FILED
AUG 26 1980
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

WILLIAM MEYER and **HERBERT MEYER,**	)	
Plaintiffs-Appellants,	)	Filed August 26, 1980
vs.	)	
ROBERT E. STOLTZE and **ELAINE M. STOLTZE,**	)	0-181 2-64232
Defendants-Appellees.	)	

Appeal from Crawford District Court - George F. Davis, Judge.

Plaintiffs appeal district court judgment dismissing action to determine boundary line between their property and defendants' property and to obtain an order requiring defendants to move fence allegedly encroaching upon plaintiffs' land. AFFIRMED.

R. E. Franck of Raun, Franck, Mundt & Nepper, Denison, for plaintiffs-appellants.

Bruce H. Stoltze of Heartney, Harvey, Butters & Ottoson, Des Moines, for defendants-appellees.

Considered by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

Plaintiffs, William Meyer and Herbert Meyer, appeal district court judgment dismissing action to determine boundary line between their farm and that of defendants', Robert E. Stoltze and Elaine M. Stoltze, and to obtain order requiring defendants to move fence allegedly encroaching on their land. On appeal, plaintiffs contend trial court incorrectly placed burden of proof on them to prove the fence was not re-erected on the correct boundary and even if they had the burden, they carried it. We affirm the judgment of the trial court.

I.

Plaintiffs filed their petition on April 11, 1978, asserting defendants had erected a fence on plaintiffs' property. They further stated a survey had been taken to establish the location of the fence. Plaintiffs requested the boundary be established, the fence moved, the cost of the survey paid, and any other necessary relief as the court found appropriate.

Defendants denied the major allegations of the petition and asserted, as an affirmative defense, the parties had recognized for more than ten years and acquiesced in the location of the fence as the boundary between their two properties. Defendants also filed a counterclaim alleging plaintiffs' fence, along the west half of the same boundary line, encroached on defendants' property and asked the boundary be determined.

The parties tried the case to the court on September 20, 1979. Plaintiffs introduced evidence of a land survey they had prepared, which showed the deviation between the fence line and the original boundary on the section line. This survey showed the existing fence is as much as six inches off the section boundary line on the plaintiffs' west half of the fence line and as much as four feet off the section line on the defendants' east half of the fence line. The evidence further showed the entire fence line had been replaced in 1973. Plaintiff testified that when he replaced his half of the fence in 1973, he had the fence posts re-positioned in the same holes used for the old fence.

At the close of plaintiffs' evidence, the parties entered into a stipulation concerning the fence line:

> MR. STOLTZE: Before I call my first witness, during the presentation of the plaintiffs' case it was admitted by the plaintiff that the fenceline which was in

> existence until 1973 when it was torn out was acquiesced to by the parties as the boundary-line fence, and therefore I would ask that it be stipulated right now that that fact is established for the purpose of this action.
>
> MR. FRANCK: I have no objection, your Honor. Our testimony shows it was moved after '73.
>
> MR. STOLTZE: Okay. Your Honor, defense calls Robert Stoltze.

Defendant Robert E. Stoltze then testified to his and his family's efforts in replacing their half of the fence in 1973. He described in detail the efforts to use certain landmarks to align properly the new fence along the boundary fixed by the old fence line.

The trial court found plaintiffs failed to meet their burden of proving by a preponderance of the competent evidence the allegations set out in their petition. The court also found defendants failed to meet their similar burden in proving their counterclaim. Accordingly, the trial court ordered the petition and counterclaim dismissed.

II.

The initial issue on appeal is whether the trial court erred in placing the burden of proof on plaintiffs to prove the fence between the parties' property had been moved in 1973. Plaintiffs contend the unrebutted testimony of the person who conducted a survey of the existing fence line and the section line and concluded the fence encroached on plaintiffs' land established a prima facie case of the alleged encroachment. Plaintiffs further argue defendants had the burden to prove their affirmative defense of acquiescense. We find plaintiffs' position unpersuasive as it fails to recognize the effect of the stipulation entered into by the parties on the acquiescense issue.

In the stipulation entered into at trial, the parties agreed the fence line that existed in 1973 before being torn out was acquiesced to by the parties as the true boundary. The law in Iowa recognizes that where two adjoining property owners mutually acquiesce for ten or more consecutive years in a line definitely marked by a fence or in some other manner, it then becomes the true boundary although a survey may show otherwise. Cozad v. Strack, 254 Iowa 734, 736, 119 N.W.2d 266, 268 (1963); Mahrenholz v. Alff, 253 Iowa 446, 450, 112 N.W.2d 847, 849 (1962). Thus, the 1973 fence line prior to replacement is the boundary between the parties' properties and plaintiffs' reference to the surveyed section line as the true boundary is incorrect and misleading.

Due to this stipulation, the key factual issue of this case became whether defendants re-erected their part of the fence in the same place as the pre-1973 fence line. On this point, plaintiffs clearly had the burden of proving by a preponderance of the evidence defendants' fence was not located along the prior fence line, and was thus an encroachment on their land. Sorenson v. Mosbacher, 210 Iowa 156, 159-60, 230 N.W. 656, 658 (1930); see Kennedy v. Oleson, 251 Iowa 418, 421, 100 N.W.2d 894, 896 (1960); Iowa R. App. P. 14(f)(5) ("Ordinarily the burden of proof on an issue is upon the party who would suffer loss if the issue were not established."). Plaintiffs' evidence concerning the land survey and deviation of the fence from the section line is irrelevant to the issue in question; plaintiffs' burden was to establish the present fence's deviance from the 1973 fence line.

Plaintiffs correctly point out the stipulation did not state the current fence line had been acquiesced to by the parties as the true boundary, but only that the pre-1973 fence line became the true boundary through acquiescense. Plaintiffs are also correct the stipulation does not satisfy defendants' burden of proving their affirmative defense since defendants' affirmative defense asserted the present fence line as the boundary line, which was not covered by the stipulation. Yet, defendants are not required to prove their affirmative defense if plaintiffs do not prove their allegations. We hold the trial court correctly placed the burden of proof on plaintiffs to establish the current fence line deviates from the prior one and thereby encroaches on plaintiffs' property. See Parizek v. Klein, 246 Iowa 557, 563-64, 68 N.W.2d 299, 303 (1955).

III.

Plaintiffs contend even if they had the burden of proving the fence was moved in 1973 from the pre-1973 fence line, the court erred in holding they failed to meet that burden. An action to establish a boundary is a special proceeding, § 650.4, The Code 1977, which on appeal is reviewed as an ordinary action, § 650.14, The Code. Our scope of review is limited in such a case to correction of errors at law. Brown v. McDaniel, 261 Iowa 730, 732, 156 N.W.2d 349, 350-51 (1968); Dart v. Thompson, 261 Iowa 237, 240, 154 N.W.2d 82, 84 (1967); Iowa R. App. P. 4. The trial court's fact-findings have the effect of a special verdict and are binding on this court if supported by substantial evidence. Iowa R. App. P. 14(f)(1).

After carefully reviewing the record, we hold substantial evidence supported the trial court's fact-findings and do not believe an extended discussion of that evidence is required. See Iowa S. Ct. R. 9. See also Parizek, 246 Iowa at 563-65, 68 N.W.2d at 304.

Trial court judgment is affirmed.

AFFIRMED.