IN THE COURT OF APPEALS OF IOWA

No. 9-019 / 08-0379
Filed March 26, 2009

CROELL REDI-MIX, INC.,
Plaintiff/Counterclaim Defendant-
Appellant/Cross-Appellee,

vs.

HAROLD BALTES and DORIS BALTES,
Defendants/Counterclaimants-
Appellees/Cross-Appellants.

HAROLD BALTES and DORIS BALTES,
Third-Party Plaintiffs,

vs.

JAMES KLUNDER and JOYCE KLUNDER,
Third-Party Defendants.

Appeal from the Iowa District Court for Chickasaw County, Kellyann M. Lekar, Judge.

Croell Redi-Mix appeals and the Balteses cross-appeal following the district court's order dismissing Croell's petition and awarding damages to the Balteses. **REVERSED.**

Gregory M. Lederer of Lederer, Weston & Craig, Cedar Rapids, and Michael M. Kennedy of Kennedy & Kennedy, New Hampton, for appellant.

Dale E. Goeke, Waverly, for appellee.

Heard by Sackett, C.J., and Potterfield and Mansfield, JJ.

POTTERFIELD, J.

I. Background Facts and Proceedings

Harold and Doris Baltes claim ownership of four parcels of land by adverse possession and/or boundaries by acquiescence. These parcels border a lot they purchased in 1974. All of the parcels are part of two larger properties located immediately east of Highway 63 on the outskirts of New Hampton, Iowa. In 1962, Ted Moldenhauer owned most of the land at issue and operated a truck stop there. Wilfred Wanderscheid owned and farmed the land to the north and east of Moldenhauer's land. Since the early 1980s, Croell Redi-Mix, Inc. (Croell) operated a plant on the land located directly east of the southern portion of Moldenhauer's truck stop.

In 1967, Harold Baltes moved to New Hampton and ran Moldenhauer's truck stop. He and Moldenhauer became friends. Over the course of seven years, Moldenhauer permitted Baltes to place three different mobile homes on Moldenhauer's property rent-free.

In 1974, Baltes purchased from Moldenhauer a 75' x 193' parcel of land, which was located north of the truck stop parking lot. Baltes moved his mobile home to this property and later moved a house there. Baltes's parcel was landlocked, so Moldenhauer formally conveyed an access easement to Baltes. Baltes and Moldenhauer discussed a larger easement that would be more useful to Baltes, but that was never reduced to writing. According to Baltes, Moldenhauer informed him that he could continue to use the larger easement that was not in writing, saying his use "would never be a problem, not as long as [Moldenhauer] was in control."

A diagram showing the areas of land at issue is attached to this opinion. For ease of discussion, we will identify the areas of land involved in the dispute using numbers as shown on the diagram. Area 1 is a parcel located on the eastern side of the southern border of Baltes's property, measuring approximately .1 acres. Area 2 is roughly .17 acres and borders the entire west edge of Baltes's property, extending south of Baltes's property line. Area 3 is a .83-acre triangle of land on the northern border of Baltes's land and area 2.[1] Area 4 is a .09-acre parcel of land located between areas 1 and 2 on the south side of Baltes's property. Area 5 is on the eastern border of Baltes's land, extending as far north as the northeast corner of Baltes's land and roughly fifty-nine feet south of the southeast corner of Baltes's land. Areas 1, 2, and 4 were on property initially owned by Moldenhauer. Areas 3 and 5 were on property owned by Wilfred Wanderscheid.

Beginning in 1974, Baltes used areas 1, 2, 4, and 5, essentially extending the lot he owned to the south, east, and west. In 1984, Baltes began to operate a boat sale and repair business out of a shop built on his property. He used areas 1, 2, 4, and 5 for a variety of purposes, including placing a sign for his business, parking boats for his business, and storing abandoned cars and trash receptacles. Baltes also improved the areas by paying for fill dirt and planting grass seed, bushes, shrubs, and small trees.

In 1994, Moldenhauer sold his truck stop to James and Joyce Klunder. The land sold included areas 1, 2, and 4, to the south and west of Baltes's parcel, and continued south. Baltes did not ask Moldenhauer to exempt any of

[1] Area 3 is not at issue on appeal. Baltes rented Area 3 from Wilfred Wanderscheid.

these areas out of the sale.[2] In 1999, Baltes requested a formal easement from Klunder for the driveway access he needed. The easement agreement, which Klunder never signed, describes Baltes's land as only the 75' x 193' foot parcel that Baltes had purchased from Moldenhauer in 1974. When Baltes refinanced his home in 2004, the mortgage documents described only the 75' x 193' parcel he originally purchased from Moldenhauer. Similarly, when Baltes filed bankruptcy schedules, he listed only the original parcel as his property.

In 2003, Croell began to acquire more property to accommodate a new concrete plant and a precast distribution yard. Croell purchased from Wanderscheid a fifteen-acre parcel of land, including area 5, that was located north of Croell's plant and east and north of Baltes's property. Around the same time, Croell entered into a lease with a buy-out option for the land owned by Klunder, including areas 1, 2, and 4. As part of these transactions, Croell commissioned a survey, which revealed that Baltes had encroached on its property in areas 1, 2, 4, and 5.

Around August 1, 2004, without notifying Baltes, Croell removed the landscaping on these areas so that it could use the property in its operations.[3] Croell also cleared a fifteen-foot strip of land running through area 5 directly to the east of Baltes's property to use as a frontage road. Baltes claims that in establishing this frontage road, Croell destroyed a berm that protected Baltes's property from water runoff, resulting in water damage to Baltes's property.

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[2] Harold Baltes's wife, Doris, moved to the property in 1986. All references to Baltes after that date refer to both Harold and Doris.

[3] Though this work occurred on a weekend when Baltes was out of town, there is no evidence that Croell intentionally timed the removal of landscaping.

Baltes protested Croell's actions through a letter from his attorney requesting that Croell "refrain from taking any further action which may damage or interfere with Harold and Doris Baltes's property rights." Croell then filed an action seeking an order requiring Baltes to cease and desist from trespassing on Croell's land and to remove his personal property and landscaping from Croell's land. Baltes filed a counterclaim asserting that he owned areas 1, 2, 4, and 5 by adverse possession and/or boundaries by acquiescence. Baltes sought damages for loss of landscaping, loss of use and enjoyment of his home, loss of value of the home, and emotional distress for both Harold and Doris. Baltes also requested punitive damages, attorney fees, and a declaration that Croell's use of its property constituted a nuisance. Baltes later filed a cross-claim against Klunder as the title holder to areas 1, 2, and 4.

The district court found that Baltes had proven his claims of adverse possession and boundaries by acquiescence and ordered Croell to convey title to areas 1, 2, 4, and 5 to Baltes. The district court also awarded treble damages of $25,758.72 for destruction of the landscaping; $10,000 for diminution in value of the Baltes property; $10,000 for Harold Baltes's emotional distress; $15,000 for Doris Baltes's emotional distress; and $30,000 in punitive damages.[4] The district court further ordered Croell to abate the nuisance caused by using the road immediately to the east of the Baltes property for ingress and egress.[5]

[4] The district court originally awarded attorney fees to Baltes but later vacated this award.

[5] The district court also dismissed Baltes's petition against Klunder. This is not at issue on appeal.

Croell appeals, arguing that Baltes did not prove adverse possession or boundaries by acquiescence and therefore is not entitled to title to the property; punitive damages; or damages for destruction of landscaping, diminution in value of the property, or emotional distress. Croell also argues that its operations should not be considered a nuisance. Baltes cross-appeals, arguing that the district court's awards for diminution in value of his property, punitive damages, and emotional distress are inadequate. Baltes also argues that the district court erred in declining to award him common law attorney fees and requests an award of appellate attorney fees.

II. Standard of Review

Because this matter was tried in equity, our review is de novo. Iowa R. App. P. 6.4.

III. Adverse Possession

"One claiming title by adverse possession must establish hostile, actual, open, exclusive and continuous possession, under a claim of right or color of title, for at least ten years, by clear and positive proof." *Carpenter v. Ruperto*, 315 N.W.2d 782, 784 (Iowa 1982). A claim of right must be made in good faith. *Mitchell v. Daniels*, 509 N.W.2d 497, 500 (Iowa Ct. App. 1993). Good faith is determined at the time of entry and possession. *See Carpenter*, 315 N.W.2d at 786. The doctrine of adverse possession is strictly construed. *Id.* at 784. Croell argues that Baltes failed to establish that his use of the property at issue was hostile or under a good faith claim of right. Baltes did not claim color of title to the land surrounding his parcel.

A. Permissive Use of Areas 1, 2, and 4 Owned by Moldenhauer

The record establishes that Baltes began using areas 1, 2, and 4 with Moldenhauer's permission. Baltes testified that he began using this land after Moldenhauer "just basically told me to use it like I owned it." He testified by deposition that Moldenhauer "basically gave [him] permission to clean it up . . . use it like I owned it." When property is used with permission, the use can never ripen into title by adverse possession. *Council Bluffs Sav. Bank v. Simmons*, 243 N.W.2d 634, 637 (Iowa 1976). Thus, Baltes's claim of adverse possession to areas 1, 2, and 4 owned by Moldenhauer fails.

B. Good Faith Claim of Right to Areas 1, 2, and 4 Owned by Klunder

When Moldenhauer sold his property to Klunder, Baltes's permissive use of the property ended. In order for Baltes to establish a claim of adverse possession over areas 1, 2, and 4 when they were owned by Klunder, he must prove all of the elements established above. Baltes cannot show that he had a good faith claim of right to the property once it was sold to Klunder.

Baltes argues that the Iowa Supreme Court eliminated the good faith requirement in *Collins Trust v. Allamakee County Board of Supervisors*, 599 N.W.2d 460 (Iowa 1999), where the court decided, without discussing the good faith requirement, that the county had met its burden to prove prescriptive easement. The supreme court in *Collins* found that the expenditure of public funds to maintain and improve a road can support a claim of right and notice to create a prescriptive easement. *Collins Trust*, 599 N.W.2d at 464 (Iowa 1999). The *Collins* facts are unique, involving the installation and maintenance of a culvert with county funds, a very different situation than the private intrusions on

land presented in this case. *See Brede v. Koop*, 706 N.W.2d 824, 829-30 (Iowa 2005).

"One of the main purposes of the claim of right requirement is to bar mere squatters from the benefits of adverse possession." *Carpenter*, 315 N.W.2d at 785 (citation omitted). "To permit a squatter to assert a claim of right would put a premium on dishonesty." *Id.* Because we agree that the doctrine of adverse possession should not encourage dishonest takings of land, we determine that a plaintiff must show a good faith claim of right in order to establish adverse possession, as confirmed in *Carpenter. Id.* at 786.

Baltes cannot establish a good faith claim when he knew he did not have title and he had no basis for claiming interest in the property. *Mitchell*, 509 N.W.2d at 500. Baltes knew that he had been using areas 1, 2, and 4 only with Moldenhauer's permission and that he did not have any right to use those areas once Klunder bought them. In addition, after Croell removed Baltes's landscaping, Baltes sent a letter to Klunder requesting, "If you have authorized the destruction of my personal property on land that you now own . . . STOP the destruction of my personal property until this has been heard by a court of law." Thus, Baltes recognized that his personal property was on land owned by someone else in which he had no basis for claiming an interest.

C. Good Faith Claim of Right to Area 5 Owned by Wanderscheid

We turn to the question of Baltes's claim of right to area 5. Baltes testified by deposition that area 5 was directly to the east of his property line and on the

Wanderscheid property, indicating that he knew he did not have title to the land. Baltes testified at trial that he was not "clearly aware" that the three trees and the honeysuckle hedge in area 5 were beyond the boundary of his parcel. However, Baltes did not present any evidence showing that when he planted the trees and hedge in area 5, he believed he had any legal right to do so. He did not carry his burden of proof on this element. Like the plaintiff in *Carpenter*, he simply improved adjacent land to provide a more desirable boundary for the land he owned. *Carpenter*, 315 N.W.2d at 784-85.

"To say that one can acquire a claim of right by merely entering possession would recognize squatter's rights. Possession for the statutory period cannot be bootstrapped into a basis for claiming a right to possession." *Id.* at 786. Because Baltes did not have a good faith belief that he had title to area 5 or a basis for claiming an interest in the property, his claim of adverse possession fails.

IV. Boundaries by Acquiescence

Baltes also asserted that he was entitled to the disputed land pursuant to the boundaries by acquiescence doctrine. The doctrine of boundaries by acquiescence 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." Iowa Code § 650.14 (2003). Thus, two owners may establish a boundary by mutually acquiescing in a "line definitely marked by a fence or in some other manner as a true boundary, although a survey may show otherwise." *Mensch v. Netty*, 408 N.W.2d 383, 386 (Iowa 1987). "Acquiescence

exists when both parties acknowledge and treat the line as the boundary." *Sille v. Shaffer*, 297 N.W.2d 379, 381 (Iowa 1980). Both parties must have knowledge of the boundary line to establish acquiescence. *Id.* To prove knowledge, it is sufficient to prove that both parties knew of the boundary and treated it as a boundary for the required period. *Id.*

The record fails to show that Moldenhauer, Klunder, or Wanderscheid acquiesced in the re-establishment of legal boundaries. Rather, Baltes's testimony at trial shows that Moldenhauer acquiesced to Baltes's *use* of the land adjacent to his property, not to his *acquisition* of it. Thus, while Moldenhauer intended to allow Baltes to use his land, Baltes cannot show that Moldenhauer acquiesced in changing any legal boundaries. Moldenhauer did not treat any line established by Baltes as a boundary; rather, he allowed Baltes to use property he was not currently using. In addition, Baltes testified that the railroad ties, which he claims establish a definite boundary on the south edge of area 2, were put into place to prevent trucks from backing into his lawn. Baltes did not place the railroad ties on the ground as a mutually agreed upon boundary; the railroad ties served another purpose.

Further, conversations between Klunder and Baltes disprove Baltes's claim that Klunder acquiesced in the boundaries Baltes established. Klunder testified that Baltes complained to him about semi trucks at the truck stop damaging Baltes's personal property. Klunder responded by telling Baltes to move his property off the land owned by Klunder if Baltes did not want the property to be damaged by the trucks.

Similarly, Baltes presented no evidence that Wanderscheid acquiesced to a boundary marked by the three trees and the hedge in area 5 that he had unilaterally established. Baltes did not show that this was a case where two owners mutually acquiesced in a boundary line that differed from the legal boundary. The record shows that this was a case where one owner used land owned by his neighbor, not boundaries by acquiescence.

V. Easement

Baltes also asserts that even if he did not establish adverse possession or boundaries by acquiescence, he established a prescriptive easement or an easement by necessity, entitling him to the use of areas 1, 2, 4, and 5. Croell contends that Baltes did not raise these issues before the district court. We agree. The record shows that Baltes never pleaded these claims, and the district court never addressed a claim of either prescriptive easement or easement by necessity relating to areas 1, 2, 4, or 5. "Ordinarily, issues must be raised and decided by the trial court before they may be raised and decided on appeal." *Peters v. Burlington N. R.R. Co.*, 492 N.W.2d 399, 401 (Iowa 1992). We therefore decline to address this issue on appeal.

VI. Damages

Because we find that Baltes failed to establish his claims of adverse possession, boundaries by acquiescence, or easement for any of the disputed land, we find that the district court erred in awarding: (1) damages for the destruction of landscaping; (2) damages for diminution in value of the Baltes property; (3) punitive damages; and (4) damages to Harold and Doris for

intentional infliction of emotional distress.[6] Additionally, we find that the district court was correct in declining to award common law attorney fees.

VII. Nuisance

Finally, Croell argues that the district court erred in finding that operation of trucks on its land constitutes a nuisance. Baltes complains that a frontage road established by Croell just to the east of his property amounts to a nuisance because traffic shakes his house, causes a dust problem, and creates mud holes. He asserts that Croell should find an alternate path for traffic.

In a nuisance action, we must make two determinations: (1) whether a nuisance exists; and (2) whether injunctive relief is appropriate. *Valasek v. Baer*, 401 N.W.2d 33, 34 (Iowa 1987). A nuisance is defined as "[w]hatever is injurious to health, indecent, or unreasonably offensive to the senses, or an obstruction to the free use of property, so as essentially to unreasonably interfere with the comfortable enjoyment of life or property . . . ." Iowa Code § 657.1. "In determining whether a nuisance has been created we consider priority of location, the nature of the neighborhood, and of the wrong complained of." *Patz v. Farmegg Prods., Inc*., 196 N.W.2d 557, 561 (Iowa 1972). An injunction is considered an extraordinary remedy and should be used only when clearly required. *Valasek*, 401 N.W.2d at 35.

We find that Croell's business operation did not constitute a nuisance. When Baltes moved into the area, Moldenhauer operated a truck stop

[6] Baltes asserts that if the court finds that he did not acquire rights to areas 1, 2, and 4 by adverse possession, boundaries by acquiescence, prescriptive easement, or easement by necessity, Croell should be required to compensate Baltes for his future lost income and value of his house and shop building. Baltes cited no authority to support this argument and has therefore waived this issue. Iowa. R. App. P. 6.14(1)(*c*).

immediately to the south of Baltes's home and Wanderscheid farmed immediately to the east of the home. For years, trucks entered and exited the area continuously, often driving close to Baltes's home. Frequently, the trucks would leave their engines running all night. Also, Wanderscheid operated agricultural machinery on the land immediately to the east of Baltes's property line. When Baltes moved his home onto the property he purchased from Moldenhauer, he knew the nature of the neighborhood. Baltes operates a boat repair business on his property, which contributes to the commercial traffic. Given the amount of heavy traffic that has existed on and around Baltes's property for thirty-five years, we cannot find that Croell's use of a frontage road near Baltes's home suddenly creates a nuisance that should be enjoined.

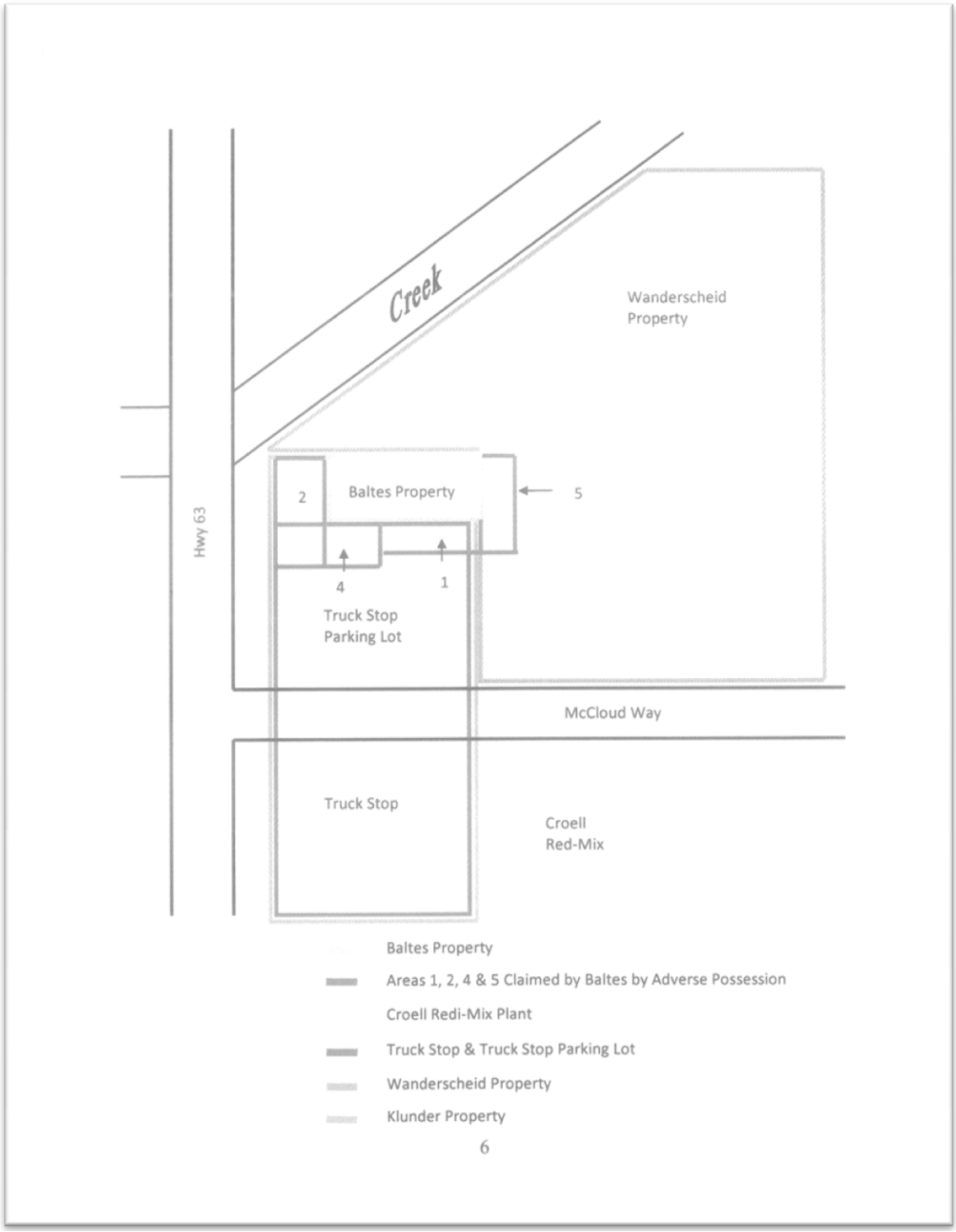
VIII. Appellate Attorney Fees

Baltes argues on cross-appeal that this court should award appellate attorney fees. Croell asserts that this court does not have such discretion outside the dissolution context. We need not consider this argument because we decline to award attorney fees.

IX. Conclusion

We find that Baltes did not establish his claims of adverse possession or boundaries by acquiescence over areas 1, 2, 4, or 5. Accordingly, we find that the district court erred in awarding damages against Croell for destruction of landscaping; diminution in value of the Baltes property; emotional distress; and punitive damages. Croell's use of the land to the east of the Baltes property does not constitute a nuisance. We do not award appellate attorney fees.

REVERSED.


Creek
Wanderscheid
Property
Hwy 63
2
Baltes Property
5
4
1
Truck Stop
Parking Lot
McCloud Way
Truck Stop
Croell
Red-Mix
Baltes Property
Areas 1, 2, 4 & 5 Claimed by Baltes by Adverse Possession
Croell Redi-Mix Plant
Truck Stop & Truck Stop Parking Lot
Wanderscheid Property
Klunder Property

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