IN THE COURT OF APPEALS OF IOWA

No. 3-724 / 13-0122
Filed October 2, 2013

MARK G. CASWELL,
Petitioner-Appellant,

vs.

RONALD PAQUIN and KAREN PAQUIN, WESLEY BECTHOLD and JUDITH K. BECTHOLD, MARK MOINE and AMY J. MOINE,
Respondent-Appellees.

Appeal from the Iowa District Court for Chickasaw County, Todd A. Geer, Judge.

A landowner appeals the district court's denial of his petition to show ownership of property by acquiescence or adverse possession. **AFFIRMED.**

Paul W. Demro of Correll, Sheerer, Benson, Engels, Galles & Demro, P.L.C., Cedar Falls, for appellant.

Heather M. Simplot of Harrison, Moreland, Webber & Simplot, P.C., Ottumwa, for appellees Paquin.

Laura L. Folkerts of Dutton, Braun, Staack & Hellman, P.L.C., Waterloo, for appellees Bectholds and Moines.

Heard by Vogel, P.J., and Danilson and Tabor, JJ.

TABOR, J.

Mark Caswell claims a wire fence on his neighbor's property has served as an actual boundary rather than just a barrier for livestock. He appeals a ruling by the district court denying his claim to property through acquiescence or adverse possession. Because Caswell does not meet the standards necessary to prove ownership under either doctrine, we affirm.

I. Background Facts and Proceedings

Mark Caswell's family has owned land in Chickasaw County since 1965. The legal description for Caswell's property is set forth in a warranty deed. Caswell's farm was bordered on the north by the Nashua Golf and Country Club and on the west by Ruby Ferguson's property. Wesley Becthold, Judy Becthold, Mark Moine, and Amy Moine purchased land from Ruby Ferguson in 1998. The Bechtolds and the Moines formed Fairway Additions L.L.C. for the purpose of subdividing and developing the land into a residential subdivision. Ronald and Karen Paquin purchased one of the subdivided parcels by warranty deed on March 19, 2009. The parcel purchased by the Paquins is adjacent to Caswell's farm.

A wire fence is located on the "easterly side" of the Paquins' property. Caswell testified Ruby Ferguson asked him to rebuild the fence in the late 1970s when he "wound up with some calves out in the country club." Licensed surveyor Lyle TeKippe testified the fence was located for "convenience sake" at the edge of the tree line rather than running right on the section line. According to three surveys conducted by TeKippe—in 1999, 2001, and 2008—the fence stands four

to five feet to the west of the section line at the northern end of the Pacquins' property and sixteen to seventeen feet west of the section line at the southeast corner.

On October 21, 2010, Caswell filed a petition naming the Pacquins, the Bechtolds, and the Moines as defendants. In the petition, Caswell alleged the Pacquins "intentionally killed trees planted by Caswell on the existing fence line." Caswell asked the district court to quiet title in the land up to the fence under the theories of acquiescence or adverse possession. The district court held a hearing regarding the property dispute on May 3, 2012. In an order issued December 28, 2012, the court ruled Caswell did not meet the standards for showing possession of the property by acquiescence or adverse possession. Caswell now appeals.

II. Scope and Standard of Review

An action under Iowa Code chapter 650 to establish a boundary is considered on appeal as an ordinary action. Iowa Code §§ 650.4, 650.15 (2011); *Egli v. Troy*, 602 N.W.2d 329, 332 (Iowa 1999). "We apply the clear evidence standard in reviewing this case." *Egli*, 602 N.W.2d at 332. The district court's judgment has the effect of a jury verdict, and we limit our inquiry to whether its findings are supported by substantial evidence. *Id.*; *Ollinger v. Bennett*, 562 N.W.2d 167, 170 (Iowa 1997).

Adverse possession is an action to quiet title and is heard in equity, so generally our review is de novo. *Barks v. White*, 365 N.W.2d 640, 643 (Iowa Ct. App. 1985). But here the parties agree we should review the case for errors at

law because the district court tried the case at law rather than in equity, ruling on objections and issuing an order rather than a decree.

Accordingly, we will review both issues for assigned errors as in a law action. *See Drake v. Claar*, 339 N.W.2d 844, 846 (Iowa Ct. App. 1983). As an appellate court, "it is not our province to solve disputed factual questions nor pass on the credibility of witnesses." *Concannon v. Blackman*, 6 N.W.2d 116, 118 (Iowa 1942).

III. Analysis

A. Did The District Court Correctly Conclude Caswell Failed To Establish A Boundary By Acquiescence?

Iowa Code section 650.14 states: "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." The term "acquiescence" is defined 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. Acquiescence exists when both parties acknowledge and treat the line as the boundary. When the 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.

Egli, 602 N.W.2d at 333. A party seeking to establish a boundary other than a survey line must prove it by "clear" evidence. *Id.* 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. *Tewes v. Pine Lane Farms, Inc.*, 522 N.W.2d 801, 806 (Iowa 1994). It does not matter what the original

intent of the fence was, the only question is whether the two adjoining landowners for ten years or more mutually acquiesced in that fence as a boundary line notwithstanding the purpose of its erection. *Sorenson v. Knott*, 320 N.W.2d 645, 647 (Iowa Ct. App. 1982).

Caswell bears the burden of showing Ruby Ferguson or her successors in title knew he was claiming the fence as a boundary, and not just as a barrier to the escape of livestock. *See Harvey v. Platter*, 495 N.W.2d 350, 352 (Iowa Ct. App. 1992) (placing burden of proof by clear evidence on party seeking to establish a boundary other than the legal description). We agree with the district court's conclusion that Caswell failed to carry his burden by clear evidence.

Caswell never informed Ferguson or her successors in title he claimed the fence as the property line nor did he engage in activities that would have led his neighbors to believe he considered the fence as the true boundary until shortly before filing this action. The district court found that photographic evidence showing segments of the fence in "extreme disrepair" and "overgrown with brush" discredited Caswell's claim he maintained the fence line. The court also noted the fence near the Pacquins' property was "fairly well maintained." Caswell did not offer credible evidence to rebut the defendants' testimony he stayed fifteen to twenty feet on his side of the fence when mowing, burning or parking a loaded manure spreader. When he put up a "keep out" sign in April 2011, he did so twenty to thirty feet from the fence, on land not in dispute.

Conversely, the defendants have asserted their ownership of the land by having surveys done and developing the land for subdivisions. They also

presented these plats to public meetings of the Nashua City Council and the Chickasaw County Board of Supervisors, where Caswell made no claim to owning the property at issue. When Caswell did post a sign on the Paquins' property, they called the sheriff and removed the sign.

We find substantial evidence in the record to support the district court's rejection of Caswell's claim to boundary by acquiescence.

B. Did The District Court Correctly Decide Caswell Failed To Establish Adverse Possession Over The Land For The Necessary Time Period?

To establish ownership by adverse possession, Caswell must prove hostile, actual, open, exclusive, and continuous possession under a claim of right or color to title, for at least ten years. *See Burgess v. Leverett & Assocs.*, 105 N.W.2d 703, 705 (Iowa 1960). The doctrine of adverse possession is strictly construed because the law presumes possession is under regular title. *Mitchell v. Daniels*, 509 N.W.2d 497, 499 (Iowa Ct. App.1993). "Mere proof of use . . . is therefore not sufficient to establish a plaintiff's claim." *Simonsen v. Todd*, 154 N.W.2d 730, 736 (Iowa 1967).

Caswell contends he established adverse possession by maintaining the fence, paying taxes on the disputed real estate, and alternatively row cropping the land, grazing cattle on it, and placing it in a government set-aside program. "Although mere use does not constitute hostility or a claim of right, some specific acts or conduct associated with the use will give rise to a claim of right." *Collins Trust v. Allamakee Cnty Bd. of Sup'rs*, 599 N.W.2d 460, 464 (Iowa 1999). "Thus,

acts of maintaining and improving land can support a claim of ownership and hostility to the true owner." *Id.* Whether a party has established a claim of right must be determined on a case-by-case basis. *Johnson v. Kaster*, 637 N.W.2d 174, 179 (Iowa 2001).

The defendants challenge Caswell's claim to hostile, actual, and open possession. They argue the testimony and exhibits indicated Caswell did not maintain the fence. As noted above, the district court accepted their evidence as credible. In addition, the defendants dispute Caswell's claim he paid taxes on the land; they point to evidence that they paid taxes on the disputed property since they purchased it from Ruby Ferguson. They also highlight Caswell's admission on cross examination that he was not certain he received a tax bill for the land in question. Finally, the defendants challenge Caswell's casual assertion he has farmed the disputed tract or has enrolled the land in the set-aside program, pointing to his lack of strict proof for either use.

After considering all the evidence, the district court decided, "Caswell has not engaged in conduct sufficient to show adverse possession until shortly prior to the filing of his Petition much less the required ten-year statute of limitations period." The court's decision was supported by substantial evidence. The court found Caswell failed to offer credible evidence he treated the fence as anything more than a cattle barrier. We defer to the district court's ability to assess the relative credibility of the witnesses in the courtroom. *See generally In re Detention of Barnes*, 689 N.W.2d 455, 459 (Iowa 2004).

Even if we consider Caswell's more assertive efforts to openly use the disputed tract of land in recent years, those actions fall far short of the ten-year requirement for establishing adverse possession.

C. Should The Defendants Be Awarded Attorneys' Fees?

The Paquins, the Bechtolds, and the Moines all ask for appellate attorney fees in connection with defending the district court's ruling. Because the right to recover attorney fees as costs does not exist at common law, recovery is not allowed in the absence of a statute or agreement expressly authorizing it. *See Van Sloun v. Agans Bros., Inc.*, 778 N.W.2d 174, 182 (Iowa 2010). The Bechtolds and the Moines provide no authority for their request. The Paquins cite only *McKee v. Dicus*, 785 N.W.2d 733, 740 (Iowa Ct. App. 2010). *McKee* involved an action under chapter 600B, which includes a specific provision for payment of attorney fees. *See* Iowa Code § 600B.26.

Iowa Code section 650.B16 states: "The costs in the proceeding shall be assessed as the court deems just, and shall be a lien on the land or interest therein owned by the party or parties against whom they are assessed, so far as such land is involved in the proceeding." But that provision makes no express reference to attorney fees. In the absence of an express reference, attorney fees are not taxable as costs. *City of Ottumwa v. Taylor,* 102 N.W.2d 376, 378 (1960). Accordingly, we deny the request for appellate attorney fees.

AFFIRMED.