

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-243

DECEMBER TERM, 2002

	}	APPEALED FROM:
	}	
Barbara and Dennis N. McCarty	}	Caledonia Superior Court
	}	
v.	}	
	}	
Lawrence Nicolai	}	DOCKET NO. 214-8-00 Cacv
	}	
	}	Trial Judge: Dennis R. Pearson
	}	
	}	

In the above-entitled cause, the Clerk will enter:

This is a boundary dispute between adjoining landowners Barbara and Dennis N. McCarty and Lawrence Nicolai. The superior court entered judgment in favor of Nicolai. The McCartys contend on appeal that the evidence failed to support the judgment. We affirm.

The facts may be summarized as follows. The parties own adjoining lots in the Town of Wheelock. Both properties were originally part of a nine-lot 1987 subdivision created by one Oakdale, Inc. Oakdale determined the configuration and boundaries of the lots using a survey plat prepared by Michael Hemond, a registered Vermont land surveyor with extensive experience. Hemond marked the corners of the lots using iron rebar driven into the ground. The original deed from Oakdale to the McCartys' predecessor-in-interest specifically referenced the Hemond survey, which was recorded in the Town's land records, and gave a metes and bounds description which referenced the iron pins at the common boundary with the Nicolai lot and described the line as running " N 37 degrees 30' a distance of 1682 feet to an iron pin." The original deed to Nicolai's predecessor-in-interest similarly referenced the Hemond survey and described the common boundary with the McCarty lot as running " S 37 degrees 30' W a distance of 1682 feet to an iron pin." All of the intervening deeds, including those to Nicolai and the McCartys, referenced the Hemond survey. In preparing the survey, Hemond used a standard surveyor's compass marked off in 360 degrees, with additional fifteen minute intervals.

This dispute arose during the summer of 2000, when Nicolai engaged Lawrence Tighe, a licensed surveyor with many years of experience, to re-survey the property in anticipation of selling all or part of the lot. Tighe was able to locate the iron pins described in the Hemond survey and, using a standard surveyor's compass with 360 degree/15 minute gradations, and a tape measure, measured and staked the boundary line with the McCarty property. He measured a distance of 1684 feet, well within the accepted deviation as compared with the Hemond survey of 1682 feet.

At the time of the re-survey, Nicolai's neighbor, Barbara McCarty, drew Tighe's attention to an intermittent line of faded blue and yellow flags or ribbons tied to small trees or saplings that she claimed marked the common boundary. This line diverged about 200 feet from the boundary marked by Tighe using the pins and coordinates described by the Hemond survey. McCarty became upset about the line staked by Tighe, posted a series of signs warning about trespassing, and ultimately filed this lawsuit against Nicolai, seeking an injunction against trespassing and damages for a variety of alleged torts. Nicolai counterclaimed for trespass and declaratory and injunctive relief. He also retained Hemond to revisit the site and review the Tighe survey. Hemond concluded that the line staked by Tighe is the same boundary line he described in his 1987 survey plat and the deeds. Andrew Dussault, another experienced surveyor

retained by the McCartys, confirmed the accuracy of the line staked by Tighe using a standard surveyor' s compass.

Following the trial, the court issued a written decision, concluding that the correct legal boundary was the line marked by Tighe and confirmed by Hemond and Dussault. Although the McCartys claimed that one of the corner pins had been moved since the original survey, the court noted that there was no evidence to support the claim. The McCartys also claimed that, if Hemond had utilized a military, or 64 " mil" compass, the line marked by the blue and yellow flags would have corresponded more accurately to the original survey and deed description. The court rejected this theory, however, noting that Hemond had denied ever using a military compass, that all three surveyors testified that military compasses were not used for surveying work in Vermont, and that Hemond had no recollection of marking a line with blue and yellow flags. The court declined to award tort damages, but issued a permanent injunction barring McCarty from interfering with Nicolai' s property. The court denied a subsequent motion for reconsideration. This appeal followed.

In their pro se appellate briefing, the McCartys variously assert that the evidence supported their claim that the common boundary was actually the line marked by the blue and yellow flags, that one of the iron pins had been relocated, and that the surveyors violated their professional responsibilities. Our review of the court' s findings, however, is limited. When reviewing the findings of a trial court, we view them in the light most favorable to the prevailing party below, disregarding the effect of modifying evidence, and we will not set aside the findings unless they are clearly erroneous. Landmark Trust (USA), Inc. v. Goodhue, 172 Vt. 515, 520 (2001). Findings will not be disturbed merely because they are contradicted by substantial evidence; rather, an appellant must show there is no credible evidence to support them. Id.

Ample record evidence supports the court' s findings in this case. That the court chose to credit the surveyors' consistent testimony concerning the location of the boundary, their use of a standard non-military compass, the validity of the iron pins located in the ground, and the irrelevance of the blue and yellow flags is not grounds for error. Allegations that the surveyors somehow violated their professional standards, even if within the scope of this appeal, are unsupported. Accordingly, we discern no basis to disturb the judgment.

Affirmed.

BY THE COURT:

Jeffrey L. Amestoy, Chief Justice

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice