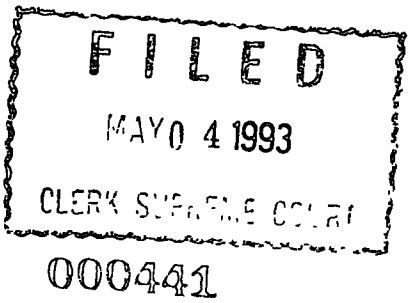
IN THE COURT OF APPEALS OF IOWA

No. 2-519 / 92-32



BENNY MUDD and SHIRLEY MUDD,

Appellees,

vs.

MIKE WARDEN and SHARON WARDEN,

Appellants.

Appeal from the Iowa District Court for Linn County, L. Vern Robinson, Judge.

Defendants appeal a district court decision finding that a boundary line had been established by acquiescence. **AFFIRMED.**

Ronald L. Ricklefs of Ricklefs & Eganhouse, Cedar Rapids, for appellant.

Mark J. McCool of McCool & McCool, P.C., Cedar Rapids, for appellee.

Considered by Oxberger, C.J., and Donielson and Hayden, JJ.

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OXBERGER, C.J.

This case involves two lots in Cedar Rapids, Iowa. Lot 27 is to the west of Lot 26, and both lots are bounded on the south by McGowan Road. Prior to 1948 a family named Watson owned both of the lots. The Watsons lived in a house on Lot 26, also known as 4921 McGowan Road. In 1948 Raynold Swanson purchased Lot 26 and built a house upon it, which then became 4925 McGowan Road.

When Swanson bought the property, a barbed wire fence ran along the west side of Lot 26. He did not have a survey conducted because he believed the fence marked the boundary between his lot and that of the Watsons. Swanson maintained the property on his side of the fence, and the Watsons maintained the property on their side.

In about 1951 a family named McNary purchased Lot 27 from the Watsons. The McNarys also maintained the property on their side of the fence. In about 1950 or 1951 Swanson replaced a portion of the fence with a rose hedge. He placed the rose bushes about two feet to the east of the previous fence line. He also built a utility shed on a concrete slab, which he considered to be about two and one-half feet east of the property line.

Benny and Shirley Mudd purchased Lot 27 from the McNarys in 1961. The Mudds maintained the property on the west side of the fence and rose bushes, and Swanson maintained the property on the east side. The Mudds' garage is about thirteen feet west of Swanson's utility

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shed, and the Mudds would sometimes drive a vehicle between the two buildings and park in back of the garage.

Swanson sold Lot 26 to James Heitt in 1964. Heitt testified he believed the fence and rose bushes marked the western boundary of his property. He testified he maintained the property on his side of the fence and the Mudds maintained the property on their side. In about 1969 Heitt took out the rose bushes and put in a privacy fence. That fence fell over after one or two years. Heitt and the Mudds agreed the Mudds would plant a hedge where the privacy fence had been in order to mark the property line.

Heitt sold Lot 26 to Mike and Sharon Warden in 1984. At that time the original barbed wire fence had fallen down and only two fence posts remained. The Wardens built a new utility shed that extended about two and one-half feet further west than the concrete slab for the previous shed. The Wardens consulted with the Mudds before building the new shed because they were not sure where the property line was.

The Wardens had a survey conducted in 1988. The survey revealed the true property line was about twelve to thirteen feet to the west of the fence line. According to the survey, the east side of the Mudds' garage lies directly on the property line. The Wardens asked the Mudds to discontinue using the area on the east side of the garage for storage. The Wardens also erected a fence on the true property line which extends a short distance north

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of the garage. Because of the location of the fence, the Mudds could no longer drive a vehicle between the garage and the utility shed and park in back of the garage.

The Mudds filed the present suit pursuant to Iowa Code chapter 650. They alleged the Wardens and their predecessors in interest had acquiesced in the fence line as the boundary line for more than ten consecutive years.

The district court issued its decision on September 6, 1991. The court found that Swanson and Heitt considered the fence line to be the western boundary of their property and they maintained the property on that basis. The court determined the boundary was marked by the two fence posts in the north part of the property, extended to a point two and one-half feet west of the southwest corner of the concrete slab, and then extended to a point two and one-half feet west of the trunk of the southern most bush on the south side of the property.

The Wardens filed a motion pursuant to Iowa Rule of Civil Procedure 179(b) and a motion for new trial. The court determined the Wardens had not sufficiently proven their affirmative defense of laches. The court denied all other issues raised in the Wardens' post trial motions. The Wardens appealed.

Suits under chapter 650 are considered actions at law reviewable on assigned error. Schroeder v. Buegel, 371 N.W.2d 178, 179 (Iowa App. 1985). The issue of acquiescence presents mostly fact questions, and the

judgment in such a case has the effect of a jury verdict. Brown v. McDaniel, 261 Iowa 237, 730, 156 N.W.2d 349, 351 (1968). Thus, the findings of fact by the trial court are binding upon us if supported by substantial evidence. Id.

A party seeking to establish a boundary, other than the legal description as disclosed by a survey, has the burden to establish mutual acquiescence by clear proof. Davis v. Hansen, 224 N.W.2d 4, 6 (Iowa 1974). Adjoining landowners may establish a boundary line by mutually acquiescing in a dividing line, definitely marked by a fence or some other manner, for a period of at least ten years, even though a survey may show otherwise and neither party intended to claim more land than called for in a deed. Sille v. Shaffer, 297 N.W.2d 379, 381 (Iowa 1980).

The parties, or their predecessors in ownership, must recognize as the boundary the fence or other dividing line. Mahrenholz v. Alff, 253 Iowa 446, 450, 112 N.W.2d 847, 849 (1962). Such recognition may be by conduct or by claims asserted, but it must be by both parties. Id. Acquiescence sufficient to establish a boundary line may be inferred from silence when there is notice of another party's claim. Ivener v. Cowan, 175 N.W.2d 121, 122 (Iowa 1970).

We conclude the district court's findings in this case are supported by substantial evidence. The evidence shows the Wardens' predecessors in title acquiesced in the boundary line created by the fence and hedge from 1948

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until at least 1984, a period of thirty-six years. Swanson and Heitt both testified they believed the fence marked the western boundary of their property and they only maintained the property on the east side of the fence. The Mudds met their burden of proof to show that the line created by the fence and hedge was acquiesced in as the boundary line for a period of at least ten years.

We affirm the district court. Costs of this appeal are assessed to Mike and Sharon Warden.

AFFIRMED.