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Boyd-Davis v. Baker Appellant's Reply Brief 2 Dckt. 40438

IN THE SUPREME COURT OF THE STATE OF IDAHO

TERRI BOYD-DAVIS, an individual Plaintiff/Counter Defendant/ Respondent/Cross-Appellant, and BRIAN F. DAVIS, an individual; and JEAN L. COLEMAN, an individual, Plaintiffs/Counter Defendants/ Respondents, v. TIMOTHY BAKER and CAROL BAKER, husband and wife, Defendants/Counterclaimants/ Appellants/Cross-Respondents.	Supreme Court Docket No. 40438-2012 Bonner County Docket No. CV2010-703

CROSS-APPELLANT TERRI BOYD-DAVIS' REPLY BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT FOR BONNER COUNTY

HONORABLE STEVE VERBY, DISTRICT JUDGE PRESIDING

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I. CLARIFICATION REGARDING EVIDENCE IN THE RECORD

A. In the *Appellant's Reply Brief and Response to Cross-Appeal*, Baker erroneously claims that the survey adopted by the District Court and cited by Respondent/Cross Appellant is not contained in the record on appeal.

For the Court's clarification, Boyd-Davis herein addresses Baker's erroneous assertion[1] that the survey adopted by the District Court is not contained in the record on appeal. The survey was submitted to the District Court by Coleman on September 7, 2012 as Exhibit A to the *Notice of Submission of Survey, Legal Description, and Letter from Surveyor Robert Stratton*[2]. The survey submitted to the District Court is a full-size survey and thus does not fit within the 8 ½" x 11" pages of the Clerk's Record on Appeal. The full-size survey is contained in the Clerk's exhibits. The record provided by the Clerk to Respondents/Cross-Appellant contained seven volumes (Vol. I – Vol. VII) of documents bound by blue stock paper. In addition, three over-sized envelopes containing exhibits in the case were provided. The location in the record of the full-size copy of the Survey is found in envelope #3 of 3 containing the exhibits provided to Respondents/Cross-Appellant by the Clerk. Boyd-Davis presumes, as is required under Idaho Appellate Rules, that the Clerk provided Appellant/Cross-Respondents Baker and the Supreme Court with the same exhibits it provided to her.

II. ARGUMENT

A. Boyd-Davis does not argue that the District Court failed to recognize that a claim for boundary by agreement *can be based* on an implied agreement but rather that it applied the wrong standard in reaching its determination that the parties had not formed an implied agreement.

In Baker's Response to Cross-Appeal, they incorrectly depict Cross-Appellant's position. Cross-Appellant Boyd-Davis' position is **not** that the District Court "*failed to recognize* that a

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[1] See Section III(E), p. 13 of *Appellant's Reply Brief and Response to Cross-Appeal.*
[2] See Section IV(A)(2)(a), pp. 23-24 of *Respondent/Cross-Appellant Terri Boyd-Davis' Brief.*

claim for boundary by agreement *can be based upon an implied agreement*" but rather, as Boyd-Davis clearly stated in the first paragraph of Section IV of her Cross-Appeal Brief, that "the District Court *erred in applying the standard* applicable to determining whether a boundary has been established pursuant to an express agreement when the proper inquiry would have been whether Coleman had proven whether an agreement was established by an implied agreement." (Emphasis added.)

Boyd-Davis finds error with the District Court's *analysis* when it stated that "*[i]n light of the denial by Cliff Johnson* that there was an agreement between the neighbors that the fence line was to be the property line...the conclusion is reached that the plaintiffs did not prove a necessary and material element of this claim." (R., Vol. VI, 1098). (Emphasis added.)

The reason Boyd-Davis finds this analysis erroneous is because when determining whether there was an *implied* agreement, the appropriate question is not whether the parties admit to having entered into an *express* agreement.

The District Court made the following significant findings of fact:

- Baker's predecessor, Clifford Johnson built the fence (and later rebuilt the fence in the same location) on what he thought was the boundary line. (Trial Tr., p. 1040, L. 3-8, 14-15).
- Coleman and the Johnsons thought the fence line was the boundary line. (Trial Tr., p. 1040, L. 3-4).
- The use as evidenced by the parties reflects that they treated the fence line as the boundary line. (Trial Tr., p. 1040, L. 8-10, 17-20).

Despite these specific and important findings, the Court determined there was no *implied* agreement because Cliff Johnson denied that there was an agreement. By focusing on Cliff Johnson's denial rather than on the conduct of the parties, the District Court fails to properly

distinguish an implied agreement from an express agreement and thereby applied the wrong standard.

By its very definition an "implied" agreement is not an "express" agreement. Therefore, in determining whether Coleman and the Johnsons had impliedly agreed that the fence marked the boundary between their properties, it does not matter what the parties said. It matters what they did. Thus, the District Court's focus on what Clifford Johnson said was erroneous.

To better understand this, it is necessary to distinguish the difference between "express" and "implied."

Black's Law Dictionary (6th ed. 1991) defines "implied" as follows:

> This word is used in law in contrast to "express."; *i.e.,* where the intention in regard to the subject-matter is not manifested by explicit and direct words, but is gathered *by implication or necessary deduction from the circumstances, the general language, or the conduct of the parties.*

(Emphasis added.)

Black's Law Dictionary (6th ed. 1991) then defines "express" as follows:

> Clear; definite; explicit; plain; direct; unmistakable; not dubious or ambiguous. Declared in terms; set forth in words. Directly and distinctly stated. Made known distinctly and explicitly, and not left to inference. Manifested by direct and appropriate language, as distinguished from that which is inferred from conduct. The word is usually contrasted with "implied."

Cliff Johnson's denial simply means that there was no direct evidence of a mutually agreed boundary (i.e. the parties never shook hands over the fence and expressly stated that they agreed the fence marked the boundary). But "no direct evidence" in this case only means that there was no express agreement. It does not mean that there was no implied agreement. The conduct of the parties (treating the fence as the boundary), the "general language" of the parties

(at trial, Cliff Johnson referred to the property south of the fence as "*my* side of the fence[3]" while Joan Johnson referred to the property north of the fence as "Jean's property[4]"), the circumstances (building the fence on what Johnson believed was the boundary line) confirms there was an implied agreement. Since the District Court made the specific finding of fact that Johnson built the fence on what he believed the boundary line was, it is apparent that Johnson impliedly "agreed" this was the boundary line.

While Cliff Johnson, a witness that the District Court had specifically found "was shown to have a bias" (Trial Tr., p. 1040, L. 2-3) and under "pressure to testify in a manner consistent with the position put forth by [Baker]" (R., Vol. VI, p. 1098), denied there was an agreement, the testimony of Jean Coleman and Cliff Johnson's wife, Joan confirmed they believed the fence marked the boundary and treated the fence as the boundary.

Joan Johnson testified as follows:

> Q. Did you ever cross over that fence line to the north?
> **A. You mean onto Jean's property? No.**
> Q. Yeah. Well, did you consider the property on the – on the north side of that fence to be Jean's property?
> **A. Yes.**
> Q. Okay. So you didn't believe that the property north of that fence line was your property? Is that correct?
> **A. Correct.**

(Tr. p. 355, L. 10-20).

Jean Coleman testified as follows:

> Q. Now, did the Johnsons ever use the property north of the fence at any time you're aware of?
> **A. No.**
> Q. Was there always a fence between your property and theirs?

[3] Trial Tr., p. 421, L. 1-7, p. 1028, L. 5
[4] Trial Tr., p 355, L. 10-12

A. Yes. There's various fence – various fences over the 40 years but yes, there was always a fence there.
Q. Was the fence always in the same location?
A. Yes.
Q. So where did you believe your boundary line was?
A. The fence line.
Q. And why did you believe that was the boundary line?
A. I had no reason not to think it wasn't. I just always knew it was.

(Tr. p. 189, L. 15-17, 21-25, p. 190, L. 1-2, p. 191, L. 1-4)

Additionally, Cliff Johnson testified that during his years of ownership (1971-2007), he did not use any of the property north of the fence line.

Q. [D]id you use any of the property north of that fence line?
A. No.
Q. Never during your time of ownership?
A. No.

(Tr., p. 389, L. 1-5).

Since an implied agreement must "be determined from the conduct of the parties, viewed in the light of the surrounding circumstances." *O'Malley v. Jones*, 46 Idaho 137, 140, 266 P. 797, 798 (1928), *Griffel v. Reynolds*, 136 Idaho 397, 400, 34 P.3d 1080, 1083 (2001), *Huskinson v. Nelson*, 272 P.3d 519, 524 (2012), the District Court wrongly focused on Cliff Johnson's denial in determining an implied agreement had not been formed.

B. Unlike the facts contained in the cases cited by Baker, in this case the District Court made no findings of fact that the fence's purpose was to contain animals, but it did make specific findings that the parties believed the fence marked the boundary and that they treated it as such.

The Court's findings that Clifford Johnson built and later rebuilt the fence on what he thought was the boundary line, that both Coleman and the Johnsons thought the fence was the boundary line, and that the parties treated the fence as the boundary line are supported by

substantial and competent evidence that distinguish the instant case from *Cox v. Clanton*, 50 P.3d 987, 137 Idaho 492 (2002).

In *Cox*, the appellants were "unable to establish the existence of an express or implied agreement to *treat the fence as the boundary*." *Id.* at 990, 495, (Emphasis added.) Also, in *Cox*, the fence was "hastily put up to contain cattle." *Id.*

In our case, despite the fact that the biased witness, Clifford Johnson testified that he built the fence to contain his horses, there is no evidence in the record that other than during the 1970s that the Johnson had horses or needed to contain them nor did the Court make any findings of such. Of significance, however, is the District Court's specific finding that Cliff Johnson erected the fence where he did because he believed that was the boundary. (Trial Tr., p. 1040, L. 24-25, p. 1041, L. 1-4).

The problem with the District Court's finding (more than 20 months after trial when the facts of the case were no longer fresh in the judge's mind) that *Cox* was "directly on point" with the instant case is that in its findings of fact orally announced one month after trial, the Court very specifically found that it "did not believe" Clifford Johnson's testimony about why he put the fence where he did. Rather, it found that Clifford Johnson built the fence where he did because he believed that was the boundary line. (R., Vol. VI, p. 1097-1098). Since Johnson placed it where he believed the boundary was, the fence's primary purpose was as a boundary. If his boundary fence also served to contain Johnson's horse, this was a secondary purpose. And this is not "directly on point" with *Cox*.

Unlike in *Cox*, where there was no finding made that the parties treated the fence as the boundary, in the instant case, the District Court very specifically found that is exactly how the parties treated the fence. (Trial Tr., p. 1040, L. 8-10, 7-20). Also, in *Cox*, the District Court found that the appellants had not established that "their predecessors in interest had acquiesced to

the fence representing the boundary between the properties" *Id.*; whereas in the instant case, the court very specifically found that the Baker's predecessors, the Johnsons, and Coleman "treated the fence line as the boundary line" (Trial Tr., p. 1040, L. 9-10), which establishes their acquiescence.

Thus, the *Cox* case is significantly distinguishable from this case and cannot accurately be called "directly on point."

C. Regardless of whether the original fence, which the Court found Johnson built on what he believed to be the boundary line, also served to contain his horse, it was also necessary that the District Court consider what happened in the years following the erection of the fence in determining whether the parties had impliedly agreed the fence marked the boundary.

While it is true that Clifford Johnson testified that he built the fence to contain his horse, the District Court made no specific finding that this was the sole or primary purpose of the fence nor did it make any findings as to whether during the subsequent 36 years after it was built the conduct of the parties supported a finding of a boundary by agreement. The Court's primary consideration in finding there was no implied agreement was based on Cliff Johnson's denial that he had entered into an express agreement with Coleman. This was erroneous especially in light of the Court's specific findings that the parties treated the fence as the boundary – thus, impliedly agreeing that it was the boundary.

The Court appears to have placed no consideration on the parties' *conduct* over the 36 years, instead focusing solely on Clifford Johnson's denial that there was an agreement in reaching its determination that no implied agreement between the parties was formed.

As in *Huskinson v. Nelson*, in this case "[t]here was evidence in the record that would support the conclusion that the [Appellants] and the predecessors in interest of both parties

agreed to the fence line as a boundary based upon their long-standing acquiescence and conduct." *Huskinson* at 524.

In the instant case, the Court has made an error similar to that made by the trial court in *Huskinson* by maintaining too narrow of a focus in reaching its determination. In *Huskinson*, the narrow focus was the purpose for which the fence was originally built with no consideration as to what occurred during the many years after that time. In our case, the narrow focus is based on a denial by a biased witness rather than a consideration of the parties' conduct, the circumstances, and their general language (i.e. "*my* side of the fence"). By discounting the parties' conduct and the Johnson's long-standing acquiescence in the fence as the boundary line, the court erred. In this case, the District Court's error is more disconcerting because of its finding that Johnson built the fence on what he believed was the boundary line. Like *Huskinson*, "[t]he problem here is that the district court did not analyze the post-1947 [post-1971 in our case] evidence to see whether it suggested a subsequent agreement regarding the boundary line." *Id.* at 525.

The District Court's specific findings of fact already reveal that it would have found a boundary by agreement if it had not narrowed its focus solely on Clifford Johnson's denial of an express agreement. The Court found the parties believed the fence was the boundary and treated it as a boundary. Since an implied agreement is necessarily determined by the conduct of the parties, the District Court erroneously concluded otherwise.

III. CONCLUSION

By basing the crux of its decision on Clifford Johnson's denial that there was an express agreement, the District Court erred in its application of the law by applying the incorrect legal standard in determining whether there was an implied agreement. Because the District Court's findings of fact support Coleman's claim that an implied agreement had been reached, this Court

should overturn the District Court's decision on this claim and quiet title to Coleman in all the Disputed Property north of the fence line.

While the District Court applied the wrong legal standard in determining Coleman's boundary by agreement claims, in all respects its findings of fact are supported by substantial and competent evidence and are, therefore, not clearly erroneous. Thus, this Court should uphold the District Court's decision quieting title in the disputed property Coleman.

Respectfully submitted,

DATED: 3-19-14

Terri Boyd-Davis
Respondent/Cross-Appellant
In Pro Se

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of March 2014, I caused to be served two true and correct copy of the foregoing document on the parties listed below in the manner indicated.

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