IN THE COURT OF APPEALS OF IOWA

No. 7-621 / 07-0268
Filed September 19, 2007

MICHAEL S. JAGER and
SHELLY J. JAGER,
Plaintiffs-Appellants,

vs.

BRACKER WEST FARM CORPORATION,
Defendant-Appellee.

Appeal from the Iowa District Court for Pottawattamie County, Timothy O'Grady, Judge.

Plaintiffs appeal district court order refusing to establish a boundary line under the doctrines of acquiescence and practical location. **AFFIRMED.**

A.W. Tauke of Porter, Tauke & Ebke, Council Bluffs, for appellants.

Deborah L. Petersen of Deborah L. Petersen, P.L.C., Council Bluffs, for appellee.

Considered by Mahan, P.J., and Miller and Vaitheswaran, JJ.

MAHAH, P.J.

Michael and Shelly Jager claim the district court erred when it refused to establish a new boundary line between their property and that of the defendant, Bracker West Farm Corporation, under the doctrines of acquiescence or practical location. The Jagers also claim the district court erred in failing to limit the defendant's rights of ingress and egress across their property. We affirm.

I. Background Facts and Prior Proceedings

The Jagers purchased their rural acreage in 1985. When they purchased the property, there was no fence to delineate the southwest border of their property. Michael Jager did not know precisely where the boundary line was, but he assumed it was somewhere "at the bottom of the hill." A plot plan was completed at the time of the purchase, but the Jagers do not recall seeing the plot plan. The plan depicted a gravel drive on the Jager property, an easement to the south of the drive, and a 49.5-foot-by-204-foot indentation in the southwest corner of their property. This indentation (hereinafter the "subject property") was a part of the large piece of property directly south of the Jagers and is the subject of the present appeal.

The Jagers mowed the subject property, down to the point of an old fence post, for the next six years. This old fence post was almost directly west of the southeast corner of the Jager property.

In 1989 Ken and Marliss Haycock purchased the property to the south of the Jager property. The Jagers had a good relationship with the Haycocks, and the precise boundary line was never an issue between the two families, partly because they were friends and were on and off each other's property "all the

time." In 1991 the Haycocks began planting rows of trees in the northwest corner of their land. Either Ken or Marliss Haycock talked with the Jagers before they planted trees in the subject property. The Haycocks did not know exactly where the property line was, but they spoke with the Jagers to make sure the trees did not cause any problems. The Haycocks planted three rows of trees. The Jagers began to mow down to the northern-most row of trees, rather than continue farther south to the area they had mowed before.[1] The Haycocks let native grass grow on the property to the south of the northern-most row of trees.

The Haycocks sold their land to Greg White in 1997. The next year, he built a fence on the northern side of his property so that he could keep horses on his land. He did not know where the property line was, but he assumed the old fence post was the northern line of his property. Thus, he used this fence post as the northwest corner of his fence. After the fence was built, two of the three rows of trees were north of the fence. The Jagers began mowing down to the fence, the same area they had mowed before the trees were planted.

In 2003 White sold his land to the defendant, Bracker West. Bracker West promptly removed the fence and took steps to divide the area for housing development.

In response, the Jagers filed the present action asking the court to establish that they owned the subject property under the doctrines of practical location, acquiescence, or adverse possession. Alternatively, they asked the

[1] The record does not contain accurate descriptions of the distance between the old fence post and the northern-most line of trees, or the distance between these trees and the actual property line. However, all were contained within the 49.5-foot distance between the old fence post and the actual property line.

court to establish that they owned at least the portion of the subject property north of the northernmost row of trees.[2] The Jagers also asked the court to find an unrelated easement for ingress and egress was unnecessary, invalid, and unenforceable.

After a one-day trial, the court found the Jagers were not entitled to a boundary by practical location, acquiescence, or adverse possession for the entire subject property or the smaller portion of the subject property, north of the tree line. The court also denied the Jager's request to terminate the easement.

On appeal, the Jagers contend the trial court erred in: (1) refusing to establish a boundary at the fence line by practical location, (2) refusing to establish a boundary at the north tree line by practical location, (3) refusing to establish a boundary at the north tree line by acquiescence, and (4) failing to limit the rights of ingress and egress across the Jager property to the prescribed location in the deed.

II. The Doctrine of Practical Location

A. Standard of Review

The doctrine of practical location is equitable in nature. *Trimpl v. Meyer*, 246 Iowa 1245, 1254, 71 N.W.2d 437, 442 (1955). Cases brought in equity are reviewed de novo on appeal. Iowa R. App. P. 6.4. We give weight to the fact findings of the district court, but are not bound by them. Iowa R. App. P. 6.14(6)(*g*).

[2] The Jagers also asked the court to establish boundary lines in a different area of the property. These claims are not a subject of this appeal.

B. Merits

The Jagers claim a practical location for a boundary line was established between either themselves and the Haycocks or themselves and White. The doctrine of practical location is set forth in *Trimpl*, 246 Iowa at 1253-54, 71 N.W.2d at 442 (quoting 11 C.J.S. *Boundaries* § 77(a)):

> To constitute a practical location of a line, the mutual act and acquiescence of the parties is required, and one adjoining owner cannot settle the location of the line without the participation, acquiescence, or consent of the other. It is in fact merely the result of an agreement or acquiescence between the parties shown by the location of monuments and marks on the ground. *When established by agreement it is a prerequisite that the true boundary line should be disputed, indefinite, or uncertain and that the parties should have the intent to settle the boundary line.* If adjoining proprietors deliberately erect or maintain monuments or fences, or make improvements on a line between their lands on the understanding that it is the true line, it will amount to a practical location.

(Emphasis added.) "One who seeks to establish a boundary line on the basis of practical location must present clear, positive, and unequivocal evidence in support thereof." 11 C.J.S. *Boundaries* § 131, at 219 (1995); *cf. Mahrenholz v. Alff*, 253 Iowa 446, 450, 112 N.W.2d 847, 849 (1962) ("To establish by acquiescence or estoppel a boundary which varies from the true line the proof must be clear.").

We find this doctrine inapplicable to the case at hand because there was insufficient evidence to prove that the trees or the fence were placed with "the intent to settle the boundary line between the properties." *Trimpl*, 246 Iowa at 1253-54, 71 N.W.2d at 442 (quoting 11 C.J.S. *Boundaries* § 77(a)); *see also Kendall v. Lowther*, 356 N.W.2d 181, 188-89 (Iowa 1984) (denying plaintiff's practical location claim, in part, because the landowners "had no intent to settle

[the] dispute at the time because they knew of none"). Despite the Jagers's claims to the contrary, the individuals who planted the trees and built the fence did not do so to settle the boundary line between the properties. The Haycocks only wanted to plant trees on their property. Even though they spoke with the Jagers before planting trees on the northern side of their property, the conversation did not concern the precise location of the property line between the parties. At most, the Haycocks talked with the Jagers to make sure the trees were not planted on Jager property. Greg White also did not indicate that he built the fence to divide his property from the Jagers; he built the fence so that he could run horses in his pasture.

We will not presume a landowner builds a fence or plants trees with the intent to settle a boundary line with his or her neighbors. Accordingly, we find the Jagers failed to meet their burden of proof and affirm the district court's decision not to establish either the fence or the trees as a boundary under the doctrine of practical location.

III. The Doctrine of Acquiescence

A. Standard of Review

> An action brought under Iowa Code chapter 650 is a special action and is heard on appeal as an ordinary action. As in an action at law, our review is on assigned errors of law. The district court's judgment has the effect of a jury verdict; thus, we are bound by the district court's findings of fact if supported by substantial evidence.

Ollinger v. Bennett, 562 N.W.2d 167, 170 (Iowa 1997) (internal citations omitted).

B. Merits

Iowa Code section 650.14 (2005) permits a suit to establish title by acquiescence:

> 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.

Our supreme court has defined "acquiescence" as "the mutual recognition by two adjoining landowners for ten years or more that *a line, definitely marked by fence or in some manner*, is the dividing line between them." *Olinger*, 562 N.W.2d at 170 (emphasis added).

Under this doctrine, each of the adjoining landowners or their grantors must have knowledge of and consented to the asserted property line as the boundary line. *Tewes v. Pine Lane Farms, Inc.*, 522 N.W.2d 801, 806 (Iowa 1994). When such acquiescence persists for ten years, the line becomes the true boundary even though a survey may show otherwise, and even though neither party intended to claim more than called for by his or her deed. *Id*.

Acquiescence "need not be specifically proven; it may be inferred by the silence or inaction of one party who knows of the boundary line claimed by the other and fails to take steps to dispute it for a ten-year period." *Id.* Nevertheless, "the party seeking to establish a boundary line other than the boundary line in accordance with a survey must prove acquiescence by clear evidence." *Id.*

The district court rejected the Jagers's claim for a boundary by acquiescence, finding the Jagers failed to prove by clear and convincing evidence that there had been acquiescence in one definite line for ten years. On

appeal, the Jagers claim the doctrine does not require one specific line. The Jagers point out that the sum total of the fence line and the tree line was more than ten years. The trees served as the boundary line for approximately seven years until the fence was built. The fence, which extended even further south into their neighbors' property, served as the boundary line for an additional five years. In essence, the Jagers claim the boundary line can move during the ten-year period necessary for acquiescence, so long as the line moved for their benefit.

We, like the district court, find a shifting or moving line cannot serve as the basis for the line of acquiescence. "'The line acquiesced in must be known, definite, and certain, or known and capable of ascertainment. The line must have certain physical properties such as visibility, permanence, stability, and definite location.'" *Heer v. Thola*, 613 N.W.2d 658, 662 (Iowa 2000) (quoting 12 Am. Jur. 2d *Boundaries* § 86, at 487 (1997) (footnotes omitted)). The very fact that the line kept moving—from the old fence line, to a tree line, and back to the old fence line—illustrates how there was not a permanent or definite line between the parties. Because the Jagers have failed to show by clear evidence the existence of one definite and clear boundary line separating the properties for ten or more years, they have not proven a boundary by acquiescence.

IV. Easement

The Jagers originally asked the court to find an unrelated easement for ingress and egress unnecessary, invalid, and unenforceable. During their response to a motion for directed verdict, their attorney set forth an alternative claim "that the easement be restricted to its area that's set out in the deed." The

court did not rule on this alternative argument, so the Jagers raise it again on appeal.

"It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal." *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). When a district court fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal. *Id.* It is not a sensible exercise of appellate review to analyze facts of an issue without the benefit of a full record or lower court determination. *Id.*

Here the court did not address or rule on this alternative prayer for relief raised by Jagers's attorney. The Jagers did not request a ruling on this unresolved issue by motion pursuant to Iowa Rule of Civil Procedure 1.904(2) or otherwise. As a result, "[t]he court was not given an opportunity to address its failure to rule on the issue either by making a ruling or refusing to do so." *Meier*, 641 N.W.2d at 539. Accordingly, we find the Jagers failed to preserve error on this issue.

AFFIRMED.