

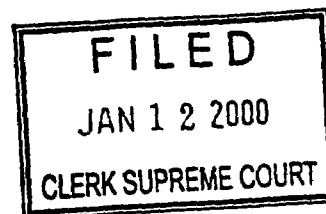
IN THE COURT OF APPEALS OF IOWA

No. 1999-483 (9-740) / 98-2282  
Filed January 12, 2000

**ROBERT E. HEER and MARY DIANA HEER,**  
Appellees,

vs.

**ROBERT J. THOLA,**  
Appellant.



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Appeal from the Iowa District Court for Jackson County, John Nahra, Judge.

Robert Thola appeals the district court's ruling which established a boundary line by acquiescence in favor of Robert and Mary Heer. **AFFIRMED.**

Bradley L. Norton and Brian T. Fairfield of Norton & Norton, P.C., Lowden,  
for appellant.

Mark Lawson, Maquoketa, for appellees.

Heard by Vogel, P.J., Vaitheswaran, J., and Habhab, S.J.\*

\*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1999).

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**VOGEL, J.**

Robert Thola appeals the district court's ruling which established a boundary line by acquiescence in favor of Robert and Mary Heer. We affirm.

***Background facts.*** Mary and Robert Heer are the daughter and son-in-law of Lawrence and Mildred Schilling. In 1973, the Heers built a home on the southern portion of the Schilling's two-acre property in rural Jackson County. In the fall of 1973, Lawrence and Robert established an east-to-west property line just south of two tall utility poles on the acreage. A fence was soon constructed along this line.

In June of 1974, the Schillings gifted the southern 139 feet of the lot to the Heers by warranty deed. Unbeknownst to the parties, the agreed upon boundary was approximately twenty-two feet north of the metes and bounds description contained in the deed. The Schillings retained the northern portion of the lot, which was being utilized for agricultural purposes at the time. The Heers seeded the property up to the fence line, planted trees and mowed the area. In 1978, the Schillings began constructing a home of their own on the northern portion of the property. At the time, the entire fence was removed except for a wooden post which had established the western boundary of the property line.

Mildred Schilling died in 1985. In 1990, Lawrence put all of his property in a revocable trust. Mary became trustee upon Lawrence's death in 1991. On March 21, 1994, Mary transferred the land north of her property to Robert Thola by a trustee's warranty deed. The legal description included the approximate twenty-two

feet maintained by the Heers. Thola did not inquire about the property lines prior to the transaction. Sometime after Thola acquired possession of the property, he asked Robert Heer where the boundary line was located. Heer replied that the line ran approximately along the utility poles on the east and west boundaries of the property. That description was approximately three to four feet from the former fence line. Based on Heer's representation, Thola mowed and maintained his property up to the utility poles from 1994 until 1997. In early 1997, Thola decided to move some trees to the property line and again asked the Heers where the line was located. This time Robert Heer indicated that the line was from the existing fence post to a telephone pedestal near the east boundary.<sup>1</sup> Thola subsequently had his property surveyed and discovered a twenty-two-foot difference between the line purported by the Heers and the property description in the warranty deed. The Heers had their own survey completed which confirmed the findings of Thola's survey. The Heers subsequently brought an action against Thola to establish the boundary at the point of the fence post.

After a bench trial, the district court determined the Heers' petition was barred by the statute of limitations. In two subsequent rule 179(b) rulings the court modified its original ruling and established a boundary line by acquiescence from the western fence post to the eastern telephone pedestal. Thola now appeals.

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<sup>1</sup> Robert Heer testified at trial that the telephone pedestal was located in approximately the same place as the previous eastern fence post.

**Scope of review.** Our review of the determination of a disputed boundary line is for errors at law. *See Ollinger v. Bennett*, 562 N.W.2d 167, 170 (Iowa 1997). We are therefore bound by the trial court's fact findings if they are supported by substantial evidence. *See id.*

**I. Substantial evidence.** Thola first contends that there was insufficient evidence to establish the required elements of a boundary by acquiescence.

Iowa Code section 650.14 (1997) 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." "Acquiescence" has previously been defined in our case law as follows:

It is 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). Determining whether acquiescence has been established requires an inquiry into the factual circumstances of each case. *See Tewes v. Pine Lane Farms, Inc.*, 522 N.W.2d 801, 808 (Iowa 1994).

In this case, Robert Heer and Lawrence Schilling decided on the line in 1973, and both mowed, landscaped and otherwise maintained their properties in accordance with that boundary for more than ten years. There was clearly a mutual acquiescence

by the Heers and Schillings in a boundary line different from the recorded line for more than ten years. The only element of acquiescence Thola disputes is whether the boundary was “definitely marked.” Thola claims that the removal of the fence in 1978 and Robert Heer’s one-time representation that the line was approximately at the two utility poles supports that the line was not “definitely marked.” We disagree. When Heer was asked at trial why he hadn’t specifically pointed out the fence post as a marker when Thola initially asked him where the property line was, Heer responded:

Because he caught me off guard in the yard. I wasn’t prepared. I didn’t think it was a big deal at that time. When he started talking about putting up fences and moving trees, then I thought it was serious and we better get down to business

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. . . . we were out of sight of both of them [the fence post and telephone pedestal] and I said approximately. I could see the high line pole. I said approximately high line pole to high line pole.

We also find no significance in the fact that the fence was removed only four years after it was erected. The western fence post remained in place, as did the trees and shrubs planted along the boundary. We find this was sufficient to meet the requirement of a “definitely marked” boundary. *Cf. Tewes*, 522 N.W.2d at 806 (finding that three posts and crop residue formed the basis of a sufficiently definite boundary line).

Alternatively, Thola claims that the Heers waived the acquiesced boundary line by their later actions and representations. This issue was not considered by the trial

court nor brought to its attention in a 179(b) motion. We conclude error was not preserved on this issue. *See State Farm Mut. Auto. Ins. Co. v. Pflibsen*, 350 N.W.2d 202, 206-07 (Iowa 1984) (issues must be presented to and ruled upon by trial court to be preserved for appeal). Furthermore, by the time Thola acquired the property, there had already been ten years of established acquiescence in the boundary established by the Heers and Schillings. Any legally enforceable change in the boundary line would necessarily require another ten years of acquiescence or adverse possession.

***II. Statute of limitations.*** Thola next contends the court erred in determining that the Heers' cause of action was not barred by the statute of limitations provided in Iowa Code section 614.14(5)(b) (1997).

Iowa Code section 614.14 outlines the limitations for actions arising out of transfers of real estate interest by a trustee. Section 614.14(5)(b) provides:

An action based upon an adverse claim arising on or after January 1, 1992, by reason of a transfer of an interest in real estate by a trustee, or a purported trustee, shall not be maintained either at law or in equity, in any court to recover or establish any interest in or claim to such real estate, legal or equitable, against the holder of the record title to the real estate, legal or equitable, more than one year after the date of recording of the instrument from which such claim may arise.

Pursuant to this statute, Thola claims that any challenge of his title to the property must have been brought within one year of the recording of the deed. However, this argument assumes that the disputed twenty-two feet were transferred by the trustee's deed. As we have already determined, when Lawrence Schilling

transferred his property into the trust in 1990, he no longer owned the disputed twenty-two feet as it had been earlier lost through acquiescence. The trustee's deed could only transfer to Thola the property actually owned by the trust. We therefore conclude that section 614.14(5)(b) did not bar the Heers' action.

**III. Estoppel.** Thola next contends the court erred in concluding the Heers' action was not barred by estoppel. "To prove estoppel, one must show by clear and convincing evidence: (1) a false representation or concealment of material facts; (2) lack of knowledge of the true facts on the part of the actor; (3) intention it be acted upon; and (4) reliance by the party to whom made to his prejudice or injury." *Bowles v. Schilling*, 581 N.W.2d 192, 194 (Iowa App. 1998) (citations omitted).

Thola does not dispute that the Heers were unaware of the discrepancy between the established line and the property records until his survey in 1997. Instead, he argues that Mary's failure to have the land surveyed prior to transferring the property was tantamount to making a false representation. We disagree. There was no evidence to support that Mary Heer knowingly made a false representation or concealed material facts. The district court did not err in rejecting Thola's estoppel argument.

Having considered all issues properly before us on appeal, we hereby affirm the ruling of the district court.

**AFFIRMED.**

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