IN THE COURT OF APPEALS OF IOWA

No. 9-625 / 08-1110
Filed September 2, 2009

ROBERT MERTEN, JOSEPH MERTEN, JOHN MERTEN, and MICHAEL HOVEN,
Plaintiffs-Appellants,

vs.

GARY D. EGGERS,
Defendant-Appellee.

Appeal from the Iowa District Court for Mitchell County, John S. Mackey, Judge.

The plaintiffs appeal from the district court's decree in this property dispute. **AFFIRMED AS MODIFIED.**

Michael G. Byrne of Winston & Byrne, P.C., Mason City, for appellants.

Gary Eggers, Stacyville, appellee pro se.

Considered by Vogel, P.J., and Potterfield, J., and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

MILLER, S.J.

Robert Merten, Joseph Merten, John Merten, and Michael Hoven (plaintiffs) appeal from the district court's decree in this equity action. We affirm as modified.

I. Background Facts and Proceedings.

Robert, Joseph, and John Merten own Tract A, a tract of land in Section 15 in Stacyville Township lying north of Tract B, owned by Michael Hoven. Tract A is farmed by the Mertens. The Mertens have field access by way of an express easement through Tract B allowing them ingress from and egress to the gravel road bordering on the south of Hoven's property—490th Street. The easement, which was created when the tracts were divided in 1987,[1] is described as:

> [A] permanent 20' wide driveway easement the centerline being described as follows: Commencing at the S ¼ Corner of said Section 15, thence N0° 44' 40" E 139.37 feet to point of beginning, thence N41° 56' 20" W 550 feet.

As described above, the easement begins 139.37 feet north of the south quarter corner of Section 15.

The south quarter corner of Section 15 was once marked by an "x" cut in the deck of a bridge running east/west on what is now 490th Street. The bridge spanned a waterway that travels north and west through Tract B from its

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[1] Both tracts were owned at one time by Clem and Rose Meyerhofer, but the tracts were divided in 1987 when Tract B was sold to Paul and Rita Hackenmiller. It is not clear from this record how Tract A passed from Meyerhofer to the Hackenmillers, but the real estate contract selling Tract A to Merten Bros. Farms (by Eugene Merten) and Robert Merten in 1993 names the Hackenmillers as sellers. The Hackenmillers sold Tract B to Hoven's grandfather in 1984.

southeast corner and effectively bisects the southern and northern parts of the parcel. Sometime after 1982 the wooden bridge was replaced by a culvert bridge. Because of the waterway, the only current road access to the buildings on Tract B is via a driveway off of 490th Street. The driveway crosses the southwest corner of Tract C.

Tract C is currently owned by Gary Eggers, who purchased the parcel in 1997 from Philip and RosaLee Studer. Tract C borders the entire eastern edge of Tract B and a part of the southeastern edge of Tract A.[2]

The Mertens and Hoven filed a petition in equity against Eggers claiming the driveway by adverse possession, and contending "the dividing line of the two properties was marked by the 1948 concrete monument to the east side of the disputed existing driveway." The petition also asserted the case was "subject to resolution on the grounds of Chapter 650." The plaintiffs asked the court to redraw the disputed corner, quiet title to the driveway in Hoven subject to the easement rights of the Mertens, and "for such other and further relief as the Court may deem equitable in the premises." At the time the case was tried to the court, the relief sought by the plaintiffs was recognition of the 1948 concrete marker as the property line between Tracts B and C or, in the alternative, a permanent easement across the driveway through Tract C.

The trial court, sitting in equity, made the following findings.

> By virtue of the description contained within the Mertens' documents of conveyance, and as reflected on . . . a 1991 survey of Eggers' Tract C, a small diagonal portion of the reserved

[2] The farmland north and east of Tract C is owned by the Charlene F. Merten Trust and is farmed by Robert, Joseph, and John Merten.

driveway easement cuts across the very southwest tip of his property. Directly to the west of the driveway lies a drainage creek which is crossed by a bridge on 490th Street. . . . Although its exact location is not clear, the South Quarter Corner of Section 15, Township 100 North, Range 16 West lies in the middle of 490th Street somewhere near the third most easterly culvert upon the bridge which crosses the drainage creek. . . .

On the east side of the driveway entrance stands a cement marker which appears to have been formed by pouring concrete into a 55-gallon barrel atop of which is etched with the number "1948." A green metal fence post and another rusted metal post of some fashion sits behind this concrete barrel. The driveway thence runs northwesterly from 490th Street along the creek and turns more northerly to run along the west side of the trees and shrubbery located upon Eggers' Tract C. Its westerly fork constitutes the sole access to Hoven's Tract B as the creek in its low flood plain effectively block[s] any other intended ingress or egress thereto. The creek and its bed run south of Hoven's building site and is approximately 15 feet below the road level of 490th Street.

From 1997 until approximately two years prior to trial, the parties enjoyed an amicable relationship normally attendant to being neighborly Iowans: helping each other out and utilizing the subject driveway without incident. It appears problems began when, after a number of years of lowering rent, Eggers verbally terminated the verbal rental agreement of approximately four acres on their north and east side of their property to the Mertens. When Gary informed Eugene Merten (plaintiffs' [Robert's and Joseph's] father) of this fact, Eugene assaulted him by striking him in the face on Easter holiday. Eugene then subsequently dug a trench with a backhoe along the eastern side of the disputed driveway after Gary parked cars in the northwest corner of his property. Gary then began parking trucks and other vehicles blocking access to Mertens' farmland upon the driveway easement. . . .The feud continues . . . .

. . . . Defendant Eggers . . . request[s] that he be allowed to utilize the disputed driveway for purposes of accessing the northwest corner of his property which is now prevented by the trench dug by Eugene Merten and his backhoe. The northernmost portion of defendant Eggers' property does not appear to be accessible due to another drainage creek cutting midway across diagonally from southwest to northeast.

The court concluded that the plaintiffs had failed to establish that the cement barrel marker was the dividing line between Tracts A/B and C. The court further concluded:

> With respect to the driveway easement, the court concludes that the express easement as previously described in the documents of conveyance should be, in the opinion of this court, declared appurtenant to and running with the land both burdening and benefitting all three tracts A, B, and C. The court finds said easement is necessary to access not only Hoven's Tract B, but also Mertens' Tract A, and the northernmost portion of Eggers' Tract C. The court further concludes that the eastern boundary of the driveway should be fixed as commencing with the 1948 cement marker and run parallel to not only the specifically described driveway easement, but shall also extend northerly in addition thereto along the existing driveway roadway constructed by the Mertens on or about 1994. The court further concludes that the Mertens shall remove the ditch dug by Eugene Merten and his backhoe along said easterly side of the easement and restore the land to its original contour so as not to interfere with the Eggers' ability to access the northern portion of his property.

The plaintiffs appeal. They contend the court erred in refusing to redraw the boundaries of the properties in dispute and in finding an easement in favor of Gary Eggers.

II. Scope and Standard of Review.

Our review of this equitable action is de novo. Iowa R. App. P. 6.4. We accordingly need not separately consider assignments of error in the trial court's findings of fact and conclusions of law, but make such findings and conclusions from our de novo review as we deem appropriate. *Lessenger v. Lessenger,* 261 Iowa 1076, 1078, 156 N.W.2d 845, 846 (1968). *See also In re Voeltz*, 271 N.W.2d 719, 722 (Iowa 1978) ("Since this is a de novo review we need not separately consider errors made by the trial court in its findings."); *Fallers v.*

Hummel, 169 Iowa 745, 751-52, 151 N.W. 1081, 1083 (Iowa 1915) ("[E]quity, having obtained jurisdiction, will determine all questions material or necessary to the accomplishment of full and complete justice between the parties, even though in doing so it may require passing on some matters ordinarily cognizable at law"). We, however, give weight to the trial court's findings of fact, especially when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 6.14(6)(*g*).

III. Discussion.

A. Disputed Corners and Boundaries. Plaintiffs' petition asserted the case was "subject to resolution on the grounds of Chapter 650." The district court's judgment in an action under Iowa Code chapter 650 (2007) to establish a boundary has the effect of a jury verdict, and on appeal the only inquiry is whether the findings are supported by substantial evidence. *Egli v. Troy*, 602 N.W.2d 329, 332 (Iowa 1999); *Ollinger v. Bennett,* 562 N.W.2d 167, 170 (Iowa 1997). The plaintiffs argue that the record does not meet that test. We disagree.

Under Iowa Code section 650.14,

> [i]f 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.

"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.

Ollinger, 562 N.W.2d at 170 (citation omitted) (emphasis added). The adjoining landowners or their predecessors must have knowledge of and consent to the asserted property line as a boundary. *Tewes v. Pine Lane Farms, Inc.,* 522 N.W.2d 801, 806 (Iowa 1994).

Here, the trial court found that "[o]ther than the 1948 cement barrel, there is no other definite demarcation of any boundary mutually recognized by plaintiffs and defendant's predecessors in title." Substantial evidence supports the finding. There was testimony that the Mertens and Hoven believed that the cement barrel marker constituted the eastern edge of Hoven's parcel. However, there was no testimony as to any purported property line flowing from that point. Moreover, if the property line were as asserted, the driveway in question would be on Hoven's property and subject to his or his predecessors' maintenance. Hoven did not testify that the driveway was his or that he maintained the driveway. Rather, the evidence showed that Eggers maintained the driveway in dispute and mowed both the east and west sides of the driveway.

The trial court did not err in refusing to redraw the property lines.

B. Easement Burdening Plaintiffs' Properties.[3] The Plaintiffs argue that there was no counterclaim filed by Eggers that would allow the trial court to establish an easement in his favor.

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[3] Eggers has not appealed from the trial court's finding that Tract C is subject to an easement for the existing driveway, and we affirm that portion of the decree.

Issues may be tried by consent, though not specifically presented in the pleadings. *See Rouse v. Rouse*, 174 N.W.2d 660, 666 (Iowa 1970). "The issues decided by the district court should be limited to those directly or impliedly raised by the pleadings or litigated with the consent of the parties." *Stew-Mc Dev., Inc. v. Fischer*, ___ N.W.2d ___, ___ (Iowa Aug. 14, 2009).

The trial court found that Eggers had raised the issue that he had no access to the northwest corner of his property other than by way of the driveway running through Hoven's and Mertens' property. We note that counsel for plaintiffs in closing argument addressed the claim ("if Mr. Eggers has an issue with accessing the rear of his property . . . ."). We conclude the trial court, sitting in equity, was well within its authority in deciding the issue.[4] In addition, there was evidence that Eggers could not access the northwest corner of Tract C other than by using the Hoven driveway and Merten field access road.

We do find that the trial court's decree is ambiguous, however, as to the extent of the easement granted and could be read to include the entire length of the driveway leading to the Hoven's building site and the entire roadway along the Mertens' eastern border of Tract A.[5] We modify the decree to clarify that the

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[4] The plaintiffs appear to argue that because the trial court refused to consider Eggers's requests for other relief such as rent, damage to his motor vehicles, and damage to his property caused by redirected water, it also should have rejected the request for an easement. Eggers does not appeal the trial court's rejection of his other claims and thus we find them of no particular import. We believe, however, that all parties were aware of the issues before the court with respect to access to the various parcels and that the parties had adequate opportunity to present evidence on those issues.

[5] The district court's decree reads in part:

> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a permanent and perpetual driveway easement, *as described on page 2* hereof, is hereby declared established for ingress and egress purposes,

easement established for ingress and egress purposes in favor of Tract C is limited to the driveway commencing with the 1948 cement marker and running along the existing driveway on Tract B, then turning northerly and extending along the existing driveway roadway constructed by the Mertens in about 1994 and continuing on into Tract A, but only to the extent necessary to reach the northwest corner of Tract C and not further. We affirm in all other respects.

AFFIRMED AS MODIFIED.

> running appurtenant to and with the land, both burdening and benefiting mutually dominant and servient estates upon the land hereinabove described as Tracts A, B, and C. The eastern boundary of said easement shall commence at the 1948 cement barrel marker located upon Eggers' Tract C and shall run parallel to the existing driveway roadway along its entire course through all of Tracts A, B, and C.

(Emphasis added.) The easement "described on page 2 hereof" is described in the documents of conveyance of the Mertens' property as:

> a 20-foot wide driveway easement across a portion of the above-described excepted parcel, the center line of said driveway easement being described as: Commencing at the South Quarter Corner of said Section 15, thence North 0° 44' 40" East 139.37 feet to point of beginning, thence North 41° 56' 20" W 550 feet.

But, all parties agree that this easement has been modified to follow only so much of the driveway on Tract B (Hoven's property) as is required to reach the field access roadway constructed by the Mertens in about 1994, not the entire 550 feet.