

STATE OF MICHIGAN
COURT OF APPEALS

DONALD R. STRAYER, MARGUERITE F.
STRAYER, NORMAN G. STRAYER, and
GERALDINE STRAYER,

UNPUBLISHED
March 11, 1997

Plaintiffs-Appellees,

v

STEFAN PILLER and WIESJE PILLER,

No. 189877
Barry Circuit Court
LC No. 90-000148

Defendants-Appellants.

Before: Hoekstra, P.J., and Markey and J.C. Kingsley,* JJ.

PER CURIAM.

In this action to quiet title,¹ following a nonjury trial, the trial court entered judgment in favor of plaintiffs. Defendants appeal as of right, and we affirm.

The parties contest the location of the southern boundary that separates their properties on Gun Lake in Barry County. The parties agree that a right-of-way easement exists near the southern portion of defendants' property to provide plaintiffs access to their property; however, the parties disagree as to whether the southernmost portion of the easement is, as the trial court determined, the southernmost portion of defendants' property.

Although we review an action to quiet title de novo, *Gorte v Dep't of Transportation*, 202 Mich App 161, 165; 507 NW2d 797 (1993), we review the factual findings of the trial court for clear error, *Michigan Nat'l Bank & Trust Co v Morren*, 194 Mich App 407, 410; 487 NW2d 784 (1992).

Defendants argue that the trial court erred by finding for plaintiff on a theory of acquiescence because the evidence was insufficient. This contention by defendants is based on a fundamental misapprehension of the trial court's ruling. The trial court, using ordinary property law rather than the

* Circuit judge, sitting on the Court of Appeals by assignment.

law of acquiescence, found that the survey relied upon by plaintiffs accurately established the southern boundary between the parties' properties.

Defendants introduced into evidence a survey that was based exclusively on the legal description found in their deed. However, this description was of questionable validity because it did not close. A second survey that relied on monuments and took into account the slope of the land was adopted by the trial court as properly fixing the boundary. It is well-settled that when monuments and measurements vary, the monuments control. *Murray v Buikema*, 54 Mich App 382, 387; 221 NW2d 193 (1974). From our review, we find no clear error in the trial court's decision. The trial court appropriately chose to disregard defendants' survey and adopt plaintiffs.' See *Hildie v Aikman*, 239 Mich 77; 214 NW 124 (1927).

Although not raised below, defendants also argue that plaintiffs' use of the easement is inappropriate. Specifically, defendants insist that plaintiffs' tenants' use of the right-of-way constitutes an improper commercial use. Because defendants failed to raise this challenge in their counter-complaint or at trial, we conclude that it is not preserved for our review, and decline to review it. *Royce v Citizens Ins Co*, 219 Mich App 537, 645; 557 NW2d 144 (1996).

Affirmed.

/s/ Joel P. Hoekstra

/s/ Jane E. Markey

/s/ James C. Kingsley

¹ Originally, the case also contained competing claims of intentional tort; however, during the trial the parties stipulated to dismiss their tort claims.