dwayne Whitworth Affidavit, ¶¶ 7,8 and 10.)

David Cornwall testified the fence is in the same place as it was when he bought the property in 1972 from Joseph Whitworth. (Cornwall Affidavit, ¶ 6.) He had put in a pond in the disputed area, (*Id*, ¶ 11), and catch basins to control water run off. (Cornwall Deposition, 16:1-12.) Cornwall observed the fence in the early 1960's prior to purchasing the property. (*Id.*,

27:23-25; 28:1-3.) Cornwall did not know about the boundary error and thought he was purchasing what was enclosed by the fence. (*Id.*, 24:24-25; 25; 26:1-16.)

Pat Whitworth thought some of the fence was constructed prior to his birth (Pat Whitworth Deposition, 11:6-5) and he did not know where the markers to establish the lines were located or if they even exist. (*Id.*, 24:19-24.) He alludes to his father, Harold Whitworth, and Joe Whitworth having discussions and locating the fence for convenience so it would be beneficial to everyone. (*Id.*, 29:10-21.)

Daniel L. Long, the surveyor, noted there is no record of the section being completely broken down by survey. (Daniel R. Long Affidavit, ¶ 10.) His survey for Flying Elk is attached as Exhibit F to the Affidavit of David F. Cornwall and was recorded in 2003. This survey is referenced in Daniel Long's Affidavit at ¶ 15. The survey showed the corners along the line between the Cornwall property and the Flying Elk property were set by him and are not shown as having been located from prior survey stakes. Mr. Long did note that the westerly end of the fence on the southern boundary of the Cornwall property runs right over a reference point set by a 1962 BLM survey, however that was not a corner of the described property. (Daniel R. Long Affidavit, ¶ 11.)

II. ATTORNEY FEES ON APPEAL

Respondent Cornwall requests attorney's fees on appeal from Appellant Flying Elk pursuant to Idaho Code §12-121. Cornwall asserts the Appellant is simply asking this Court to

second guess the district court's decision and is not presenting any basis to reverse the decision given the well established case law in Idaho on fence disputes. *Teton Peaks Investment Co, LLC v. Ohme,* 08.22 ISCR 1084, 1086 (2008); *Read v. Harvey,* 09.12 ISCR 32, 41 (2009).

III. STANDARD OF REVIEW

When the grant of a Motion for Summary Judgment is appealed, this Court uses the same standard as used by the district court in ruling on the motion. *Shawver v. Huckleberry Estates, L.L.C.,* 140 Idaho 354, 93 P.3d 685 (2004).

Summary judgment is appropriate if the pleadings, depositions and the affidavits show there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *Id.*; I.R.C.P. 56 (c).

Since no jury trial was requested, the matter was to be tried to the court and the lower court "as the trier of fact is entitled to arrive at the most probable inferences based upon the undisputed evidence properly before it and grant the summary judgment despite the possibility of conflicting inferences." *Rae v. Bunce*, 145 Idaho 798, 805, 186 P.3d 654, ___ (2008) (citing *Shawver v. Huckleberry Estates, L.L.C.*, 140 Idaho 354, 360-61, 93 P.3d 685, 691-92 (2004).)

The test for viewing the inferences drawn by the trial court is whether the record reasonably supports the inferences. *Shawver*, 140 Idaho at 361, 93 P.3d at 692. The court is not required to draw inferences in favor of the party opposing the summary judgment motion but is free to arrive at the most probable inferences drawn from the undisputed facts and evidence,

notwithstanding the possibility of conflicting inferences. *Chapin v. Linden*, 144 Idaho 393, 396, 162 P.3d 772 (2007).

When questions of law are present, this Court exercises free review and may draw its own conclusions from the evidence presented. *Id.*

"The test for reviewing the inferences drawn by the trial court is whether the record reasonably supports the inferences." *Shawver*, 140 at 361, 93 P.3d at 692. The trial court's findings of fact will be set aside only if clearly erroneous. *Griffin v. Anderson*, 144 Idaho 376, 377-78, 162 P.3d 755, 756 (2007).

IV. ARGUMENT

A. There are no Material Issues of Fact Precluding Summary Judgment.

Summary judgment is only appropriate if there are no material issues of fact in dispute. I.R.C.P. 56(c). In this instance it is acknowledged that the fence line has been in place for a number of years and has not been moved since 1979 when Pat Whitworth, Flying Elk's predecessor in interest, inherited the property from his father or more likely prior to 1972 when Cornwall bought his property from his father-in-law.

There was uncertainty as to the location of the true boundary since both the surveyor and Pat Whitworth indicated there were no markers in that section and the survey originally performed for Flying Elk showed that the points at the corners of what Flying Elk argues should

be the boundary based upon the survey all had to be set by the surveyor, no old survey pins were located.

Both Cornwall and Pat Whitworth acknowledge there is no express agreement regarding the boundary.

What is in dispute is the legal effect of the long observance of the fence on both sides as the boundary and the testimony by Pat Whitworth that the fence line was never intended to be the boundary and that he knew the fence was not the boundary.

B. The District Court was Correct in Finding the Existing Fence is the Boundary by Agreement.

Although frequently used interchangeably, the expressions "Boundary by Agreement" or "Boundary by Acquiescence" have a long history in Idaho law beginning with *Bayhouse v. Urquides*, 17 Idaho 286, 105 P. 1066 (1909).

> Landmarks, such as fences, maintained for nearly half a century, coupled with actual occupation for forty years, ought not to be disturbed at the instance of one who has acquiesced therein for the same period of time. The law looks with favor on the diligent, and with especial disfavor on alleged claims and rights that have been allowed to slumber beyond the memory of the generation that witnessed their inception and origin. Statutes of limitation or repose have been enacted to guard against such cases and protect parties against the loss of witnesses, and the frailty of human memory. Long acquiescence ought to also preclude a controversy that will involve rights that have been unquestioned for a generation.
>
> *Id.* at 298, 105 P. at 1069-1070.

While is has been argued to this court that Boundary by Acquiescence and Boundary by Agreement are two separate legal theories with separate elements, that argument has been rejected, *Cox v. Clanton*, 137 Idaho 492, 495, 50 P.3d 987, 990 (2002). Idaho law is firmly grounded on Boundary by Agreement which has two elements:

1. There must be an uncertain or disputed boundary and
2. An agreement, express or implied, which fixes that boundary.

Luce v. Marble, 142 Idaho 264, 271, 127 P.3d 167, ___(2005).

The testimony of Dwayne Whitworth, David Cornwall, Pat Whitworth and the surveyor, Daniel L. Long, establish that there was uncertainty as to the location of the true boundary.

The first part of the test is then met.

At issue is the second part of the test as to whether or not the fence was established by agreement, either expressed or implied. Both Cornwall and Pat Whitworth acknowledge there is no express agreement fixing the fence as the boundary. Cornwall relies on a long series of cases beginning with *Bayhouse* that indicate where there is uncertainty as to the boundary and the long established fence line has been recognized as the boundary by the treatment of the land owners by either side of this fence it "ought not to be disturbed at the instance of one who has acquiesced therein for the same period of time." *Bayhouse*, 17 Idaho at 298, 105 P. at 1069.

"[T]he adjoining owners have treated the same as fixing the boundary between them for such length of time that neither ought to be allowed to deny the correctness of its location." *O'Malley v. Jones*, 46 Idaho 137, 141, 266 P. 797, 798 (1928).

In *Herrmann v. Woodell*, 107 Idaho 916, 693 P.2d 1118 (Ct. App. 1985) the court found no evidence as to who placed the original fence or why is was so placed. "Acquiescence can then be relied upon to show that a settlement agreement must have taken place sometime in the past and was memorialized by the placement of the fence. *Id.* at 920, 693 P.2d at 1122.

A thirty year period of acquiescence was sufficient in *Woll v. Costella*, 59 Idaho 569, 85 P.2d 679 (1938). Nearly twenty years was sufficient in *Wells v. Williamson*, 118 Idaho 37, 794 P.2d 626 (1990).

The appellant argues a different line of cases buttressed by Pat Whitworth's declaration that the fence was not the boundary and he knew it was not on the boundary supports reversal of the district court. A close examination of those cases however reveals distinctions not present in this action.

The core issue is whether or not there is in this action "want of any evidence as to the manner or circumstances of its original location...." *Beneficial Life Ins. Co. v. Wakamatsu*, 75 Idaho 232, 241, 270P.2d 830, 835 (1954). Although Pat Whitworth testified he knew the fence was not on the line, neither he nor Cornwall had any knowledge as to why the fence was originally constructed there. There was speculation by both:

> I'm not sure when it was done, but I know it was done, Joe was my dad's brother, the fellow that owned the ground, and they talked of these things, there were a lot for convenience, so they moved the fence so it would be beneficial to everybody.

Pat Whitworth Deposition 29:12-16 [Joe Whitworth was Cornwall's predecessor in interest as to the Cornwall ground].

> I don't think anybody is going to fence off that much land for convenience. I think it was may even negotiated or something.
>
> Cornwall Deposition 26:14-16.
>
> I don't think that that fence could have been that convenient for anybody, I think something - - to be it there or here, I don't see that big a difference in the fence line (indicating).
>
> Cornwall Deposition 27:11-14.

Cornwall testified he first saw the fence in the early 60's before he bought the ground (Cornwall Deposition 27:23-25; 28:1-3).

Appellant relies on *Brown v. Brown*, 18 Idaho 345, 110 P. 269 (1910) and that court specifically held that the facts did not bring it within the rule established in *Bayhouse*. In *Brown*, G.F. Rhodes, one of the original owners who was present when the fence in question was erected, testified that he didn't know where the true line was and that he gave his permission to have the fence erected at that place for the time being. The *Brown* court went on to indicate that presumptive evidence, i.e. the occupation of the property for a number of years up to the fence line, did not overcome the positive evidence that the fence in question was not intended to be the boundary line. *Brown* is distinguishable from the facts in this case in that the parties who originally put in the fence are not alive to testify as to the circumstances. The positive evidence present in *Brown* as to the understanding when the fence was put in is not present in this case. The hearsay testimony of Pat Whitworth as to conversations with his father establishes Pat Whitworth's state of mind that he knew the fence was not on the survey lines but that does not take it out of the *Bayhouse* principal.

Similarly in *Downey v. Vavold*, 144 Idaho 592, 166 P.3d 382 (2007), the lower court had found no boundary by agreement. *Downey* noted there was evidence from which the court could have drawn the inference of a boundary by agreement, but the lower court did not do so. The finding there was no boundary by agreement was upheld as not clearly erroneous. In reviewing the facts in *Downey*, elements were missing:

1. There was no testimony that Conner, the party erecting the fence, was uncertain as to the true boundary. The court noted the lower court could have inferred that Conner was uncertain as to the true boundary but was not required to draw that inference. *Id.*, 144 Idaho at 595, 166 P.3d at ___.

2. There was no evidence that Conner's neighbors were uncertain as to the location of the true boundary even though one of them, Loegering, testified. Loegering just said he accepted the fence as the boundary. *Id.*

Thus the lower court did not draw inferences as to the uncertainty as to the location of the true boundary although it could have done so.

Likewise the *Downey* court noted that the lower court could have inferred an agreement from the long period of acquiescence in the line but had not done so. *Downey* noted:

> In this case, any agreement establishing an uncertain boundary would have to be inferred from the conduct of the parties viewed in light of the surrounding circumstances.

Id. at 596, 166 P.3d at ___.

Downey noted some of the conduct that was examined including the fact the neighbors did not make any improvements on the property which of course is not the fact in this case since Mr. Cornwall built a pond and some check dams. There was also no testimony as to the acquiescence of the party, Conner, that had originally built the fence. There was no testimony by prior owners of other properties belonging to the plaintiff as to whether or not they had accepted the fence as the boundary. Thus the *Downey* case has very different facts and inferences upon which the trial court in *Downey* found there was no boundary by agreement.

The opposite is present in this case where the court looked at the conduct of not only Cornwall and his predecessors evidenced by the testimony of Cornwall, Dwayne Whitworth and Max Whitworth but also the conduct of Pat Whitworth in not saying anything about the fence not being on the line, the replacement of the fence from time to time upon the same line, the fact the terrain showed that both sides had been farmed up to the fence or grazed up to the fence for many years and even the conduct of Flying Elk's principal, Bohus, in purchasing the property in 1999 with the explicit notice from Pat Whitworth that he would have to get a survey and then waiting several years to do so. Given the standard of review, there is no precedent established by *Downey* that would require reversal of this case. *Downey* stands for the principle, as noted by the lower court herein, that it is up to the lower court to draw the inferences from the facts presented and if those inferences are not clearly erroneous, the decision will stand.

In another case where a boundary agreement was not found, *Cox v. Clanton*, 137 Idaho 492, 50 P.3d 987 (2007), a previous owner testified of personal knowledge as to why the fence

was erected and testified that it had been put up hastily to contain cattle and was not intended to be a boundary fence.

In *Beneficial Life Ins. Co. v. Wakamatsu*, 75 Idaho 232, 270 P.2d 830 (1954), the court reviewed the action of Lewis, the plaintiff, who had purchased the land on one side of the boundary in 1941, inspected it and thought it was not on the line, was told by his Seller that the fence was not on the line and then asked the landowner (Moody who was Wakamatsu's predecessor in interest) on the other side who refused to discuss the matter. The *Beneficial* court on remand directed the lower court to enter judgment finding the fence constituted the boundary.

> "Moreover, Lewis' failure to assert his right for ten years, from the time he approached Moody in 1941 to the commencement of this action in 1951, but adds to the staleness of his claim. .... Under these circumstances the continued possession and use of the land by Moody and Wakamatsu would appear to be based on a claim of right and sufficient to defeat plaintiffs' case."
>
> *Id.* at 240-241, 270 P.2d at 835.

The court also noted any statements to Lewis by his predecessor would be hearsay as to the defendants and, in any event, the fact Lewis did not accept the fence as the boundary, "would avail the plaintiffs nothing, if the title thereto had already vested in the predecessors of the defendants either by acquiescence or prescription." *Id.* at 240, 270 P.2d at 835.

The case at bar is very similar to *Teton Peaks Investment Co., LLC v. Ohme*, 08.22 ISCR 1084. The facts in Ohme were stipulated and the court noted there was no evidence as to who built the fence, when the fence was constructed or for what purpose. Each side in *Ohme* had treated the fence as the property line from 1940 until 2004, the time when Teton Peaks purchased

the property and later had it surveyed in 2006. The *Ohme* court recited the elements of the boundary by agreement. The court found summary judgment was appropriate based upon the facts presented in the case and that there was not genuine issue of material fact as to whether there was a boundary by agreement.

One aspect of *Ohme* needs to be examined. *Ohme* relied upon the finding in *Downey* that the conduct of subsequent owners does not prove or disprove an implied agreement between the original parties. The common thread in the cases where the fence has been found not to be the boundary is going back to *Brown* is that there is no agreement between the original owners because of testimony by them or lack of establishment of uncertainty as to the boundary by them. In this case the original owners, Joe Whitworth on Cornwall's side and Harold Whitworth on Flying Elk's side are deceased. While Pat Whitworth testified he knew the boundary was off, he did not testify in the capacity as the person that erected the north-south fence and, more importantly, his long period of acquiescence in the fence line being the boundary, to farming up to it, re-erecting the fence on the line and not raising the issue firmly puts it under the *Bayhouse* doctrine that "Landmarks, such as fences, maintained for nearly half a century, coupled with actual occupation for forty years, ought not to be disturbed at the instance of one who has acquiesced therein for the same period of time." *Id.* at 286, 105 P. at 1069.

The lower court had clear facts before it and different inferences could be drawn from those facts. The court drew inferences that are supported by the evidence in the record and which are not clearly not erroneous. The Judgment should be affirmed.

C. The District Court was Correct in Finding Idaho Code § 35-110 Not Applicable.

Most of Title 35, Chapter 1 originates with 1885 legislation clearly applicable to open range of that era. The lower court found the law did not apply where a boundary had been established by adverse possession or by agreement, *C.f. Beneficial Life Ins. Co. v. Wakamatsu, supra*. Even Idaho Code § 35-108 imposes a time limit of one year from the date of discovery of a mistake to remove the fence. Since Pat Whitworth believed the fence to not be in the correct place, any change should have been done in a more timely manner than letting the fence remain as it was, not raising the issue and attempting to pass the problem on to Bohus, who likewise did not take any action for several years. The lower court correctly found the property rights were defined by a fence in place, for the most part, for 70 years and, relying on the long line of cases originating with *Bayhouse*, did not find the statute applicable.

D. Respondent Cornwall is Entitled to Attorneys Fees on Appeal.

The inferences and ruling of the trial court in this action are supported by facts in the record and based upon the standard of review the record reasonably supports the inferences. *Shawver v. Huckleberry Estates, L.L.C.*, 140 Idaho 354, 93 P.3d 385 (2004).

Appellant has not presented any basis to reverse the lower court given the well established case law in Idaho. The appellant asks this court in its prayer for relief to reverse the District court and remand this case for a trial. However as noted in the Memorandum Decision on Defendant's Motion for Summary Judgment,

> Both parties agree they knew of no additional witnesses, history or other evidence that would support one side or the other. The case is set to be tried to the Court....

One of the purposes of summary judgment is to eliminate the necessity of trial where the facts are not in dispute and the existing and undisputed facts lead to a certain conclusions of law. *Berg v. Fairman*, 107 Idaho 441, 690 P.2d 896 (1984); *Bandelin v. Pietsch*, 98 Idaho 337, 563 P.2d 395 (1977). Appellant Flying Elk is simply requesting this court to second guess the trial court or reverse the trial court in the hopes that a different district judge will draw different inferences. Consistent with *Ohme* and *Harvey*, Respondent Cornwall should be awarded its attorney fees on appeal.

V. CONCLUSION

Based upon the standard of review and the record, there are no material facts in dispute, the inferences drawn by the trial court are supported by the record and the judgment entered in favor of the Respondent Cornwall should be affirmed.

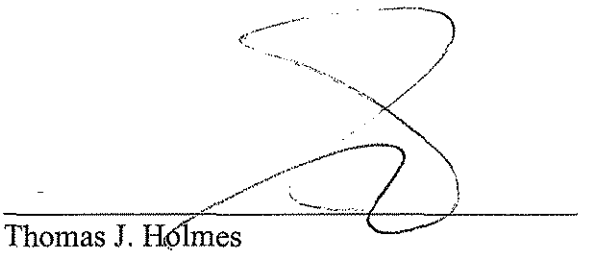
DATED this 26th day of June, 2009.

Thomas J. Holmes, Attorney for
Defendant-Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two true and correct copies of the foregoing **RESPONDENT'S BRIEF** was mailed this 26 day of June, 2009, in an envelope with sufficient first-class postage prepaid thereon to the following:

F. Randall Kline
Attorney at Law
P O Box 97
American Falls, ID 83211



Thomas J. Holmes