IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

No. 5-385 / 94-1156

**DON L. KELLER,**

Appellant,

**vs.**

**KENNETH TISINGER and**
**CHAE S. TISINGER,**

Appellees.

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Appeal from the Iowa District Court for Scott County, Bobbi M. Alpers, Judge.

Keller appeals a district court judgment rejecting his proposed boundary by acquiescence between his property and Tisingers' property and instead establishing Tisingers' fence as the boundary between the two lots. **AFFIRMED.**

Michael J. McCarthy of McCarthy & Lammers, Davenport, for appellant.

Edward N. Wehr of Wehr, Berger, Lane & Stevens, Davenport, for appellees.

Considered by Hayden, P.J., and Sackett and Habhab, JJ.

**HAYDEN, P.J.**

In 1959 Don Keller purchased lot fifteen in Hawthorn Hills First Addition in Bettendorf, Iowa. David Laing purchased an adjacent lot, lot fourteen, in 1965. Laing sold his lot in 1980. In 1989, Tisingers purchased lot fourteen. Lot fifteen is located to the north of lot fourteen.

Tisingers obtained a survey in 1992 which indicated a "suspect" stake on the northwest corner of their lot. The surveyor believed the true corner of lot fourteen was three feet north of the suspect stake. The surveyor also noted a stake from a 1980 survey was missing. Tisingers subsequently built a fence within the surveyed boundary of the lot but encroaching on Keller's property as marked by the suspect stake.

Keller brought an action to establish a disputed boundary under Iowa Code chapter 650. Keller presented his testimony along with Laing's testimony, Tisingers' predecessor in interest. Laing testified Keller told him the stake marked the northwest corner. Laing then used the stake as a reference point in making improvements to his property over the years. Laing and Keller ultimately testified they had used a line running from the edge of a concrete driveway to the stake as a boundary line. No evidence was presented concerning how owners between Laing's and Tisingers' possessions of lot fourteen treated the disputed boundary.

The Tisingers presented testimony indicating Kellers and Tisingers are not compatible families. Several neighbors testified Kellers continually harassed Tisingers.

Testimony also revealed Keller removed stakes and pins during and after the 1992 survey. Additionally, two surveyors testified the suspect pin was about three feet south of the actual corner and a stake from a 1980 survey was missing.

The district court ruled Keller failed to establish his proffered boundary by acquiescence. The court then accepted, for practical reasons, Tisingers' offer to establish the newly-erected fence, which was south of the survey line, as the boundary between the lots. Keller appeals. Keller contends the district court's decision was not in accordance with applicable law. He claims the court incorrectly required him to show (a) the boundary line was marked by a fence or barrier and (b) the lot's owners were advised by their predecessors in interest of the disputed boundary line.

**I. Scope of Review.**

Actions concerning whether parties acquiesced in a boundary line between their properties is reviewed on assigned errors as in a law action. *Harvey v. Platter*, 495 N.W.2d 350, 351 (Iowa App. 1991); *Drake v. Claar*, 339 N.W.2d 844, 846 (Iowa 1983). The district court's findings of fact are binding upon us if supported by substantial evidence. *Id.* The district court, as fact finder, is best equipped to determine the credibility of witnesses. *See State Sav. Bank v. Allis-Chalmers Corp.*, 431 N.W.2d 383, 386 (Iowa App. 1988) (credibility of witnesses is best determined by the fact finder).

**II. Substantive Law on Boundary Disputes.**

Adjoining landowners may establish a boundary line, other than the legal description as disclosed in a survey, by mutually acquiescing in a dividing line definitely marked by a fence or in some other manner for at least ten consecutive years. *Harvey*, 495 N.W.2d at 352; *Drake*, 339 N.W.2d at 846. This is true even though a survey shows otherwise and neither party intended to claim more land than called for by the deed. *Id.* The party seeking to establish the boundary has the burden of proving the boundary by clear evidence. *Id.*

Acquiescence may be inferred from 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 ten years. *Id.* Knowledge by both parties is a condition precedent for existence of acquiescence. *Id.* A person cannot acquiesce in a line created by himself or herself and bind another party, even though he or she acts in good faith and believes it to be the boundary line. *Id.* Acquiescence must be determined in light of the factual situation presented. *Drake*, 339 N.W.2d at 846.

**III. Analysis.**

The reason behind the district court's decision is not entirely clear. The district court acknowledged Keller told Laing the stake located six inches south of the telephone pole should be used as the boundary for the northwest corner of lot fourteen, and Laing did nothing to challenge this assertion. Furthermore, the court noted Laing

used the stake as the boundary when making improvements on his property. The district court, however, found Keller did not prove by clear evidence he and Laing acquiesced to the boundary. The decision appears to be predicated in part on three facts. First, there was no evidence Laing told his successors in interest about the property line. Second, Laing never intended to give any of his land to Keller. Lastly, "no fence or other continuous barrier was ever erected along this line which Laing and Keller discussed."

As Keller points out in his brief, some of the court's reasoning is an inaccurate statement of the current law. When parties have acquiesced to a boundary for a period of ten years, there is no requirement to tell a subsequent buyer about the boundary. "It is well settled that purchasers of property cannot question a boundary line acquiesced in by predecessors in title more than ten years." *Dart v. Thompson*, 261 Iowa 237, 241, 154 N.W.2d 82, 84 (1967); *Novotny v. Robbins*, 492 N.W.2d 216, 219 (Iowa App. 1992).

It is also irrelevant to a boundary dispute whether a party intended to give or take away the property of the other. Acquiescence exists when *both* parties mutually acknowledge and treat the line as the boundary. *Novotny*, 492 N.W.2d at 219; *Pruhs v. Stanlake*, 253 Iowa 642, 645, 113 N.W.2d 300, 302 (1962). This is true even though neither party intended to claim more than called for by the deed. *Id.*

The district court also placed emphasis on the fact no fence or other continuous barrier was ever erected along the line which Laing and Keller claim to be the boundary. For clarification purposes, we will note the law does not necessarily require a fence or continuous barrier to establish acquiescence. The law only requires a boundary line marked in some definite manner.

Although we do not agree with some of the district court's reasoning, we affirm. An appellate court can affirm on appeal when *any* proper basis appears for the district court's ruling, even though it is not the one upon which the district court based its ruling. *Little v. Winborn*, 518 N.W.2d 384, 387 (Iowa 1994). Later in its opinion, the district court stated it could not "find that the plaintiff has demonstrated by clear evidence that the boundary . . . is as the plaintiff declares it to be." We agree. In order to establish a boundary line other than the legal description in a survey, a plaintiff must prove by clear evidence the parties *mutually acquiesced* in a dividing line *definitely marked*. There is substantial evidence in the record indicating the boundary allegedly agreed upon by Keller and Laing has not been clearly established as to meet Keller's burden of proof.

In the petition at law, Keller contends the boundary goes along a line from a point on the northernmost portion of the defendants' concrete driveway to a point approximately sixteen inches south of a telephone pole on the westernmost portion of the plaintiff's real estate. According to the petition, this line includes a pine tree, apple

tree, and hedges on plaintiff's property. In sworn testimony, however, Laing states the boundary line is actually within a foot of the telephone pole. He states, "It was within a foot. Six inches, a foot . . . " After Laing testified at trial, Keller, despite his sworn petition stating the boundary was sixteen inches from the telephone pole, testified under oath the boundary was six inches from the telephone pole. Considering the dispute is over only a few feet of land, a difference of four to ten inches is a substantial variance indicating Keller and Laing did not agree upon or definitely mark the location of the boundary.

While living on lot fourteen, Laing built a split rail fence on the southern part of his property. Although this fence was never meant to be a boundary, Laing testified the fence was probably located on the boundary line as acquiesced by him and Keller. Laing moved off lot fourteen in June 1980. Witnesses testified Laing returned later in 1980 to move the split rail fence because of a prospective sale. Although Laing admits he removed the fence, he states it was placed in exactly the same location. At least two other witnesses, however, testified Laing moved the fence about a foot north to coincide with the actual boundary because it was encroaching on Keller's property. One witness testified Laing told him the fence had to be moved because the FHA objected to the location of the fence. This witness also testified he dug new holes for the fence in its new location. Another witness remembers watering the seed placed in the former

location of the fence. This evidence further suggests Laing and Keller never mutually agreed upon the boundary's exact location.

Keller presented his own and Laing's testimony suggesting Keller told Laing the boundary line was located at the suspect stake. Despite this testimony, other evidence suggests Keller told Tisingers the boundary line was located at the telephone pole. This inconsistency reveals Keller was uncertain about the exact location of the boundary.

We are disturbed by evidence indicating Keller continually removed survey stakes. Several witnesses testified Keller constantly pulled up surveyor stakes and threw them on Tisingers' property. Additionally, one surveyor testified a 1980 survey placed a pin three feet north of where the suspect pin is now located. During a 1992 survey, however, this pin was missing, and the suspect pin had been placed three feet to the south. Because stakes have been removed since Laing moved off the property, it is unclear whether any definite boundary was marked or agreed upon prior to Laing moving.

Credibility was a major issue throughout the case. The fact finder is best able to determine the credibility of witnesses. The district court judge was able to evaluate the demeanor of witnesses and determine who was credible. There were several discrepancies between the facts as presented by both parties, and the credibility of Keller's only witness, Laing, was strongly attacked on cross-examination. In holding against Keller, the district court judge indicated her belief Tisingers' witnesses were

more credible than Keller's witness. We defer to the district court's conclusion on the credibility of witnesses.

Keller did not meet his burden of proving acquiesce in a definitely marked boundary by clear evidence. Furthermore, it was appropriate for the court to accept Tisingers' proposal to establish the fence as the boundary line. We affirm.

**AFFIRMED.**