IN THE COURT OF APPEALS OF IOWA

No. 1-892 / 10-1378
Filed January 19, 2012

KIRK W. ROECKER, KRISTIN K. ROECKER, PALMER B. VOLKMANN and RUTH E. VOLKMANN,
Plaintiffs-Appellees,

vs.

BRADLEY J. NELSON and JULI E. NELSON,
Defendants-Appellants,

and

JULIANN E. NELSON, as Trustee of the WILLIAM Q. NORELIUS REVOCABLE TRUST,
Proposed Intervenor-Appellant.

Appeal from the Iowa District Court for Crawford County, Duane E. Hoffmeyer, Judge.

Bradley and Juli Nelson appeal the district court's grant of summary judgment based on acquiescence. **AFFIRMED.**

Jessica A. Zupp of Norelius & Nelson, P.C., Denison, for appellant Bradley J. Nelson.

Jennifer M. Zupp of Norelius & Nelson, P.C., Denison, for intervenor-appellant Juli Nelson.

Warren L. Bush of Bush Law Office, Wall Lake, for appellees.

Heard by Vogel, P.J., and Potterfield and Doyle, JJ.

VOGEL, P.J.

Property owners Bradley and Juli Nelson appeal the district court's ruling that granted summary judgment, and established a boundary between tracts of land owned by them and adjoining property owners, Kirk and Kristin Roecker and Palmer and Ruth Volkmann. Because there was no genuine issue of material fact in dispute, the district court did not err in granting the Roeckers' and Volkmanns' motion for summary judgment. Further, because there was proof of acquiescence in the previously existing fence line, there was no occasion for a disinterested commission to survey the property.

I. Background Facts & Proceedings

This case involves two adjacent pieces of land—a western tract and an eastern tract. In 2000, the Volkmanns sold all but five acres of the western tract of land to the Roeckers. The Volkmanns had purchased the property from Ruth's parents in 1966; the land had been owned by both Ruth's parents and grandparents prior to that time.

On December 27, 2001, the Roeckers and the owners of the eastern tract of land, William and Diane Norelius, entered into a "Fence Agreement," which provided legal descriptions of each party's land, and stated, "A fence line presently exists on the boundary line between the parcels described above." The Fence Agreement also referred to the fence as a "partition fence between the partys' [sic] real estate." Finally, the Fence Agreement provided that, "Any fence placed upon the lines shall comply with Chapter 359A of the 2001 Code of Iowa or any subsequent section or chapter of the Iowa Code which replaces or

supersedes that chapter." The Fence Agreement was drafted by William Norelius's law partner and son-in-law, defendant-appellant Bradley Nelson. On January 2, 2002, the Fence Agreement was filed with the Crawford County Recorder.

In 2006, the Nelsons purchased the eastern tract of land from Juli's father, William Norelius (hereinafter "Norelius"). Norelius had acquired the land from his father, Everett Norelius, who acquired the land in the mid-to-late 1950s. The Nelsons gave Norelius a purchase money mortgage to secure the balance of the purchase price. In 2007 or 2008, Wal-Mart purchased land in the same quarter section as the Roeckers and the Nelsons.

In 2007 or 2008, the Nelsons hired Wal-Mart's surveyors to survey their land and locate the property lines provided for in their deed. The surveyors discovered the fence between the Roeckers' and Nelsons' properties was slightly east of the Nelsons' westernmost boundary. When the Nelsons were informed of the findings, they tore out the fence, intending to build a new one on the recently surveyed line. When the Roeckers were told the Nelsons intended to relocate the fence, this proceeding was initiated by Kirk Roecker and Palmer Volkmann (hereinafter collectively "the Roeckers")—later amended to add their respective spouses, Kristin Roecker and Ruth Volkmann—against the Nelsons.

In their initial petition dated October 6, 2009, the Roeckers asserted acquiescence, petitioned the court to enjoin the Nelsons from moving the previously existing fence line, and requested a disinterested surveyor locate the disputed corners and boundaries as those being established by the previously

acquiesced in and existing fence line. The initial filing was followed by a flurry of motions, mainly by the Nelsons, with responsive pleadings by the Roeckers. On December 10, 2009, the Roeckers moved for summary judgment. On April 1, 2010, the district court granted the Roeckers' motion, and overruled the Nelsons' December 18, 2010 motion to dismiss. The district court directed the parties to obtain a survey of the property based on the previous fence location, which was then completed on July 9, 2010. The district court's ruling was followed by another flurry of motions. The Nelsons filed their own motion for summary judgment on April 7, 2010, as well as a Rule 1.904 motion requesting the district court to enlarge its findings in the April 1 summary judgment ruling. On August 16, 2010, the district court denied the Nelsons' Rule 1.904 motion. The Nelsons filed a notice of appeal on August 25, 2010. On August 26, 2010, the district court denied the Nelsons' April 7 motion for summary judgment, incorporated the legal description of the July 9 plat of survey filing, and denied Norelius's motion to intervene. The Nelsons filed a Rule 1.904 motion on August 31, 2010, requesting the district court enlarge its findings and conclusions of law in the August 26 ruling. On September 17, 2010, the district court declined to rule on the Nelsons' "serial 1.904 motions," stating it no longer had jurisdiction as the ruling on the previous Rule 1.904 motions had been appealed. On October 1, 2010, the Nelsons and Norelius filed a notice of appeal based on the district court's September 17, 2010 ruling, in which the district court refused to rule on the Rule 1.904 motions filed on August 31, 2010.

II. Standard of Review

Our review of a ruling on a motion for summary judgment is for errors at law. *Lambert v. Iowa Dep't of Transp.*, 804 N.W.2d 253, 256 (Iowa 2011). Summary judgment is proper only when the record establishes "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Iowa R. Civ. P. 1.981(3); *Margeson v. Artis*, 776 N.W.2d 652, 655 (Iowa 2009). Our review is therefore limited to whether a genuine issue of material fact exists, and whether the district court's application of the law was correct. *Pillsbury Co., Inc. v. Wells Dairy, Inc.*, 752 N.W.2d 430, 434 (Iowa 2008).

> The burden of showing the nonexistence of a material fact is upon the moving party. Every legitimate inference that can be reasonably deduced from the evidence should be afforded to the nonmoving party, and a fact question is generated if reasonable minds can differ on how the issue should be resolved.

Id. (internal citation omitted).

III. Motion for Summary Judgment

The Nelsons first assert the district court erred in granting the Roeckers' motion for summary judgment. Where the corners and boundaries of real property are in dispute, Iowa Code chapter 650 (2009) applies. The Roeckers asserted acquiescence under Iowa Code section 650.6, which states:

> Either the plaintiff or defendant may, by proper plea, 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, which issue may be tried before commission is appointed, in the discretion of the court.

"A party seeking to establish a boundary other than a survey line must prove it by 'clear' evidence." *Egli v. Troy*, 602 N.W.2d 329, 333 (Iowa 1999).

> Acquiescence may be inferred by the silence or inaction of one party who knows of the boundary line claimed by the other and fails to dispute it for a ten-year period. Acquiescence is said to be 'consent inferred from silence—a tacit encouragement[—and] involves notice or knowledge of the claim of the other party.'

Id. (internal citation omitted).

In 2001, the Roeckers, along with the previous adjacent landowners, Norelius and his wife, signed a Fence Agreement drafted by Bradley Nelson—Norelius's law partner, the Noreliuses' son-in-law, and the defendant-appellant in this proceeding. The agreement reads, in pertinent part:

> c. The real estate described above in paragraph a owned by Roecker adjoins the real estate described above in paragraph b owned by Norelius.
> d. A fence line presently exists on the *boundary line* between the parcels described above.
> e. The parties have made an agreement as to the maintenance of the fence line *between* the respective parcels of real estate and desire to document that agreement herein.

(Emphasis added). The next section of the Fence Agreement sets forth the fence maintenance, repair, and replacement agreement between the parties. In that section, the fence is twice referenced as a "partition fence between the partys' [sic] real estate." The parties ultimately "agree[d] to be bound by the terms and provisions of this agreement."

In addition to the Fence Agreement, the Roeckers included the affidavit of Terence Crawford, a Professional Land Surveyor, to support their summary judgment motion. Crawford opined, "the boundary line [between the Roecker and Nelson properties] is where that fence was located for more than 100 years

and not where the line should theoretically be based on a breakdown of the section." Among the factors considered by Crawford were the Fence Agreement, and the fact that it

> references a fence that has been in place for over 100 years so it is not prospective in nature, it simply recognizes that the existing fence marks the boundary and divides the responsibility and cost of its maintenance into the future.

He also noted the importance of taking physical evidence—such as an existing fence—into consideration when surveying land, and the fact that "the fence is obvious from all of the old aerial photographs of this area and it is apparent that the land has been used and farmed by the respective landowners recognizing it as the boundary line."

In their resistance to the Roeckers' motion for summary judgment, the Nelsons alleged: "no definitely marked line or fence exists," "Defendants never affirmatively recognized the fence as a boundary," "[t]he fence . . . was exclusively used as a barrier for cattle, and was not recognized or acknowledged to be a boundary,"[1] and "Defendants and their predecessors in title dispute that they have agreed with anyone for more than ten years that the old fence was a boundary between the farms."

[1] The Nelsons argue the district court applied the wrong acquiescence test because the fence served as a barrier, and not a boundary. The Nelsons cite *Brown v. McDaniel*, 261 Iowa 730, 735, 156 N.W.2d 349, 352 (1968), for the proposition that "[a]cquiescence in the existence of a fence as a barrier, not as a boundary, is not such recognition as will establish it as the true line." While we acknowledge this is a correct statement of the law, we find it cannot apply in the case at hand because the fence was explicitly treated as a boundary—not a barrier—under the terms of the Fence Agreement and the parties' conduct.

"Acquiescence may be inferred by the silence or inaction of one party who knows of the boundary line claimed by the other and fails to dispute it for a ten-year period." *Id.* As the district court explained,

> The Fence Agreement cannot be any clearer on this matter. As the fence had been in existence for decades prior to this agreement, a fact undisputed by either party, it is unclear how it could not have been considered the boundary prior to December 27, 2001, the date of the signing. The court finds that simply stating that the parties did not treat the line as a boundary, despite written and signed evidence to the contrary, is not sufficient to create a genuine issue of material fact.

We agree with the district court that no genuine issue of material fact existed, and that summary judgment was appropriate under the factual circumstances of the case. *See Ollinger v. Bennett*, 562 N.W.2d 167, 171 (Iowa 1997) ("Determining whether acquiescence has been established requires an inquiry into the factual circumstances of each case."). We also note the district court's overall conclusion that:

> Seldom, if ever, has the court seen evidence so overwhelming by title of acquiescence when it is supplemented or supported by a fence agreement, particularly, when the fence agreement is drafted by a current party in their capacity as a lawyer.

The Roeckers proved the elements required for acquiescence by offering evidence that the alleged boundaries "have been recognized and acquiesced in by the parties or their grantors for a period of ten consecutive years." Iowa Code § 650.6. The district court therefore did not err in granting the Roeckers' motion for summary judgment, and we affirm as to this issue.

IV. Plat Survey

In addition to granting the Roeckers' motion for summary judgment, the district court ordered, "The parties and their attorneys are directed to forthwith meet and obtain a survey of this ground based upon the fence location." The Nelsons appeal, stating that under Iowa Code section 650.7, the district court was required to "appoint a commission of one or more disinterested surveyors" to determine the disputed corners and boundaries. They argue the district court erred in denying their motion to strike because the sole surveyor, Terence Crawford, did not constitute a "commission," was not "disinterested," and the Nelsons were not provided adequate notice of the date and place of the survey.

Our supreme court has held, "[i]f there [is] proof of acquiescence in an existing line there [is] no occasion for a commission survey." *Allen v. Melson*, 150 N.W.2d 292, 294 (Iowa 1967); *see Smith v. Scoles*, 65 Iowa 733, 736, 23 N.W. 146, 147 (1885) (holding that where the facts in a boundary dispute are not at issue, no grounds exist for the appointment of a commission). "The sole office of a commission is to ascertain facts." *Smith*, 65 Iowa at 736, 23 N.W. at 147. Because the district court, in granting the motion for summary judgment, determined there was no genuine issue of material fact, it follows that a commission need not be appointed under Iowa Code section 650.7. Therefore, the district court did not err in declining to appoint a commission to survey the land, nor in accepting the legal description attached to the July 9 plat of survey filing.

V. Additional Claims

The Nelsons raise several additional claims on appeal, including: Iowa Code chapter 650 violates procedural due process; Iowa Code chapter 650 violates the State and Federal Takings Clauses; the Roeckers' claims were barred by the ten-year statute of limitations; and the district court erred in denying Norelius's motion to intervene because he was an indispensible party. [2] While the Nelsons assert the enactment of Iowa Code section 650 is sufficient state action to trigger constitutional protections, the district court found no such authority, nor do we as section 650.14 is based on the conduct of private parties, and does not involve state or federal governmental action.[3] We deem those claims not specifically addressed are without merit, and decline to address them on appeal.

AFFIRMED.

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[2] The Nelsons assert that Norelius, who is not a party to the case, but who holds a purchase money mortgage on the Nelsons' property, was denied due process as he was not served with notice of the action. On July 13, 2010, Norelius filed a motion to intervene, which was denied by the district court. The Nelsons do not have standing to assert a non-party's constitutional claims. *See, e.g.*, *Neill v. Western Inns, Inc.*, 595 N.W.2d 121, 124 (Iowa 1999) (stating the general rule is that "[p]ersons who are not parties of record to a suit have no standing therein which will enable them to take part in or control the proceedings").

[3] *See Harms v. City of Sibley*, 702 N.W.2d 91, 101–02 (distinguishing *direct* government action where a taking results, such as the State government's action in *Bormann v. Board of Supervisors In and For Kossuth County*, 584 N.W.2d 309, 321–22 (Iowa 1998), where "the legislature itself granted the easement in question without the payment of just compensation," from cases where no direct action is involved and no taking results, such as the rezoning of private property to allow for the construction and operation of a ready mix plant in close proximity to the property owners' property). Because this action is between private property owners and is not the result of direct government action, any argument under the Takings Clause is misplaced.