

IN THE SUPREME COURT OF IOWA

No. 22-0848

IN THE IOWA DISTRICT COURT FOR WAPELLO COUNTY

SUNDANCE LAND COMPANY,
LLC

Appellant,

vs.

PHILLIP REMMARK AND BOBBIE
REMMARK,

Appellee.

CASE NO. EQEQ112440

APPELLANT'S APPLICATION
FOR FURTHER REVIEW

APPEAL FROM THE DISTRICT COURT OF
WAPELLO COUNTY

JUDGE WYATT PETERSON

APPELLANT'S APPLICATION FOR FURTHER REVIEW
Court of Appeals Decision Filed March 8, 2023

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QUESTIONS PRESENTED FOR REVIEW

- I. DOES THE OWNERSHIP OF PROPERTY ON BOTH SIDES OF A LINE BY THE SAME PARTY TERMINATE A BOUNDARY BY ACQUIESCENCE? THE COURT OF APPEALS DECIDED THIS ISSUE. THIS IS AN IMPORTANT QUESTION OF LAW THAT HAS NOT BEEN BUT SHOULD BE DECIDED BY THE SUPREME COURT.**

- II. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE DECISIONS OF THE SUPREME COURT WHEN THE COURT OF APPEALS FOUND BOUNDARY BY ACQUIESCENCE WITHOUT PROOF OF MUTUAL RECOGNITION BY TWO ADJOINING LAND OWNERS THAT A DEFINITE LINE IS THE DIVIDING LINE BETWEEN THEM.**

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STATEMENT SUPPORTING FURTHER REVIEW

I. The Court of Appeals has decided an important question of law effecting the ownership of real estate in Iowa that has not been, but should be settled by the Supreme Court (Iowa Rule of Appellate Procedure 6.1103(1)(b)(2)).

Does the ownership of property on both sides of a line by the same party terminate a claim of boundary by acquiescence? This appears to be an issue of first impression in the State of Iowa. The Court of Appeals decided that a boundary by acquiescence is permanent even if the same landowner owns property on both sides of the line and as a result a boundary by acquiescence creates a permanent restriction on the alienation of real estate in the state of Iowa. It is the position of Sundance that once a landowner takes title to both parcels on either side of a purported line the legal significance of the boundary is extinguished and the landowner may use and enjoy the combined real estate as the landowner wishes. This is the law in several other states. This is an important issue that has not been but should be settled by the Supreme Court.

II. The Court of Appeals has entered a decision in conflict with a decision of the Supreme Court on an important matter (Iowa Rule of Appellate Procedure 6.1103(1)(b)(1)).

Decisions of the Iowa Supreme Court are clear that in order to prove the

acquiescence to a different boundary line to prove a boundary by acquiescence a party must prove by clear and convincing evidence: "**mutual** recognition by **two** adjoining landowners for **ten years or more** that a line, **definitely marked** by a fence or in some manner, is the dividing line between them. Acquiescence exists when **both parties** acknowledge and treat the line as the boundary. [Emphasis added]. *Ollinger v. Bennett*, 562 N.W.2d 167, 170 (Iowa 1997); *Sille vs. Shaffer*, 297 N.W.2d 379, 381 (Iowa 1980) (collectively the "Decisions").

The decisions of both the trial court and the Court of Appeals are in conflict with the Decisions of the Iowa Supreme Court because they have summarily found a boundary by acquiescence without the proof of the following required elements:

1. The mutual (at the same time) acquiescence of two adjoining landowners;
2. The required period of mutual acquiescence of over ten years (when the period began and when the period ended); and
3. That the adjoining landowners acquiesced to a definite line as the boundary line between them.

BRIEF

STATEMENT OF THE CASE

This is a quiet title action concerning adjoining landowners in Wapello County, Iowa. The Plaintiff (Appellant), Sundance Land Company, LLC is holder of record title and claims title to real estate legally described as the North Half of the Southwest Quarter of Section 3, Township 17 North, Range 14 West of the 5th P.M. in Wapello County, Iowa as shown in a deed recorded in Book 2018, Page 3862 of the records in the office of the Wapello County, Iowa Recorder (the "Sundance Real Estate") (APP. 87). The Defendants (Appellees), Remmarks, hold record title to the adjoining real estate to the south described as the South Half of the Southwest Quarter of Section 3, Township 71 North, Range 14 West of the 5th P.M. in Wapello County, Iowa except public highway and except the West 25 acres thereof, and except the Southeast corner of the Southeast Quarter of the Southwest Quarter, lying South and East of the public highway (the "Remmark Real Estate") (APP. 106). The Remmarks claim that the northern boundary of their property is not as is shown by their deed but lies north of their deeded property line pursuant to the legal theory of boundary by acquiescence. The Plaintiff, Sundance Land Company, LLC, filed a petition to quiet the title to the real estate established in its deed and demanded that any encroachments of the Remmarks be removed from its real estate. The Defendants, Remmark, counterclaimed for determination of a different boundary

under the legal theory of boundary by acquiescence. The Court of Appeals affirmed the decision of the district court which found that the Defendants had proven a boundary by acquiescence.

BRIEF – QUESTION PRESENTED I.

DOES THE OWNERSHIP OF PROPERTY ON BOTH SIDES OF A LINE BY THE SAME PARTY TERMINATE A BOUNDARY BY ACQUIESCENCE? THE COURT OF APPEALS DECIDED THIS ISSUE. THIS IS AN IMPORTANT QUESTION OF LAW THAT HAS NOT BEEN BUT SHOULD BE DECIDED BY THE SUPREME COURT.

Does the ownership of property on both sides of a line by the same party terminate a claim of boundary by acquiescence? This appears to be an issue of first impression in the State of Iowa. The Court of Appeals decided this question as follows:

"In reaching that conclusion (that a boundary by acquiescence had been established), we have considered Sundance's contention that Hubbell's three-year ownership of both parcels extinguished the boundary by acquiescence. The district court was unpersuaded by the contention. The court reasoned that to find that "ownership of both parcels re-sets the boundary line to the survey line contradicts the purpose and doctrine of acquiescence established by Iowa Code chapter 650 and as established by the Iowa Supreme Court for over one hundred years." We agree with the court's conclusion."

In making this decision the Court of Appeals creates permanent restrictions on the alienation of real estate in Iowa. This decision made by the Court of Appeals is an important question of law that has not been, but should be, settled by the Supreme Court. Sundance would respectfully request that the Court approve this request for further review and upon review decide that common ownership of parcels on either side of a line terminates a boundary by acquiescence.

At the outset it must be noted that in none of the cases the Court of Appeals cited in support of its decision did the litigating adjoining owners obtain their real estate from a common owner. In *Ollinger v. Bennett*, 562 NW2d 167 (Iowa 1997), one owner did not at any time own all of the real estate on both sides of the claimed line. In *Ollinger* there were always two different land owners on either side of the claimed line. Similarly, in *O'Callaghan v. Whisenand*, 93 N.W.579 (Iowa 1903) the properties on either side of the claimed line were owned by different parties and were never owned by the same landowner. Therefore, the Court of Appeals used authority concerning the permanence of a boundary by acquiescence between two different landowners and applied it to a factual situation that had not yet been addressed by the appellate courts in Iowa. This appears to be an important point of law of first impression in Iowa and should be decided by the Supreme Court.

The effect of the decision of the Court of Appeals is far reaching. This decision creates permanent internal boundary lines wholly located within property

of a single landowner and places permanent restrictions on that common owner's use and enjoyment of the combined real estate. The Court of Appeals appears to take the position that when a landowner takes title to both properties on either side of a line (fence, trees, crop residue, etc.) the same owner is required to subsequently convey property to that purported line regardless of the time that elapses between the common ownership and the subsequent conveyance, the agreement that the landowner makes with a subsequent purchaser and regardless of the legal description in the deed between the landowner and the subsequent purchaser. Under this theory the subsequent purchaser would also be bound to take title to a purported line even if they never intended to. How far down the chain of title can a remote grantee claim a boundary by acquiescence when both properties on either side of a purported line have been owned by the same owner? Remarks make such a claim based on the hearsay statement of an owner who has not owned an interest in the real estate since 1995 (Hobart Sims) (APP. 116). Clearly the law of boundary by acquiescence must have its limits. The limits of the legal theory are reached when the real estate is owned on both sides by the same owner and there is no boundary line inside the common owned property. That is the case here and the claims of boundary by acquiescence must fail.

What legal significance does a boundary previously established by acquiescence between two different land owners have when the properties on both

sides of a line are later combined and owned by the same owner? If the same party owns real estate on both sides of a demarcation line, does that party not have the right to the free use and enjoyment of the combined property in any manner that that owner desires? Is a landowner in Iowa restricted from removing a fence running through the middle of the landowner's property because of an agreement between prior separate landowners? Does a landowner in Iowa not have the unrestricted use and enjoyment of real estate they own including the right to later divide and sell a part of the combined parcel however that owner chooses? The creation of permanent boundary lines lying totally within a parcel of a landowner creates a perpetual restraint on the alienation of real estate.

It is the position of Sundance that any claim to a boundary by acquiescence was destroyed when Scott Hubbell and Mary Sue Hubbell acquired the Sundance Real Estate when they already owned the adjoining Remmark Real Estate. The common ownership of the two tracts of land eradicated the significance of any acquiescence as to the legal boundary existing prior to the period of common ownership as a matter of law. *Salazar vs. Terry*, 911P.2d 1086, 1089 (Colorado 1996). Unity of ownership destroys the need for boundary fences. *Id* at 1092. The issue here is not whether the common owner intended that the two tracts of land merge. *Id*. Rather, what is relevant is the effect of the unity of ownership on the legal significance of the fence. *Id*. Once the two tracts fell under common ownership,

the fence no longer served any legal purpose, i.e., there was no need for an internal boundary to separate land belonging to one owner. *Id.* When the two tracts again came under separate ownership, the process of acquiescence and adverse possession commenced afresh. *Id.*

The real estate owned by Sundance Land Company, LLC and the real estate owned by Phillip Remmark and Bobbie Remmark came from a common owner. (APP. 87, 106) Scott Brian Hubbell and Mary Sue Hubbell owned the Sundance Real Estate and the Remmark Real Estate at the same time. (APP. 102, 87, 110, 107-108; TRA. Page 88, Lines 15-20) It is undisputed that the Hubbells owned both properties from May 9, 2014 through April 18, 2017. (APP. 102-103,106,110-115; TRA. Page 88, Lines 15-20) Pursuant to the authorities stated above once the two tracts fell under common ownership, the fence no longer served any legal purpose. There was no need for an internal boundary to separate land belonging to the same owners. The common ownership of the two tracts of land eradicated the significance of any acquiescence as to the legal boundary existing prior to the period of common ownership as a matter of law.

The effect common ownership of land on both sides of a purported line has on the legal theory of boundary by acquiescence has been addressed in other jurisdictions. In *Salazar vs. Terry*, 911P.2d 1086 (Colorado 1996) cited above, the Colorado Supreme Court had a fact pattern similar to one as the case at bar. In

Salazar, there was a boundary line dispute wherein one of the parties claimed that boundary by acquiescence had been established in a fence that ran between the two respective properties. Both of the respective properties were owned by a predecessor in title, Mills Ranches, Inc., between November 3, 1977 and November 18, 1977. The fence in question had existed since 1888. The Supreme Court of Colorado held as follows:

“Unity of ownership destroys the need for boundary fences.” *Salazar*, 911 P2d at 1092... The issue here is not whether the common owner intended that the two tracts of land merge. Rather, what is relevant is the effect of the unity of ownership on the legal significance of the fence. The acquiescence to the fence as the boundary separating the two tracts of land was wiped out when common ownership of both tracts was held for a period of 15 days. Once the two tracts fell under common ownership, the fence no longer served any legal purpose, i.e., there was no need for an internal boundary to separate land belonging to one owner. When the two tracts again came under separate ownership, the process of acquiescence in adverse possession commenced afresh. *Id.*

The Colorado Supreme Court in *Salazar* also looked at other jurisdictions addressing the issue.

1. Missouri. In *Patton vs. Smith*, 71 S.W.187 (1902), the Missouri Supreme Court held that the defendant got and paid for only what was described in his deed and that “when Remelius became the owner of both tracts, he wiped out and abandoned any agreed dividing line if there ever was one.” *Patton*, 71 S.W. at 190.... There was no adverse holding thereafter by Remelius as the owner of one tract against himself as the owner of the other tract, and there was no longer any question of an agreed line dividing the two tracts. *Id.*, 71 S.W. at 190.

2. Illinois. Similarly, in *Conklin vs. Newman*, 115 N.E. 849 (1917) the Illinois Supreme Court held that when title to both tracts of land is held in one person “any agreement and division that had theretofore been made while ownership of the two tracts was in different persons ceased to exist or be effective because the two portions of the fence at issue ceased to be appurtenant to any particular parts of the tract.” *Id.*, 115 N.E. at 850;

The case at bar is similar to the *Salazar* case and the cases reference therein. In *Salazar*, the Colorado Supreme Court indicated that common ownership of only 15 days was enough to destroy any claim of boundary by acquiescence under the doctrine of merger. In this case, Scott Brian Hubbell and Mary Sue Hubbell owned both respective properties for almost 3 years. When Scott Brian Hubbell and Mary Sue Hubbell took title to both the Remmark Real Estate and the Sundance Real

Estate, all claims of the fence in question being a boundary line established by acquiescence lost their legal significance, were terminated and merged into the fee interest. In the end, Mr. and Mrs. Remmark were conveyed exactly what they purchased and nothing more. When the Hubbells gained ownership of both properties the legal significance of the fence was terminated. The clock for determining boundary by acquiescence would then start over when the Hubbells' relinquished the common owned title to the Remmarks on April 18, 2017. Since the required 10-year period has not elapsed since the common ownership was terminated the claims of the Remmarks for boundary by acquiescence must fail.

Therefore, Sundance respectfully requests that its application for further review be granted and that following review the Supreme Court rule that ownership of property on both sides of a line by the same party terminates a claim of boundary by acquiescence and an owner of the combined property may fully use and enjoy the combined real estate free of any claim of a boundary by acquiescence to that line.

BRIEF – QUESTION PRESENTED II.

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE DECISIONS OF THE SUPREME COURT WHEN THE COURT OF APPEALS FOUND BOUNDARY BY ACQUIESCENCE WITHOUT PROOF OF MUTUAL RECOGNITION BY TWO ADJOINING LAND OWNERS THAT A DEFINITE LINE IS THE DIVIDING LINE BETWEEN THEM

In the ruling of the Court of Appeals upon its de novo review, it found as follows:

"We agree with the district court that the fence line was accepted as the boundary for well over a decade and became the boundary by acquiescence."

Decisions of the Iowa Supreme Court are clear that in order to prove the acquiescence to a different boundary line a party must prove by clear and convincing evidence: "**mutual** recognition by **two** adjoining landowners for **ten years or more** that a line, **definitely marked** by a fence or in some manner, is the dividing line between them. [Emphasis added]. *Sille vs. Shaffer*, 297 N.W.2d 379, 381 (Iowa 1980). Acquiescence exists when **both** parties acknowledge and treat the line as a boundary. *Sille*, 297 N.W.2d at 381; *Ollinger vs. Bennett*, 562 N.W.2d 167, 170 (Iowa 1997); *Tewes vs. Pine Lane Farms*, 522 N.W.2d 801, 806 (Iowa 1994). Knowledge on the part of **both** parties is a condition precedent for the existence of acquiescence. *Sille*, 297 N.W.2d at 381. **All parties must be aware that the asserted boundary is being treated as the boundary.** *Tewes*, 522 N.W.2d at 806.

It is sufficient knowledge if **both** parties are aware of the fence or other line and of the fact that **both** adjoining landowners are for the required period treating it as a boundary.

The decisions of both the trial court and the Court of Appeals are in conflict with the Decisions of the Iowa Supreme Court because it summarily found a boundary by acquiescence without the proof of the following required elements:

1. The mutual acquiescence of two adjoining landowners; and
2. The required period of mutual acquiescence of ten years (when the period began and when the period ended); and
3. That the adjoining landowners acquiesced to a definite line as the boundary line between them.

Having failed to find that the required elements of boundary by acquiescence have been proven by clear and convincing evidence as required by the decisions of the Supreme Court, the application for further review should be granted and ultimately the decisions of the trial court and the Court of Appeals should be reversed. Each of the required elements of the legal theory of boundary by acquiescence and the failure of the Court of Appeals to address these requirements as required by the Decisions of the Iowa Supreme Court will be discussed below.

A. Neither the trial court or the court of appeals found that two adjoining landowners mutually recognized a line for a period of over ten years and

therefore its decision is in conflict with the Decisions which require proof of these underlined elements.

Although the decision of the court of appeals correctly states the requirement that acquiescence is the mutual recognition by two adjoining landowners for a period of 10 years or more, the decision of the Court of Appeals does not mention anything about mutual recognition by two adjoining landowners for a required ten-year period. The decision of the Court of Appeals, just like the decision of the trial court did not state what two adjoining landowners mutually recognized the boundary line claimed now by Mr. and Mrs. Remmark. Further there is no required finding of when the required ten-year period began and when the period of required acquiescence ended. Past decisions of the Iowa Supreme Court have made specific findings as to what adjoining landowners mutually recognized the claimed line as well as the period of this acquiescence. The following are examples:

"In the past ten years, the North 80 has had several different owners— Mildred Pashby (1981–1985), Linda Kaufman and Robert Pashby (1985–1991), and Tewes (1991–present). Kaufman's trial testimony that Robert Charles Pashby, her mother's husband, had a survey performed in 1975 to determine the southern boundary line of the North 80, as stated by the trial court, “appears to contradict her contention of lack of knowledge that the owners of the south were claiming a different boundary line.” The fact that

Robert Charles Pashby requested the 1975 survey also supports the inference that Mildred Pashby, his wife, had knowledge of the South 80 landowner's claim to a different boundary line. Finally, Tewes' knowledge of Pine Lane's assertion of a boundary line other than the boundary line established by the Scherlin survey is proved by Dykstra informing Tewes of the same just prior to Tewes taking possession of the North 80 in 1991." *Tewes v. Pine Lane Farms, Inc.*, 522N.W.2d 801, 807(Iowa 1994).

"Defendants Bennett do not seriously dispute that the Ollingers and Coburn treated the fence and tree line as the western and northern boundaries of Coburn's property (now the Bennetts' property) for more than the requisite ten years. Indeed, Coburn testified at trial as a witness for the Ollingers and corroborated the Ollingers' claim that they treated the fence line and tree line as the boundary lines of Coburn's property." *Ollinger v. Bennett*, 562 N.W.2d 167, 171 (Iowa 1997).

"The fence remained in position until removed in 1976. From 1956 until 1976 plaintiff maintained and used the disputed strip. She mowed the strip and planted bushes upon it. Defendant made no use of the tract. ...

We find that the fence during that period was recognized as the

boundary and not merely a barrier. The plaintiff treated the property on her side of the fence as her own. She improved and maintained the property. Her dominion over the property was well known by defendant. Neither party treated the fence as a mere barrier to protect the defendant's garden." *Sille v. Shaffer*, 297N.W.2d 379, 380-381 (Iowa 1980).

Although the absentee landlord-owner, Linda Handling, testified that she believed that the southern boundary line to her property (the Sundance Real Estate) was a fence, there is absolutely no evidence in this record of the testimony acquiescing to the purported line from any other adjoining landowner of the Remmark Real Estate when Linda Handling owned the adjoining property. The only owners of the Remmark Real Estate that testified they thought the purported line was the boundary were the Mr. and Mrs. Remark themselves. Neither of the Remmarks were ever owners of the Remmark Real Estate when Linda Handling owned the Remmark Real Estate. The Remmarks have only owned the Remark Real Estate since 2017. (APP. 106) At the time of filing the petition, they had only owned the property for three years which is not enough time for acquiescence to have occurred. (APP.6-10; APP. 106).

The landowner of the Remmark Real Estate before the Remmarks was Scott Brian Hubbell and his wife, Mary Sue Hubbell. The Hubbells owned both the

Sundance Real Estate and the Remmark Real Estate from May 9, 2014 to April 18, 2017. (TRA. Page 88, Lines 15-20; APP. 145) When Mr. Hubbell owned both the Sundance Real Estate and the Remmark Real Estate for a period of almost three years, the boundary line between those parcels didn't matter because he owned both parcels and continued to farm both parcels. (TRA. Page 89, Lines 2-22; Page 101, Lines 14-20). Scott Hubbell was the adjoining landowner of Linda Handling from June of 2005 until May of 2014 when the Hubbells purchased the Sundance Real Estate. (APP. 110-115; TRA. Page 85, Lines 7 - 13, Page 88, Lines 15-20) This is a period of 8 years and 11 months which is not enough time for the 10-year acquiescence to take place.

Prior to the Hubbells owning the Remmark Real Estate, the Remmark Real Estate was owned by the Sims Family Trust (the "Trust") from March of 1995 to June of 2005. (APP. 110-115,116-118,145) There is absolutely no evidence in this record whatsoever about what transpired during the ownership of the Remmark Real Estate by the Sims Family trust or what the trustee of the Sims Family Trust believed their boundary line to be. In addition, there was no evidence of ownership of any adjoining landowner of the Sims Family Trust other than Linda Handling who would have owned the adjoining Sundance Real Estate next to the Sims Family Trust from 1991 to 1995. (APP. 145) This four-year period is not enough to establish acquiescence for the required 10-year period.

Similarly, before the Sims Family Trust owned the Remmark Real Estate, the Remmark Real Estate was owned by Hobart C. Sims and Mary Kay Sims. (APP. 116-118, 119, 145) They owned the property from October 1961 to March of 1995. (APP. 116-118, 119, 145) Neither Hobart C. Sims, Mary Kay Sims or any member of the Sims family ever testified at trial concerning their ownership of the property or what they thought their boundary line was. In addition, there is no evidence at all concerning the ownership of the neighbors of the Sims family John Grabenschroer and Sarah Grabenschroer who owned the property from August 25, 1941 through June 21, 1991 (APP. 105,104, 145).

The court of appeals did not make a finding of mutual acquiescence by two adjoining land owner for a period of ten years. The court focused on the ownership of Linda Handling who owned the Sundance Real Estate from June 21, 1991 to May 12, 2014. The only other evidence concerning any other landowner of the Remmark Real Estate other than Remmarks was the hearsay statement as reported by neighbor Jerry Breon. Mr. Breon recalled Hobart Sims telling him that Mr. Sims considered an undefined fence as his boundary. Hobart Sims, along with his wife owned the Remmark Real Estate from October 20, 1961 to October 20, 1995 for a period of over 34 years. Linda Handling owned the adjoining Sundance Real Estate for only 4 years when Hobart Sims and his wife owned the adjoining Remmark Real Estate. There is no evidence that when Hobart Sims owned the Remmark Real Estate that

an adjoining landowner of the Sundance Real Estate mutually recognized a line as the boundary between them for a period of over 10 years. There is no evidence in this record that a landowner of the Remmark Real Estate when Linda Handling owned the Sundance real estate acquiesced to a boundary line for a period of over 10 years.

There is no finding in the decision of the trial court or the court of appeals as to when a period of acquiescence began, when it ended and who the adjoining landowners were when this period of acquiescence took place. There is no proof that two adjoining landowners mutually recognized a definite line as the boundary between them for a period of over 10 years. The decisions of the Iowa Supreme Court require these elements to be proven before a boundary by acquiescence can be established. Concluding an acquiescence to a boundary and establishment of boundary by acquiescence without these findings is in conflict with the decisions of the Iowa Supreme Court and therefore the application for further review should be granted.

B. Neither the trial court or the court of appeals found acquiescence by parties to a definite line and therefore its decision is in conflict with the Decisions which require proof of acquiescence to a definite line.

A requirement to prove boundary by acquiescence is a line definitely marked by a fence or some manner as the dividing line between them. *Sille vs. Shaffer*, 297

N.W.2d 379, 381 (Iowa 1980). The judgment establishing a boundary must be sufficiently definite to run a line in accordance therewith. *De Viney v. Hughes*, 243 Iowa 138 (1952).

In this case, neither the trial court or the Court of Appeals found a definite line between the Remmark Real Estate and the Sundance Real Estate. The Court of Appeals ruling is totally silent as to the location of a definite line between the Sundance Real Estate and the Remmark Real Estate. The Court of Appeals is obligated to find a definite line as part of its de novo review as required by the Decisions. With regards to the location of the boundary line, the trial court held as follows:

“The court must next determine the exact location of the boundary line between the properties in accordance with the above finding (of boundary by acquiescence) ...**where boundary lines are not established in the trial**, a commission should be appointed to establish the disputed boundary.” (APP. 52) [Emphasis added]

These statements by the trial court are in conflict with the decisions of the Supreme court which require acquiescence to a definite line. In Iowa, the Remmarks have the burden of proof to prove boundary by acquiescence by clear proof. In this case, to overcome the presumption of record title in Sundance the proof must be clear and convincing. This includes not only that acquiescence occurred but also the requirement of proof of acquiescence to a definite line. The Remmarks cannot and did not prove a definite line between the two properties was acquiesced in.

In this case, the trial court admitted that a definite line was not established at trial when it said that **"where boundary lines are not established in the trial a commission should be appointed to establish the disputed boundary."** (APP. 52) It was error for the Court to determine a boundary in which no definite line was proven at trial. The Remmarks did not prove acquiescence to a definite line and therefore the Remmarks have failed to meet their burden of proof and their claim of boundary by acquiescence fails. As a result of Remmarks' failure to prove their requirements of boundary by acquiescence the finding of the trial court concerning boundary by acquiescence must be reversed.

The evidence in this case does not support a finding of definite line between the properties and no such finding was made by the trial court or the Court of Appeals. The trial court acknowledged that most of the evidence at trial focused on the eastern portion of the disputed boundary line from east side of the parties' properties to the west side of the machine shed. (APP. 52) The Court first makes a finding of the boundary line from the east to the fence post in back of the machine shed but admits that the boundary line was not established a trial and a commission should be appointed to establish the disputed boundary. (APP. 52) **The Court then held that "the evidence is insufficient to determine the boundary beyond this point."** (APP. 53) **The Court stated that little testimony was given and the photographs are not sufficiently clear for the Court to determine the boundary.**

(APP. 53) Despite there being no evidence to determine the boundary west from these fence posts, the Court determined that a commission of fence viewers should be appointed to locate the boundary line from the ending point noted above to the western most point of the Remmark Real Estate sharing a boundary with the Sundance Real Estate. (APP.54)

The plaintiff in a quiet title action bears the initial burden to prove her title by a preponderance of the evidence. *State ex rel. Iowa Dept. of Natural Resources v. Burlington Basket Co.*, 651 N.W.2d 29, 34 (Iowa 2002). Under Iowa law, the owner of record title is presumed to be the owner of the real estate. *Id.* The presumption of ownership which follows the legal title can be only overcome only by evidence that is clear and convincing. *Shine v. State*, 458 N.W.2d 864, 866 (Iowa App. 1990); *Jeffrey v. Grosvenor*, 261 Iowa 1052, 157 N.W.2d 114, 122 (1968). A preponderance of the evidence is not sufficient. *Thompson v. Thompson*, 39 N.W.2d 132, 138 (Iowa 1949). Pursuant to these authorities, once Sundance Land Company, LLC proved it was the owner of record title, the presumption is that the boundaries as is shown by the record title. The boundaries as shown by the record title were as shown by the survey of Trevor Brown (APP. 143). There is no evidence to prove that the boundary west of the fence posts in back of the machine shed is anything other than as shown in the deeds of conveyance. The trial court appears to attempt to change the boundary line established by the deeds of conveyance and Trevor Brown's survey

without any evidence to support such a change. Clearly, there was no definite line established in the trial record west of the fence posts in back of the machine shed. The boundary line for the property from this point are as shown by the deeds of conveyance and the presumption of title to that point has not been overcome by any evidence in this record. Therefore, the ruling of the trial court seeking to change this portion of the legal boundary between the properties of should be reversed.

In summary, neither the trial court nor the Court of Appeals made the findings of the elements of proof for a boundary by acquiescence as set forth in prior decisions of the Iowa Supreme Court. Sundance would respectfully request that it grant its application for further review and upon review find that the Remmarks failed to prove the required elements of boundary by acquiescence and the decisions of the trial court and the Court of Appeals are reversed.

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March 28, 2023
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