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**IN THE
COURT OF APPEALS OF INDIANA**

JAMES BISHOP,)

Appellant-Plaintiff,)

vs.)

No. 31A01-0701-CV-50)

RALPH MCRAE,)

Appellee-Defendant.)

APPEAL FROM THE HARRISON CIRCUIT COURT
The Honorable Susan L. Orth, Special Judge
Cause No. 31C01-0505-PL-20

October 19, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

James Bishop appeals the trial court's adoption of a land survey initiated by his neighbor, Ralph McRae. We affirm.

Issues

Bishop raises two issues, which we restate as:

- I. whether the surveyor complied with statutory notice provisions; and
- II. whether the survey changed and illegally superceded the prior 1890 survey.

Facts

Bishop owns a twenty-acre rectangular shaped tract of land in Harrison County. Ralph McRae owns the tract of land immediately north of Bishop's land. Bishop and McRae contest the boundary line between these properties. The deed for the Bishop property describes it as follows:

Part of the northeast quarter of the southwest quarter of section seven (7), township (5) south, range five (5) east, described as follows: beginning thirty-eight (38) rods and twenty-two (22) links north of the southeast corner of said northeast quarter, running thence north two and one fourth ($2\frac{1}{4}$) degrees west thirty-eight (38) rods and twenty-two links, thence south eighty-seven and three fourths ($87\frac{3}{4}$) degrees west eighty-two (82) rods and eighteen (18) links to the west line of said northeast quarter, thence south two and one fourth ($2\frac{1}{4}$) degrees east thirty-eight rods and twenty-two (22) links, thence north eighty-seven and three fourths ($87\frac{3}{4}$) degrees east eighty-two (82) rods and eighteen (18) links to the place of beginning containing twenty (20) acres, more or less.

App. p. 33.

Evidence indicated that this description likely stems from an 1890 survey performed on the property and recorded in the Harrison County Recorder's Office.

McRae engaged in logging activities on his property in the spring of 2004. Bishop suspected the logging encroached his own property by at least one hundred feet. To confirm his suspicions, Bishop hired a surveyor to determine the property line and the exact nature and extent of encroachment. Surveyor Robert Isgrigg completed a survey of the Bishop property, but did not record his survey with Harrison County officials. Bishop approached McRae with the survey results and McRae indicated he would "take care of all of it." Tr. p. 19.

McRae then initiated his own survey, which was completed by surveyor Victor McCauley. The McCauley survey is the subject of this dispute. The primary objective of the survey was to determine the line between the McRae and Bishop properties. McCauley testified that in doing the survey he was retracing the deeds for Bishop and McRae. Prior to conducting the survey, McCauley sent a letter by registered mail to adjoining landowners Douglas and Candace Keys and Bishop. The letter indicated that McCauley would be performing a boundary retracement survey on the McRae property.

McCauley reviewed the 1890 survey on file in the Recorder's Office, the Isgrigg survey, and gathered subsequent recorded surveys of the surrounding area in preparation for his work. He walked the property and observed and marked certain monuments that were utilized in the 1890 survey. He then retraced the property lines based on those monuments and measurements in the 1890 survey.

The McCauley survey differed from the Isgrigg survey by about twenty feet on the northern boundary line, essentially giving McRae twenty more feet to the north than the Isgrigg survey did. McCauley testified that Isgrigg ignored certain evidence of monuments and instead based his line for the northern boundary on a nearby road. McCauley filed his completed survey with the Harrison County Recorder's office.

Bishop then appealed the McCauley survey to the Harrison Circuit Court. The appeal did not make any specific allegation regarding the notice, method, or illegality of the McCauley survey but rather requested the trial court to review the survey, conduct a hearing, and make findings pursuant to Indiana Code Section 36-2-12-14(c). The trial court held a hearing on October 17, 2006, and adopted the McCauley survey. This appeal followed.

Analysis

We apply a two-tiered standard of review when, as here, the trial court enters findings and conclusions of law. We will not reverse a finding of fact unless the evidence only points to one conclusion and the trial court reaches a contrary conclusion. Gill v. Pollert, 810 N.E.2d 1050, 1058 (Ind. 2004). Conclusions of law are reviewed de novo. Fraley v. Minger, 829 N.E.2d 476, 482 (Ind. 2005). The cause below was not heard by a jury, and Indiana Trial Rule 52 provides that in reviewing such decisions we “shall not set aside the findings or judgment unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.”

I. Notice

Bishop contends that the McCauley survey is void and not legally binding because it did not comply with the notice requirements of Indiana Code Section 36-2-12-10(b). That statute provides: “The land surveyor shall notify the owners of adjoining lands that the land surveyor is going to make the survey. The notice must be given by registered or certified mail at least twenty (20) days before the survey is started.” Ind. Code § 36-2-12-10(b)(1). McCauley sent registered letters to adjoining landowners Douglas and Candance Keys and Bishop. Bishop contends that a landowner to the west, Gardner, and a landowner to the south, Deatrick, should have received notice as they were “owners of adjoining lands.”

Bishop also argues that the notice was misleading and therefore not in compliance with statutory requirements. The letter sent by McCauley indicated he was surveying the McRae property, yet his survey established the boundary line between the McRae and Bishop property. Bishop argues the letter should have indicated these specifics. Bishop contends on appeal that the letter is so misleading that it renders the notice improper and adjoining landowners cannot be bound by the survey.

Bishop did not argue to the trial court that notice of the McCauley survey was insufficient or misleading. The appeal of the survey filed in Harrison County Circuit Court did not allege the survey failed to comply with notice requirements, nor did Bishop’s arguments at the hearing include allegations of insufficient or misleading notice. Rather, the testimony before the trial court by McCauley indicated that proper notice was given to adjoining landowners. Bishop did not cross-examine McCauley on this point,

introduce evidence to the contrary, or make any argument that notice was improper. Notably, the findings of fact and conclusions of law submitted to the trial court by Bishop include a statement that notice was sent to adjoining property owners and all the requirements of the statute were met. See App. p. 24. Appellate review of an issue or argument is waived if a party did not raise that issue or argument to the trial court. Grathwohl v. Garrity, 871 N.E.2d 297, 302 (Ind. Ct. App. 2007). We conclude that based on the record below, this argument has been waived.

Bishop argues that despite any waiver, we must enforce the statute. Waiver can be avoided when the issue was inherent to the resolution of the underlying case, if the other party had clear notice of the issue and an opportunity to litigate it, or if the trial court addressed the issue without argument. Id. These exceptions do not apply here. Notice was not inherent to the resolution of this case. Rather, the trial court's focus was on the whether or not the survey was correct and the testimony and exhibits centered on the survey technique. Bishop did not raise any issues regarding the sufficiency of the notice, so McRae had no opportunity to litigate this issue. McRae's evidence on the notice consisted of McCauley's uncontested testimony that he provided notice to adjoining landowners in accordance with the statute, paired with the copies of the letters and registered mail receipts. The trial court did not address the notice issue, other than to adopt the findings of fact supplied by both parties.

Bishop cannot now argue the notice of the survey was misleading and insufficient; that issue has been waived. Waiver notwithstanding, the only properly line at issue in the McCauley survey was the Bishop-McRae line. McCauley testified that the primary

objective of the survey was to determine the line between the Bishop and McRae properties and the other property lines were not affected. The relevant adjoining landowner, then, would be Bishop. Bishop also was aware of the ongoing boundary dispute and notice of a survey of McRae's property necessarily implied it would deal with the boundary of Bishop's land. Because the other property lines were not adjusted and the owners not affected, we find that notice here was sufficient.

II. Survey Conflict

Bishop contends that the McCauley survey conflicts with the 1890 survey, and it cannot be adopted by a judgment of the trial court. McRae contends that this issue has also been waived because Bishop did not make these claims at the hearing. At the October 17, 2006 hearing, Bishop did not argue that the McCauley survey illegally attempted to supercede the 1890 survey, nor did the findings of fact and conclusions of law submitted by Bishop include such an argument. Bishop's contentions centered on the different methods employed by Isgrigg and McCauley and the respective differences of their surveys. A party may not argue to the trial court one theory, and then argue on appeal an alternate theory. Parkson v. McCue, 831 N.E.2d 118, 129 (Ind. Ct. App. 2005), trans. denied. Parties are bound, on appeal, by the theories upon which the case was tried. THQ Venture v. SW, Inc., 444 N.E.2d 335, 340 (Ind. Ct. App. 1983). Our review of an issue or argument is waived when a party does not raise that issue or argument to the trial court. Grathwohl, 871 N.E.2d at 302.

Waiver notwithstanding, we find no clear error in the trial court's conclusion that the McCauley survey was legally sound and should be adopted. The evidence before the

trial court indicated that the McCauley survey did not conflict with the 1890 survey; rather it attempted to retrace the older survey with more accurate methods. A great deal of the testimony elicited in the Isgrigg deposition, which was before the trial court, dealt with the nature and application of the 1890 survey. Also, much of McCauley's own testimony focused on how his survey retraced and comported with the 1890 survey. McCauley's testimony indicated he utilized the 1890 survey, its landmarks and monuments, the notes of the 1890 surveyor, and the description in the deed. In fact, on cross-examination of McCauley by counsel for Bishop, McCauley agreed that the "object of the exercise was to retrace the 1890 survey." Tr. p. 109.

McCauley explained that minor differences existed between his survey and the 1890 survey, but went on to describe that the instruments used in the 1800's were very different than the instruments used by modern surveyors. Specifically, he concluded that the discrepancy in the angle between the 1890 northwest corner and his northwest corner was minor and resulted from the obsolete and inexact tools used by surveyors in the earlier era. McCauley stressed that his survey utilized nearly all of the same monuments utilized and recorded by the 1890 surveyor. He explained any discrepancies between his survey and the Isgrigg survey and testified that some of Isgrigg's methods did not comply with accepted surveying technique. McCauley also testified that Isgrigg did not utilize many of the 1890 monuments and landmarks.

Still, Bishop contends that any discrepancy between the McCauley survey and the 1890 survey is fatal and relies on Herbst v. Smith, 71 Ind. 44 (1880), to support this proposition. In Herbst, a subsequent survey attempted to override the official county

survey and our supreme court contended the official survey was conclusive and could not be overridden. Our supreme court noted, however, that new surveys may be had for “for the purpose of re-locating or perpetuating the corners, lines or boundaries established by such original survey, where they have become obscured or lost.” Id. at 48. The boundary line between Bishop and McRae was obviously obscured and the plain objective of the McCauley survey was to retrace it. McRae presented ample evidence of the validity of the McCauley survey and how it comports with the information originally outlined in 1890. The trial court considered this evidence, and we find no clear error.

Conclusion

We affirm the trial court’s finding that the McCauley survey is a legal survey establishing the boundary line between the McRae and Bishop properties. We affirm.

Affirmed.

KIRSCH, J., and ROBB, J., concur.