

**IN THE COURT OF APPEALS OF IOWA**

No. 6-747 / 06-0171  
Filed December 28, 2006

**ELIZABETH MILLER, DANIEL D. MILLER,  
JODY J. JOHNSON and CHRISTOPHER L.  
MILLER,**  
Plaintiffs-Appellants,

**vs.**

**MICHAEL BURGESS, SUSAN K. BURGESS  
And DWIGHT GAHM,**  
Defendants-Appellees.

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Appeal from the Iowa District Court for Monona County, Dewie J. Gaul,  
Judge.

Plaintiffs appeal from a district court decree that denied their request to  
establish property boundaries by acquiescence and their claims for trespass.

**AFFIRMED.**

Sam S. Killinger and Karrie R. Hruska of Rawlings, Nieland, Probasco,  
Killinger, Ellwanger, Jacobs & Mohrhauser, L.L.P., Sioux City, for appellants.

Timothy S. Bottaro of Vriezelaar, Tigges, Edgington, Bottaro, Boden &  
Ross, L.L.P., Sioux City, for appellees Michael and Susan Burgess.

Jennifer V. Mumm of the Mumm Law Firm, Missouri Valley, for appellee  
Dwight Gahm.

Considered by Vogel, P.J., and Miller and Eisenhauer, JJ.

**MILLER, J.**

Plaintiffs Elizabeth Miller, Daniel Miller, Jody Johnson, and Christopher Miller appeal from the district court decree that denied their request to establish by acquiescence boundaries between their property and property owned by defendants Dwight Gahm and Michael and Susan Burgess, as well as their related trespass claims. We affirm the district court.

Elizabeth Miller holds a life estate in certain real property located in Section Thirty-Two (32), Township Eighty-Three (83) North, Range Forty-Five (45) West of the Fifth (5th) Principal Meridian, Monona County, Iowa (Miller property). Daniel Miller, Jody Johnson, and Christopher Miller hold remainder interests in portions of the Miller property. The Miller property abuts real property, also located in Section 32, that is owned, respectively, by Dwight Gahm and by Michael and Susan Burgess.

In 2003 the plaintiffs filed a petition to establish by acquiescence a boundary between the Miller property and the Burgess property. The petition was later amended to request the establishment of boundaries between the Miller property and the Gahm property. The plaintiffs also added claims for trespass, asserting the defendants had wrongfully taken possession of the land between the survey boundaries and the boundaries claimed in the petition. In his answer Gahm requested the district court to “reaffirm” that the boundary lines between the adjoining properties were those established by deed and survey.<sup>1</sup>

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<sup>1</sup> The plaintiffs also sought to establish by acquiescence a boundary between their land and land owned by Rick and Cheryl Archer, and alleged trespass by the Archers. In addition, the Burgesses filed a counterclaim for trespass. Neither the plaintiffs’ claims against the Archers, nor the Burgesses’ counterclaim, is at issue on appeal.

The matter was tried to the district court in October 2005. The court was presented with testimony and photographic and other documentary evidence that both supported and refuted the plaintiffs' contention that the defendants and/or their predecessors in title had acquiesced in the boundaries claimed by the plaintiffs. After considering the evidence, as well as the credibility of witnesses, the district court determined: "There is ample evidence that the Millers and their predecessors in interest considered the boundaries they are claiming as the true boundaries, but that the defendants' predecessors in interest so considered them has not been shown by clear evidence." The court accordingly denied the plaintiffs' claims, and found that "[t]he boundary lines between the properties of the parties are as shown by the pertinent instruments of title of record and the surveys offered and received in evidence in this case." The plaintiffs filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2), which was denied by the district court. This appeal by the plaintiffs followed.

On appeal, the plaintiffs contend they presented sufficient evidence to establish by acquiescence the claimed boundaries between their property and the Gahm and Burgess properties. Although actions to establish a boundary by acquiescence are ordinarily tried at law, *Ollinger v. Bennett*, 562 N.W.2d 167, 170 (Iowa 1997), this matter was filed and tried in equity. As such, our review is de novo. Iowa R. App. P. 6.4; *Molo Oil Co. v. City of Dubuque*, 692 N.W.2d 686, 690 (Iowa 2005). Although not bound by the court's fact findings we give them weight, especially when assessing witness credibility. Iowa R. App. P. 6.14(6)(g).

An action to establish a boundary by acquiescence is authorized by Iowa Code section 650.14 (2003), which provides: "If it is found that the boundaries and corners alleged to have been recognized and acquiesced in for ten years have been so recognized and acquiesced in, such recognized boundaries and corners shall be permanently established." Acquiescence requires mutual recognition by the adjoining landowners, for ten or more years, that a definitely marked line is the dividing line between the properties. *Ollinger*, 562 N.W.2d at 170. As the parties seeking to establish boundaries other than those in the legal descriptions as disclosed by surveys, the plaintiffs must demonstrate, by clear evidence, that they and the defendants, or their respective predecessors in title, had knowledge of and consented to the asserted boundaries. *Egli v. Troy*, 602 N.W.2d 329, 333 (Iowa 1999). Acquiescence may be inferred from silence or inaction *if* it shown that the defendants had knowledge or notice of the claimed boundary lines yet failed to dispute them for a ten-year period. *Id.*

The evidence as to whether Gahm and the Burgesses or their predecessors in interest acquiesced in the asserted boundaries, particularly whether they had the requisite knowledge or notice, was clearly in dispute. Proof of acquiescence turned largely on witness testimony, particularly that of Dwight Gahm, Elizabeth Miller's husband Gerald Miller, and Russ Lawrenson, who had farmed what is now the Gahm and Burgess property when it was owned by Dwight's parents, Edward and Erma Gahm. In fact, the plaintiffs' claims rely heavily upon Lawrenson's assertion that Edward Gahm had shown him the boundaries of what are now the Gahm and Burgess property and that the boundaries Edward identified were the same as those claimed by the Millers.

Significantly, the district court determined that Lawrenson was not credible in his assertions, and provided reasons for its decision. As we readily agree with most of the reasons underlying the district court's credibility assessment, and as the court had the benefit of directly observing the witnesses, we give weight to and concur in its assessment. Other than Lawrenson's testimony, there is no direct evidence of knowledge by the defendants or their predecessors in interest. Moreover, the circumstantial evidence of knowledge or notice was either contradicted or subject to more than one reasonable inference.

Our review of the record indicates that the evidence regarding acquiescence is, at best, in equipoise. We accordingly agree with the district court that the plaintiffs have failed to present clear proof in support of their claims. The district court's decree is affirmed.

**AFFIRMED.**