

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY

JAMES A. RADER, et al., :
 :
 Plaintiffs-Appellants, : CASE NO. CA2008-01-001
 :
 - vs - : OPINION
 : 11/3/2008
 :
 DENNIS C. SKEENE, et al., :
 :
 Defendants-Appellees. :

CIVIL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2005-CVH-00537

W. Kenneth Zuk, 1324 S.R. 125, Amelia, OH 45102, for plaintiffs-appellants, James A. Rader and Elizabeth K. Nevel

Ritter & Randolph, LLC, Carey K. Steffen, 105 East 4th Street, Suite 1200, Cincinnati, OH 45202, for defendants-appellees, Dennis C. & Karen S. Skeene

YOUNG, J.

{¶1} Plaintiffs-appellants, James Rader and Elizabeth Nevel, appeal the decision of the Clermont County Court of Common Pleas quieting title to property in favor of defendants-appellees, Dennis Skeene and his wife, Karen Skeene.

{¶2} The parties are adjoining owners along the south corporation line of the village of Moscow in Clermont County, Ohio. Appellants are the owners of real estate located at 100

Water Street in the village of Moscow (the "village"). The property, also known as Lot 16, is at the very south-westerly corner of the village. The Skeenes are owners of real estate located immediately south of the village's corporation line which abuts Lot 16. The Skeenes' property is used solely for recreational purposes. The property line between the parties' properties is also the south corporation line for the village.

{¶3} At the time appellants purchased their property, it already had a garage and a stone wall. The garage sits at the southeasterly corner of the property; the stone wall is located south of the garage (and north of the south corporation line for the village) and extends to the west of the garage. In 2002 or 2003, believing their property line was demarcated by the stone wall, appellants built a bump-out to the south wall of the garage. The bump-out is therefore north of the stone wall.

{¶4} In early 2005, Dennis Skeene became aware of the bump-out. Believing it was encroaching on his property and that it was not built within a proper set back distance, Skeene filed a formal complaint with the village's zoning board (at the time of the trial court's decision, the zoning board had yet to issue a decision). Skeene also sent a letter to appellants notifying them that he believed the bump-out encroached on his property. By letter, appellants responded they would check into the situation. Skeene also received a letter from appellants' attorney indicating he was looking into the dispute.

{¶5} On April 14, 2005, appellants filed a complaint seeking, inter alia, to quiet title to the contested property line, a declaratory judgment, and punitive damages and attorney fees. The Skeenes filed an answer and counterclaim seeking a declaratory judgment, attorney fees, and an order that the bump-out be removed.

{¶6} Trial was held on June 14, 2007. Appellants presented the testimony of Jack Rosenfeldt, a land surveyor. In 1997, while working at Byrnside Surveying, Rosenfeldt performed a survey at the request of the village to establish the locations of right-of-ways,

alleys, and various boundary lines. In preparation for the survey (the "Byrnside survey"), Rosenfeldt reviewed the 1816 original village plat, a 1855 survey, and a survey recorded in 1883 by George Hill, the then Clermont County surveyor (the "1883 survey"). Rosenfeldt explained that the 1816 village plat set lots within the village to be in rectangular sets perpendicular to one another, and called for each lot to be four poles wide and eight poles deep (i.e., 66 feet wide and 132 feet deep). However, the 1883 survey revealed that the village did not develop as anticipated; there were surpluses in certain blocks, including a seven foot surplus between Broadway and Walnut Streets; and as a result, each lot was 4.1 poles instead of four poles.

{¶7} When performing the Byrnside survey, Rosenfeldt located two stone buildings at the corner of Broadway and Water Streets. Both buildings were referred to in the 1855 and 1883 surveys as being the most reliable monuments in town. Rosenfeldt started his survey with the two buildings. Rosenfeldt testified he also found a third monument in the center line of Third Street at the south corporation line of the village. The monument, known as the "stone at T," is not in the 1816 village plat but is referred to in both the 1855 and 1883 surveys. Based upon the "stone at T" and the surpluses found in the 1883 survey, the Byrnside survey established the south corporation line of the village farther south than demarcated in the 1816 village plat. Based on the foregoing, Rosenfeldt testified that the proper south property line for appellants' property was roughly ten inches back from the garage as it now stands, which is about 15 feet from the south corporation line as it was set in the 1816 village plat. Rosenfeldt further testified that the bump-out was within the property lines of appellants' property and did not encroach on the Skeenes' property. At appellants' request, Rosenfeldt performed a new survey in 2007 which is substantially similar to the Byrnside survey.

{¶8} The Skeenes presented the testimony of John Haley, a land surveyor they hired

to perform a survey and establish the proper property line between the parties' properties. In preparation for the survey (the "Haley survey"), Haley reviewed the 1816 village plat and the Byrnside survey. Haley located the two buildings at the corner of Broadway and Water Streets. Using the south corporation line as established in the 1816 village plat, and based upon the two buildings, Haley applied the call distances, as set in the 1816 village plat, from the south right-of-way line of Broadway Street to the south corporation line of the village. Based on his survey, Haley testified the bump-out encroached on the Skeenes' property by 4.8 feet. When asked about the surpluses referred to in the 1883 survey and the Byrnside survey, Haley stated it was his opinion one should not move the corporation lines of a village to accommodate a surplus (as it was done in the Byrnside survey). Rather, any shortage or surplus should be dealt with within the corporation lines of the village by proration.

{¶9} Although he did not review the 1855 and 1883 surveys in preparation for his survey, Haley testified he reviewed them prior to trial. However, the surveys did not prompt him to modify his survey or the location of the south corporation line of the village. With regard to the "stone at T," Haley noted that the 1816 village plat did not refer to it; prior to trial, Haley went to see the stone claimed to be the "stone at T;" and he did not believe the stone was a survey stone or the "stone at T." Haley acknowledged that if the stone was actually the "stone at T," then the Byrnside survey was accurate.

{¶10} On September 17, 2007, based upon the Haley survey, the trial court found that the bump-out encroached on the Skeenes' property and quieted title in favor of the Skeenes. Acknowledging that the "stone at T" was the crux of the case and weighing the conflicting evidence with regard to the stone, the trial court found "that the identity and validity of the stone in question has not been proven to be the actual 'stone at T' by a preponderance of the evidence. As a result, the court does not find the 1997 Byrnside survey or the 2007 Rosenfeldt survey to be accurate in their placement of the south boundary line.

{¶11} "There is also a difference in the professional opinions of Haley and Rosenfeldt as to the proper use of 'proration.' Rosenfeldt testified that he found surpluses in the Village, which led to his placement of the south corporation line [15] feet from its position in the original plat. Haley testified that one should not use proration to move the boundary lines of a village, but should instead make up any shortages or surpluses within the corporation lines.

{¶12} "The court finds that Haley's use of proration is reasonable and less problematic than simply trying to make up for a surplus by enlarging the Village boundaries. As a result, the court lends credence to Haley's testimony that even if he had reviewed the 1883 *** survey and found the 'stone at T' prior to his survey, he would not have pushed the corporation line of the Village to the south as did Rosenfeldt.

{¶13} ****

{¶14} **** Haley explained that he located the two available monuments, the two stone buildings, and then utilized the calls from the original plat because he had no monument delineating the south [corporation] line. The court finds that Haley's survey was properly performed and delineates the correct south boundary line of the Village of Moscow. The court finds that the boundary line between the parties shall be fixed as set forth in the Hailey [sic] survey."

{¶15} In a subsequent decision on damages and attorney fees, the trial court ordered appellants to remove the encroaching bump-out at their own expense and to pay the Skeenes \$10 in nominal compensatory damages. Appellants appeal, raising one assignment of error:

{¶16} "THE TRIAL COURT ERRED IN FIXING THE PROPERTY LINE IN ACCORDANCE WITH THE HALEY SURVEY."

{¶17} Appellants argue that the trial court incorrectly found the Haley survey more reliable and credible than the 1855, 1883, and Byrnside surveys; improperly ignored the "stone at T" as a monument; and ignored the holdings of *Sellman v. Schaaf* (1971), 26 Ohio

App.2d 35.

{¶18} Evaluating evidence and assessing the credibility of that evidence are the primary functions of the trier of fact, in this case the trial court. *Owens v. Haurert* (2000), 137 Ohio App.3d 507, 513. "Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *Id.* at 513-514, quoting *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279. The underlying rationale of giving deference to the findings of the trial court rests with the knowledge that the trial court is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony. *Owens* at 514; *Sanders v. Webb* (1993), 85 Ohio App.3d 674.

{¶19} The law concerning the establishment of property boundaries and what priority a survey must be given in relation to prior and subsequent surveys has been extensively discussed in *Broadsword v. Kauer* (1954), 161 Ohio St. 524; and *Sellman*, 26 Ohio App.2d 35. In *Broadsword*, the Ohio Supreme Court held that when determining boundary disputes:

{¶20} "It is well settled that monuments are of prime importance in settling boundary disputes. *** A 'monument' is a tangible landmark, and monuments, as a general rule, prevail over courses and distances for the purpose of determining the location of a boundary, even though this means either the shortening or lengthening of distance, unless the result would be absurd and one clearly not intended, or all of the facts and circumstances show that the call for course and distance is more reliable than the call for monuments. *** Generally, in determining boundaries, natural and permanent monuments are the most satisfactory evidence and control all other means of description, in the absence of which the following calls are resorted to, and generally in the order stated: First, natural boundaries; second, artificial marks; third, adjacent boundaries; fourth, course and distance ***. Area is the

weakest of all means of description. *** The reason assigned for this rule is that monuments are considered more reliable evidence than courses and distances." *Broadsword*, 161 Ohio App. at 533-534.

{¶21} In *Sellman*, the Third Appellate District discussed resurveys and the function of the second surveyor:

{¶22} When an original survey has been made, monuments placed or ascertained, and boundary lines established by such monuments, it is not the plat that is primary. Rather, the plat is derivative and secondary. The actual physical markings and location by monument is the primary thing. *Sellman*, 26 Ohio App.2d at 40-42.

{¶23} The primary function of the second surveyor is to find first where the boundaries were established by the first surveyor. *Id.* Where the original monuments as located by the first surveyor are still ascertainable, the boundary lines determined by such monuments will determine the boundaries of the respective lots irrespective of deviation from the course or distance as set forth in the plat. *Id.* at paragraph two of the syllabus. In making a resurvey, the duty of the surveyor is merely to locate the monuments placed by the original surveyor, or, where such monuments no longer exist, the places where they originally stood, and to relocate the original lines and corners at the places actually established. *Id.* at 42-43. The resurveyor should not run new lines, even where the original lines are full of errors. *Id.* at 43.

{¶24} The original monuments set or established at the time of the original survey "assume extreme importance in the location of land boundaries. *** [N]o matter how erroneously the original work is done, lines and monuments that can be identified still govern the land boundaries." *Sanders*, 85 Ohio App.3d at 681, quoting Moffitt & Bouchard, *Surveying* (8 Ed.1987), Sections 18-16, 18-19, and 18-24. The identity and validity of a given monument, when in question, must be established by a preponderance of the evidence. *Sellman*, 26 Ohio App.2d at 46; *Owens*, 137 Ohio App.3d at 515.

{¶25} In the case at bar, the Byrnside survey and the Haley survey were both performed in part based on the two stone buildings located at the corner of Broadway and Water Streets. Rosenfeldt, appellants' surveyor, testified that both buildings were referred to in the 1855 and 1883 surveys "as being the most reliable monuments in town." Rosenfeldt further testified that a building is a more reliable monument than a stone because a building is not going to be moved. Rosenfeldt admitted that the two stone buildings were more reliable monuments than the "stone at T." In turn, Haley, the surveyor for the Skeenes, testified that the two buildings were the best monuments to use. Thus, the two stone buildings which were both referred to in the (older) 1855 and 1883 surveys and which are still ascertainable are clearly original monuments. As such, these two buildings are of primary importance in locating boundaries. *Broadsword*, 161 Ohio St. at 533. Such is not the case for the "stone at T."

{¶26} Rosenfeldt determined the south corporation line of the village based upon the "stone at T," a monument he found in the center line of Third Street at the south corporation line of the village. Rosenfeldt testified that the stone, which was not referred in the 1816 village plat, was mentioned in the 1855 and 1883 surveys. Based upon the 1883 survey, Rosenfeldt testified he found the stone almost a foot below the ground and where the survey said it was. The stone looked like a survey stone, was intact, and it "appeared that it was planted." Rosenfeldt admitted that he could not be 100 percent certain that the stone he found was the "stone at T" referred to in the prior surveys, and that excavation or construction in the area of the stone could have affected the location of the "stone at T." Nevertheless, Rosenfeldt was confident the stone he found was the "stone at T."

{¶27} Haley testified that he did not locate the "stone at T" when he performed his survey. However, he went to see the stone claimed to be the "stone at T" by Rosenfeldt. Haley did not believe this was the "stone at T" because the stone did not look like a survey

stone; rather, it looked like an oddly shaped boulder; and the stone was loose in the ground, about a foot and a half deep.

{¶28} Steven Mann, a technician who worked with Haley on the survey for the Skeenes, testified that after seeing pictures of the alleged "stone at T," he did not believe the stone was a valid monument as the stone did not look like other monument stones and was instead much larger and not as smooth cut as survey stones. Mann also testified that at the time they performed the Haley survey, they had not located the alleged "stone at T" and that they had "no reliable monumentation on the South corporation line" of the village.

{¶29} Rosenfeldt, Haley, and Mann also briefly testified about a stone located at the north end of Third Street. Both Haley and Mann testified that unlike the "stone at T," this particular stone looked like a survey stone. Haley described it as a four inch square top stone on the surface of the ground. By contrast, Rosenfeldt testified that although he "found a stone along the north line," he did not believe it was the stone that was referred to in the 1855 and 1883 surveys as that stone was located too far east.

{¶30} Finally, Skeene also testified about the "stone at T." According to Skeene, he saw the stone when he was the village chief of police; the stone was then sticking about six inches out of the ground next to a large oak tree at the very end of Third Street; and in 1992, when a sewer system was installed in the village, the oak tree (which was dead) was removed and the area at the end of Third Street was excavated and used as a staging area for backfill. Skeene testified that because of the 1992 sewer system work, the stone alleged by Rosenfeldt to be the "stone at T" could not be the same stone Skeene saw next to the oak tree.

{¶31} In light of the foregoing, we agree with the trial court that appellants failed to establish by a preponderance of the evidence the identity and validity of the "stone at T." That is, appellants failed to establish by a preponderance of the evidence that the stone

Rosenfeldt found is the actual "stone at T" as referred to in the 1855 and 1883 surveys, and therefore a monument. By contrast, all the surveys discussed in this decision refer to the two stone buildings as original and most reliable monuments. In light of the evidence presented, we cannot say that the trial court lost its way in finding the Haley survey more reliable. Nor can we say that the trial court ignored the holdings of *Sellman*. We find that sufficient competent, credible evidence supports the trial court's judgment.

{¶32} We therefore find that the trial court correctly acted upon the results of the Haley survey and appropriately quieted title in favor of the Skeenes. Appellants' assignment of error is overruled.

{¶33} Judgment affirmed.

WALSH, P.J., and POWELL, J., concur.

[Cite as *Rader v. Skeene*, 2008-Ohio-5666.]