9-14-2017

Fischer v. Croston Appellant's Reply Brief Dckt. 44887

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IN THE SUPREME COURT OF THE STATE OF IDAHO

WILLIAM R. FISCHER AND M. ANN FISCHER, Trustees of the William and Ann Fischer Revocable Trust,	)	Docket #44887
Respondents/Plaintiffs,	)	
vs.	)	
JAMES F. CROSTON and MARGORIE C. CROSTON, HUSBAND AND WIFE; et. al.	)	
Appellants/Defendants.	)	

APPELLANTS' REPLY BRIEF

Appeal from the District Court of the Seventh Judicial District for Bonneville County
Honorable Joel E. Tingey, District Judge, Presiding

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RESPONDENTS

TABLE OF AUTHORITIES

Statutes:

I.C. §12-121

I.C. §6-202

Cases:

Flying Elk Inv., LLC v. Cornwall, 149 Idaho 9, 232 P.3d 330 (2010);

Sims v. Daker, 154 Idaho 975, 303 P.3d 1231 (2013).

Weitz v. Green, 148 Idaho 851, 230P.3d 743 (2010).

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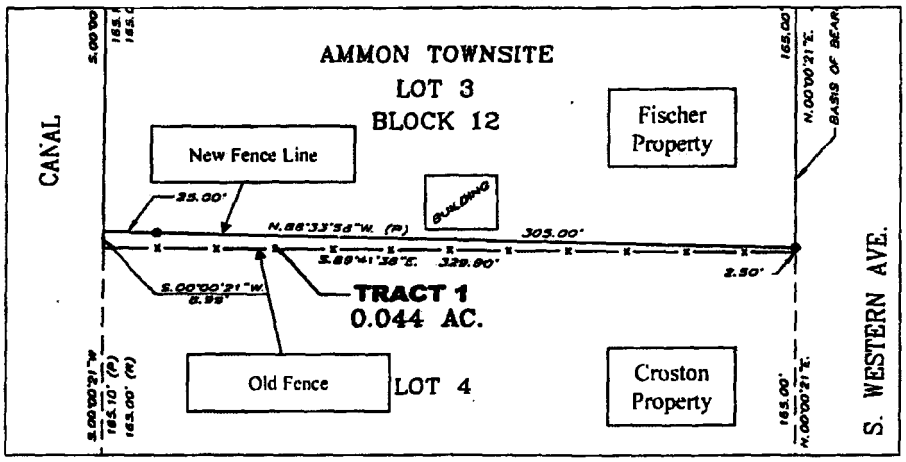
AMMON TOWNSITE
LOT 3
BLOCK 12
CANAL
New Fence Line
Fischer Property
BUILDING
35.00'
N.88°33'58"W. (R)
305.00'
S.88°41'38"E. 329.90'
2.50'
S.00°00'21"W.
8.95'
TRACT 1
0.044 AC.
Old Fence
LOT 4
Croston Property
S. WESTERN AVE.
N.00°00'21"E.
BASIS OF BEAR
165.00'

ARGUMENT

I. INTRODUCTION.

The respondent begins its brief by quoting *Weitz v. Green*, 148 Idaho 851, 230P.3d 743 (2010) for the proposition that parties should not engage in self-help when a real property dispute is pending. Accusations fly that the appellants put up a fence while the matter was pending. That is true and was not a malicious step. Initially, the appellants were going to place animals on the property to keep the grass and weeds eaten. The City of Ammon, it was learned, did not allow animals.

On the other hand, the respondents had torn down and completely removed the old fence. The respondents had obtained a survey when the old fence line was known. The respondents resorted to self-help in commencing the entire dispute in removing the old fence along with other actions. The respondents were turning large trucks on the land of the appellants. The respondents removed a ditch. The respondents placed sand and materials on the appellants' real property. These measures were all instigated by the respondents not the appellants. (See, Affidavit of Penning; See also, R. Vol. I, pp. 10, 70, 77, 78, 125, 165, 178).

The appellants have not asked the appellate court to second guess the ruling of the district court on summary judgment but rather to look at the material facts in dispute and rule that summary judgment was not proper. The district court even stated, as repeated from the appellants' opening brief: "Once the fence was no longer standing, reasonable minds could question the location of the boundary between the parties." R. Vol. I, p. 293.

The appellants have assigned error in multiple matters over the facts in question. A genuine dispute exists as to the survey, the oral agreement, the placement of the new fence and the reasoning by the parties. These facts do not allow the lower court to make inferences that an agreement was not in place.

The respondents fail to recognize that the appellants did not question the boundary being set by the old fence line UNTIL AFTER the removal of the fence, a new survey and the directive that the fence would be placed on the new fence line as surveyed. The respondents, it is alleged, actually believed the new survey would cut further into the appellants' real property when the actual survey revealed the reverse.

The appellants do not question the history of the past but rather the events after the removal of the fence.

II. Designation of Issues.

Contrary to the assertions of the respondents, the factual issues are set forth clearly in appellants' brief. The appellants indicate that the lower court did not correctly observe the disputed facts when applying a summary judgment standard. This court should realize this is a summary judgment appeal and not an entire record before the court from a trial.

The factual issues are very clear. Why did respondents obtain a survey when the old fence markings were well known to both parties? Why did the respondents remove other existing land marks viz. the canal? Why did the respondents place sand and gravel materials on the appellants' real property? Why did Ms. Fisher have a discussion with Jim

Croston, whose statement is contained in the respondents materials submitted to the court indicating the new fence would be placed on the actual surveyed line? Why did Linda Penning make statements in her affidavit of this fact? (The court only struck portions of her affidavit and not the total affidavit. Appellants have not relied upon the stricken parts of the affidavit, for the purpose of this appeal, that were considered hearsay. The same documents are provided in the discovery of appellant placed before the court.)

The pleadings cited in the opening brief cite specific references to an oral agreement; the affidavit of Linda Penning were relied upon; but more important, the discovery of the appellants provided to respondents and asserted by respondents is most compelling on the issue of an agreement.

Clearly, for purposes of summary judgment, the court did not consider the contested facts when making its inferences for the grant of summary judgment.

III. Stricken Portions of Penning Affidavit.

The appellants chose not to appeal the lower court's ruling to strike portions of the Penning affidavit for the simple reason that the lower court's ruling is believed to be correct. Furthermore, the same evidence is contained in discovery from the appellants and contained in the materials submitted to the lower court by the respondents. Thus, the appellants had the most important and necessary facts being the statement of Jim Croston and the actual testimony, non-stricken, of Linda Penning.

Once again, this is a summary judgment proceeding and not the entirety of evidence to he presented at trial. It is alleged and believed that the information

submitted to the court, by both parties, precludes summary judgment on the basis that an agreement was established when viewing the materials in the light most favorable to the non-moving party.

IV. The lower court missed the argument that the old fence line was not being challenged UNTIL it was removed.

The appellants are 100% in agreement that the old fence line served as the boundary for over six decades.1 No reason exists to question this fact and legal holding. The dispute arose when the respondents removed the fence, surveyed the real property boundary and agreed to place the new fence on the actual survey line established by the records.

Most, if not all, of the participants in this action miss the issue that the removal of the canal, the driving of vehicles on the appellants' real property, the placement of materials and items on the appellants' real property are the issues which is established by "where is the boundary?" The appellants are aged and merely want to protect their real property from abuse. The value of the parcel, between the old and new fence in question, is de minimis. The use and treatment of the respondents towards the appellants and the appellants' real property is considered major.

The appellants do not contest the legal theory of boundary by agreement prior to the actions taken by the respondents. It is argued that boundary by agreement prior to

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1 The lower court correctly defines boundary by agreement on page 5 of its memorandum decision. The court quotes *Flying Elk Inv., LLC v. Cornwall*, 149 Idaho 9, 232 P.3d 330 (2010); *Sims v. Daker*, 154 Idaho 975, 303 P.3d 1231 (2013). The appellants have no disagreement that a boundary is established, as in the instant case, after being in place for numerous years by monument such as a fence.

the "disagreement" is irrelevant. The appellants issue is very narrow and precluded by summary judgment. The appellants deserve and are legally entitled to their day in court.

V. The lower court erred in granting summary judgment on the true boundary line and quieting title.

The statement of Jim Croston is sworn to despite the incorrect statement of the respondent in its brief on page 10. The statement was provided in discovery which was sworn to and submitted.

Reiterated from the opening brief is the following:

"The court even states at page 6 of its decision: "Once the fence line had fallen down or was removed, it would be possible for the Parties to make an oral agreement fixing a new fence line as the properties' boundary. (Citations omitted)."2

The district court then goes on to make inferences which are susceptible of various reasonable interpretations. The court states that no evidence to support a claim that an agreement existed between the two owners. That is correct because the Crostons are very elderly. However, there can be no mistake that the children of the Crostons were acting as agents for their parents and had direct communications with the Fishers.

The court then goes on to state, by way of inference, that Mrs. Fischer would have no way of knowing that the new survey line would differ from the old fence line. If that were the case, why would anyone purchase a new survey. The parties could simply place the fence where the old holes and marks existed. The reasoning of the lower court is flawed in believing that another interpretation is just as plausible. The court then goes on to state that

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2 R., Vol. I, p. 248.

the comments by Penning were not sufficiently clear to give rise to an enforceable agreement to change the property line.

Penning states, in her affidavit at paragraph 8, as follows:

> "I was present on an earlier date when Ann Fischer indicated that the fence was being torn down, a new survey was being obtained and the new fence would be placed on the new survey line."3

Furthermore, Jim Croston's statement is contained in the respondents' declaration of their attorney citing the discovery responses of appellant at page 127 of the record. His statement is as follows:

I went to my parent's property at 3020 E. Western Ave. Ammon, 10 after the Fischers took It out their fence and filled In their Irrigation ditch. This was on August 30, 2015. I was marking and measuring where the original fence had been. Ms. Fischer came out and asked me who I was and what I was doing.
I answered her questions. When I told her I was determining where the fence line used to be, she replied, "We will be replacing the fence with a much better fence. We are going to get a survey to find out where the line Is at. We are using the same surveyors as the City uses so shouldn't be any disputes."
I said OK. Ms. Fischer then returned to her house.

Certainly, the actions taken by the appellants in being very precise in placing a new fence on the surveyed line give rise to an extreme inference that an agreement had been reached.4"

Mrs. Fischer statement from page 17 of the respondents brief is telling:

We will be replacing the fence with a much better fence. <u>We are going to get a survey to find out where the line is at</u>. . . [Emphasis added].

Everyone knew where the old fence line was located without a survey. Thus, Mrs. Fischer had to be referring to the actual legal line. There is no other reasonable inference.

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3 R., Vol. I, p. 165.
4 R., Vol. I, pp. 77, 78.

Throughout these proceedings, the appellants have consistently indicated that the children were handling the affairs of the elderly parents. Actual and apparent authority exists. Once again, this is a fact question and not a legal question.

Mutual assent between the parties was obvious. The appellants began the replacement fence on the surveyed and legal boundary line. If the respondents did not believe such was the case the why was no legal action commenced to stop the appellants. No motion was filed, no TRO was attempted, nothing was done except to state that the appellants somehow enraged the situation that the appellants did not start.

The entire set of facts needs to be taken into account to analyze the scenario. This is not a "still life" picture but rather a series of events in "movie" fashion. The lower court and this court need to evaluate the entire process. Facts exist to support, by reasonable inference, the version set forth by appellants at a summary judgment proceeding.

The Crostons have never tried to gain "more" property. The appellants did not know what a survey would reveal. All they knew was a new fence would be constructed on the survey line of the actual boundary.

A contract existed. Everyone knew who the parties to this action were and it is asserted in the pleadings of both parties. The parties were the Crostons and the Fischer's. Everyone knew where the land was located. Everyone knew where the old fence line was located. Everyone knew that the Crostons paid for the new fence. Everyone knew that the new fence was placed on the new survey line. There are no unknowns in this matter after the survey was completed. The old fence line was known without a survey.

VI. The appellants could not commit trespass.

To commit trespass, the property would have to be owned by the respondents. The court did not make a ruling until after the new fence was constructed. How could the appellants trespass on land that had not been owned by the respondents? The appellants did not cross onto the land of the respondents as determined by the survey. Actual pictures show the care with which the appellants honored this matter.

With no trespass, there can be no attorney fees. I.C. §6-202.

Assuming arguendo, there was a trespass by the appellants; the legal time spent on the trespass was so minimal that nominal attorney fees should have been granted. The fees for trespass were arbitrary as there was no break-down of the time spent on trespass in the legal proceedings. (See Memorandum of Fees and Costs; R. at p. 251).

VII. Attorney Fees on Appeal.

The respondents have requested fees on appeal pursuant to the trespass statutes. This appeal's focus is on the grant of summary judgment and not the issue of trespass. The fees eligible for trespass cover only the issue of trespass. The respondent is mistaken to rely upon Idaho Code §6-202 for fees unrelated to the issue of trespass.

The lower court did not grant fees based upon Idaho Code §12-121 and neither should this court as requested by appellants. The lower court, as stated multiple times, felt there were very discernable issues as to the facts and the issue of the formation of an agreement as to the boundary. For these reasons and those to be set forth at oral argument, fees to the respondent should be denied.

CONCLUSION

The requests in the initial brief of the appellants should be followed. This reply brief is meant to be " brief" and rebut the statements/arguments of respondents in their briefing.

Dated this 14 day of September, 2017.

Robin D. Dunn
Attorney for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14 day of September, 2017, a true and correct copy of the foregoing, with appropriate copies, was delivered, postage prepaid mail, to the following persons(s):

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