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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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FORREST RYAN,	)	
Plaintiff-Appellant,	)	Filed October 28, 1987
vs.	)	
RALPH E. ARNESON and SHIRLEY J. ARNESON,	)	7-279 86-1498
Defendants-Appellees.	)	

Appeal from the Iowa District Court for Allamakee County (21420), James L. Beeghly, Judge.

This case arises from a boundary dispute between adjoining landowners concerning the ownership of approximately twenty acres of timberland and certain logs taken therefrom. **AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.**

James U. Mellick, Waukon, for appellant/cross-appellee.

James A. Garrett of Jacobson, Bristol, Thomson & Garrett, Waukon, for defendants-appellees/cross-appellants.

Considered by Donielson, P.J., and Schlegel and Sackett, JJ. Snell, J., takes no part.

SCHLEGEL, J.

This case arises from a boundary dispute between adjoining landowners concerning the ownership of approximately twenty acres of timberland and certain logs taken therefrom. In a bifurcated proceeding, the district court quieted title to the land in the defendants, and a jury then awarded the defendants actual and punitive damages on their counterclaim for the plaintiff's wrongful attachment of the logs. The plaintiff appealed the resulting judgment and the defendants cross-appealed. Our scope of review is for correction of errors of law. Iowa R. App. P. 4.

In his appeal, the plaintiff contends that (1) the district court erred by rejecting his theories that the land belonged to him either by acquiescence or by adverse possession; (2) the district court erred by admitting testimony about plaintiff's prior disputes with the defendants and with other alleged trespassers; (3) the district court erred in rejecting his request to hear testimony from the jurors on his allegation of juror misconduct in using a quotient verdict to arrive at the amount of punitive damages and also by including a surveyor's bill in the punitive damage award; (4) the award of punitive damages on the counterclaim was excessive. In their cross-appeal, the defendants challenge the exclusion of evidence concerning emotional distress and mental anguish as elements of damage caused by the alleged wrongful attachment of the logs. We affirm in part, reverse in part, and remand.

I. Background. The plaintiff, Forrest Ryan, and the defendants, Ralph and Shirley Arneson, own adjacent farms. Each claims ownership of an approximately twenty-acre tract of timberland which generally lies between the two farms. The Arnesons cut some logs from the disputed area. Ryan obtained a writ of attachment to attach the logs. He then filed the present action claiming title to the land by acquiescence or adverse possession, and also seeking treble

damages for trespass and conversion based on the cutting of the logs. The Arnesons counterclaimed, asking that title to the disputed tract be quieted in them and seeking both actual and punitive damages for wrongful attachment of the logs.

By agreement of the parties, the case was tried in a bifurcated proceeding. First, the issue of ownership of the land was to be submitted to the court. Then, the damage claim of whichever party the court found to own the land would be submitted to a jury. The district court found the Arnesons to be absolute owners of the land. The Arnesons' damage claims for wrongful attachment were then submitted to a jury which awarded the Arnesons $120 in actual damage and $18,600 in punitive damages. In addition, the district court awarded the Arnesons approximately $11,000 in attorney's fees. This appeal and cross-appeal followed.

II. Acquiescence. Ryan contends that the district court erred in ruling that he failed to establish title to the disputed area by acquiescence. Section 650.14 of the Iowa Code (1985) provides that where boundaries "have been recognized and acquiesced in for ten years . . . such recognized boundaries . . . shall be permanently established." The Iowa Supreme Court established the meaning of "acquiescence" under section 650.14 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. . . .
>
> Knowledge on the part of both parties is a condition precedent for the existence of acquiescence. . . . (citations omitted) (emphasis added)

Sille v. Shaffer, 297 N.W.2d 379, 381 (Iowa 1980). We hold that the district court was correct in denying Ryan's acquiescence claim. The evidence shows that there was no "mutual recognition" between Ryan and the Arnesons that the fence along the disputed area was the boundary as opposed to the surveyed boundary line. Specifically, the evidence showed that: (a) fence lines commonly do not follow boundary lines in the vicinity; (b) years ago Ryan told Ralph Arneson that he had found where the two farms "cornered" on top of the hill (where the surveyed boundary line is located); (c) Ryan made no improvement in the disputed area, nor paid any taxes on it, nor does he possess any document of title to it; (d) Ralph Arneson uses the disputed area every year for hunting and cutting fence posts and has never considered the fence to be the boundary. Thus, we believe that the evidence fails to show that the Arnesons recognized the fence as the boundary. Furthermore, based on Ryan's own admission that the two farms "cornered" on top of the hill (rather than at the location of the fence), the evidence does not support Ryan's claim that he recognized the fence as the boundary. Having found no "mutual recognition" of the fence as the boundary, we conclude that the district court correctly denied Ryan's acquiescence claim.

III. Adverse Possession. Ryan also argues that the district court erred in ruling that he did not acquire title to the disputed area by adverse possession. The law on adverse possession is well established and was summarized by the Iowa Supreme Court as follows:

> One claiming title by adverse possession must establish all its constituent elements by clear and positive proof; it cannot be made out by inference. There are usually no equities in favor of one who claims property of another by adverse possession and his acts are to be strictly construed. While title by adverse possession is a legal title in fee simple, the doctrine is to be taken strictly. The law presumes the possession of land is under the regular title. (Authorities).

> To establish ownership by adverse possession plaintiff was required to prove hostile, actual, open, exclusive and continuous possession, under claim of right or color of title, for at least ten years. (Authorities).

I-80 Assoc., Inc. v. Chicago, Rock Island & Pac. R.R. Co., 224 N.W.2d 8, 10 (Iowa 1974). The Iowa Supreme Court has also recognized the rule that "the true owner must have knowledge, actual or constructive, of the hostile possession." Abel v. Abel, 245 Iowa 907, 919, 65 N.W.2d 68, 74 (1954). In the instant case, we do not believe that the evidence supports a finding that the Arnesons had knowledge of Ryan's hostile possession. Rather, the evidence shows that Ryan made a statement to Ralph Arneson that he had found where the two farms "cornered" on top of the hill. This statement confirms that Ryan himself recognized the Arnesons as the true owner of the disputed land. Furthermore, nothing that Ryan did on the land was sufficient to indicate to the Arnesons that Ryan was in hostile possession: Ryan's running of cattle onto the disputed area was entirely consistent with local custom, and the Arnesons were not aware that Ryan's son had cut down trees in the disputed area. Therefore, in the absence of sufficient proof that the Arnesons had knowledge that Ryan was asserting a claim of right and hostile possession, we hold that the district court was correct in rejecting the adverse possession claim.

IV. Evidence of Malice. Ryan contends that the district court erred by admitting testimony about Ryan's alleged prior disputes with the Arnesons and with others he believed to be trespassers on the disputed land. It has been held that in a wrongful attachment case, in order to receive punitive damages, there must be a finding of malice. See Pricer v. Meisters, 184 Iowa 1121, 1123, 169 N.W. 346, 346 (1918). In Pricer, the Iowa Supreme Court upheld the admission of testimony regarding the harassment by the attaching party of the property owner prior to attachment on the ground that it tended to show malice. Id.

Likewise, we believe that the district court in this case was correct in admitting evidence tending to show that Ryan's attachment of the logs was motivated by malice toward the Arnesons.

V. Damages. Ryan further claims that the jurors committed misconduct by using a "quotient verdict" to arrive at the amount of punitive damages, and also by including a certain surveyor's bill in the punitive damage award. Ryan contends that the district court erred by rejecting his request to hear testimony from the jurors on this alleged misconduct and the court erred by holding that such testimony is incompetent under Iowa Rule of Evidence 606(b). Iowa Rule of Evidence 606(b) states as follows:

> **(b) Inquiry into validity of verdict or indictment.** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

It is well established in Iowa that juror misconduct occurs when a jury agrees in advance of arriving at a damage verdict to be bound by whatever amount they calculate by use of a quotient verdict. See e.g., Sheker v. Jensen, 241 Iowa 583, 587, 41 N.W.2d 679, 681 (1950). Furthermore, merely because jury members each put down an amount they consider to be a proper verdict and these are added together and the sum divided by the number of jurors does not invalidate the verdict if this is done only as a basis of discussion; however, if the jurors bind themselves to accept the quotient as the verdict of each before they know what that sum may be, the verdict so reached is invalid. Gus Gutfreund & Co. v. Williams, 172 Iowa 535, 537, 154 N.W. 753, 753 (1915). Finally, it has

been held that where jurors originally agreed to employ a quotient verdict, subsequent ratification by them of the figure arrived at, to remove the taint of illegality, must be something more than a mere new assent to the sum reached on the basis of the original agreement. Klein v. Swift & Co., 248 Iowa 563, 568, 81 N.W.2d 469, 472 (1957). The supreme court in Klein stated that where a damage verdict was originally determined by use of a quotient verdict, the mere fact that a slight additional amount was added on to make an even figure does not cure the evil of the quotient verdict. Id. at 569, 81 N.W.2d at 473.

In the instant case, Ryan obtained the affidavit of a juror that lent support to his claim of juror misconduct. The affidavit provides as follows:

> 2. That we, the jury, arrived at the verdict of punitive damages in the amount of $18,600.00 as follows: We agreed that each juror would write down on a slip of paper the amount they felt should be the amount of punitive damages, that the figures from all the jurors were totaled and then divided by eight, and we reached a figure of approximately $17,500.00, which we rounded to $17,500.00. This $17,500.00 figure was discussed by the jurors, and it was decided to have each juror again write down the figure they felt should be the amount of punitive damages, which was done and totaled, and divided by eight, and the figure reached was exactly $17,500.00. Then we added $1,100.00 to this figure to cover Mr. Mohn's bill for surveying the disputed area, because we felt this should have been a part of the actual damages, but since it wasn't, we included it as part of the punitive damages and added it to the $17,500.00 figure, and this is how we arrived at the figure of $18,600.00 for punitive damages.

From this affidavit, it is apparent that the jury agreed in advance to be bound by the quotient verdict. The fact that the initial figure arrived at "was discussed by the jurors" is not sufficient to conclude that the quotient was merely a basis of discussion since the jury subsequently repeated the quotient verdict procedure and arrived at the same figure they initially had. We believe this indicates that very little significant discussion regarding modifying the quotient verdict ever took place. "The illegal conduct in reaching the amount of the verdict to be returned was not repudiated or abandoned, but rather confirmed, by what

followed." Carter v. Marshall Oil Co., 185 Iowa 416, 424, 170 N.W. 798, 800 (1919). Furthermore, the additional $1,100 added to the base quotient does not serve to cure the juror misconduct since the verdict was already tainted by an improper quotient verdict. We therefore hold that the district court erred in rejecting Ryan's request to hear testimony from the jurors on this alleged misconduct.

Regarding the alleged improper inclusion of a surveyor's bill in the punitive damages award, Ryan again argues that the district court erred in denying his request to hear testimony from the jurors in order to show juror misconduct. Regarding this allegation, we believe that the district court did not err. In Crowley v. Glessner, 328 N.W.2d 513, 514-15 (Iowa 1983), the Iowa Supreme Court held that a juror affidavit to prove misconduct because of the inclusion of allowances for attorney fees in its verdict was not competent. Similarly, we find the requested juror testimony in this case regarding the surveyor's bill to be incompetent.

Having found that the district court erred in rejecting Ryan's request to hear testimony from the jurors on the allegation of juror misconduct in using a quotient verdict, we remand for a new determination of the damages. We therefore need not reach the issue of whether the amount of punitive damages awarded by the jury was excessive and disproportionate to the actual damage award.

VI. Evidence of Emotional Distress and Mental Anguish. In their cross-appeal, the Arnesons contend that the district court erred by excluding their proposed evidence of emotional distress and mental anguish as elements of damage caused by Ryan's alleged wrongful attachment of the logs. In light of the case of Tisdale v. Major, 106 Iowa 1, 4-5, 75 N.W. 663, 664 (1898), which held that mental suffering resulting from a wrongful and malicious attachment

does not afford a ground for the recovery of compensatory damages, we conclude that the district court correctly excluded the Arnesons' evidence of emotional distress and mental anguish.

VII. Attorney Fees. The Arnesons request an award of attorney fees incurred on this appeal pursuant to section 639.14 of the Iowa Code (1985). We believe such an award is proper and order the plaintiff to pay $1,000 in appellate attorney fees.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.