

**IN THE COURT OF APPEALS OF IOWA**

No. 9-739 / 08-1788  
Filed December 17, 2009

**MARK E. LYNCH and JANINE K. LYNCH,**  
Plaintiffs/Counterclaim-Appellees,

**vs.**

**BRITT A. LENNON and CHRISTINE I. LENNON,**  
Defendants/Counterclaimants-Appellants.

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**BRITT A. LENNON and CHRISTINE I. LENNON,**  
Cross-Petitioners-Appellants,

**vs.**

**ROY F. PIERCE and DIANE L. PIERCE,**  
Cross-Petition Defendants-Appellees.

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Appeal from the Iowa District Court for Webster County, Ronald H.  
Schechtman, Judge.

Britt and Christine Lennon appeal the district court's ruling finding the  
Lynches had established a boundary by acquiescence and declining to award  
damages to the Lennons from the Pierces, who sold them the property.

**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Ernest Kersten, Fort Dodge, for appellants.

Eric Eide, Fort Dodge, for appellees Mark and Janine Lynch.

Monty L. Fisher, Fort Dodge, and Mark D. Fisher of Nidey Peterson Erdahl  
& Tindal, Cedar Rapids, for appellees Roy and Diane Pierce.

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

Schechtman, S.J., takes no part.

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

**POTTERFIELD, J.****I. Background Facts and Proceedings**

In 2004, Mark and Janine Lynch acquired farmland, part of which lies adjacent to and south of land owned by Britt and Christine Lennon. The Lennons acquired their land in 2000 from Ray and Diane Pierce by general warranty deed. None of the parties to this action had their property lines surveyed at the time they purchased their property. However, in 2007, the Lennons commissioned a survey of their land, and they now dispute the location of the boundary between their property and the Lynches' property.

On the southern portion of the Lennons' land, approximately fifty feet to the north of the boundary described in the Lennons' deed, lies a fence line. The fence line consists of old fence posts, some fence wire, which is mostly covered by a mound of dirt and weeds, and several mature trees. The Lynches have always farmed up to the fence line, as did their predecessors on the land. The Lynches believed the fence line was the northern boundary of their farmland. Britt Lennon testified that when he bought his land from the Pierces, he thought the fence line was the southern boundary of his land.

However, the 2007 plat of survey prepared for the Lennons showed that the fence line was north of the legal boundary, adding about a fifty foot strip of land to the Lennons' property. After making this discovery, the Lennons placed wooden fence posts in concrete at the southern corners of their land as described by the survey. The Lynches removed these posts from what they considered to be their land and filed a petition for the court to establish the fence as the true boundary between the parties' land. The Lennons filed a cross-

petition, seeking damages from the Pierces for breach of warranty of title. At trial, the Pierces made a motion for reformation of their warranty deed to the Lennons.

After trial, the district court found that the Lynches established their claim of acquiescence to the boundary line. The district court denied the motion for reformation because the matter was heard at law, not equity. The Lennons appeal, arguing the district court erred in: (1) finding the Lynches established the parties' acquiescence to the purported boundary with competent evidence; and (2) dismissing their claim for damages from the Pierces. We grant the Pierces' petition for rehearing on the claim of reformation and attorney fees and substitute this opinion for the opinion filed on November 12, 2009.

## **II. Standard of Review**

This case was tried as an action at law. Therefore, our review is for errors at law. *Davis v. Hansen*, 224 N.W.2d 4, 5 (Iowa 1974). The district court's findings of fact are binding if supported by substantial evidence. *Id.*

## **III. Boundaries by Acquiescence**

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 (2007). 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 shows that the owners of these two tracts of land had acknowledged the fence as the boundary for decades. Roy Pierce testified that he had recognized the fence as the boundary since 1985, fifteen years before he sold the land to the Lennons in 2000. The Lynches and their predecessors also recognized the fence as the boundary for decades. This satisfies the ten-year requirement and establishes the fence as the boundary line in this case.

The Lennons assert the district court erred in admitting several exhibits on the question of acquiescence over counsel’s hearsay and foundation objections. We do not reverse for errors in the admission of evidence unless substantial rights are affected. Iowa R. Evid. 5.103. “[E]rror in the admission of evidence is not prejudicial where substantially the same evidence is in the record without objection.” *State v. Jurgenson*, 225 N.W.2d 310, 312 (Iowa 1975). Assuming without deciding that the district court erred in admitting the evidence at issue, the Lennons cannot prove prejudice. The witnesses’ testimony and the Lennons’ own exhibits establish the existence of the fence and the history of the Lynches’ use of the strip of land at issue as farmland. Therefore, the district court properly found the Lynches had established their claim of acquiescence to the fence as the boundary line.

#### IV. Breach of Warranty

The Lennons cross-petition against the Pierces arguing that if the court finds a boundary by acquiescence, the Pierces should pay damages for breach of warranty of title made in their general warranty deed. The district court dismissed the Lennons' cross-petition, saying the deed given to them by the Pierces "was not a special warranty deed warranting against claims arising through acquiescence . . . nor was there any proof that Pierce knowingly allowed Lynch . . . to establish the fence boundary."

We agree with the district court that the deed given to the Lennons by the Pierces was not a special warranty deed. We also find that the terms of the general warranty deed provide the Lennons some protection against lawful claims adverse to their title. The deed states:

Grantors do Hereby Covenant with grantees . . . that grantors hold the real estate by title in fee simple; that they have good and lawful authority to sell and convey the real estate; that the real estate is free and clear of all liens and encumbrances except as may be above stated; and grantors Covenant to Warrant and Defend the real estate against the lawful claims of all person except as may be above stated.<sup>[1]</sup>

This covenant of warranty "constitutes an agreement by the grantor that upon the failure of the title which the deed purports to convey, either for the whole estate or part only, the grantor will pay compensation for the resulting loss." *Kendall v. Lowther*, 356 N.W.2d 181, 189-90 (Iowa 1984). While a grantor of a special warranty deed promises that no title defects have arisen because of the grantor's

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<sup>1</sup> This language is from The Iowa State Bar Association's form for a warranty deed, Form No. 103.

acts or omissions, the grantor of a general warranty deed promises to defend all claims. See Black's Law Dictionary 446 (8th ed. 2004).

However, a "mere discrepancy in the amount of land conveyed by deed is not, in itself, sufficient to constitute a breach of warranty of title." Kendall, 356 N.W.2d at 190. A breach of a general warranty deed occurs when the court's decree establishing boundaries "effectively evict[s the grantees], from a substantial part of the property described in their deed." See *id.* (finding grantor liable to grantee for breach of covenant of warranty after a flawed survey resulted in grantee losing title to a portion of purchased land, which the grantee's neighbor had been using). A grantee's recovery for breach of a warranty deed is limited to the amount of consideration paid for the portion of the land for which the deed was invalid. *Boice v. Coffeen*, 158 Iowa 705, 712-13, 138 N.W. 857, 860 (1912).

The Pierces argue they are not liable because the fence between the properties was an open, notorious, and obvious divider.<sup>2</sup> The Pierces cite case law from other jurisdictions supporting the proposition that an open, notorious, and visible encumbrance should not be held to breach a covenant against encumbrances because it is presumed the encumbrance is accounted for in determining the price. See *Ford v. White*, 172 P.2d 822, 824 (Or. 1946); *Murdock Acceptance Corp. v. Aaron*, 230 S.W.2d 401, 405-06 (Tenn. 1950).

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<sup>2</sup> The Pierces also assert the district court should have reformed the deed to reflect the agreement of the parties. However, the district court heard this matter at law, and reformation is a remedy only available in a court of equity. See *First Nat'l Bank v. Curran*, 206 N.W.2d 317, 320 (Iowa 1973) (stating reformation of instruments is "exclusively equitable in nature"). Thus, the district court did not err in denying the Pierces' motion to reform the deed.

In the present case, the fence boundary was not only open and obvious, but the landowners on both sides accepted the fence line as the boundary. The Lennons did not believe they owned the land south of the fence at the time of purchase. Britt Lennon testified that he believed the fence was the boundary line when he bought the land. He reached a purchase price based on his belief that the fence was the southern boundary of his land. Because the Lennons' purchase price was not based on the correct legal description in the deed, but rather on the mutually understood fence-line boundary, they are not entitled to recovery for the loss of the land. See *Boice*, 158 Iowa at 712-13, 138 N.W. at 860. Accordingly, we agree with the district court that the Pierces are not liable to the Lennons for damages for breach of the warranty of title.

However, attorney fees are a lawful element of damages to be recovered for a breach of warranty. *Meservey v. Snell*, 94 Iowa 222, 226, 62 N.W. 767, 769 (1895). The Lennons are entitled to damages in the amount of the attorney fees and expenses reasonably incurred in correcting the defects in the deed. See *Kendall*, 356 N.W.2d at 190 (finding the trial court properly awarded grantee the recovery of attorney fees and expenses incurred in defending action to quiet title to disputed area, based on the theory that the grantor had failed to warrant and defend the premises against other claims which were based on a superior legal title). We therefore reverse and remand for a calculation of attorney fees and expenses incurred in defending this action.

**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**