

IN THE COURT OF APPEALS OF IOWA

No. 7-266 / 96-0425

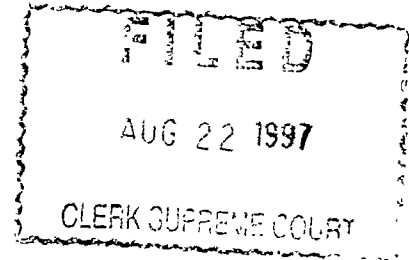
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**THOMAS KLOSTERMANN and VIVIAN
KLOSTERMANN,**

Plaintiffs-Appellants,

vs.

GEORGIANNA SWEET,
Defendant-Appellee.



Appeal from the Iowa District Court for Linn County, Thomas L. Koehler,
Judge.

Plaintiffs appeal from a district court judgment establishing a boundary line
dividing the parties' real property and ordering plaintiffs to remove portions of a
fence which was placed outside of the established boundary. **AFFIRMED.**

Douglas C. Meyer of Ackley, Kopecky & Kingery, Cedar Rapids, for
appellants.

Gary F. McClintock of Hoeger & McClintock, Independence, and Janice A.
Aasgaard and Jean C. Lawrence of White, Stone & Aasgaard, Marion, for appellee.

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

HUITINK, J.

Thomas and Vivian Klostermann appeal from a district court judgment that dismissed their trespass claim against the defendant Georgianna Sweet and resolved a boundary line dispute in Sweet's favor. We affirm.

I. Background Facts and Proceedings.

This dispute concerns placement of a fence separating adjacent real estate owned by the parties. The Klostermanns purchased twenty-nine acres of farm and pasture land in Linn County in January 1977. Sweet and her former husband purchased an adjacent parcel in June 1978. The record indicates these properties share a common boundary marked by a 960-foot fence line established fifty years ago. The remnants of a post and wire fence existed on this line when the Klostermanns purchased the property.

In 1978, Sweet replaced 583 feet of the existing fence line. In July 1993, the Klostermanns extended this fence at Sweet's request. Klostermann's fence connected with the partial fence constructed by Sweet. The Klostermann's placement of their portion of the fence varied from Sweet's recollection of the location of the original fence line and the results of a 1978 survey. Sweet objected to Klostermanns' placement of the Klostermanns' share of the fence and requested that it be moved and placed according to the results of the survey. The Klostermanns refused. Thomas Klostermann testified he placed their portion of the fence line according to his recollection of the location of the old fence in relation to a row of cedar trees.

In November 1993, the Klostermanns sued Sweet for trespass and requested an injunction requiring Sweet to remove the fence constructed in 1978. Sweet counterclaimed requesting an injunction restraining the Klostermanns from interfering with the boundary line or from constructing a fence at any place other than the old fence line.

Following a trial in January 1996, the district court dismissed Klostermann's claims and enjoined them from erecting a fence on Sweet's property. The court ordered the Klostermanns to comply with the boundary established by the 1978 survey and also to remove the portions of the fence encroaching on Sweet's property.

The Klostermanns filed a motion requesting the court to more clearly describe the location of the parties' common border line. The court denied the motion citing the 1978 survey indicating the correct boundary line location.

On appeal, the Klostermanns claim the court erred in finding that a permanent fence had been established along a common property line. They also challenge the court's determination that the location of the fence line as reflected by the 1978 survey represents the correct boundary line.

II. Standard of Review.

This is a special action which is normally tried at law pursuant to Iowa Code section 650 (1995).¹ However, because the parties requested equitable relief and they

¹ Iowa Code section 650.1 provides:

When one or more owners of land, the corners and boundaries of which are lost, destroyed, or in dispute, desire to have the same established, they may

agreed, the case would be tried in equity. An action for injunction, tried in equity, is reviewable on appeal de novo. *Rokusek v. Jensen*, 548 N.W.2d 570, 571 (Iowa 1996) (citing *Incorporated City of Denison v. Claybaugh*, 306 N.W.2d 748, 751 (Iowa 1981)). We give weight to the district court's findings of fact, but we are not bound by them. Iowa R. App. P. 14(f)(7). Even so, we are especially deferential to the district court's assessment of witness credibility. *Boekeloo v. Board of Review of Clinton*, 529 N.W.2d 275, 276 (Iowa 1995).

III. Merits.

The Klostermanns challenge the trial court's finding that a fence existed for the requisite statutory period along the entire boundary dividing these properties. They cite Sweet's testimony indicating that prior to placement of the permanent fences, there was "no fence to crawl over" when entering onto either property. She also testified there was little or no fence on the southern portion of the boundary from 1989 until 1993. The Klostermanns argue it was impossible to acquiesce to a boundary when no fence existed. The Klostermanns also assert the court erred in finding that the 1978 survey correctly placed the boundary line along the path of the old fence line.

bring an action in the district court of the county where such lost, destroyed, or disputed corners or boundaries, or part thereof, are situated, against the owners of the other tracts which will be affected by the determination or establishment thereof, to have such corners or boundaries ascertained and permanently established.

Under the theory of acquiescence, a boundary line may be established by a showing that adjoining landowners or their predecessors in title have recognized and acquiesced in a boundary line for a period of ten years. Iowa Code §§ 650.6, 650.14; *see Tewes v. Pine Lane Farms, Inc.*, 522 N.W.2d 801, 806 (Iowa 1994). Proof of acquiescence need not be direct. It may be inferred from 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. *Tewes*, 522 N.W.2d at 806 (citations omitted.). The party seeking to establish a boundary line other than the boundary line in accordance with a survey has the burden to prove acquiescence by clear evidence. *Brown v. McDaniel*, 261 Iowa 730, 733, 156 N.W.2d 349, 351 (1968).

The evidence in this case shows both parties, as well as their predecessors in interest, acquiesced in the boundary delineated by the old fence line. The trial court determined, and we agree, that the Klostermanns have treated the old fence as the boundary line since the 1950's. Thomas Klostermann conceded there were posts and wires "every now and then" representing the boundary line recognized in the past. We also agree the Klostermanns "passively watched" Sweet and her son erect a fence on the same line as the old fence in 1978. Moreover, testimony of the parties' neighbors supported Sweet's version of the location of the old fence line in relation to the cedar trees and the duration of its existence. Finally, we note the testimony of the Klostermanns' former tenant who claimed his landlord informed him the old

barbed wire fence represented the boundary line and he maintained the property up to that boundary line.

We also reject the Klostermanns' challenge to the court's adoption of the boundary line as determined by the 1978 survey. We note the Klostermanns did not object to the survey results until 1993. The testimony of the surveyor's helper, who assisted in completing the 1978 survey and reviewed its findings in 1994, established that the 1978 survey located the fence is in the same place as Sweet's recollection of its location.

Furthermore, several witnesses recalled survey stakes placed in accord with Sweet's version of the line location. The court found Thomas Klostermann concealed a survey stake by pounding it into the ground. We defer to the credibility findings of the trial court that determined Thomas Klostermann was "not being truthful" when he testified as to the location of the old fence line. We conclude the weight of the evidence confirms the correctness of the 1978 survey findings.

Finally, we do not find the trial court should have provided the parties with a more descriptive indication of where the fence should now lie. The order clearly states the parties shall comply with the boundary established by the 1978 survey. The judgment of the district court is affirmed.

AFFIRMED.