

**IN THE COURT OF APPEALS OF IOWA**

No. 8-621 / 97-1842

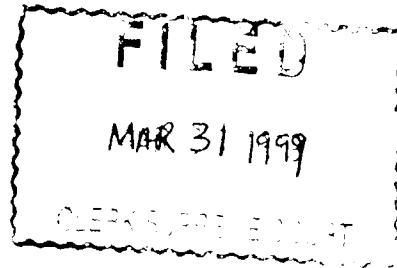
**ALAN C. TEGTMEIER and MARLA J. TEGTMEIER,**

Plaintiffs-Appellants,

**vs.**

**SCOTT APPEL and VICKIE APPEL,**

Defendants-Appellees.



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Appeal from the Iowa District Court for Floyd County, John S. Mackey, Judge.

The plaintiffs appeal from a district court judgment dismissing their petition to establish a boundary by acquiescence. **AFFIRMED.**

Normand Klemesrud, Charles City, for appellants.

Judith O'Donohoe of Elwood, O'Donohoe, O'Connor & Stochl, Charles City, for appellees.

Considered by Huitink, P.J., and Vogel, and Zimmer, JJ.

**ZIMMER, J.**

Plaintiffs, Alan and Marla Tegtmeier, appeal from a district court judgment dismissing their petition to establish a boundary by acquiescence pursuant to Iowa Code chapter 650 (1997). We affirm.

In 1995, the defendants, Scott and Vickie Appel, contracted to buy a plot of land adjacent to a plot owned by plaintiffs.<sup>1</sup> Before closing, the property was surveyed by Robert Holze. He established a boundary between defendants' and plaintiffs' properties in accord with the legal description. The survey resulted in a boundary which differed from that which the Tegtmeiers believed to be the boundary. They alleged the survey resulted in the loss of a strip of land seventeen feet wide on the west side of the surveyed boundary and forty feet wide on the east side. The land included a row of poplar trees planted by previous owners of the Appels' land, as well as other trees planted by the Tegtmeiers.

The Tegtmeiers, seeking to enjoin further use by the Appels of the lost land, filed a petition claiming adverse possession and boundary by acquiescence. The Appels filed an answer and a counterclaim seeking an injunction against the Tegtmeiers. The district court granted Appels' motion for dismissal of the Tegtmeiers adverse possession claim. Following trial, the court found the Tegtmeiers and their

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<sup>1</sup> Plaintiffs purchased their land from Louis Heft in 1991, who acquired it 1983 when Eulalia Christie severed a portion of her acreage and sold it to Heft. Upon obtaining the severed portion of Eulalia Christie's land, Heft agreed to obtain a survey to establish the boundary between his property and the remaining Christie property. He failed to do so. The dispute presently before us concerns the boundary between the Heft property (now owned by the plaintiffs) and the Christie property (now owned by defendants).

grantors had never recognized, adopted, and acquiesced in a clearly established boundary line during the period of their possession. Having found no boundary by acquiescence, the court granted defendant's counterclaim for injunction. Plaintiffs now appeal.

*I. Scope of Review.* An action brought under Iowa Code chapter 650 is a special action, but is heard on appeal as an ordinary action. *See* Iowa Code §§ 650.4, 650.15. As in an action at law, our review is assigned on errors of law. *See 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; thus, we are bound by the district court's findings of fact if supported by substantial evidence. *See Brown v. McDaniel*, 261 Iowa 730, 732, 156 N.W.2d 349, 351 (1968).

*II. Boundary by Acquiescence.* Plaintiffs contend the district court erred in finding they failed to present clear and convincing evidence of a boundary by acquiescence. They argue they sufficiently demonstrated a boundary consisting of an imaginary line along the edge of a field just north of a walnut tree, recognized for more than the statutory period.

Iowa Code chapter 650 codifies the doctrine of acquiescence, by which a boundary line contrary to a property's legal description may be established. 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).

The Iowa Supreme Court has defined “acquiescence” as:

the mutual recognition by two adjoining landowners for ten years or more that a line, *definitely marked by fence or in some manner*, is the dividing line between them. Acquiescence exists when both parties acknowledge and treat the line as the boundary. 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.

*Sille v. Shaffer*, 297 N.W.2d 379, 381 (Iowa 1980) (emphasis added). The party seeking to establish a boundary line other than a surveyed boundary line must prove acquiescence by clear evidence. See *Tewes v. Pine Lane Farms, Inc.*, 522 N.W.2d 801, 806 (Iowa 1994).

Substantial evidence supports the district court’s finding and conclusion the plaintiffs have not shown acquiescence by clear evidence. Few geographical markers demarcate the boundary plaintiffs claim to be the true boundary. Plaintiffs argue a walnut tree at one point along the imaginary boundary adequately indicates the border between the parties’ properties. We agree the tree may indicate one point of demarcation, but there is no evidence of a second companion point between which an imaginary boundary line could be identified. The plaintiffs point out a “mow line” between the properties on the edge of a field to the north of the walnut tree helps in this respect. However, the evidence shows the parties and previous owners did not mow the area in a routinely similar fashion: the edge of the mowed area fluctuated routinely, often extending significant distances in either direction between the parties’ land.

After careful review of the record, we agree with the trial court the plaintiffs have failed to show by clear evidence a definite and ascertainable boundary different from the surveyed boundary. We will not resort to conjecture and speculation in locating boundary lines. *See Mensch v. Netty*, 408 N.W.2d 383, 386 (Iowa 1987). In the absence of more specific proof, plaintiff's claim must therefore fail. *Id.* We determine the district court's finding in favor of defendants is not in error.

**III. Land Survey.** Plaintiffs also argue the survey of the property conducted by Holze is not in conformity with Iowa Code chapter 355. Plaintiffs, however, failed to previously raise this issue in the district court. In fact, the record reveals plaintiffs and defendants jointly submitted the survey without dispute. Plaintiffs later reaffirmed their stipulation to the accuracy of the Holze survey and indicated there was no controversy surrounding the survey.

A theory for recovery or an issue not presented to the trial court is waived. *See In re Estate of Crabtree*, 550 N.W.2d 168, 171 (Iowa 1996). Plaintiffs' second argument has not been preserved for appeal.

**AFFIRMED.**