

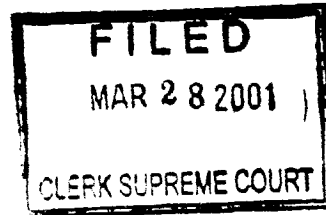
IN THE COURT OF APPEALS OF IOWA

No. 0-609 / 99-1740
Filed March 28, 2001

J.W. DULIN, WILLIAM A. CARLSON,
and JOHN A. CARLSON,
Plaintiffs-Appellees,

vs.

LYNN M. REES,
Defendant-Appellant.



Appeal from the Iowa District Court for Louisa County, R. David Fahey,
Judge.

The defendant appeals from the district court decree quieting title to a
disputed tract of land in the plaintiffs. **AFFIRMED.**

R. Craig Oppel of Allbee, Barclay, Allison, & Denning, P.C., Muscatine, for
appellant.

William L. Matthews of Hicklin & Matthews, Wapello, for appellees.

Heard by Zimmer, P.J., and Hecht and Vaitheswaran, JJ.

HECHT, J.

The parties to this litigation claim ownership of certain land in the vicinity of Keever Slough in Louisa County, Iowa. The land in question was used by plaintiffs J.W. Dulin, William A. Carlson, and John A. Carlson, and their predecessors in title, as a private hunting and fishing preserve for more than forty-five years before Lynn M. Rees claimed an ownership interest in it. The plaintiffs filed a quiet title action and sought injunctive relief and damages for trespass against Rees after they discovered trees had been cut and a duck blind had been placed in the slough without their permission. The district court quieted title in the plaintiffs but denied them damages and injunctive relief. Rees appeals from the district court's decree. We affirm.

I. Factual Background and Proceedings.

A. Ambiguity in Documents of Title. Both plaintiffs and Rees derive their claims of title to real estate in the vicinity of the slough through grantors Kenneth Baker, R.E. White, and Dorothy White. On March 15, 1946, the grantors conveyed a portion of their real estate to A.D. Graves, described as follows:

Beginning at the South East corner of the West Half of the South West Quarter of Section No. 8, Township 73 N. R. 2 W. of the 5th P.M. thence West along the South boundary thereof a distance of 770 feet to the West bank of Keever slough, thence in a Northeasterly direction along the West bank of Keever slough a distance of 80 rods, thence due East to the East boundary of the West Half of the South West Quarter, thence South along the East boundary of said tract to the place of beginning, all in Section 8, Township 73 N. R. 2 West of the 5th P.M.

In February of 1947, Graves conveyed the same real estate to Adrian Carlson, who took title as trustee of a trust established "for the primary purpose of deriving benefits from operating and maintaining a hunting, fishing and recreational club."

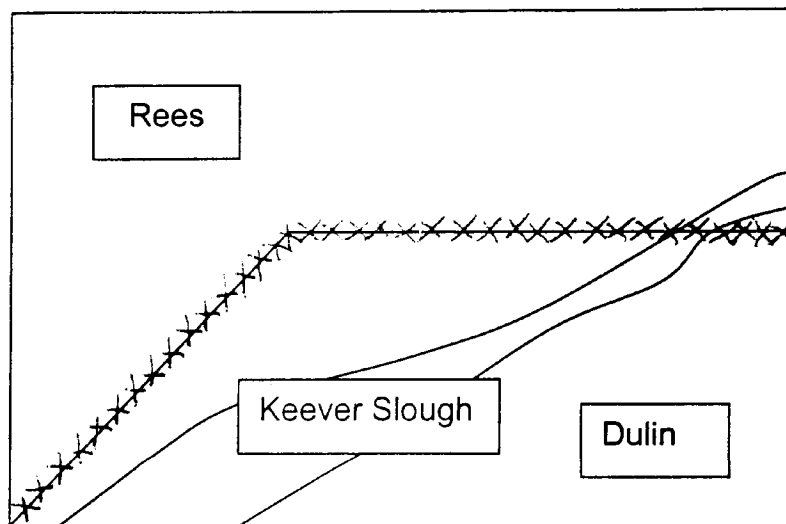
In 1956, Baker and the Whites conveyed real estate including a portion of Section Eight to Alta D. Jordan. Excepted from this conveyance was a portion of the section described as:

Beginning at the Southeast corner of the West Half of the Southwest Quarter of said Section 8; thence West along the South boundary thereof a distance of 775 feet; thence in a Northeasterly direction along the slough a distance of 80 rods; thence due East to the East boundary of the West Half of the Southwest Quarter, thence South along the East boundary of said West Half of the Southwest Quarter to the place of beginning, containing approximately 11 acres.

Jordan died in November of 1991, and her estate conveyed her interest in the property to Rees in June of 1992.

The legal descriptions in the conveyances from common grantors to the parties' respective predecessors in title were not based upon a survey. The description of the real estate in the plaintiffs' deed varies in some respects from the description of the property excepted from the conveyance to Rees. The former describes the south boundary as running from the South East corner of the West Half of the South West Quarter of Section No. 8 "a distance of 770 feet *to the West bank of Keever slough*, thence in a Northeasterly direction along the West bank of [the slough]" (emphasis supplied); but the latter describes the southern boundary of the excepted parcel as running "a distance of 775 feet," and then running in a "northeasterly direction along the slough" without reference to either the east or west bank. The former conveyance made no attempt to quantify the number of acres conveyed, but the Rees deed describes the excepted portion of Section Eight as consisting of "approximately 11 acres."

B. The Fence Line Dispute. Although the deeds through which the parties claim title to land in Section Eight do not refer to it, plaintiffs claim, and the district court found, a fence in the vicinity of the slough marks the boundary between their property and that of Rees. We incorporate below a diagram (not to scale) crudely illustrating the relationship between the fence and the slough in the disputed area.



Plaintiffs presented evidence tending to prove the parties and their predecessors in title had long considered the fence as the boundary between their properties. Harry Jordan, the son of Alta Jordan, accompanied his mother, Baker, and a realtor on an excursion to view the land in 1957 before Mrs. Jordan purchased it. Harry testified he heard Baker tell his mother he had given plaintiffs' predecessor in title "11 or 12 acres. . . . off the corner of the farm so nobody could shoot from there into the [slough]." Harry further testified he farmed the ground for his mother from 1957 until the estate sold it in the early 1990s. During that entire time, the Jordans treated the fence as the south boundary of the farm. This is evidenced by the fact Harry sought permission

from the trustee to gain access for the Jordans' cattle through the fence to drink in the slough. When he desired to trim a tree on the slough side of the fence, Jordan again sought permission from the trustee. Harry further testified his mother knew the fence marked the south boundary of her farm.

The district court found plaintiffs own the land between the west bank of the slough and the fence, but denied injunctive relief and damages for trespass against Rees. Rees challenges the district court's finding and contends: (1) the plaintiffs' quiet title action is barred by the statute of limitations; (2) the Forty Year Marketable Title Act gives her a superior claim of title; (3) the plaintiffs did not prove title by acquiescence; (4) the plaintiffs did not prove title by adverse possession; (5) a 1957 quiet title action brought by Alta Jordan and various equitable considerations preclude judgment in favor of plaintiffs; and (6) the slough should be placed in public trust.

II. Standard of Review. Actions to quiet title are equitable proceedings. Iowa Code section 649.6 (1997). Our review is de novo. Iowa R. App. P. 4.

III. Statute of Limitations Issue. Rees contends the district court erred in failing to conclude plaintiffs' action is barred by Iowa Code section 614.17, which addresses the statute of limitations for actions arising out of claims to real estate antedating 1980. See Iowa Code § 614.17. Rees did not raise this issue in the district court and the district court did not rule on it in its decision. Accordingly, we give the contention no further consideration. See *Benavides v. J.C. Penney Life Ins. Co.*, 539 N.W.2d 352, 356 (Iowa 1995) (issues must be "presented to and passed upon" by the trial court to be raised and adjudicated on appeal).

IV. Forty Year Marketable Title Issue. Rees next claims the district court erred in failing to conclude her title to the disputed land is superior to that of the plaintiffs because of the Forty Year Marketable Title Act. See Iowa Code § 614.31. The district court did not rule on the applicability of the Act and Rees did not request a ruling in a motion pursuant to Iowa Rule of Civil Procedure 179(b). “[I]t is now well settled a rule 179(b) motion is essential to preservation of error when a trial court fails to resolve an issue, claim, defense or legal theory properly submitted for adjudication.” *Arnold v. Lang*, 259 N.W.2d 749, 753 (Iowa 1977). Accordingly, Rees failed to preserve this legal issue for our review.

V. Title by Acquiescence. Rees contends the district court erred in concluding the plaintiffs established title to the land between the west bank of the slough and the fence by acquiescence. Acquiescence in a boundary occurs when adjoining landowners recognize a definitely marked fence as the dividing line between their properties for ten years or more. *Ollinger v. Bennett*, 562 N.W.2d 167, 170 (Iowa 1997). We adopt as our own the district court’s finding Baker informed Mrs. Jordan before she purchased land in Sections Seven and Eight in 1956 that the plaintiffs’ predecessors in title had been given land on the east side of the fence to prevent others from shooting into the slough. There is no evidence Mrs. Jordan ever claimed ownership of land to the east or south of the fence. On the contrary, her tenant and son acknowledged the fence as the boundary line by requesting from plaintiffs access for the Jordans’ cattle to the slough; and by requesting plaintiffs’ permission to trim a tree on the east side of the fence.

Rees argues any acknowledgement by the tenant of the fence as the boundary for nearly thirty years was not sufficient to establish the owner's acquiescence. While this may be true, we find other evidence clearly establishes Alta Jordan's knowledge of the boundary marked by the fence. Harry testified his mother knew the fence marked the boundary between her property and plaintiffs' property because she was told this in his presence before she purchased the real estate in 1957. Her failure to dispute the boundary during the ensuing three decades constitutes "consent inferred from silence" and compelling evidence of acquiescence. *Olson v. Clark*, 252 Iowa 1133, 1138, 109 N.W.2d 441, 444 (1961). Although the testimony of Harry, Mrs. Jordan's son and tenant who farmed the adjacent land for more than thirty years, concerning the parties' treatment of the fence as the boundary is not dispositive, we believe his knowledge of the parties' conduct is compelling evidence. See *id.* at 1138, 109 N.W.2d at 445 (noting the relevance of the knowledge of defendant's sibling who farmed ground for defendant in the immediate vicinity of the real estate claimed by the parties). Under the circumstances, we find Alta Jordan and plaintiffs' predecessors recognized and acquiesced in the fence as the boundary line for more than ten years.

Rees contends plaintiffs failed to prove the fence is a "definitely marked" boundary line. A surveyor who was called as plaintiffs' witness testified he did not locate a fence along the north side of the parcel in dispute. However, we

credit the testimony of plaintiff William Carlson¹ who testified, although in poor repair, the fence still exists. Accordingly, we affirm the district court's determination plaintiffs met their burden of proving the parties acquiesced in the fence as the boundary line between their properties. We also affirm the district court's determination that title to those portions of Sections 7 and 8 to the east and south of the fence should be quieted in plaintiffs.

VI. 1957 Quiet Title Action. Rees contends the district court erred by failing to conclude her claim to the disputed property is superior by virtue of a quiet title action filed by Alta Jordan in 1957. The district court found the 1957 litigation was commenced to correct an erroneous legal description utilized in connection with the issuance of a tax sale deed, and did not resolve the issue presented in this case. We concur. The plaintiffs' predecessors were not made parties to the 1957 litigation even though their identities could have been determined. The pleadings in that litigation did not disclose the boundary line dispute at issue here was to be resolved. For these reasons, we conclude the district court did not err by failing to give the 1957 decree preclusive effect in this case.

VII. Public Trust Issue. The district court concluded Rees "failed to prove the 'public trust doctrine' is applicable." Rees challenges this determination, pointing to testimony of the Louisa County Engineer who noted public roadways cross the slough and run more or less parallel to it, permitting

¹ Carlson, who was fifty-five years of age at the time of trial, testified he used the property for recreational purposes since his youth. His earliest recollection of such visits to the property dates back nearly fifty years.

public access to the slough waters from public roadway rights-of-way. We are uncertain from the district court's ruling whether the district court determined defendant failed to present sufficient evidence to establish the slough could be the subject of a public trust, or whether the court concluded the public trust doctrine is inapplicable in this case because the doctrine cannot be advanced by a party other than the State. Notwithstanding our uncertainty with regard to the district court's reasoning, however, we find no reversible error in the district court's ruling on this issue.

When faced with ambiguity in a district court ruling, we are guided by certain principles. The findings of the trial court are liberally construed to uphold rather than defeat a judgment in cases of doubt or ambiguity. *KCOB/KLVN, Inc., v. Jasper County Bd. of Supervisors*, 473 N.W.2d 171, 174 (Iowa 1991). A successful party may urge affirmance on a ground upon which the district court did not rely. *Johnston Equip. v. Industrial Indem.*, 489 N.W.2d 13, 17 (Iowa 1992) ("Our cases are legion which hold that a trial court may be affirmed on grounds upon which it does not rely.")

The public trust doctrine is based on the notion the public possesses inviolable rights to certain natural resources. *Larman v. State*, 552 N.W.2d 158, 161 (Iowa 1996). The State's title to public trust property "is not proprietary but is in the nature of a trusteeship, which confers upon the state a burden rather than a benefit. . . ." *Peck v. Alfred Olsen Const. Co.*, 216 Iowa 519, 522, 245 N.W. 131, 132-33 (1932). The State of Iowa is not a party to this litigation and has not asserted the land claimed by the parties is affected by a public trust. Furthermore, Rees cites no authority for the proposition the public trust doctrine

may be advanced by a litigant other than the sovereign. We conclude it would be inappropriate in this case to adjudicate the State's legal interest, if any, in the slough because the sovereign is not a party to this litigation. Accordingly, we affirm on this issue.

VIII. Claim for Reimbursement of Taxes and Insurance. Rees contends the district court erred in failing to grant her a hearing on her claim for reimbursement for real estate taxes and insurance paid in connection with the real estate claimed by the parties. Rees did not allege the claim for reimbursement in her pleadings, but did testify at trial she had paid taxes and insurance on the property. However, she did not present evidence with regard to the amount of these payments. In her motion filed pursuant to rule 179(b) of the Iowa Rules of Civil Procedure, Rees requested the district court to schedule a hearing on her claim for reimbursement. The district court declined the request, refusing to "expand [the] case to include these entirely new issues."

If one pays taxes on real estate while mistakenly but reasonably believing she owns the property, she may assert a claim against the owner for reimbursement. See *Goodnow v. Moulton*, 51 Iowa 555, 558, 2 N.W. 395, 398-99 (1879). Rees elected not to present evidence during the trial of the amounts of the payments for which she claims reimbursement. We conclude the district court did not abuse its discretion by declining to schedule a post-trial hearing to receive evidence on an issue not addressed in the pleadings.

IX. Conclusion. We affirm the district court's determination the plaintiffs proved the establishment of the boundary by acquiescence. We therefore find it unnecessary to address Rees's contention the district court erred in finding

plaintiffs proved they are also entitled to relief under other legal theories including adverse possession. We have considered all contentions advanced by Rees on appeal and find them to be without merit. Accordingly, we affirm the district court's decree in its entirety.

AFFIRMED.