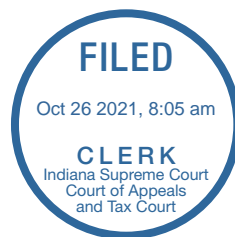


## MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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ATTORNEY FOR APPELLANT

Justin W. Leverton,  
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Crystal G. Rowe  
Katherine E. Tapp  
New Albany, Indiana

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## IN THE COURT OF APPEALS OF INDIANA

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Jason Gay,  
*Appellant-Plaintiff,*

v.

Monroe County Community  
School Corporation,  
*Appellee-Defendant.*

October 26, 2021

Court of Appeals Case No.  
21A-PL-185

Appeal from the Monroe Circuit  
Court

The Honorable Kelsey B. Hanlon,  
Special Judge

The Honorable Nathan G. Nikirk,  
Special Judge

Trial Court Cause No.  
53C01-1805-PL-918

**Tavitas, Judge.**

## Case Summary

- [1] Following Jason Gay’s dispute with Monroe County Community School Corporation (“MCCSC”) regarding MCCSC’s removal of trees located near Gay’s property, Gay appeals the trial court’s grant of summary judgment in favor of MCCSC. Gay alleges that his opinion as a landowner and as a licensed attorney as to the location of the parties’ property boundary created a genuine issue of material fact that precluded entry of summary judgment. Based on Gay’s failure to rebut designated survey evidence that placed the removed trees outside the borders of his parcels, we affirm the trial court’s judgment.

## Issue

- [2] Gay’s sole issue on appeal is whether genuine issues of material fact precluded the trial court’s entry of summary judgment in favor of MCCSC.

## Facts

- [3] The instant property boundary dispute stems from MCCSC’s removal of trees that Gay purported to own. Gay is a licensed attorney and a retired veteran with “military training in map reading and magnetic declination[.]”<sup>1</sup> Gay’s App. Vol. II p. 126. Gay is not a professional surveyor.

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<sup>1</sup> According to Gay’s designated materials, “[m]agnetic declination is the difference between magnetic north and true north and a change in magnetic declination is the tendency of the magnetic north to shift over time.” Gay’s App. Vol. II p. 126.

[4] MCCSC owns Clear Creek Elementary School (the “School”), which is located at 300 West Clear Creek Drive in Bloomington. Gay owns property located west of the School at 426 West Clear Creek Drive. During the relevant period, what remained of a metal and wood fence (“Fence”) existed between the properties and was partly covered by undergrowth and leaning trees.

[5] In July 2015, prior to Gay’s purchase of his property, land surveyor Ben Bledsoe (“Surveyor Bledsoe”) of Bledsoe Riggert Guerrettaz (“BRG”), a land surveying and civil engineering firm, prepared a Retracement Survey<sup>2</sup> (the “2015 Survey”) of 426 West Clear Creek Drive.<sup>3</sup> The 2015 Survey, which fully encompassed the 426 West Clear Creek Drive parcel and depicted only the periphery of adjacent properties, used the following legal description for the property:

A part of the Southeast quarter of Section Twenty (20), Township Eight (8) North, Range One (1) West, bounded as follows: Beginning at the Southwest corner of Lot Number One (1) in Clear View Addition to the City of Bloomington as recorded in Plat Book No. 3, page 78, and thence North Three Hundred Four (304) feet, which is the real point of beginning; thence North Three Hundred Four (304) feet thence North Eighty-nine and One-half (89 1/2) degrees West magnetic bearing West (that is to say North 87 1/2 degrees West true

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<sup>2</sup> “[A] retracement survey is a survey of real property that has been previously described in documents conveying an interest in property.” *Lane Alan Schrader Tr. v. Gilbert*, 974 N.E.2d 516, 525 n.1 (Ind. Ct. App. 2012), *clarified on reh’g*, 978 N.E.2d 519 (Ind. Ct. App. 2012) (citation omitted).

<sup>3</sup> In an apparent oversight, the 2015 Survey was not recorded until September 25, 2017. *See* Gay’s App. Vol. II p. 145.

bearing) One Hundred Eighty (180) feet; thence South Three Hundred Five (305) feet; thence magnetic East One Hundred Eighty (180) feet and to the place of beginning, containing One and Twenty-five Hundredths (1.25) acres, more or less. . . .

*Id.* at 33, 54.

[6] In February 2017, Gay acquired 426 West Clear Creek Drive by warranty deed. The warranty deed used the same legal description for Gay’s lot as did the 2015 Survey. Gay did not have a survey performed of his property when he purchased it. Shortly after Gay purchased his property, MCCSC asked Gay to cut through the Fence to create a safe path for Gay’s child to walk to the School and playground.<sup>4</sup> The communication led Gay to believe that the Fence was on his property.

[7] In the Spring 2017, Gay met Chris Ciolli, MCCSC’s director of building operations. Gay expressed concerns regarding a fallen tree on the north side of the School’s property. On September 23, 2017, Gay telephoned MCCSC about another fallen tree. In a voicemail message, Gay said:

You have dozens of trees on my property line and around the back of the school that need to be trimmed. In the last school year, we got lucky and a tree fell on your property — on a Sunday — that could have killed kids that were walking on a walk-a-thon the next morning . . . . Now this weekend another tree has fallen, this time in my yard. It could have killed my children or my dog. Had it been closer to the house, it could

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<sup>4</sup> Apparently, the available alternative required the child to traverse a parking lot used by school buses.

have done severe damage to my house. You need to trim your trees. They could kill somebody or do severe damage to my house. You need to trim your trees. . . . You're putting my family at risk because you're ignoring your responsibility to maintain your property.

Gay's Supp. App. Vol. II, Exhibit H.

- [8] On September 25, 2017, after again speaking with Gay, Ciolli enlisted Blesdoe Riggert Cooper James ("BRCJ"), a land surveying and civil engineering firm, to identify and stake Gay's eastern property line before the tree removal commenced. Ciolli also retained Bloomingscapes, LLC, "to evaluate the trees, and leave any mature, healthy trees that weren't a safety concern[,] [a]nd clear out the underbrush and the [F]ence." Gay's App. Vol. II p. 148.
- [9] Soon thereafter, BRCJ staked the line between Gay's and MCCSC's property in accordance with the 2015 Survey. *See id.* at 36. According to the 2015 Survey, the Fence: (1) was located outside the borders of Gay's property; (2) ran approximately parallel to the eastern border of Gay's lot; and (3) ranged, along the length of Gay's 304-foot eastern border, from thirteen to twenty-two feet from Gay's border. Upon seeing the staked boundary line, Gay expressed his belief that the Fence—and not the staked line—reflected the accurate boundary line between the parties' parcels.
- [10] On September 27, 2017, Gay left a second voicemail message for MCCSC in which he again disputed the accuracy of the staked boundary line. Gay also asked MCCSC to "kind of update the property line" and to

just sort of agree . . . that through adverse possession that it [the strip of land between the staked line and MCCCS's boundary] was open[ly] and notoriously held by someone other than [MCCSC] for more than ten years and that it[ ] [wa]s now part of [Gay's] property . . . .

Gay's Supp. App. Vol. II, Exhibit I. At Gay's request, Ciolli emailed the 2015 Survey to Gay on September 29, 2017.

[11] On October 2, 2017, Bloomingscapes began to remove trees located along MCCSC's western boundary.<sup>5</sup> On October 3, 2017, Gay obtained a survey that was prepared of MCCSC's boundaries in February 1953 (the "1953 Survey") from the local recorder's office. The 1953 Survey depicted only MCCSC's property and identified the Fence as MCCSC's western border. Gay urged MCCSC to stop the ongoing tree removal and also asked that MCCSC conduct a new survey of its property.

[12] Also in October 2017, MCCSC commissioned a retracement boundary survey ("2017 Survey") as Gay requested. Surveyor Marty James ("Surveyor James") of BCRJ staked MCCSC's property line in December 2017. The 2017 Survey established that: (1) MCCSC's western property line was approximately the Fence; (2) the Fence did not run in a straight line and, with one exception,<sup>6</sup>

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<sup>5</sup> The majority of the trees had to be removed due to an emerald ash borer infestation.

<sup>6</sup> The 2017 Survey found that: "[a]t the North end, 2.2 feet South of the Northwest corner, a corner fence post was found in line with MCCSC's property line. At other points, the fence was between 0.3 and 1.3 feet east of MCCSC's property line." Gay's App. Vol. II p. 37.

ranged “between 0.3 and 1.3 feet east of MCCSC’s property line”; and (3) the previously-staked line was Gay’s eastern boundary. Most pertinently, the 2017 Survey revealed that an intervening strip of land belonging to neither party, or a “deed gap[,]” existed between the parties’ boundary lines. *See* Gay’s App. Vol. II pp. 37, 41. In his affidavit, Surveyor James explained the existence of the deed gap as follows:

10. The “deed gap” exists because Gay’s deed is held from Western controlling monuments, while MCCSC’s deed is described from Eastern controlling monuments. Further, . . . the MCCSC’s deed calls the West boundary as “running North over and along said fence.” *See* Exhibit B (MCCSC’s deed) and Exhibit C (Gay’s deed).

*Id.* at 37 (Surveyor James’ Affidavit).

[13] In the meantime, the tree removal effort continued and culminated on October 5, 2017. In all, Bloomingscapes removed trees, ground the stumps, and “planted [ten] new trees further set back into the MCCSC’s property to replace trees that were removed.” *Id.* at 156. After the trees were removed, Gay informed Ciolli that “he believed those [removed trees] were his trees.” *Id.* at 147.

[14] Gay timely filed a notice of tort claim on November 14, 2017. On May 11, 2018, Gay filed a complaint alleging that MCCSC<sup>7</sup> committed the following offenses: criminal trespass; criminal theft; criminal conversion; common law trespass; common law theft; common law conversion; negligence; and inverse condemnation.<sup>8</sup> MCCSC filed its answer on June 28, 2018. On July 20, 2020, MCCSC filed a motion for summary judgment, a brief in support, and designated materials. MCCSC's designated materials included: (1) the 2015 Survey; (2) Surveyor James' affidavit and supporting exhibits, including the 2017 Survey; (3) Ciolli's Affidavit and supporting exhibits; (4) Gay's purchase agreement; (5) Gay's answer to one of MCCSC's interrogatories; and (6) excerpts of MCCSC's deposition.

[15] Gay filed his response to MCCSC's motion for summary judgment on September 1, 2020. In addition to his brief, Gay designated: (1) Gay's affidavit; (2) the 1953 Survey; (3) MCCSC's deposition transcript; and (4) Monroe County Health Department records approving an application for a septic tank in the strip of land now known as the deed gap in August 1989 and installation thereof in October 1989. On September 10, 2020, MCCSC filed a reply in

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<sup>7</sup> Gay also named Clear Creek Elementary as a defendant; however, Clear Creek Elementary was subsequently dismissed by stipulation of the parties.

<sup>8</sup> An action for inverse condemnation requires: "(1) a taking or damaging; (2) of private property; (3) for public use; (4) without just compensation being paid; and (5) by a governmental entity that has not instituted formal proceedings." *Murray v. City of Lawrenceburg*, 925 N.E.2d 728, 731 (Ind. 2010) (quoting 29A C.J.S. *Eminent Domain* § 560 (2007)).



support of its motion for summary judgment (“reply”), a motion to strike portions of Gay’s affidavit, and a supplemental designation of evidence in support of the motion to strike. MCCSC’s supplemental designation included Gay’s voicemail messages to MCCSC.

[16] On October 9, 2020, the trial court judge disclosed a friendship with Surveyor Bledsoe that, she opined, did not warrant recusal. In its ensuing order on MCCSC’s motion to strike and motion for summary judgment (“Order”), entered on October 19, 2020, the trial court granted MCCSC’s motion to strike and motion for summary judgment. The Order provided in part as follows:

1. As to [MCCSC]’s Motion to Strike, the Court GRANTS the same as follows:

a. While [Gay] has impressive credentials, [Gay] is not competent to testify regarding preparation or interpretation of land surveys and has not shown that previous surveys failed to account for “magnetic declination”. Accordingly, the Court strikes Paragraphs 3, 52, and 7 of the [Gay]’s Affidavit.

b. [Gay] lacks personal knowledge of events occurring before his purchase of the property and cannot rely on inadmissible hearsay to establish the property lines or title by acquiescence. Accordingly, the Court strikes Paragraphs 15, 9, 14, 18, 22, 24, 26, 28, 29, 32, and 34.

The Court, having reviewed and considered: the pleadings, summary judgment motion/response thereto, the admissible evidentiary designations, the briefing, and oral argument of the Parties, the Court FINDS that there are no genuine issues as to

material fact, as to any of [Gay]’s claims, and that the [MCCSC] is entitled to Judgment as a matter of law.

It is therefore ORDERED [MCCSC]’s Motion for Summary Judgment is GRANTED and that [Gay]’s Complaint shall be DISMISSED . . . .

Gay’s App. Vol. II p. 14.

[17] Gay filed a motion to correct error on November 18, 2020, wherein he: (1) reiterated his bases for opposing MCCSC’s motion for summary judgment; and (2) requested the trial court judge’s recusal. On November 20, 2020, the trial court entered an order of recusal stemming from the alleged conflict of interest. The trial court did not set a hearing or rule on the summary judgment merits of Gay’s motion to correct error within forty-five days of filing; thus, it was deemed denied pursuant to Indiana Trial Rule 53.3(A). A special judge was appointed on January 11, 2021.

[18] Gay timely filed his notice of appeal on or about February 1, 2021. On February 8, 2021, Gay filed a motion for remand, which was subsequently denied by the motions panel of this Court. Gay now appeals from the trial court’s entry of summary judgment in favor of MCCSC.

### **Analysis**

[19] Gay argues that the existence of genuine issues of material fact precluded the trial court’s entry of summary judgment in favor of MCCSC. “When this Court reviews a grant or denial of a motion for summary judgment, we ‘stand

in the shoes of the trial court.” *Burton v. Benner*, 140 N.E.3d 848, 851 (Ind. 2020) (quoting *Murray v. Indianapolis Pub. Sch’s*, 128 N.E.3d 450, 452 (Ind. 2019)). Summary judgment is appropriate “if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Murray*, 128 N.E.3d at 452; see also Ind. Trial Rule 56(C). The party moving for summary judgment bears the burden of making a prima facie showing that there is no issue of material fact and that it is entitled to judgment as a matter of law. *Burton*, 140 N.E.3d at 851. The burden then shifts to the non-moving party to show the existence of a genuine issue. *Id.*

[20] On appellate review, we resolve “[a]ny doubt as to any facts or inferences to be drawn therefrom . . . in favor of the non-moving party.” *Id.* We review the trial court’s ruling on a motion for summary judgment de novo, and we take “care to ensure that no party is denied his day in court.” *Schoettmer v. Wright*, 992 N.E.2d 702, 706 (Ind. 2013). “We limit our review to the materials designated at the trial level.” *Gunderson v. State, Indiana Dep’t of Nat. Res.*, 90 N.E.3d 1171, 1175 (Ind. 2018), *cert. denied*.

### ***A. Motion to Strike***

[21] We initially note that Gay does not allege error from the trial court’s ruling on the motion to strike. The effect of a trial court’s decision to grant a motion to strike is that “any materials stricken, whether arguments or evidence, will not be considered by either the trial court or this court on appeal.” *McGill v. Ling*, 801 N.E.2d 678, 683 (Ind. Ct. App. 2004).

[22] The trial court struck various paragraphs of Gay’s affidavit because: (1) “[Gay] is not competent to testify regarding preparation or interpretation of land surveys and has not shown that previous surveys failed to account for ‘magnetic declination’”<sup>9</sup>; and (2) “[Gay] lacks personal knowledge of events occurring before his purchase of the property and cannot rely on inadmissible hearsay to establish the property lines or title by acquiescence.” Gay’s App. Vol. II p. 14. Gay does not allege that the trial court abused its discretion in granting MCCSC’s motion to strike. As such, we do not consider the following stricken paragraphs in resolving Gay’s appeal:

3. I am a lawyer and am licensed to practice law in Texas and Wyoming.

\* \* \* \* \*

7. The property line between the MCCSC Property and my Property is the Fence.

\* \* \* \* \*

9. The Fence has been treated as the boundary line between my Property and the MCCSC Property for over sixty (60) years.

\* \* \* \* \*

14. For over forty (40) years prior to me purchasing the property, the prior owners of my Property had no property line disputes with MCCSC.

\* \* \* \* \*

18. MCCSC has never asserted ownership or possession over any real estate west of the Fence.

\* \* \* \* \*

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<sup>9</sup> See footnote 1.

34. MCCSC never objected to any purported encroachment of my parking pad into the purported deed gap.

\* \* \* \* \*

52. The differences between the two boundary lines represented in the 2015 Retracement Survey and the 2017 Survey is due to changing magnetic declination.

Gay's App. Vol. II p. 126.<sup>10</sup>

### ***B. Ownership***

[23] Gay contends that: (1) the removed trees straddled the Fence; (2) the Fence was the boundary line between Gay's and MCCSC's parcels; (3) Gay and MCCSC owned the trees jointly; (4) MCCSC was not authorized to remove the trees; and (5) MCCSC must compensate him for their loss. Gay maintains that a genuine issue of material fact exists regarding the placement of the boundary. MCCSC counters that the trial court properly entered summary judgment in its favor because Gay possessed no ownership interest in the removed trees.

[24] In support of his position, Gay relies on *Luke v. Scott*, 98 Ind. App. 15, 187 N.E. 63 (1933). Scott prevailed in the trial court on her claim that Luke felled trees located on Scott's premises without permission. In affirming the trial court, this Court opined:

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<sup>10</sup> Additional stricken paragraphs pertained to Gay's contentions that MCCSC did not use, improve, drive on, maintain, permit schoolchildren to play on, or encumber via easement the property located to the west of the Fence.

There was evidence to support the contention that the trunks of these trees were wholly upon the land of [Scott]. Under such circumstances, an adjoining owner has no right to cut or destroy the trunk of a tree which is entirely upon the land of another, although it causes him personal inconvenience, discomfort, or injury; and, if he cuts or destroys such a tree, he is liable in damages to the owner thereof.

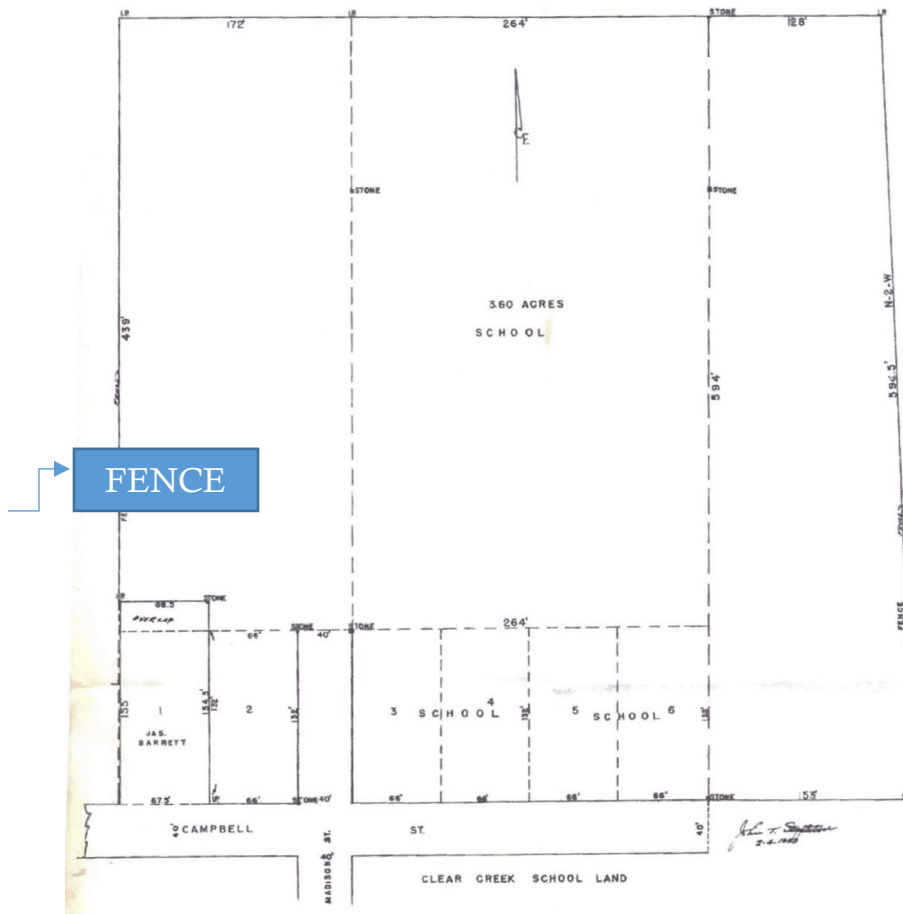
\* \* \* \* \*

Even if one of these trees was partly upon the land of appellants, this would not give them the right to cut them off at the ground[ ] or destroy them. Under the rule, in such case, if the trunk of a tree is wholly or in part upon the line dividing the land of an adjoining owner, it is the common property of both; and it has been held that the property interest of each owner is identical as to the extent the portion of the tree is upon his land, and that, where a tree is thus owned in common, neither party has the right to cut or injure the same without the consent of the other, and, if he does, he will be liable for damages therefor.

*Luke*, 187 N.E. at 63-64. *Scott* is readily distinguishable, as we explain below.

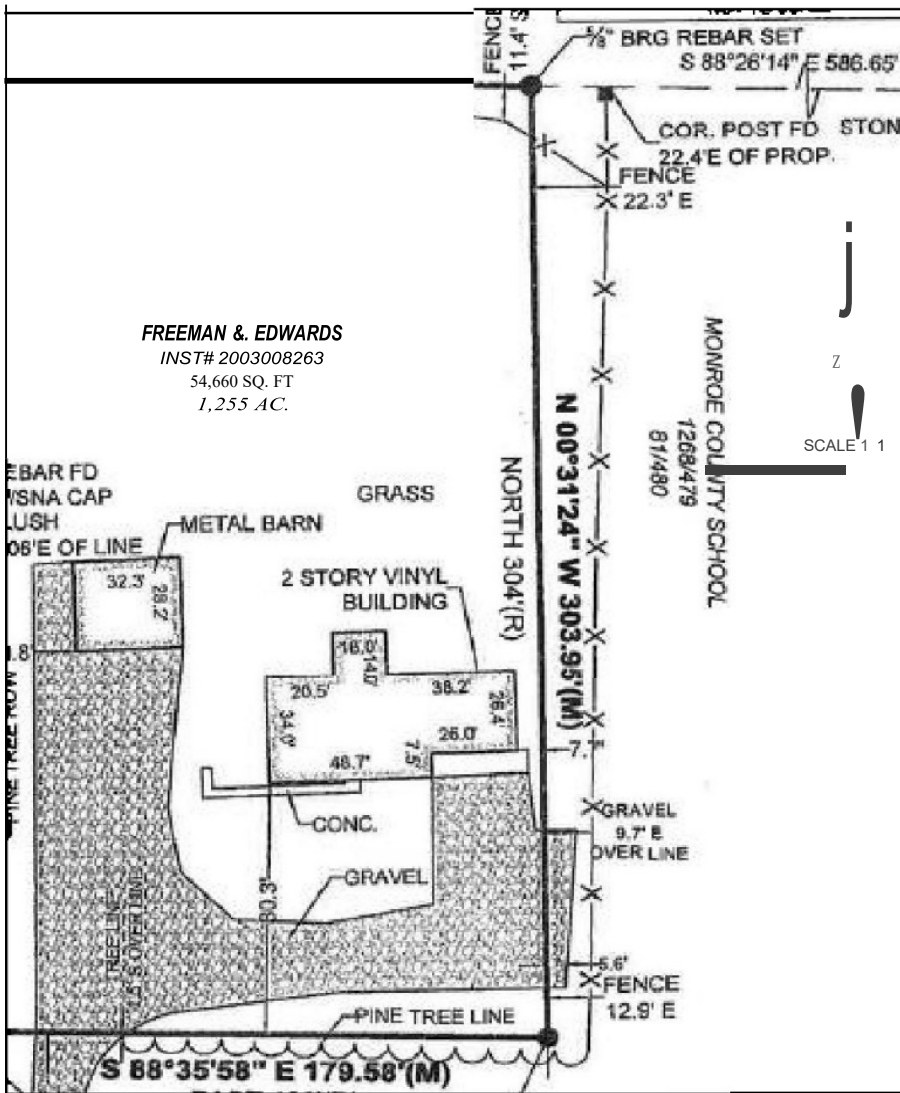
[25] Gay's argument hinges on his claim that some of the removed trees straddled the Fence, which he maintains was a shared boundary with MCCSC. Unlike the circumstances in *Scott*, the designated evidence shows that Gay and MCCSC do not share a boundary line and, therefore, are not adjoining property owners. Gay's and MCCSC's designated materials include three surveys. Our review reveals that the three surveys are consistent with one another. First, Gay designated the 1953 Survey, (Diagram 1 below), which depicts MCCSC's parcel only and shows the Fence as MCCSC's western boundary.

Diagram 1 - 1953 Survey



[26] Next, MCCSC designated the 2015 Survey, (Diagram 2 below), which shows Gay's entire parcel and the periphery of MCCSC's parcel; the 2015 Survey also depicts the Fence as located outside Gay's eastern border.

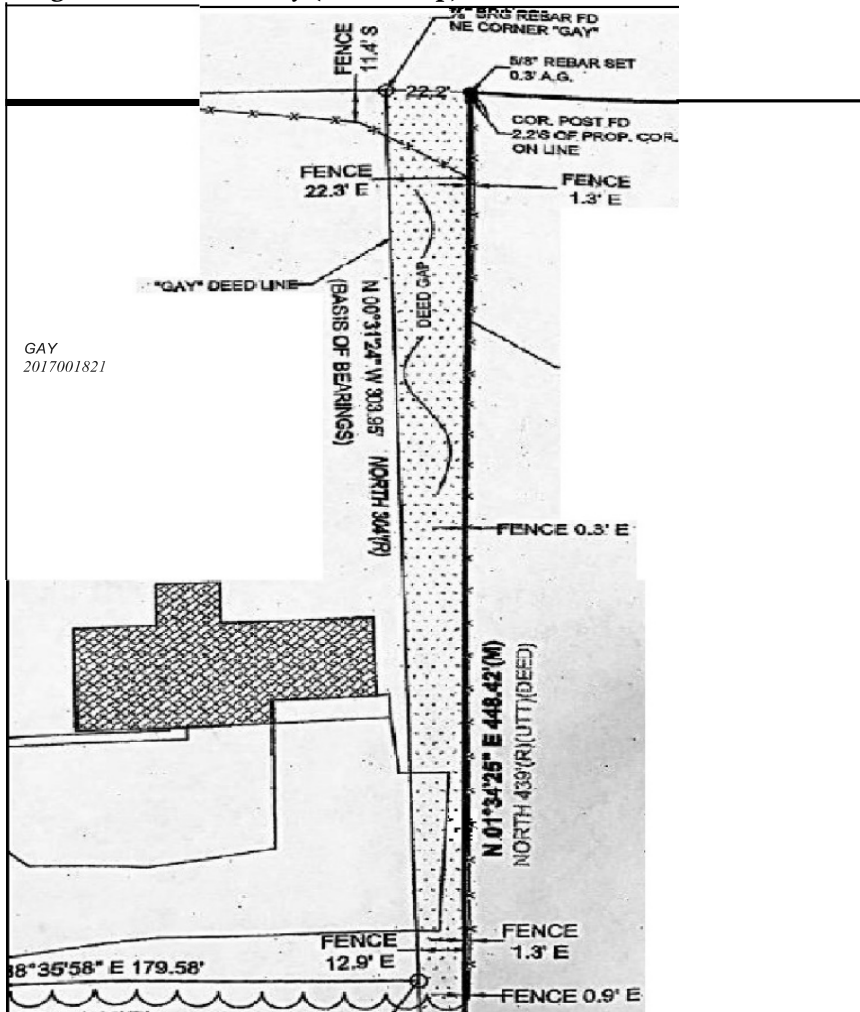
Diagram 2 - 2015 Survey (cleaned up)



[27] MCCSC also designated the 2017 Survey, (Diagram 3 below), which depicts Gay’s and MCCSC’s parcels and reveals that: (1) a deed gap, or tract belonging to neither party, exists between the parcels; (2) MCCSC’s western boundary is approximately the Fence; (3) the Fence does not run in a straight line; (4) at one point, the Fence coincides with MCCSC’s western boundary and, elsewhere, the Fence falls within the deed gap or on MCCSC’s parcel.



Diagram 3 - 2017 Survey (cleaned up)



[28] In his designated affidavit, Surveyor James best explained how the designated surveys are consistent with one another and why the deed gap exists. See Surveyor James’ Affidavit, ¶10 (“Gay’s deed is held from Western controlling monuments, while MCCSC’s deed is described from Eastern controlling monuments.”). We agree with the following characterization by MCCSC in its response in opposition to Gay’s motion to correct error:

The only survey that Gay designated in opposition to MCCSC’s summary judgment motion — the [1953 Survey] — was

considered by the surveyor who prepared the 2017 survey showing a “deed gap.” The surveyor listed the [1953] survey as a “survey of record,” and consistent with the [1953] survey, he found MCCSC’s western boundary to be approximately the old fence line. The fact that each property has a different boundary, as established by the surveys, does not mean the evidence is conflicting. *Each property has its own deed, and the legal boundaries established by each deed simply do not meet in the middle.* Gay has failed to produce any survey that shows otherwise.

Gay’s App. Vol. II pp. 216-17 (internal citation omitted, emphasis added).

[29] Thus, to meet its initial burden of establishing that Gay lacked an ownership interest in the trees, MCCSC designated, among other things: (1) Gay’s warranty deed and the 2015 Survey; (2) two voicemail messages in which Gay admitted that MCCSC owned the trees;<sup>11</sup> and (3) Gay’s answer to Interrogatory Number 18 in MCCSC’s Second Set of Interrogatories to Gay, wherein Gay marked the location of the removed trees on a copy of the 2017 Survey. *See id.* at 81. Each of these designated materials placed the removed trees outside the eastern border of Gay’s lot in either the deed gap or on MCCSC’s property, as depicted in the 2017 Survey.

[30] When the burden shifted to Gay to demonstrate the existence of a genuine issue of material fact regarding whether he possessed an ownership interest in the

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<sup>11</sup> In the former message, Gay demanded that MCCSC trim *its* trees, which Gay believed posed a threat to his family. *See Gay’s Supp. App. Vol. II, Exhibit H.* In the latter voicemail message, Gay asked MCCSC to “work with [him]” and “[to] hopefully agree that through adverse possession” the deed gap was “now part of [his] property. . . .” Gay’s App. Vol. II p. 88.

trees, Gay—who is not a surveyor and who lacks a professional background in preparing or interpreting surveys—did not rebut the designated surveys or designate an affidavit from his own professional surveying expert. Rather, Gay designated, among other things, the 1953 Survey, which is not inconsistent with MCCSC’s designated 2015 and 2017 Surveys.<sup>12</sup> The trial court, thus, found that Gay failed to carry his burden. We agree. None of the surveys shows Gay as the owner of the land bearing the disputed trees.

[31] Additionally, Gay does not challenge the trial court’s ruling on MCCSC’s motion to strike, wherein the trial court struck the paragraphs of Gay’s affidavit in which Gay opined regarding the location of the boundary. The stricken paragraphs were the only evidence that Gay designated regarding his opinion, as an attorney and as a landowner, that he shared a boundary with MCCSC. Gay’s surviving designated materials do not raise a genuine issue of material fact regarding whether Gay owned the land bearing the disputed trees. Gay has, therefore, failed to carry his burden.

[32] Based on the foregoing, the undisputed evidence shows that, at Gay’s urging, MCCSC removed diseased trees from its premises and, to some degree, from the deed gap. Gay has failed to demonstrate the existence of a genuine issue of material fact regarding the location of the boundary between the parties’ parcels

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<sup>12</sup> Gay makes much of the fact that Monroe County Health Department approved a previous owner’s application to install a septic system in the property now known as the deed gap. The fact that a septic system was allowed on the deed gap does not establish Gay’s ownership of the trees at issue.

by rebutting MCCSC's designated survey evidence. For these reasons, we agree with the trial court that the designated evidence shows Gay lacked an ownership interest in the felled trees. We conclude that the trial court properly entered summary judgment in favor of MCCSC.<sup>13</sup>

## **Conclusion**

[33] The designated evidence indicates that no genuine issue of material fact existed and that MCCSC is entitled to judgment as a matter of law regarding its boundary dispute with Gay. The trial court properly entered summary judgment in favor of MCCSC. We affirm.

[34] Affirmed.

[35] Mathias, J., and Weissmann, J., concur.

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<sup>13</sup> Because we find Gay's raised issue to be dispositive, we do not reach MCCSC's claim regarding whether Gay's claims for criminal theft, criminal conversion, and criminal trespass fail as a matter of law for lack of criminal intent.