FILED
OCT 25 1983
CLERK SUPREME COURT

**IN THE COURT OF APPEALS OF IOWA**

**KLARA NORTHRUP** a/k/a **CLARA NORTHRUP**,

Plaintiff-Appellant,

vs.

**DORIS M. COOPERMAN, GERALD M. COOPERMAN, JERA D. COOPERMAN,** and **DENNIS G. MICHEL,**

Defendants-Appellees.

Filed October 25, 1983

3-275
2-69131

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Appeal from Linn District Court - L. Vern Robinson, Judge.

Plaintiff appeals from a judgment for defendants in her suit for trespass and to establish her ownership of some disputed land. AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Lloyd E. Humphreys of Humphreys & Associates, Cedar Rapids, Iowa, for plaintiff-appellant.

Thomas M. Wertz of the Tom Riley Law Firm, Cedar Rapids, Iowa, for defendants-appellees.

Considered by Oxberger, C.J., and Donielson, Snell, Schlegel, Hayden and Sackett, JJ.

**HAYDEN, J.**

Plaintiff appeals from a judgment for defendants in her suit for trespass and to establish her ownership of some disputed land. We affirm in part, reverse in part, and remand.

Plaintiff owns sixty acres of land in rural Linn County. Defendants are owners or lessees of lots abutting the western boundary of plaintiff's land.

In the early 1970's plaintiff and defendant Doris Cooperman were involved in a dispute over an easement allegedly existing over Mrs. Cooperman's property to allow plaintiff access to part of her land. Plaintiff sued to establish the easement and lost. Due to a ravine across the realty, plaintiff could not farm part of her land without the easement for access. Therefore, she contracted with a nursery to plant 2,000 walnut trees on the landlocked portion. In 1978 defendant Gerald Cooperman mowed part of plaintiff's land and cut down some of the saplings. Defendant Dennis Michel mowed approximately the same area several months later.

Plaintiff claims that these two mowings constituted trespass quare clausum for which she should be compensated. She further alleges that the injury to her trees falls within Iowa Code section 658.4 which allows treble damages. Plaintiff also sued under Iowa Code chapter 646 to eject defendants from .457 of an acre of her land which they were allegedly wrongfully occupying. The basis of this contention is plaintiff's assertion that the north-south fence on the western edge of her property had been moved several feet to the east since 1962 when a survey was done.

Defendant Doris Cooperman counterclaimed alleging that after the easement dispute plaintiff played music outside over a loudspeaker to harass her. A cousin of the trial judge testified on behalf of Mrs. Cooperman regarding the counterclaim. After being informed of this relationship plaintiff chose to proceed with the trial. The counterclaim was dismissed on the grounds that plaintiff had

played the music prior to the easement dispute and there was no evidence that she did so to harass Mrs. Cooperman.

On the other issues the court held that defendant Michel's mowing of plaintiff's land constituted a trespass but concluded that there was no damage since the trees had sprouted again. The court also found that the fence had not been moved and that on the basis of the evidence before the court, it was impossible to determine the true boundary. Therefore, the court held for defendants and assessed all costs against plaintiff.

Our review of this action at law is on assigned error. Iowa R. App. P. 4. We cannot disturb a finding of fact of the court if it is supported by substantial evidence. However, we are not bound by the court's interpretation of the law. Davis v. Hansen, 224 N.W.2d 4, 5 (Iowa 1974).

I.

**Ejectment.** Plaintiff's claim under Iowa Code chapter 646 is essentially the same as a common law action of ejectment. Jensen v. Nolte, 233 Iowa 636, 638, 10 N.W.2d 47, 48 (1943). The purpose of the action is to determine the right to possession of realty. Id. The holder of legal title to the land is presumptively entitled to its possession. Wood v. Irving, 159 Iowa 658, 659, 140 N.W. 880 (1913). Where the defendant disputes plaintiff's title, the burden is on the plaintiff to prove title to the property. Klinkner v. Schmidt, 114 Iowa 695, 700, 87 N.W. 661, 662 (1901).

The court in this case found that the fence between plaintiff's and defendant's properties had not been moved. There was substantial evidence to support that finding of fact. Several people familiar with the location of the fence testified to that effect. The court found particularly persuasive the testimony of a witness who had farmed plaintiff's land. He testified that his dead furrow was the same distance from the fence as it had been several years earlier. Although plaintiff did present an expert witness who testified that the fence had

been moved, it is the prerogative of the trier of fact to determine which evidence is entitled to belief. DeYarman v. State, 226 N.W.2d 26, 29 (Iowa 1975).

Furthermore, the court noted that even if the fence had been moved it is impossible based on the record to determine where the true boundary lies. Plaintiff asserts that the court should have found that the fence, before it was allegedly moved, was the true line by acquiescence under Iowa Code section 650.6. Although the issue of acquiescence was raised at trial, it was not pled by the plaintiff nor was it considered by the trial court. Even if the issue was properly raised, plaintiff did not show by clear evidence that there was mutual acquiescence for the statutory period. There was evidence that the fence had never been considered to be the true boundary by all the parties. This, if accepted by the court, would be fatal to plaintiff's position. Davis v. Hansen, 224 N.W.2d 4, 6 (Iowa 1974).

We find no error in the trial court's conclusion that plaintiff did not meet her burden of showing her title to and her right to possession of the disputed land.

II.

**Trespass.** The trial court found that defendant Michel committed a trespass when he entered plaintiff's land without her consent and without legal justification. The court concluded, however, that since the trees had sprouted back, there were no damages which could be awarded plaintiff. There is no evidence supporting this conclusion. While the trees are growing again, they are not in the same condition as they would have been had they been left alone. Although this difference may be slight and may be inconsequential to the future growth of the trees, we believe plaintiff is entitled to some compensation for the injury to her property. It is impractical to assign a dollar value to each year's growth of the trees based on their expected value at maturity. Therefore, we deem the replacement cost of the trees to be the appropriate measure of damages.

The number of trees cut is disputed. Plaintiff claims she lost 110 trees while Michel testified that he counted between 38 and 43. The court found that 55 trees had been cut down. We see no reason to disturb this finding. Plaintiff paid $72.80 for 2,000 trees and $435 for delivery, planting, and herbicide. Each tree, therefore, cost approximately $0.25. Plaintiff suffered actual damages of $13.75 from the trespass.

III.

**Treble Damages.** Plaintiff alleges that she is entitled to treble damages for the injury to her trees. Iowa Code section 658.4 provides: "For 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." Defendant argues that since he did not know the trees had been planted, he did not "willfully" cut them within the meaning of the statute.

The supreme court has held that "willfully" in this statute falls somewhere between accidentally on the one hand and maliciously on the other hand. Cozad v. Strack, 254 Iowa 734, 741, 110 N.W.2d 266, 271 (1963); Clark v. Sherriff, 247 Iowa 509, 515, 74 N.W.2d 569, 573 (1956). Defendant claims that the injury to the trees was accidental because he did not see them. We disagree. It is undisputed that Michel intentionally trespassed on plaintiff's land for the purpose of cutting down all of the growth within nine feet of his lot line. The fact that he mistakenly believed this growth to be worthless is irrelevant to the question of his intent. It merely goes to the amount of damages.

Therefore, trebling the plaintiff's actual damages we remand this case for entry of judgment against defendant Michel for $41.25.

IV.

**Bias of the Trial Court.** Plaintiff alleges that the trial judge was prejudiced against her because his cousin testified for Mrs. Cooperman regarding a counterclaim. Before this testimony was offered, plaintiff was informed of the

relationship between the witness and the judge. Plaintiff elected to proceed. The court ultimately dismissed the counterclaim. There is no evidence of any prejudice.

V.

**Costs.** Since we find that the plaintiff is entitled to damages for the trespass on her property, all of the costs of the underlying action should not have been assessed against her as the unsuccessful party. See Iowa Code § 625.1. In view of the fact that plaintiff prevailed on one theory and lost on another, apportionment of costs under Iowa Code section 625.3 is appropriate. Therefore, plaintiff is ordered to pay one-half of the trial and appellate costs; defendant Michel shall pay the remaining trial and appellate costs.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.