

IN THE COURT OF APPEALS OF IOWA

FILED

MAY 22 1984

CLERK SUPREME COURT

FRANCES STEWART YOUNG,

Plaintiff-Appellee/
Cross-Appellant,

vs.

EMMA HAVEL,

Defendant-Appellant/
Cross-Appellee.

Filed May 22, 1984

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Appeal from the Iowa District Court for Washington County - Robert Bates,
Judge.

The defendant has appealed, and the plaintiff has cross-appealed, from the trial court's ruling in a boundary dispute under Iowa Code chapter 650. The defendant contends there was no substantial evidence to support the trial court's conclusion that a fence which was initially constructed as a barrier in about 1960 had become a boundary by acquiescence of the parties. The defendant also challenges miscellaneous evidentiary rulings. The plaintiff contends in her cross-appeal that the trial court erred by awarding her only actual damages for the defendant's removal of a tree from the disputed land, rather than treble damages pursuant to Iowa Code section 658.4, upon a showing of willfulness. **AFFIRMED.**

Emmit J. George of Johnston & George, Iowa City, for defendant-appellant.

Michael J. Gallagher and Richard S. Bordwell of Bordwell Law Office,
Washington, for plaintiff-appellee.

Heard by Donielson, P.J., and Snell and Sackett, JJ.

In this action to resolve a boundary dispute pursuant to Iowa Code chapter 650, the trial court established a boundary and awarded the plaintiff, Frances Stewart Young, \$1,000 to compensate her for the defendant's removal of a tree from the disputed land. The defendant, Emma Havel, has appealed from the trial court's ruling, and Young has cross-appealed.

Havel contends there was no substantial evidence to support the trial court's conclusion that a fence which was initially constructed as a barrier in 1960 had become a boundary by acquiescence of the parties. She also contends the trial court erred by permitting Young to present evidence on acquiescence after Young had failed to file an exception to a boundary commissioner's report which did not take acquiescence into account. Finally, Havel contends the trial court erred by allegedly trying the case in equity, and reserving ruling on evidentiary objections, after declaring that the case was a special proceeding which would be tried as a law action.

In her cross-appeal, Young contends the trial court erred by awarding her only actual damages for the removal of the tree rather than treble damages as she requested. The trial court considered Young's claim but concluded that the destruction of the tree had not been willful.

Havel raises our scope of review as an issue. This case was pleaded initially in equity, but at trial Young requested that the matter "be transferred from equity to an ordinary case or case at law, pursuant to 650.4." The court reserved ruling until matters of evidence arose, but later sustained the motion to transfer the case from equity to law. Havel claims that, even though the court ruled that the case would be tried at law, it "ruled on objections in the nature of an equity case, admitt[ing] most evidence subject to a standing objection." If this case was brought and tried in equity, our review would be de novo.

Whether a particular action was at law or in equity is generally determined

by the essential character of the cause of action and the remedy or relief it seeks, as shown by the allegations of the complaint. Mosebach v. Blythe, 282 N.W.2d 755, 758 (Iowa Ct. App. 1979). Despite the fact that Young's petition was filed in equity, it asked for damages and for relief under Iowa Code section 650.7, both of which are legal causes of action. Accordingly, we conclude that this action was tried at law. See Brown v. McDaniel, 261 Iowa 730, 732, 156 N.W.2d 349, 350 (1968); Drake v. Claar, 339 N.W.2d 844, 846 (Iowa Ct. App. 1983). Therefore, if the trial court's judgment is supported by substantial evidence, it will not be disturbed on appeal. Mosebach v. Blythe, 282 N.W.2d at 758; Brown v. McDaniel, 261 Iowa at 732, 156 N.W.2d at 351.

Havel's main contention is that the trial court erred in finding a boundary had been established by acquiescence, because Young did not show the necessary elements by clear proof.

Havel and Young own adjoining lots. Havel acquired her lot from Tina Dill in 1976. During the time that Tina Dill owned the property, in the late 1950's or early 1960's, a fence was placed between the two properties. Apparently the actual boundary between the properties was not straight, so Young, Tina Dill, and Dill's tenant at the time, Armour Carlin, agreed to set up the fence in a straight line. Thus, in places it was set two feet onto the Dill property and in other places it was one foot onto the Young property. The Youngs took care of the property on their side of the fence and the Carlins and Dills cared for the property on the other side of the fence. Soon after Havel acquired the Dill property, she removed the fence, removed a tree, and put up another fence, evidently on the Youngs' side of the alleged acquiesced boundary. Young brought an action to have a surveyor locate the boundary along the line of the first common fence and to collect damages for the tree that Havel removed, which grew in the disputed area and which Young claims was on her side of the property.

It is the general rule "that the burden is upon the party claiming a boundary

line different from that disclosed by the survey to establish the alleged acquiescence by clear proof." Brown v. McDaniel, 261 Iowa at 733, 156 N.W.2d at 351. Chapter 650 of the Iowa Code allows owners of land to bring an action to have boundaries ascertained and permanently established. Iowa Code § 650.1 (1983). A party may "put in issue the fact that certain alleged boundaries or corners are the true ones, or that such have been recognized and acquiesced in by the parties or their grantors for a period of ten consecutive years" Iowa Code § 650.6 (1983) (emphasis added). In interpreting this section, the supreme court has stated:

Acquiescence, as used in this chapter, means that where two adjoining owners for ten years or more mutually acquiesce in a line, definitely marked by a fence or in some other manner as the dividing line between them, such line becomes the true boundary although a survey may show otherwise and neither party intended to claim more than called for by his deed.

Pruhs v. Stanlake, 253 Iowa 642, 645, 113 N.W.2d 300, 302 (1962). Such acquiescence must be determined in large part in light of the factual situation presented. Davis v. Hansen, 224 N.W.2d 4, 6 (Iowa 1974). "Knowledge on the part of both parties is a condition precedent for the existence of acquiescence." Sille v. Shaffer, 297 N.W.2d 379, 381 (Iowa 1980). See also Petrus v. Chicago, R.I. & P.R. Co., 245 Iowa 222, 228, 61 N.W.2d 439, 442 (1953).

In Sille v. Shaffer, 297 N.W.2d 379, the supreme court looked to whether the plaintiff treated the property on her side of the fence as her own. The plaintiff in that case improved and maintained the property. "Her dominion over the property was well known by defendant. Neither party treated the fence as a mere barrier to protect the defendant's garden." Id. at 381. Similarly, in the instant case, Young maintained the property on her side of the fence. Peony bushes and trees were planted in the disputed area, the lawn was mowed regularly, items were stored next to the fence. The supreme court put weight on the use and occupation of disputed property in determining whether a boundary had been established by

acquiescence in Brown v. McDaniel, 261 Iowa at 734-35, 156 N.W.2d at 352. We find evidence in this case that Young used and occupied the disputed area.

During the ten to twenty years Tina Dill owned the property while the fence was present, no complaints were received. In fact, she was present and agreed to the placement of the fence when it was arranged between her tenant, Carlin, and Young. "Acquiescence may be inferred from the silence or inactions of one party who knows of the boundary line claimed by the other and fails to take steps to dispute it for the ten year period." Drake v. Claar, 339 N.W.2d at 847. "Acquiescence is consent inferred from silence—a tacit encouragement. This involves notice or knowledge of the claim of the other party." Eggers v. Mitchem, 239 Iowa 1211, 1216, 34 N.W.2d 603, 606 (1948). Havel contends that there was no claim made by Young to the disputed area and, even if there was, neither she nor Dill had any knowledge of such a claim. She argues that the fence was erected contrary to the actual boundary for aesthetic reasons and for convenience, not to establish a new dividing line or boundary. Although "[a]cquiescence in the existence of a fence as a barrier, not as a boundary, is not such recognition as will establish it as a true line," Ivenar v. Cowan, 175 N.W.2d 121, 122 (Iowa 1970), it does not appear to us that the fence was put up as a protective barrier only, although Havel made some attempts at trial to indicate that it was erected to limit the wanderings of Carlin's children.

We find substantial evidence exists to support trial court's determination that Young established acquiescence to the alleged boundary by Dill. "[P]urchasers of property cannot question a boundary line acquiesced in by predecessors in title for more than ten years." Dart v. Thompson, 261 Iowa 237, 241, 154 N.W.2d 82, 84 (Iowa 1967). The supreme court explained the reason for this rule in the following manner:

Where the line so fixed is definitely and visibly marked, so that an intending purchaser, even without inquiry, may see and know its purpose, we think the rule is a just one, which,

in the absence of fraud or mistake, gives to the description covered by his purchase the acreage which time and recognition have fixed.

Johnson v. Trump, 161 Iowa 512, 519, 143 N.W. 510, 513 (1913). In the instant case, the fence was standing on the acquiesced boundary at the time Havel purchased the property. Thus, Havel purchased the property subject to the acquiesced boundary, not according to the plat description of the lot's boundary.

Havel claims the trial court should have struck all evidence on acquiescence because Young did not file an exception to the commission's report pursuant to Iowa Code section 650.12. Section 650.12 states that "[w]ithin twenty days after such report is filed, any party may file exceptions thereto . . ." (emphasis added). Because this language is permissive, we do not find that filing an exception is a requisite to objecting to the report at trial. Havel's contention is without merit.

Young's counterclaim asserts that the trial court erred in denying her claim for treble damages "[f]or willfully injuring any timber, tree, or shrub on the land of another . . . the perpetrator shall pay treble damages at the suit of any person entitled to protect or enjoy the property." Iowa Code § 658.4 (1983). The supreme court discussed the mutable nature of the term "willfully" in Cozad v. Strack, 254 Iowa 734, 119 N.W.2d 266 (1963). The trial court found that Havel's actions in cutting down the tree were not done willfully so as to allow treble damages. We conclude under our standard of review that the evidence supports this finding. There is insufficient evidence on the record regarding Havel's state of mind when she had the disputed tree removed. She testified she believed it was on her property. Such a belief, though mistaken, would preclude a finding that she "willfully injur[ed] any . . . tree . . . on the land of another." Iowa Code § 658.4. Young was the only person who suggested Havel had cut down the tree as a symbolic gesture. Trial court did not err in denying Young treble damages.

AFFIRMED.

All judges concur, except Sackett, J., who dissents.

I am unable to find substantial evidence in the record that the fence in question was ever intended to be a boundary fence. It was erected as a barrier fence and continued to be a barrier fence. Because acquiescence in the existence of a fence as a barrier, not as a boundary, is not such recognition as will establish it as a true line, Ivener v. Cowan, 175 N.W.2d 121, 122 (Iowa 1970), I would reverse the trial court decision.