ELECTRONICALLY FILED OCT 13, 2022 CLERK OF SUPREME COURT

**IN THE SUPREME COURT OF IOWA**

No. 22-0848

**IN THE IOWA DISTRICT COURT IN AND FOR WAPELLO COUNTY**

| | | |
|---|---|---|
| SUNDANCE LAND COMPANY, LLC, | ) | |
| Appellant, | ) | |
| | ) | Case No.: EQEQ112440 |
| vs. | ) | |
| BOBBI REMMARK and PHILLIP REMMARK, | ) | |
| Appellees. | ) | |

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**APPELLEE'S FINAL BRIEF**

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## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. **NO ONE DISPUTES THAT SUNDANCE LAND COMPANY, LLC IS THE OWNER OF THEIR REAL ESTATE IN FEE SIMPLE. THIS CASE INVOLVES A DISPUTED BOUNDARY, NOT DISPUTED TITLE.**

II. **BECAUSE ACQUIESCED BOUNDARIES ARE "PERMANENTLY ESTABLISHED", COMMON OWNERSHIP OF ADJOINING PROPERTIES DOES NOT ERASE THOSE BOUNDARIES BY OPERATION OF LAW.**

III. **THE REMMARKS PROVED THE BOUNDARY BY ACQUIESCENCE BY CLEAR AND CONVINCING EVIDENCE.**

IV. **THE ISSUE OF ACCESS TO THE SUNDANCE REAL ESTATE WAS NEITHER PLED NOR ARGUED BELOW AND SHOULD NOT BE REACHED IN THIS ACTION.**

## ROUTING STATEMENT

While Appellee agrees with Appellant that this case turns on a substantial issue of first impression – whether a period of common ownership of adjoining lands erases an established acquiesced boundary, this question can be answered by the application of existing legal principles. The case should therefore be transferred to the Court of Appeals pursuant to Iowa R.App.P. 6.1101(3)(a).

## STATEMENT OF THE CASE

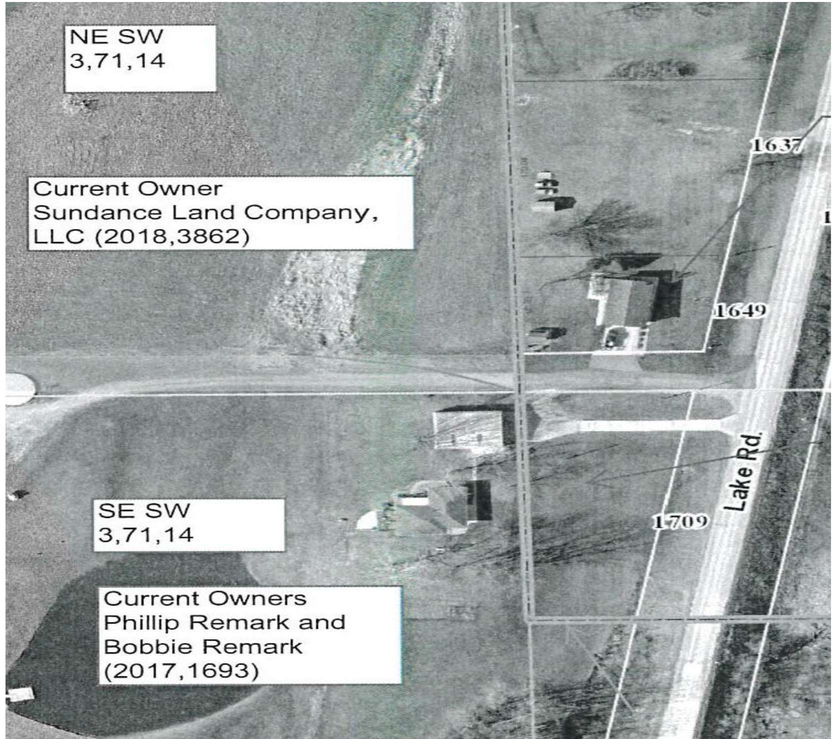
Though framed as a quiet title action by Appellant in its Petition, this case actually involved a disputed boundary under Iowa Code Chapter 650. This was

identified in Appellee's Answer and Counterclaim. The only issue litigated and tried below was the proper location of the boundary between the parties' land.

The trial court ruled in favor of Appellees, finding that they had established a boundary by acquiescence, and that this boundary was not erased by a period of common ownership of both parcels. The court identified the acquiesced boundary line for the eastern portion of the boundary, and ordered the appointment of a land surveyor to survey that line. The court further ordered the appointment of a commission to locate the boundary to the western part of the properties. Finally, the trial court refused to address the issue of Appellant's access to the property, as that issue was first raised in a post-trial motion and was not pled by either party or argued at trial.

**STATEMENT OF THE FACTS**

This case involves the disputed boundary between two parcels of real estate in rural Wapello County. Appellant Sundance Land Company, LLC ("Sundance") owns approximately 80 acres just to the west of Lake Road ("Sundance Real Estate"). Appellee Phillip and Bobbie Remmark ("Remmark") own approximately 60 acres adjacent to the south of the Sundance Real Estate ("Remmark Real Estate").




*Detail of Exhibit 13 (APP. 124)*

*(APP. 77)*

The historical chain of title of both properties was well illustrated by Sundance's Exhibit 17:

| Remmark Real Estate | | | | Sundance Real Estate | | | |
|---|---|---|---|---|---|---|---|
| Sequence | Grantee | Book/Page | Rec. Date | Sequence | Grantee | Book/Page | Rec. Date |
| | | | | 1 | Deed to John Grabenschroer and Sarah Grabenschroer | 167/408 | 8/25/1941 |
| 2 | Deed to Hobart C. Sims and Mary K. Sims | 297/242 | 10/27/1961 | | | | |
| | | | | 3 | Deed to Larry E. Handling and Linda S. Handling | 475/498 | 6/21/1991 |
| 4 | Quit Claim Deed to Sims Family Trust | 496/1032 | 10/20/1995 | | | | |
| 5 | Contract to Scott Brian Hubbell and Mary Sue Hubbell | 2005/3485 | 6/30/2005 | | | | |
| 7 | Deed to Scott Brian Hubbell and Mary Sue Hubbell | 2014/1821 | 5/12/2014 | 6 | Deed to Scott Brian Hubbell and Mary Sue Hubbell | 2014/1819 | 5/12/2014 |
| 8 | Deed to Phillip Remmark and Bobbie Remmark | 2017/1693 | 4/24/2017 | | | | |
| | | | | 9 | Deed to Sundance Land Company LLC | 2018/3862 | 9/19/2018 |

*(APP. 145)*

Since as far back as 1941, deeds for both properties described the boundary between them as the half-section line between the north and south halves of the southwest quarter of Section 3, Township 71, Range 14 in Wapello County. (APP. 105; APP. 119).

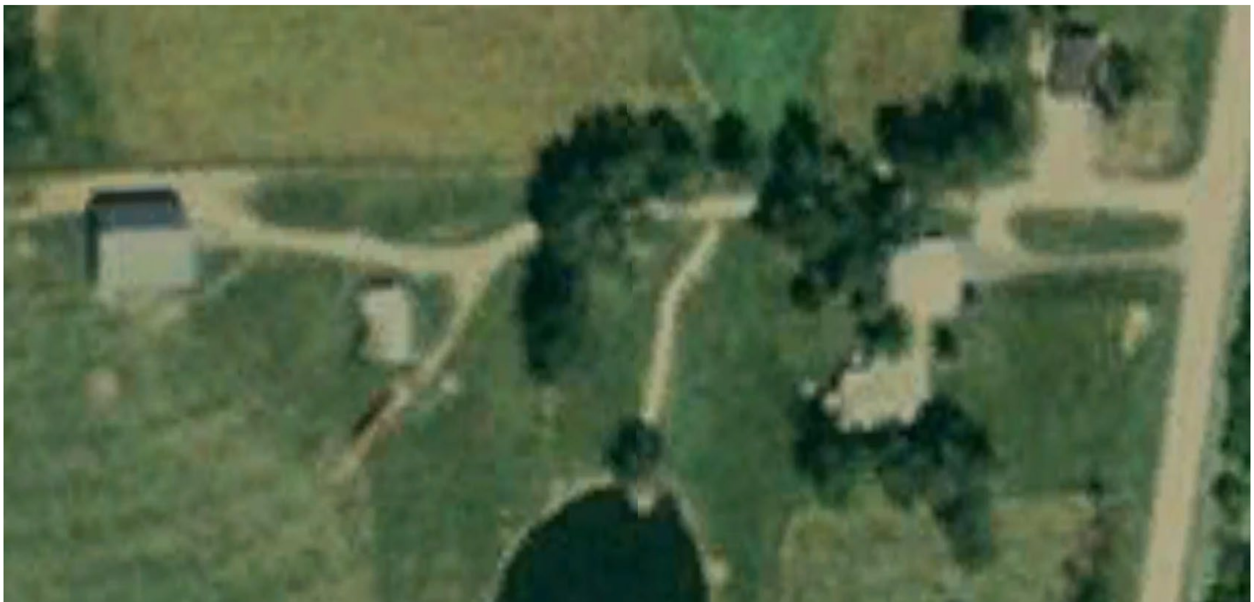
Beginning in 1869, Wapello County owned an easement for Michael Road, a 45-foot wide road running along the boundary between properties along that half-section line. (APP. 67-68, APP. 69-70). That part of Michael Road commencing

154 feet to the west of the eastern border of both properties was legally abandoned by Wapello County in 1980. (APP. 69). The remnants of the old Michael Road can be seen in old air photos, identified as a double line of trees on each side of the right-of-way. (APP. 86; Tr. 55).

At some point, either before or after the formal abandonment of the road, the owners of the Remmark Real Estate began to treat the land up to the north end of the right-of-way as theirs. This boundary was marked by an ancient fence, which presumably marked the northern extent of the Michael Road right-of-way. (Tr 53 - testimony of Trevor Brown; Tr. 121-122; APP. 80-81). An aerial photograph from 1994 reveals that Dorothy and Hobart Sims, then the owners of the Remmark property, were using the remains of Michael Road as a means of access to the structure in the rear of the property. (APP. 71). The white object in the photo was identified by witnesses as a semi trailer owned by Hobart Sims. (Tr. 109 – testimony of Scott Hubbell; Tr. 158-159 – testimony of Jerry Breon). This trailer is parked north of the half-section line but south of the north line of the old right-of-way. (Tr 109). The Sims barred access to the driveway with a gate. (Tr. 113 – testimony of Hubbell).

*Detail from Exhibit O – 1994 Air Photo (APP. 71)*

Subsequent air photos showed the continued occupation of the old road easement by the owners of the Remmark Real Estate. (APP. 72; APP. 73; APP. 74; APP. 75; APP. 76; APP. 77).



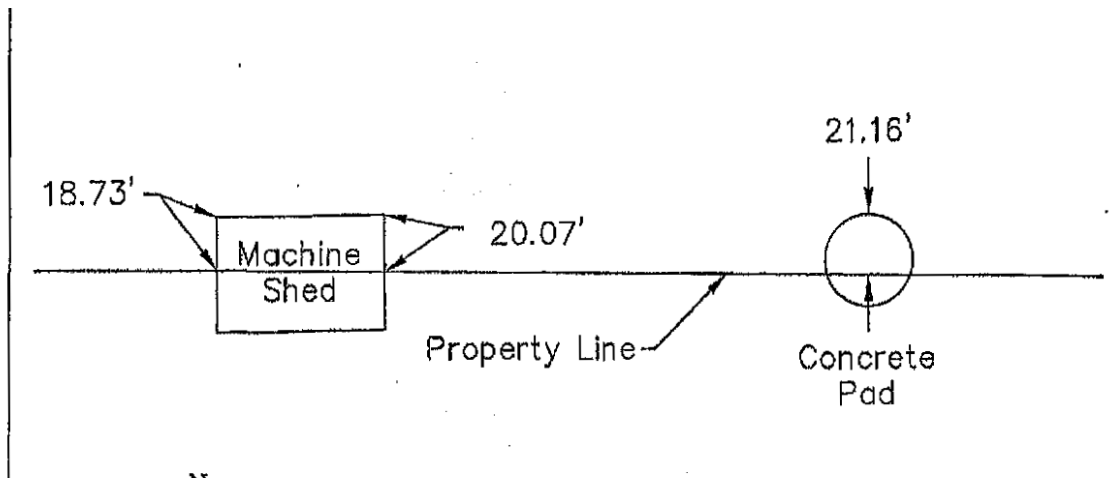
*Detail from Exhibit Q – 2006 Air Photo (APP. 73)*

*Detail from Exhibit R – 2010 Air Photo (APP. 74)*

*Detail from Exhibit S – 2013 Air Photo (APP. 75)*

*Detail from Exhibit T – 2016 Air Photo (APP. 76)*

The air photos show that sometime between 1994 and 2004 a blue-roofed machine shed was erected to the south of the fence line. (APP. 71; APP. 73). The photos also show that between 2013 and 2016 a circular grain bin was erected, also to the south of the fence line. (APP. 75; APP. 76). Both of these structures are south of the old fence line, but both are bisected by the half-section line. (APP. 144).



Detail from Ex. 16, p. 18 (Brown Survey) (APP. 144).

The machine shed was built in 2004. (Tr. 110 – Testimony of Hubbell). The Sims, through their trust, owned the land, and they built the shed at the request of Scott Hubbell, who was at that time farming the Remmark property. (Tr. 115). Hubbell paid for the structure. (Tr. 115). Neither the Sims, Hubbell, or Handling complained about the location of the shed. (Tr. 116). Hubbell built the grain bin during his period of common ownership of both the Remmark and Sundance Real Estate, and he did not believe that it encroached on the Sundance Real Estate. (Tr. 116-117).

Testimonial evidence confirmed that the owners of both parcels had long treated the north fence line of the old Michael Road right-of-way as the boundary. Linda Handling testified at trial. She was the owner of the Sundance Real Estate from 1991 to 2014. (APP. 102-103; Tr. 16). Handling testified that there was a fence between her property and the property then owned by the Sims. (Tr. 12, 13). She always considered that fence to be the boundary between their properties. (Tr. 13).

As for the Remmark Real Estate, the Sims are long gone, but neighbor Jerry Breon was able to testify about his conversations with Hobart Sims. Breon owns the house between Lake Road and the Sundance Real Estate depicted in the aerial photos, where he has resided since 1999. (Tr. 155; 156). Breon knew Hobart Sims

"[v]ery well." (Tr. 156) "Sat on the deck many times talking to him." (Tr. 156 – testimony of Breon). From that deck Breon could observe the boundary between the Remmark Real Estate and the Sundance Real Estate. (Id.) Breon always considered the fence to be the boundary. (Tr. 157). He confirmed that Hobart Sims "always claimed that was his land. The fence line was his land." (Tr. 157). "He claimed that was his, and everybody thought that." (Tr. 157).

Scott Hubbell also testified at trial. In about 1995 Hubbell began to rent the Sundance Real Estate from Linda Handling so he could farm it. (Tr. 83; 84). A year later, Hobart Sims offered to rent his fields to Hubbell. (Tr. 84). He purchased the Remmark Real Estate from Sims in 2005 (APP. 110-115, Tr. 85) and the Sundance Real Estate from Handling in 2014 (APP. 102-103, Tr. 85), owning both properties until he sold the Remmark Real Estate to the Remmarks in 2017. (APP. 66).

When called as a witness by Sundance, Hubbell testified that the fence "was just a fence. I didn't, you know – I guess I didn't know that as a boundary, but it was a fence." (Tr. 89-90). He denied that he ever treated the fence as the boundary between the properties and denied knowledge that the previous owners had treated it as such. (Tr. 92-93).

This was contradicted by his testimony on cross-examination, when he admitted that he thought that remaining original fence posts were the true

boundary. (Tr. 122); (APP. 80, 81). He also testified that he was involved in the erection of both the machine shed and the grain bin. (Tr. 110; 115). He believed that the true boundary was to the north of those objects. (Tr. 116). "I assumed it was close to that fenced area but didn't know exactly where . . . ." (Tr. 116). He further testified that after he sold the Remmark Real Estate to the Remmarks there was an understanding that the driveway "had to be used by both parties to get to the 80 [i.e., the Sundance Real Estate]." (Tr. 103-104; Tr. 118-119).

Hubbell testified that he had one conversation with the Remmarks prior to closing. (Tr. 101-102). He testified that this conversation occurred in his driveway. (Tr. 102). He testified that there was no discussion of boundaries, nor was there any question or concern that a survey ought to be done to find the boundary. (Tr. 102). He confirmed, however, that he never gave them any reason to believe that they were going to get anything less than the total use of the grain bin or machine shed. (Tr. 118). Hubbell testified that he never discussed changing the legally established boundary line with the Remmarks. (Tr. 118).

The Remmarks also testified about this conversation in the driveway. Phillip Remmark testified:

> I was raised on a farm and my dad always told me to walk the fence lines when you buy a property, and I told Scott, I said, I would like to -- before we close I would like to walk these fence lines with you to make sure where the property lines are. He said, I'm real busy. He said, I'm trying to close on our property at the end of Lake Road, and he said, I probably won't have time, but, he said, in any direction, he said, Lake Road is the boundary from the

> east and the south. He said, any -- the north and the west directions, when you come to a fence, that is the property line. I had no reason not to believe him.

(Tr. 136 – testimony of Phillip Remmark). Bobbie Remmark was present for this conversation and confirmed Phillip's testimony. (Tr. 150). The buildings, including the grain bin and the machine shed, were listed on the realtor's brochure. (Tr. 144). "At the time I thought I got everything I looked at. That's what he had for sale, and that's what I bought." (Tr. 145 – testimony of Phillip Remmark).

No one thought any different until Keith Davis, president and manager of Sundance Land Company, LLC, entered the scene. (Tr. 68). Davis purchased the Sundance Real Estate for Sundance Land Company, LLC in September of 2018. (APP. 88-101; Tr. 70). Before purchasing the property, Davis had questions about means of access to the property from Lake Road. (Tr. 70). He also looked up the property on the county GIS website, and noticed that the property line showed "encroachment of some of the southern property." (Tr. 71). He therefore decided to commission a survey performed by Trevor Brown. That survey was conducted on August 3, 2018. (APP. 128). This survey confirmed his suspicion that the half-section line was well to the south of the apparent boundary line. (APP. 143-144). Davis decided to proceed with the transaction anyway, as he liked the farm "and it fell into the criteria that Sundance Land Company discovers when they are looking for property." (Tr. 73; 74).

On July 23, 2019, an attorney for Sundance wrote to the Remmarks and demanded that they remove the allegedly encroaching buildings. (APP. 125-126). However, Davis conceded that Sundance was not taxed for any buildings and never paid taxes for any buildings supposedly located on the Sundance Real Estate. (Tr. 79-80; Ex. X, Ex. Y).

When asked about the effect that establishing the survey line as the boundary would have on his use of the property, Phillip Remmark testified:

> [I]t would be devastating. I wouldn't [] be able to get up to the pad. I haul grain for my little brother sometimes, and I was going to use the machine shed for my semi, and I would have to somehow build a new road around the property, and I don't know how I would do it without just basically ruining the property, and I thought this was the perfect property. I would have never bought it if I thought that the fence line wasn't the line. It would be devastating.

(Tr. 138 – testimony of Phillip Remmark).

Trevor Brown, the professional surveyor commissioned by Sundance, also testified. He testified that any survey performed in the last 40 years is required to be recorded with the county. (Tr. 47). He found no such prior surveys. In fact, he found no prior surveys other than the original survey from the 1830's. (Tr. 47). He confirmed that the survey line went through the machine shed, the grain bin, and interrupted the driveway. (Tr. 52). He acknowledged that the "'occupation line' differed from the line that we defined [in the survey]". (Tr. 52; 61). He further confirmed that the northerly fence line was "approximately the same

distance as the old right-of-way width of the road that used to go through that area." (Tr. 53).

## ARGUMENT

### I. NO ONE DISPUTES THAT SUNDANCE LAND COMPANY, LLC IS THE OWNER OF THEIR REAL ESTATE IN FEE SIMPLE. THIS CASE INVOLVES A DISPUTED BOUNDARY, NOT DISPUTED TITLE.

#### ERROR PRESERVATION

Appellee agrees with Appellant that this issue was preserved, as it was pled and argued below. (APP. 6-10; APP 31-40).

#### SCOPE AND STANDARD OF REVIEW

The case was tried in equity, and the standard of review is therefore *de novo*. *Albert v. Conger,* 866 N.W.2d 877, 879-80 (Iowa App. 2016).

#### ARGUMENT

Remmark has never claimed ownership over the Sundance property generally, nor has Sundance claimed ownership over the Remmark property generally. The argument is over the proper location of the boundary between these two distinct and separate parcels. This is a Chapter 650 disputed boundaries case.

Sundance's decision to frame the issue in terms of quiet title is an attempt to confuse the issue and draw the Court's gaze away from Chapter 650. Acquiescence statutes such as the one found in Chapter 650 are a practical response designed to bridge the gap between the invisible and abstract legal

descriptions found in deeds and the on-the-ground reality of real estate in the physical world. In his 1958 Michigan Law Review article, Professor Olin Browder recognized the judicial confusion over these issues. "Vagueness of theory has led in turn to vagueness and disagreement on the facts which will merit judicial recognition [of a boundary]. The result has been the growth of a gnarled and hoary knot upon this branch of the law of property." Olin L. Browder, Jr., *The Practical Location of Boundaries,* 56 MICH. L. REV. 487, 489 (1958).

Sundance's arguments suggest various theories that skirt around Chapter 650. One such theory is that the deed conveyed from Hubbell to Remmark, ending the period of common ownership, should have the effect of returning the boundary to the half-section line because that's what the deed says, and is therefore a written agreement evidencing a tacit intent to return to that line. (Appellant's Brief, p. 35). Another such theory is that the boundary should disappear the same way an easement disappears by merger when dominant and servient estates are unified in title. (Appellant's Brief, p. 28-30).

These theories and analogies are not useful for understanding acquiescence cases. The problem with these other legal doctrines is that they are designed to address different problems than what acquiescence is trying to address. Per Professor Browder, acquiescence addresses "the gulf in our conveyancing between descriptions in deeds and boundaries on the ground. It is the impossibility by

existing methods of so describing land that competent persons can, by using that description, be reasonably certain of locating its exact boundaries." Olin L. Browder, Jr., *The Practical Location of Boundaries,* 56 MICH. L. REV. 487, 531 (1958). It has nothing to do with contract interpretation or the relationships between dominant and servient estates.

## CONCLUSION

Remmark asks that the Court keep its gaze firmly fixed on Chapter 650, where it belongs, and not be pulled into misleading and distracting theories.

Remmarks concede that Sundance Land Company, LLC, is the owner of its real estate in fee simple. Remmarks and Sundance disagree as to the location of the boundary between their properties. Remmarks ask the Court to affirm the district court, and quiet title in Sundance Land Company, LLC for the land to the north of the acquiesced boundary described by the trial court and whatever boundary the commission appointed by the district court finds.

## II. BECAUSE ACQUIESCED BOUNDARIES ARE "PERMANENTLY ESTABLISHED", COMMON OWNERSHIP OF ADJOINING PROPERTIES DOES NOT ERASE THOSE BOUNDARIES BY OPERATION OF LAW.

## ERROR PRESERVATION

Remmarks agree with Sundance that this issue was preserved. Remmarks pled acquiescence in their answer (APP. 11-12) and the issue was tried and argued to the Court below. (APP. 51-52).

## SCOPE AND STANDARD OF REVIEW

The case was tried in equity, and the standard of review is therefore *de novo*. *Albert v. Conger,* 866 N.W.2d 877, 879-80 (Iowa App. 2016).

## ARGUMENT

Iowa Code § 650.14 provides as follows: "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 (emphasis added).

Sundance argues that a period of common ownership of both sides of an acquiesced boundary erases the acquiesced boundary as a matter of law. (Sundance Brief, p. 25). While it does not appear that any Iowa court has ever addressed this specific issue, the plain language of the statute answers the question – acquiesced boundaries are "permanently established." The statute does not leave open that any subsequent act would "terminate" the acquiesced boundary, save a boundary by agreement as authorized by Iowa Code § 650.17.

The permanence of acquiesced boundaries was confirmed by the Iowa Supreme Court in *Ollinger v. Bennett*, 562 N.W.2d 167 (Iowa 1997). In *Ollinger*

the Court addressed whether evidence of the parties' subsequent repudiation of the acquiesced boundary was relevant. In finding that it was not, the Court outlined the principles of the doctrine of acquiescence that are also relevant to our issue:

> [W]e believe scrutinizing parties' conduct, after acquiescence has been established, for signs of repudiation would undermine the purpose of establishing boundaries by acquiescence. The doctrine of acquiescence represents an attempt to settle titles and "avoid litigation resulting from the disturbance of boundaries long established." *Miller v. Mills County*, 111 Iowa 654, 662, 82 N.W. 1038, 1041 (1900); *see also King v. Fronk*, 14 Utah 2d 135, 378 P.2d 893, 896 (1963) (noting that the doctrine prevents "protracted and often belligerent litigation usually attended by dusty memory, departure of witnesses, unavailability of trustworthy testimony, irritation with neighbors and the like"); 12 Am.Jur.2d *Boundaries* § 85, at 620 (1964) (explaining that the doctrine of acquiescence "is a rule of repose for the purpose of quieting titles and discouraging confusing and vexatious litigation"). We believe that the goals underlying the doctrine of acquiescence are best served in this case by giving effect to the conduct of the owners of both parcels between 1972 and 1993 [the period of acquiescence].

*Ollinger v. Bennett*, 562 N.W.2d at 171-2.

*Ollinger* provides substantial guidance to the Court in addressing the issue of common ownership. Recognizing the objective of avoiding "litigation resulting from the disturbance of boundaries long established" the Court should extend the holding of *Ollinger* and find that common ownership of properties divided by and acquiesced boundary does not disturb the boundary.

Sundance complains that "[u]nder this theory the subsequent purchaser would also be bound to take title to a purported line even if they never intended to." (Appellant's Brief, p. 25). Section 650.17 addresses this concern. Section

650.17 allows for a change to an established boundary when the parties agree to such a change, but to do so the parties must follow the specific requirements laid out in the Code. For example, such an agreement must be accompanied by a plat that is to be recorded. IOWA CODE § 650.17. No plat accompanied the deed to the Remmarks because there was no agreement to change the established boundary line.

The only case from the modern era that the undersigned was able to find specifically addressing common ownership and acquiescence was the Colorado case of *Salazar v. Pretto*, 911 P.2d 1086 (Colo. 1996). The narrow majority opinion in that case gets it wrong, and is an example of the "vagueness of theory" that Professor Browder warned of, as the majority confuses and conflates unrelated principles of the law of easements to the issue at hand. *Salazar*, 911 P.2d at 1091.

The three-justice minority in *Salazar* understood acquiescence, and it is their lead that this Court should follow:

> An acquiesced boundary often will not lie on the surveyor's true location. When this occurs, the legal effect of the doctrine of acquiescence is to rewrite the deed or document of title by operation of law to reflect the acquiesced change so that the agreed upon boundary becomes the true dividing line. *Duncan v. Peterson*, 3 Cal.App.3d 607, 83 Cal.Rptr. 744, 746 (1970); *Edgeller v. Johnston*, 74 Idaho 359, 262 P.2d 1006, 1010 (1953). An acquiesced line "becomes, in law, the true line called for by the respective descriptions, regardless of the accuracy of the agreed location." *Young v. Blakeman*, 153 Cal. 477, 95 P. 888, 890 (1908). "Thus, if the distance call in the deed is '500 feet,' it may henceforth be treated as if it read '517 feet' or '483 feet,' and every future deed of the land which copies or incorporates the original description will also be so read." Roger A. Cunningham et al., The

> Law of Property § 11.8, at 765 (1984). See also Olin L. Browder, *The Practical Location of Boundaries*, 56 Mich.L.Rev. 487, 530 (1958).
>
> The policy underlying this construction of the language in the deed is the doctrine of repose, or "the notion that the law ought not to tinker with the well-settled and long-held understanding of the people involved, even if it does not comport with their documents." Cunningham et al., supra, at 766. See also 12 Am.Jur.2d *Boundaries* § 85 (1964). As the California Supreme Court has reasoned, measurements made at different times, by different persons, and with different instruments will usually vary, and that:
>
> > If the position of the line always remained to be ascertained by measurement alone, the result would be that it would not be a fixed boundary, but would be subject to change with every new measurement. Such uncertainty and instability in the title to land would be intolerable.
>
> *Young,* 95 P. at 889. Hence, boundary lines which have been recognized for the statutory period are regarded in law as being the true and permanent boundaries described by the language in the deed.
>
> Once the original language in the deed has been effectively changed in accordance with the acquiesced boundaries, a conveyance by that original description should be presumed to have been intended to refer to the boundaries as fixed by such acquiescence unless there is specific language to the contrary.

*Salazar*, 911 P.2d at 1093 (J. Kourlis, dissenting). This is the same understanding of acquiescence outlined by the Iowa Supreme Court in *Ollinger.*

The two other cases cited by Sundance – *Patton v. Smith*, 71 S.W. 187 (Mo. 1902) and *Conklin v. Newman,* 115 N.E. 849 (Ill. 1917) - are both pulled from cites in *Salazar v. Pretto*. Both are also from foreign jurisdictions, and both are more than 100 years old. The cite to Professor Browder's article for support is a circular reference, as the Professor was simply noting the holding in *Patton* in his review of

the case law, not endorsing that outcome. Olin L. Browder, Jr., *The Practical Location of Boundaries,* 56 MICH. L. REV. 487, 530 (1958).

None of these out-of-state opinions have any precedential value for an Iowa statute. The Court should follow the lead of the *Ollinger* court recognizing the anti-litigation purpose of the Iowa acquiescence statutes, the plain language of Iowa Code § 650.14 affirming the permanency of acquiesced boundaries, and the place of Iowa Code § 650.17 in the statutory scheme in describing how changes to established boundaries by agreement are made, and hold that common ownership has no particular effect on an acquiesced boundary.

## CONCLUSION

For the foregoing reasons, the Remmarks ask the Court to affirm the holding of the district court, and rule that a period of common ownership does not as a matter of law erase a boundary established by acquiescence.

## III. THE REMMARKS PROVED THE BOUNDARY BY ACQUIESCENCE BY CLEAR AND CONVINCING EVIDENCE.

## ERROR PRESERVATION

Remmarks agree with Sundance that this issue was preserved. Remmarks pled acquiescence in their answer (APP. 11-12) and the issue was tried and argued to the Court below. (APP, 58-62).

## SCOPE AND STANDARD OF REVIEW

The case was tried in equity, and the standard of review is therefore *de novo*. *Albert v. Conger,* 866 N.W.2d 877, 879-80 (Iowa App. 2016).

## ARGUMENT

Remmarks can add little to the thorough and well-reasoned analysis of the trial court. The evidence of acquiescence recited above in the Statement of Facts, both direct and circumstantial, is unrebutted, consistent, and persuasive.

The strongest evidence of acquiescence is the construction of the machine shed astride the half-section line in 2004, and the grain bin between 2013 and 2016. The former evidences the Sims occupation of the disputed area, and the Handling's acquiescence to it. The latter evidences Hubbell's perception of the boundary during his period of common ownership.

Next most persuasive are the air photos, showing the long and consistent occupation lines and practical locations of the boundaries. These are supplemented by the on-the-ground photos in Exhibit Z (APP. 78-85), which show the obvious boundaries, and the complete lack of any visual indication of the presence of the half-section line. Finally, the testimony of the witnesses serves to confirm and support the rest of the evidence, which stands unrebutted.

The only thing to add is to identify the ten-year acquiescence period. This period could be met in a variety of ways. It could begin to run as early as 1991,

when the Handlings purchased the Sundance Real Estate. Linda Handling's testimony confirms her acquiescence to the fence, and Breon's testimony, coupled with the 1994 air photo, are evidence of Sim's earlier acquiescence. It could start in 1994 to conform to the date of the air photo that further proved Sims' acquiescence. It could start in 1999, when Breon first moved to his property and interacted with Hobart Sims. The earliest that it would end is 2014, when the Hubbells took title to both properties from Sims and Handling. Given Hubbell's construction of the grain bin during the period of common ownership, the acquiescence period could arguably run through the period of common ownership, terminating only upon Sundance's purchase of its property in 2018.

All of this evidence stands unrebutted. No witness testified that the half-section line was recognized as boundary prior to the Brown survey in 2018. No one testified to any other boundary line. The only boundary line that any of the owners or neighbors identified was the old fence line.

**CONCLUSION**

Remmarks have satisfied their burden and have proved acquiescence, and ask that this Court affirm the holding of the district court on that issue.

## IV. THE ISSUE OF ACCESS TO THE SUNDANCE REAL ESTATE WAS NEITHER PLED NOR ARGUED BELOW AND SHOULD NOT BE REACHED IN THIS ACTION.

## ERROR PRESERVATION

Remmarks do not agree that this issue was preserved. This issue was neither pled nor argued, and the trial court did not rule on it. The issue was first raised post-trial by Sundance in a Motion to Reconsider, Enlarge, and Amend. APP. 58-62). The Court specifically refused to rule on the issue, finding that "Sundance did not plead the issue of legal access or request the court to rule on that issue at trial. The evidence presented at trial centered on other matters as pled in the Petition and the Remmark's counterclaim, not a determination regarding legal access to the Sundance property. The court will not reconsider, enlarge, or amend its Ruling for separate matters not pled or addressed as issues for the court to determine at trial." (Ruling on Motion to Enlarge and Amend.

## SCOPE AND STANDARD OF REVIEW

The case was tried in equity, and the standard of review is therefore *de novo*. *Albert v. Conger,* 866 N.W.2d 877, 879-80 (Iowa App. 2016).

## ARGUMENT

The issue of access to the Sundance Real Estate is potentially complicated. The record below was not developed to address this issue, and only hints at possible solutions. For example, what exactly is the status of Michael Road? Where does it end? The abandonment proceedings indicate that 154 feet of the road from the eastern boundary of the properties was retained by the county.

(APP. 67-68). The location of this endpoint was not identified or discussed. The consequences of this detail were not researched, explored, or developed.

Access to the southeast corner of the Sundance Real Estate also potentially implicates the land owned by Jerry Breon. It is unclear from this record whether Breon's land extends to the half-section line, or whether the county owns the "stub" of Michael Road projecting off of Lake Road. (*See* APP. 120-122). The record regarding this area must be further developed.

Finally, there is also an alternative access point at the northeast corner of the Sundance Real Estate from Lake Road, which was only very briefly mentioned at trial. (Tr. 77 – testimony of Keith Davis; *see also* APP. 120-122). This means of access also needs to be considered, but again the record below did not address this.

**CONCLUSION**

Remmarks ask that this Court affirm the district court's decision to decline to rule on an issue that was neither pled nor argued at trial.

**CONCLUSION**

Remmarks asks that this Court affirm the district court in all respects, and remand this matter for the appointment of a commission as ordered by the district court.

**REQUEST FOR ORAL ARGUMENT**

Remmarks ask for oral argument in this matter.

## **CERTIFICATE OF SERVICE**

Pursuant to Iowa R. App.P. 6.701 and 6.901, the undersigned hereby certifies that on the 13th day of October, 2022, the Final Brief was filed with the Supreme Court via EDMS and electronically served on all parties of record.

/s/ Michael O. Carpenter

## **CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS**

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because this brief contains 4990 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

/s/ Michael O. Carpenter