IN THE COURT OF APPEALS OF IOWA

No. 1-751 / 10-1970
Filed November 23, 2011

BOBBIE L. CARTER and PATRICIA J. CARTER,
Plaintiffs-Appellees/Cross-Appellants,

vs.

J.D. FLEENER,
Defendant-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Mahaska County, Daniel P. Wilson, Judge.

The defendant appeals, and the plaintiffs cross-appeal, in a boundary by acquiescence case. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Brent B. Green, Martin J. Kenworthy, and E.J. Flynn of Duncan, Green, Brown & Langeness, P.C., Des Moines, for appellant/cross-appellee.

Dustin D. Hite and Matthew B. Moore of Heslinga, Heslinga, Dixon & Moore, Oskaloosa, for appellees/cross-appellants.

Heard by Sackett, C.J., and Vogel and Eisenhauer, JJ.

VOGEL, J.

I. Background Proceedings.

The parties are adjoining landowners, with Bobbie and Patricia Carter owning the property to the north and J.D. Fleener owning the property to the south. The Carters' property consists of a home and several outbuildings on approximately 1.32 acres, and Fleener's property is approximately six acres of farmland.

The parties disagree over the boundary between their properties, specifically disputing the ownership of a triangle-shaped strip of land. At its widest point, the disputed land is sixteen-feet wide near the road that runs along both parties' land and angles back toward the Carters' property. On the strip of land, is a light pole and telephone pedestal near the road, a rock garden, and bushes.

The Carters moved into their home in 1963 and purchased the property in 1965. At the time the Carters moved onto their property, the disputed property had a shed and a fenced pig pen on it, which the Carters used for several years. After the shed and fence were torn down, the Carters continued caring for the disputed land, including continuously mowing, planting bushes, and building a rock garden in the 1990's. For thirty-three years, the Carters maintained the property, assuming that which is now in dispute was their land.

The record contains the chain of title to the south property since 1963, with ownership as follows: Vera Houser in 1963; brothers, William, Richard, Charles, and Donald Cummings in July 1976; the Henry Hackert GST Trust and the Sarah Hackert GST Trust in 2007; and Fleener on January 8, 2008.

Fleener had rented the south property for ten or fifteen years prior to acquiring title to it, and also rented other farmland adjacent to the Carters' property. While renting the farmland, disputes arose between the Carters and Fleener, including Fleener poisoning two elm trees on the Carters' property in 2004 or 2005. The conflict between the parties escalated and after Fleener acquired the south property in 2008, he had the land surveyed and discovered that what the Carters had treated as their southern boundary was not the boundary surveyed according to the legal description. In a letter addressed to Bobbie Carter and dated June 3, 2009, Fleener's attorney stated in part,

> It is therefore obvious to you that you are ENCROACHING on my clients' property. You are directed to immediately remove your encroaching items as follows: fence, rock garden, tile, overhanging trees, lilac bushes, and any other property of yours which is located on my clients' property.

In 2009, the Carters initiated the present action.[1] In the Carters' first claim, they sought to establish a boundary by acquiescence between their property and Fleener's property. *See* Iowa Code § 650.6 (2009). In the second claim, the Carters sought damages for willful injury of their trees. *See* Iowa Code § 658.4. Fleener answered and asserted two counterclaims, in which he sought damages for (1) trespass, and (2) the plaintiffs filing of the lawsuit because it was intended to deprive him of his legally protected property interest.

The district court scheduled the issues to come on for trial on September 28, 2010. In July 2010, Fleener filed a motion for partial summary judgment,

[1] In November 2009, the Carters filed the initial petition asserting their first claim. Fleener answered and asserted a counterclaim for trespass. In December 2009, the Carters amended their petition asserting their second claim. Fleener answered and asserted his second counterclaim.

arguing that because a commission had not been appointed under Iowa Code section 650.7, the Carters' first claim required dismissal. The Carters resisted the motion, arguing that appointing a commission is discretionary to the court and the district court may determine the issue of boundary by acquiescence. Following a hearing, the district court found that the issue of acquiescence may be tried to the court before the appointment of a commission under Iowa Code sections 650.6 and 650.7, and denied Fleener's motion.

Trial commenced on September 28, 2010, and on October 1, 2010, the district court issued its ruling. It set forth the recent chain of title to the properties, and noted that the initial dispute between the Carters and Fleener involved land to the north of the Carter property that Fleener farmed. As to the disputed land at issue in the present case, the court held that the Carters had established a boundary by acquiescence and set the legal description accordingly. The court next found that during the dispute over the north boundary, the Carters proved, and Fleener admitted, that he intentionally killed the Carters' two Chinese elm trees by poisoning them in early 2004. The "Carters would be entitled to damages but for the fact they waited too long to assert their claim," as the Carters' claim was barred by the five-year statute of limitations set forth in Iowa Code section 614.1(4). As for Fleener's trespass claim, the court found there was not sufficient evidence of trespass and "Fleener produced no evidence that he was damaged by any such trespass." Next, the court found Fleener's "taking property without legal grounds" claim was not supported by any evidence. Therefore, the district court dismissed both of Fleener's counterclaims.

On October 11, 2010, the Carters filed a post-trial motion pursuant to Iowa Rule of Civil Procedure 1.904. In part, they requested the court reconsider the dismissal of their claim for damages to their trees. They argued that Fleener did not plead nor prove a statute of limitations defense. Further, because the court raised this issue sua sponte, they did not have an opportunity to present evidence as to when they discovered the damage Fleener had caused. Fleener then filed a motion to amend to assert the affirmative defense of statute of limitations, to conform to the evidence. On October 29, 2010, the district court ruled on the pending motions. It granted Fleener's motion to amend, stating that Fleener "is deemed to have timely asserted the affirmative defense of statute of limitations." It then denied the Carters' motion pursuant to rule 1.904 pertaining the statute of limitations defense as to the damage of trees. Fleener appeals and the Carters cross-appeal.

II. Boundary by Acquiescence.

A. Standard of Review.

Fleener first asserts the Carters did not prove they acquired title to the disputed land by acquiescence. The parties initially disagree as to what standard of review this court applies when examining the claim on appeal. Fleener asserts the case was tried in equity and our review is de novo. The Carters assert the case was brought as a special action under Iowa Code chapter 650, which is reviewed for errors at law.

The nature in which a case was tried is determinative of our scope of review. *In re Mount Pleasant Bank & Trust Co.*, 426 N.W.2d 126, 129 (Iowa 1988). If the case was tried in equity, our review is de novo; if the case was tried

at law, our review is for errors at law. *See id.*; *Sille v. Shaffer*, 297 N.W.2d 379, 381 (Iowa 1980).

This proceeding was brought under Iowa Code section 650.14. "The proceeding contemplated by this section is triable as at law and our review ordinarily is not de novo." *Sille*, 297 N.W.2d at 380. "Under this limited extent of review the findings of fact by the trial court have the effect of a special verdict and are equivalent to a jury verdict. If supported by substantial evidence, the judgment will not be disturbed on appeal." *Tewes v. Pine Lane Farms, Inc.*, 522 N.W.2d 801, 804 (Iowa 1994) (citations and internal quotations omitted); *see also Sille*, 297 N.W.2d at 380 ("The issue of acquiescence presents mostly fact questions, and the judgment in such a case has the effect of a jury verdict."); *Davis v. Hansen*, 224 N.W.2d 4, 5 (Iowa 1974) ("Stated in other words, in a law action tried to the court its findings of fact having adequate evidentiary support shall not be set aside unless induced by an erroneous view of law.").

Fleener acknowledges this was a case brought under chapter 650, but argues that the case was actually tried in equity and should be reviewed de novo. Fleener only points to the petition, which was entitled "in equity." However, the petition was also entitled a "special action" and stated it was brought under chapter 650, and the substance of the petition set forth a question to be tried at law. Prior to the presentation of evidence, there was no discussion of the manner in which the case was to be tried. In his brief, Fleener does not make an argument regarding whether the district court ruled on evidentiary objections, and makes no citation to the transcript. *Citizens Sav. Bank v. Sac City State Bank*, 315 N.W.2d 20, 24 (Iowa 1982) (explaining where it is unclear whether the case

was tried in equity or at law, we often look to whether the district court ruled on evidentiary objections—if the court ruled on objections this indicates the case was not an equitable proceeding, but was heard at law). From our review of the record, very few objections were made, but in one instance a hearsay objection was made, the court acknowledging the objection, directed that another question be asked. Under the present circumstances, we find that the petition was brought as a special action under chapter 650 and tried as such. Therefore, our review is for errors at law.

B. Merits.

Iowa Code chapter 650 provides for actions to establish boundaries where there is a dispute.

> According to the theory of acquiescence set forth in the Iowa Code, a boundary line may be established by a showing that the two adjoining landowners or their predecessors in title have recognized and acquiesced in a boundary line for a period of ten years. Iowa Code §§ 650.6 & 650.14; *see* [*Davis*], 224 N.W.2d at 6. Each of the adjoining landowners or their grantors must have knowledge of and consented to the asserted property line as the boundary line. [*Sille*, 297 N.W.2d at 381.] "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 deed." *Id.*; [*Davis*], 224 N.W.2d at 6.
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> 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. *Dart v. Thompson*, 261 Iowa 237, 241, 154 N.W.2d 82, 84–85 (1967). However, the party seeking to establish a boundary line other than the boundary line in accordance with a survey must prove acquiescence by clear evidence. *Brown v. McDaniel*, 261 Iowa 730, 733, 156 N.W.2d 349, 351 (1968).

Tewes, 522 N.W.2d at 806.

Fleener first asserts the boundary line that the Carters claimed separates their respective properties is not definitely marked so as to provide notice of acquiescence. The two properties were visually distinct from one another—the Carters' property consisted of a home and outbuildings, and was comprised of a grassy yard on approximately 1.32 acres; Fleener's property was a farm field, which was currently used for row crops. While there was no longer a fence that ran between the two properties, there was a clear demarcation. Since 1963, the triangular strip of land had been used and maintained as part of the Carters' property. A portion of the property had a shed on it when the Carters purchased the land, which they understood from the then current tenant, "overhung" or straddled the land to the south. A fence ran from west of the shed to the road, but was removed in the late 1960s or early 1970s. However even after the fence was removed, the line continued to be treated as the boundary between the properties. The Carters established grass in the area, which they mowed and maintained. They planted lilac bushes and built a rock garden in the widest part of the strip of land. A disinterested witness, a farmer from the area, described what he observed to be the "property line," with the disputed land mowed and maintained as part of the Carters' yard. The photographs introduced into evidence, including an aerial photo from 1954, present a clear division between the parties' properties, with the disputed land being part of the Carters' lawn and dividing it from Fleener's field. *See id.* (finding that although the claimed boundary line was not "marked by a fence or some other consistently solid barrier," there was "a distinct division of the parties' properties"). We find substantial evidence supports that the boundary was definitely marked.

Fleener next argues there was not acquiescence because no owner of the south property ever expressly "approved" or "discussed" the boundary, and no owners of the south property "should have" had knowledge of the Carters' claimed boundary. "It is well settled that purchasers of property cannot question a boundary line acquiesced in by predecessors in title for more than ten years." *Dart*, 261 Iowa at 241, 154 N.W.2d at 84. For more than ten years prior to Fleener's purchase of the south property, the disputed land was treated as part of the Carters' property, creating a property line that was clear and visible, and consistently treated as the boundary line by the various properties' owners. *See Sille*, 297 N.W.2d at 381 ("Acquiescence exists when both parties acknowledge and treat the line as the boundary."). On cross-examination of Bobbie Carter, Fleener attempted to establish that no owner "agreed" to the Carters' claimed boundary line. However, Carter's testimony was that no prior owner "disagreed" with the boundary the Carters assumed to be the true boundary. The owners of the south property were not required to expressly approve the boundary. Rather, it is sufficient the prior owners had knowledge of where the boundary line was located and failed to dispute it for a ten-year period. *See Tewes*, 522 N.W.2d at 806 ("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."); *Sille*, 297 N.W.2d at 381 ("It is sufficient knowledge if both parties are aware of the fence or other line and of the fact that both adjoining landowners are, for the required period, treating it as a boundary. Knowledge, in the sense required for

acquiescence, does not encompass record ownership."). We find Fleener's argument without merit.

III. Commission.

Fleener next asserts the district court was required to appoint a commission pursuant to Iowa Code section 650.7, rather than proceed to trial on the issue of boundary acquiescence. The parties again disagree as to the standard of review. Fleener asserts that this is an issue of statutory construction and should be reviewed for errors at law. The Carters assert the district court is vested with discretion to determine whether a commission should be appointed and therefore, our review is for an abuse of discretion. We find that Fleener raises an issue of statutory interpretation, arguing that the code requires appointment of a commission and that essentially the district court has no discretion. If the code does not require the appointment of a commission, he makes no challenge to the district court's exercise of discretion. Consequently, we find our review is for errors at law.

Iowa Code section 650.6 provides,

> 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.

Iowa Code section 650.7 provides,

> The court in which said action is brought shall appoint a commission of one or more disinterested surveyors, who shall, at a date and place fixed by the court in the order of appointment, proceed to locate the lost, destroyed, or disputed corners and boundaries.

The two sections must be read together—the district court has discretion to try the issue without appointing a commission, but if the district court appoints a commission it is required to be comprised as stated in section 650.7. We do not read section 650.7 to require that a commission be appointed in every case, as that would make section 650.6 meaningless; rather we read section 650.7 as setting forth the requirement of the make-up of the commission. Our supreme court previously found, "As the parties had litigated the question of the acquiescence in the disputed boundary line, we can see no need for the appointment of a commission. Any report a commission would make would not bind the court." *Lannigan v. Andre*, 241 Iowa 1027, 1032, 44 N.W.2d 354, 357 (1950). We find the district court was not required to appoint a commission and Fleener's argument fails.

IV. Damage to Trees.

The Carters assert that the district court erred in dismissing their claim for damages for the trees Fleener admitted to destroying. Our review is for correction of errors at law. Iowa R. App. P. 6.907; *see Clark v. Miller*, 503 N.W.2d 422, 424 (Iowa 1993). In December 2009, the Carters amended their petition alleging that Fleener had intentionally killed two trees located on their property and seeking damages. *See* Iowa Code §§ 658.1A (Treble Damages), 658.4 (Treble Damages for Injury to Trees). In his answer, Fleener did not plead a statute of limitations defense and the defense was not raised at any point during the trial. *Davis v. State*, 443 N.W.2d 707, 708 (Iowa 1989) (explaining that the statue of limitations is an affirmative defense that generally must be asserted by a responsive pleading). The evidence introduced at trial demonstrated that

Fleener poisoned two elm trees located on the Carters' property. Fleener admitted he applied a chemical to the trees' roots in 2004 or 2005, intending to kill the trees. Bobbie Carter testified that it would cost $2900 to replace the trees, which Fleener did not contest. In its ruling, the district court found that the Carters had proved their claim, but it was barred by the statute of limitations. *See* Iowa Code § 614.1(4) (providing that for claims regarding damage to property and five-year statute of limitations applied). In the Carters' rule 1.904 motion, they asserted Fleener had not raised a statute of limitations defense and it could not be raised sua sponte by the district court. They further argued that had they been provided notice of a statute of limitations defense, they would have presented evidence as to the time of the discovery of the damage to their trees and under the discovery rule, the statute of limitations would not bar their claim.

On appeal, the Carters argue that because Fleener did not raise a statute of limitations defense, it was error for the court to find their claim was barred by Iowa Code section 614.1(4). We agree. A statute of limitations defense must be raised by the party relying on the defense, which then has the burden of proving the claim is time barred. If the defense is not pleaded, then it is waived. *See Cuthburtson v. Harry C. Harter Post No. 839 of the V.F.W.*, 245 Iowa 922, 928, 65 N.W.2d 83, 87 (1954) (stating "a party relying upon the statute of limitations as a defense must specifically plead that fact and he must also show the facts constituting the bar" and "[a] failure to plead a limitation statute operates as a waiver of this defense"). Fleener did not plead the defense, and did not raise it at any point during the trial. Consequently, Fleener waived the defense. *Id.*

Moreover, because it was not an issue at trial, neither party produced evidence to prove nor respond to the defense. Consequently, the defense was not available to bar the Carters' claim. Fleener testified that he applied the chemical to kill the trees in 2004 or 2005. It was unclear as to when the trees actually died. In April 2009, after Fleener had admitted to Bobbie that he had killed the trees, the Carters filed a complaint against Fleener with the Iowa Department of Agriculture and Land Stewardship. A soil sample was taken in May 2009. In a letter dated June 24, 2009, the Department confirmed that Fleener applied a chemical to the trees that damaged them. Because the Carters had no notice regarding a statute of limitations defense, they did not present evidence regarding the precise timing of events.

Fleener argues that after the district court's ruling, the Carters "had ample opportunity to argue their position in their posttrial brief and subsequent hearing." This overlooks the fact that it was Fleener's burden to raise and prove the affirmative defense, which he failed to do. Further, without notice of the defense, the Carters did not have the opportunity, or reason to challenge an unasserted defense during trial. Because they were not aware of it until after trial had occurred, they could not introduce any additional evidence. We find because Fleener did not plead and prove the statute of limitations defense, the district court erred in finding the Carters' claim was time barred. As the district court found, the Carters established their claim and testified the replacement value of the trees was $2900. Under Iowa Code sections 658.1A and 658.4, treble damages are to be awarded for willful injury to "any timber, tree, or shrub."

Therefore, we reverse and remand for entry of an award of damages in the amount of $8700 in favor of the Carters and against Fleener.

V. Conclusion.

We find the Carters established their claim of boundary by acquiescence.[2] Further, as the district court found, the Carters also proved their claim of property damage. It was error for the district court to consider an affirmative defense that was neither pleaded nor proved. Therefore, we reverse the dismissal of the Carters' claim and remand for entry of judgment in their favor. We affirm in part, reverse in part, and remand.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

[2] Fleener also asserted that because the Carters did not establish their boundary by acquiescence claim, they committed trespass and caused damages. Based upon our conclusion, we need not address this issue.