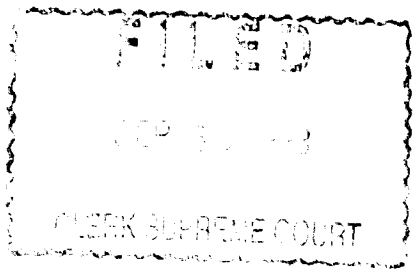
IN THE COURT OF APPEALS OF IOWA

No. 8-156 / 97-0852
Filed September 30, 1998



DOROTHY L. KARIS, MARK B. KARIS AND KAREN KARIS,
Appellees,

vs.

DOROTHY OHLINGER, ALVIN B. OHLINGER AND FIRST BANK COUNCIL BLUFFS,
Appellants.

Appeal from the Iowa District Court for Pottawattamie County, Keith E. Burgett, Judge.

The defendants appeal the district court ruling in favor of the plaintiffs in this property dispute. **AFFIRMED.**

Richard D. Crotty, Council Bluffs, for appellants.

Richard A. Heininger of the Smith Peterson Law Firm, Council Bluffs, for appellees.

Considered by Cady, C.J., and Streit and Mahan, JJ.

STREIT, J.

The Ohlingers appeal the trial court's order establishing the fence line between the Ohlinger and Karis property as the true boundary line by acquiescence and recognizing the Karis's prescriptive easement to use the Ohlingers' driveway. Because substantial evidence on the record supports the trial court's findings, we affirm.

I. Background Facts & Proceedings.

The Karises and Ohlingers own adjacent residential properties. The Karises have owned their property since 1985 and the Ohlingers have owned their property since 1996.

From 1985 to August 1996, a fence enclosing the Karis's backyard was located between the properties. On the other side of the fence was the Ohlingers' driveway. The fence was not along the true boundary line. Rather, it was located approximately two to three feet east of the true boundary on the Ohlingers' property. This resulted in a portion of the Ohlingers' property being enclosed in the Karis's backyard. The Karises used the enclosed property as if it were their own. They stored items on the land, allowed their dogs to use the land, maintained the land, and gardened up to the fence line.

In 1985, the Karises removed a portion of the fence and constructed a parking stall at the northeast corner of their house. The stall was partially located on the Ohlingers' property. The Karises began using the Ohlingers' driveway to access their

parking stall and backyard. The owners of the property at that time did not object to the removal of the fence or the use of the driveway.

In 1996, the Ohlingers began removing the fence. They intended to replace the original fence with a fence located on the boundary line identified in a survey. The Karises sought a temporary restraining order to prevent further action. The court granted the temporary restraining order. The Karises also filed a petition for declaratory judgment to determine the parties' property rights.

On April 15, 1997, the court determined the original fence line was the true boundary line by acquiescence pursuant to Iowa Code section 650.14 (1995). The Karises were granted an easement to use the driveway as an ingress and egress to their property, but were not to obstruct the driveway. The defendants were ordered to replace, at their expense, the portion of the fence they had torn down. The Ohlingers appeal.

II. Standard of Review.

This case is decided pursuant to Iowa Code section 650.14. An action brought under Iowa Code chapter 650 is a special action and is heard on appeal as an ordinary action. Iowa Code §§ 650.4, .15. Our review is on assigned errors of law. *Tewes v. Pine Lane Farms, Inc.*, 522 N.W.2d 801, 804 (Iowa 1994). The district court's judgment has the effect of a jury verdict and we are bound by the district court's findings of fact if supported by substantial evidence. *Ollinger v. Bennett*, 562 N.W.2d 167, 170 (Iowa 1997).

III. Fence as Boundary by Acquiescence.

The Ohlingers contend the trial court erred in ruling the original fence line was the true boundary line of the Karis's property under the doctrine of boundary by acquiescence. Iowa Code chapter 650 codifies this doctrine. Section 650.14 provides:

> If it is found that the boundaries and corners alleged to have been recognized and acquiesced in for ten years have been so recognized and acquiesced in, such recognized boundaries and corners shall be permanently established.

Iowa Code § 650.14 (1997). Acquiescence exists when both parties acknowledge and treat the line as the boundary. *Ollinger*, 562 N.W.2d at 170. Acquiescence need not be specifically proven; it may be inferred by the silence or inaction of one party who knows of the boundary line claimed by the other and fails to take steps to dispute it for a ten-year period. *Id. at 170-71.* A landowner's inaction is sufficient to meet the consent element of acquiescence. *Id.* at 171.

When the acquiescence persists for ten years the line becomes the true boundary even though a survey may show otherwise and even though neither party intended to claim more than called for by his deed. *Id.* However, acquiescence in the existence of a fence as a barrier, not as a boundary, is not such recognition as will establish it as the true boundary line. *Harvey v. Platter*, 495 N.W.2d 350, 352 (Iowa App. 1992).

A boundary line may also be established by showing the current landowners' *predecessors in title* recognized and acquiesced to a fence as the true boundary line. *Tewes v. Pine Lane Farms, Inc.*, 522 N.W.2d 801, 806(Iowa 1994). "[P]urchasers of property cannot question a boundary line acquiesced to by predecessors in title for more than ten years." *Novotny v. Robbins*, 492 N.W.2d 216, 220 (Iowa App. 1992) (quoting *Dart v. Thompson*, 261 Iowa 237, 241, 154 N.W.2d 82, 84 (1967)).

Determining whether acquiescence is established requires an inquiry into the factual circumstances of each case. *Ollinger*, 562 N.W.2d at 171. Factors used in determining whether acquiescence has been established are: (1) exercise and dominion over the disputed property by maintaining and improving the property; (2) whether the party resisting the acquiesed boundary has asked the other permission to make changes to the property; (3) whether either party has verbally recognized the fence was not the true boundary during the period of acquiescence. *Id.*

The district court correctly applied the legal principles set forth here. Substantial evidence in the record proved: (1) the Karises considered the fence the boundary of their property since 1985; (2) the Karises engaged in conduct that gave the owners prior to the Ohlingers knowledge the Karises claimed the fence as their boundary; and (3) the Ohlingers' precedent owners acquiesced in the fence as the boundary of the Karis's property.

Karis testified he considered the property up to the original fence line his since he bought the property in 1985. Karis maintained the property on his side of the

fence. There were three owners of the property previous to the Ohlingers between 1985 and 1996. Each of these owners acquiesced in the fence as the boundary of Karis's property. Shortly after the Karises moved in, Mr. Karis tore a portion of the fence down to haul materials into his backyard. He did not ask the former owner, Mr. Bruner's permission to remove the fence and Mr. Bruner had no objections to the Karis's actions. In 1989, Frank Scarpello bought the property. He asked the Karis's permission to remove a portion of the fence. The owners subsequent to Scarpello never challenged Karis's actions indicating the fence was the boundary of his property. These facts are sufficient to establish the fence as the boundary of the Karis's property by acquiescence.

The Ohlingers argue they took action in 1996 to repudiate the original fence line as the boundary, however, actions taken after the ten-year period required for acquiescence do not negate or repudiate the acquiescence of previous owners. *See Ollinger*, 562 N.W.2d at 171. Scrutinizing the parties' conduct after acquiescence has been established, for signs of repudiation, would undermine the purpose of establishing boundaries by acquiescence. *Id.*

The trial court's ruling establishing the original fence line as the true boundary is affirmed.

IV. Easement to Driveway.

The Ohlingers contend the trial court erred in ruling the Karises had established an easement to their driveway.

An easement in real estate may be established in four different ways: (1) by written agreement; (2) by prescription; (3) by necessity; or (4) by implication. *Heald v. Glentzer*, 491 N.W.2d 191, 193 (Iowa App. 1992). A prescriptive easement may be established by "'by adverse possession, under claim of right or color of title, openly, notoriously, continuously, and hostilely asserted against defendants for ten years or more.'" *Id.* (citations omitted). Permissive use is not adverse or under a claim of right. *Id.*

There is substantial evidence the Karises have established a prescriptive easement by adverse possession. The Karises began using the driveway in 1985 shortly after purchasing the property. Although they knew they did not own the driveway, they did not ask permission to use it. The Karis's use of the driveway was open and notorious, to the extent that often times Karis family members would block the driveway and obstruct the Ohlingers' access. The Karises constructed a parking stall off the driveway, partially on the Ohlingers' property, which could only be accessed via the driveway. The Karis's use of the driveway for ten years, as if they owned it, is sufficient to establish an easement by prescription. The trial court's order establishing the Karis's easement to the driveway for ingress and egress to their backyard is affirmed.

AFFIRMED.