

IN THE COURT OF APPEALS OF IOWA

No. 7-215 / 06-1427

Filed June 13, 2007

**LON LINDSEY and JODI LINDSEY,
RON ABEL, DAVID STAAKE and KORENE STAAKE,
and GARY STAAKE and CATHY STAAKE,**
Plaintiffs-Appellees,

vs.

MILFORD KOEHN,
Defendant-Appellant.

Appeal from the Iowa District Court for Clayton County, Monica L. Ackley,
Judge.

Defendant appeals the district court decision quieting title to certain
property in plaintiffs over his claims of boundary by acquiescence. **AFFIRMED.**

Terry D. Parsons of Olsen & Parsons Law Firm, Cedar Falls, for appellant.

Andrew P. Nelson of Meyer, Lorentzen & Nelson, Decorah, for appellees.

Considered by Zimmer, P.J., and Baker, J., and Brown, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

BROWN, S.J.**I. Background Facts & Proceedings**

In August 2005, Lon Lindsey, Ron Abel, David Staake, Gary Staake, and their spouses filed a petition against Milford Koehn seeking to quiet title to certain real estate in Clayton County. The petition stated plaintiffs were credibly informed and believed that Koehn made some claim to the premises adverse to their title. Koehn raised as an affirmative defense the failure to mitigate damages, and reserved the right to amend his answer to raise further affirmative defenses.

On the morning of trial, held on June 1, 2006, Koehn submitted a trial brief which raised for the first time the issue of boundary by acquiescence under Iowa Code section 650.14 (2005). Plaintiffs advised the court they would not try that issue by consent, and asked that the case be tried solely on the pleadings. Koehn stated he had claimed during discovery that a fence had become the boundary line through the acquiescence of the adjoining landowners. Koehn orally requested to amend his answer to include the affirmative defense of boundary by acquiescence. The district court ruled the hearing would go forward based only on the pleadings in the record. The court further offered the parties a continuance if either party believed that it was necessary “to conform the pleadings to what it is you believe your evidence will support.” Neither party requested a continuance.

After the close of the evidence, Koehn orally moved to amend his answer to conform to the proof in the case. Plaintiffs resisted Koehn’s motion. The court

stated it would take the matter under advisement and the decision on that matter would be part of the court's ruling.

The district court issued a judgment on the quiet title action on August 2, 2006. The court found plaintiffs had established ownership in the property. The court did not specifically rule on the pending motion to conform to the proof and did not mention boundary by acquiescence. The court discussed adverse possession and stated, "The Court therefore does not find that the Defendant's efforts to utilize the fence as the demarcation line by adverse possession have been successful."

The district court entered a decree quieting title in plaintiffs. The court stated, "All claims raised by the Defendant as to the subject property are deemed failed and the Defendant therefore has no interest or rights to the subject parcel." Koehn was assessed treble damages for removing two trees from the disputed area. Koehn did not file any post-trial motions. He appealed the decisions of the district court.

II. Standard of Review

Our review of an action to quiet title is de novo. Iowa R. App. P. 6.4; *Garrett v. Huster*, 684 N.W.2d 250, 253 (Iowa 2004). In equity cases, especially when considering the credibility of witnesses, 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).

III. Merits

On appeal, Koehn asserts that he established a boundary by acquiescence under section 650.14. Plaintiffs respond that this issue has not

been preserved for our review because it had not been ruled upon by the trial court, and Koehn did not file a post-trial motion.

A claim of boundary by acquiescence may be brought as a defense in an action to quiet title. *Ivener v. Cowan*, 175 N.W.2d 121, 122 (Iowa 1970). A defendant has the burden of proving an affirmative defense, such as acquiescence. *Kennedy v. Oleson*, 251 Iowa 418, 421, 100 N.W.2d 894, 896 (1960). A party's failure to plead an affirmative defense normally results in its waiver, unless the issue is tried by the consent of the adverse party. *Dutcher v. Randall Foods*, 546 N.W.2d 889, 893 (Iowa 1996).

Iowa Rule of Civil Procedure 1.457 permits a party to make a motion to amend the pleadings to conform to the evidence, even after judgment in a case. An amendment to conform to the proof should not be allowed if the amendment will substantially change the claims before the court. *Tomka v. Hoechst Celanese Corp.*, 528 N.W.2d 103, 108 (Iowa 1995). A court's decision to grant a motion to amend to conform to the evidence will be reversed only upon a clear abuse of discretion. *Scott v. Grinnell Mut. Reins. Co.*, 653 N.W.2d 556, 561 (Iowa 2002).

In this case, the district court did not specifically rule on the motion to amend to conform to the evidence. It appears, however, that the court must have granted the motion, but believed the issue raised as an affirmative defense was adverse possession. The court discussed the elements of adverse possession, which are that a party claiming title by adverse possession must

establish hostile, actual, open, exclusive and continuous possession, under claim of right or color of title, for at least ten years. See *Garrett*, 684 N.W.2d at 253.

The elements necessary to show a boundary by acquiescence under section 650.14 are not the same. To prove a boundary by acquiescence, a party must show by clear evidence that two adjoining landowners or their predecessors in title have recognized and acquiesced in a boundary line for a period of ten years. *Tewes v. Pine Lane Farms, Inc.*, 522 N.W.2d 801, 806 (Iowa 1994).

"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). The district court did not discuss whether a boundary had been established by acquiescence nor did it mention the elements of that doctrine. Even assuming that issue was before the court, a party must file a post-trial motion to preserve error on the claims which the court failed to address. *Stammeyer v. Division of Narcotics Enforcement*, 721 N.W.2d 541, 548 (Iowa 2006). A "party must still request a ruling from the district court to preserve error for appeal on an issue presented but not decided." *Meier*, 641 N.W.2d at 539.

We conclude Koehn has failed to preserve for our review the issue of the affirmative defense of boundary by acquiescence. We affirm the decision of the district court.

AFFIRMED.