

IN THE COURT OF APPEALS OF IOWA

LEONARD BROWN and LENORA BROWN,)

Plaintiffs-Appellants,)

Filed November 24, 1981

vs.)

FRANKLIN EVANS and MARILYN EVANS, WAYNE ECKLES and MYRNA L. ECKLES,)

Defendants-Appellees.)

FRANKLIN DUANE EVANS and MARILYN EVANS,)

Plaintiffs-Appellees,)

1-190
2-85248

vs.)

GILBERT F. KRISINGER and KAREN D. KRISINGER,)

Defendants-Appellees.)

Appeal from Pottawattamie District Court - Leo F. Connolly, Judge.

The plaintiffs Browns appeal from an adverse trial court judgment in an action seeking determination of a boundary dispute between the Browns and their adjoining property owners, defendants Eckles. Plaintiffs also appeal the trial court's denial of their request for either specific performance or damages arising out of a real estate contract between the Browns and their grantors, defendants Evans. **AFFIRMED.**

Richard O. Habermann, Griswold, for plaintiffs-appellants.

Milton L. Hanson, Avoca, for appellees Evans.

Keith I. Frederick of Schmid, Ford, Mooney & Frederick, Omaha, Nebraska, and James M. Burns, Crescent, for appellees Eckles.

N. Michael D'Angelo, Oakland, for appellees Krisingers.

Considered by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

DONNELSON, J.

The plaintiffs Browns appeal from an adverse trial court judgment in an action seeking determination of a boundary dispute between the Browns and their adjoining property owners, defendants Eckles. Plaintiffs also appeal the trial court's denial of their request for either specific performance or damages arising out of a real estate contract between the Browns and their grantors, defendants Evans. We affirm the trial court.

Plaintiffs' action against the defendants Eckles was brought pursuant to chapter 650, The Code 1981, and as such, it is a special proceeding, not reviewable here de novo. § 650.4, The Code 1981. The judgment in such a case has the effect of a jury verdict, which will not be disturbed unless it is unsupported by substantial evidence. § 650.15, The Code 1981.

Plaintiffs' action against defendants Evans was brought in equity and will be reviewed by this court de novo. Iowa R. App. P. 4.

I.

This case involves two tracts of land, both originally owned by the Krisingers. On April 1, 1969, the Krisingers conveyed the western tract of land, approximately 40 acres, to the Evans. Both parties believed that a fence then in existence, running from north to south between the eastern and western tracts, was the boundary. The Evans sold the western tract to plaintiffs on October 26, 1974. The Krisingers sold the eastern tract to the Eckles on March 28, 1975. A real estate agent, who was involved with these sales, indicated that he had shown both the Evans and the plaintiffs the boundaries of the tract before the sale. The agent specifically remembered pointing out the boundaries to the plaintiffs from the top of a hill where all four corners of the property could be observed.

In our opinion, there is no doubt that the fence line was treated by all the parties as the boundary and this finding is supported by substantial evidence. There is also no doubt that the full ten years required for boundary acquiescence had run by the time plaintiffs filed suit against the Eckles on June 28, 1979. Plaintiffs' allegation that their attorney wrote a letter to the Eckles on May 9, 1978, informing them of the boundary dispute is only supported by an affidavit which defendants claim is a typographical error. The trial court ruled that plaintiff's testimony as to the date he informed Eckles of the fence line error did not establish a date. Furthermore, they took no action upon

the alleged letter until over a year later. We believe that the trial court's finding of fact that the boundary had been acquiesced in by plaintiffs for a period of ten consecutive years is supported by substantial evidence.

II.

After a thorough examination of the record, we also agree that the trial court correctly denied plaintiffs' request for specific performance or alternatively damages from defendants Evans. It is clear that plaintiffs were shown what both the Evans and the Krisingers believed to be the boundaries of the western tract at the time of the sale. The fact that the fence line was not where the legal description would place it should not be allowed to give plaintiffs something they did not bargain for or pay for. To do so would result in unjust enrichment.

AFFIRMED.