

Follow My Footsteps

By Charles M. Greene

"Fences make good neighbors," or so many of us have been told. That general rule, however, like most rules, has exceptions.

One departure from the general rule arises when a neighbor puts her fence in the wrong place, especially if the fence is placed over the line separating the property of the neighbor next door. In that situation, fences give rise to "boundary disputes," and, unfortunately for the neighborhood, boundary disputes often give rise to litigation.

In *Noah's Ark v. Smith*, the Plaintiff filed a Complaint for Ejectment in which it sought to eject the Defendant from approximately one third of an acre of commercial property that had been used and possessed by Defendant Smith and his family for more than thirty years. Dr. Smith objected to the efforts to eject him from what he considered to be his own property. The tenor of his objections was undoubtedly influenced by the fact that the property at issue is valuable commercial property bordering Highway 436 in Apopka, Florida.

Plaintiff's claims were premised on the allegation that prior surveys of the parcels of land at issue erroneously established the boundary between the properties, apparently due to an inaccurate estimation of the exact location of a "Section Line" created by federal surveys of Orange County, Florida in the 1800's. A fence had been constructed and maintained by Dr. Smith on the line that prior surveyors had found to be the boundary separating the Smith property from the adjoining property.

In 2004, when Noah's Ark was considering purchasing the property adjacent to Dr. Smith's, it commissioned a survey of the property it contemplated buying. The surveyor for Noah's Ark opined that Dr. Smith's fence was thirty feet over the Southerly line of the property that Noah's Ark wanted to buy. The discovery of discrepancies in older surveys is not uncommon, especially given the advances in available survey technology over the last 160 years, such as global positioning systems which enable lines and points to be established with a precision that Abraham Lincoln could only contemplate. Nonetheless, a thirty foot discrepancy may not be so common and certainly increased the stakes involved in this particular battle.

Despite the boundary issue, Noah's Ark purchased the property next door to Dr. Smith. The title company handling the transaction for Noah's Ark excluded the "disputed property" from coverage.

Dr. Smith and Noah's Ark were good neighbors for a few years thereafter. Noah's Ark even hired Dr. Smith's brother, a fence contractor, to install a fence separating the two properties. Indeed, the fence was installed on the line claimed by Dr. Smith, the same line which had been observed to be the correct line for more than thirty years.

Unfortunately, two events occurred that caused Noah's Ark to rethink whether it wanted to be a good neighbor or litigate. First, Noah's Ark had certain drainage issues which it felt could be cured if it acquired the property claimed by Dr. Smith. Second, in 2008, Noah's Ark refinanced the property. During the re-fi, a second title company missed the "disputed property" issue and did not exclude it from coverage. This made it easier for Noah's Ark to sue because, win or lose, it would not have to pay the lawyers.

So, Noah's Ark sued. As some readers have probably concluded, there were obvious defenses to the claim, including the defense of adverse possession. Before reaching those defenses, however, the court was obliged to first address the issue of whether Noah's Ark had any right to claim possession of the property based upon the alleged survey error.

In June of 2012, the case was tried to the bench, with the Honorable Patricia Doherty presiding. Following well-recognized principals of law applicable to re-surveys, Judge Doherty ruled in favor of Dr. Smith. Judge Doherty held that, even if the original surveys from the 1940's were erroneous, the law required that subsequent surveyors "retrace the footsteps" of the original surveyors and honor the monumentation placed by them. If the location of survey lines could be moved based upon the whims, whimsies, and opinions of a subsequent surveyor, chaos, rather than certainty as to property boundaries, would be the undesirable result.

Judge Doherty found that certainty is preferred in real estate transactions. Her well-supported opinion unequivocally laid the lines to be traced when battle is joined in Orange County, Florida concerning boundary disputes created by subsequent surveyors who disagree with the opinions of those whose footsteps they were obligated to follow.



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