

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-001276-MR

WILLIAM J. HARVEY

APPELLANT

v. APPEAL FROM FLEMING CIRCUIT COURT
HONORABLE STOCKTON B. WOOD, JUDGE
ACTION NO. 09-CI-00029

HAROLD G. KINDER
AND WILMA KINDER

APPELLEES

OPINION
AFFIRMING

** ** * ** * **

BEFORE: DIXON, STUMBO, AND VANMETER, JUDGES.

STUMBO, JUDGE: William J. Harvey appeals from a Judgment and Order of the Fleming Circuit Court denying his request for an injunction requiring his neighbors, Harold G. Kinder and Wilma Kinder, to remove fence posts which Harvey maintains encroach upon his property. Harvey contends that the circuit court erred in relying on *Hensley v. Stinson*, 287 S.W.2d 593 (Ky. 1956), to reach

the conclusion that Harvey is entitled to damages rather than an injunction requiring removal of the fence. Because the law requires an award of damages in lieu of an injunction under the facts at bar, we find no error and accordingly affirm the Judgment and Order on appeal.

The facts are not in controversy. Harvey is the owner of a parcel of real property situated in Fleming County, Kentucky. Appellees Harold G. and Wilma Kinder own an adjoining parcel. In 2008, Harvey and the Kinders agreed to have a survey conducted for the purpose of establishing the boundary line between the two parcels. The survey was conducted on August 14, 2008, by surveyor William Thomas Carpenter.

Sometime thereafter, the Kinders erected an approximately 347 foot fence on the boundary. The fence was constructed by a third party, and it appears from the record that Mr. Kinder was present during its construction. The fence was placed in such a way that the wire fencing material was situated directly over the boundary line, but the wood support posts were placed wholly on Harvey's property. Harvey would later contend that he never consented to the placement of the wood posts on his parcel.

On February 2, 2009, Harvey filed the instant action against the Kinders in Fleming County Circuit Court. Harvey alleged that the posts were placed on his property without his consent, and he sought an injunction requiring their removal. A bench trial was conducted on March 22, 2010, and on May 18, 2010, the trial court rendered a Judgment and Order denying the request for an

injunction. As a basis for the Judgment, the court determined that *Hensley, supra*, required an award of damages rather than injunction if damages could be proven. Therefore, the court held in abeyance the issue of damages and gave Harvey leave to present proof of damages. Harvey failed to tender such proof, resulting in no award of damages, and this appeal followed.

Harvey now argues that the circuit court erred in applying *Hensley* to conclude that he is entitled to damages rather than an injunction. He maintains that *Hensley* is distinguishable from the instant facts because *Hensley* addressed the placement of a large, concrete retaining wall, which was not easily removed from the plaintiff's property. Harvey argues that while damages may have been the proper remedy in *Hensley* because the concrete retaining wall was not easily removed, the wood posts placed on Harvey's property by the Kinders are easily removed – and therefore should be removed. Accordingly, Harvey contends that the Kinders should be enjoined from leaving in place the wood posts, and that the trial court erred in failing to so rule.

Hensley sets out the general rule that an injunction should be denied under circumstances where there is an adequate remedy at law. See also, *Fitzpatrick v. Patrick*, 410 S.W.2d 143 (Ky. 1966). This rule appears to derive from the notion that an injunction should be imposed only by operation of statute or under circumstances where there is an irreparable injury. *Wallace v. Jackson*, 224 Ky. 25, 3 S.W.2d 766 (Ky. App. 1928).

The question before us, then, is whether the trial court properly determined that Harvey could be made whole with an award of damages. We must answer that question in the affirmative. The trial court calculated that the encroachment of the fence posts on Harvey's property collectively covered an area of less than 5 square feet. This determination was based on the evidence that each post was approximately 5" to 6" in diameter, that 48 posts were installed, and was made by comparing the current position of the posts with a theoretical placement of the posts directly on the boundary line. The court went on to rule that if Harvey could offer proof of something more than *de minimis* damages, an award would be made based on that proof.

The Fleming Circuit Court applied the correct rule of law to the facts. Pursuant to *Hensley, Fitzpatrick, et al.*, Harvey would be entitled to damages – if any – in lieu of an injunction because an adequate remedy at law is available. We find no error, and accordingly affirm the Judgment and Order on appeal.

ALL CONCUR.

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