STATE OF MICHIGAN

COURT OF APPEALS

WILBERT WHEAT, Plaintiff-Appellee,	UNPUBLISHED February 5, 2004
v	No. 242932 Wayne Circuit Court
STEGER HORTON, Defendant-Appellant.	LC No. 99-932353-CZ

Before: Schuette, P.J., and Murphy and Bandstra, JJ.

PER CURIAM.

In this property dispute, defendant appeals as of right from a judgment in favor of defendant in part and in favor of plaintiff in part. We affirm in part and reverse in part.

I. FACTS

Plaintiff and defendant were next-door neighbors since 1982. Sometime in 1980 or 1981, defendant erected a fence in his back yard along the southern border of his property and the northern border of plaintiff's property. The fence ran along the property line for several feet, and then began to encroach on plaintiff's property, enclosing and denying access to a small area of plaintiff's property, and denying plaintiff access to the north wall of plaintiff's garage (as the fence was attached to, or flush to, this wall). Defendant also stacked firewood along the north wall of plaintiff's garage for between ten and 14 years. In 1997, plaintiff engaged the services of a contractor to build a new driveway on his property. The contractor became concerned that the new driveway would cause water to run into defendant's basement unless it was allowed to extend onto defendant's property up to the side of defendant's house. The contractor advised plaintiff and defendant of his concerns and defendant orally agreed to allow the extension of the driveway at plaintiff's expense. In 1999, plaintiff asked defendant to move his fence off of plaintiff's property, at which point defendant, according to plaintiff, became "belligerent" and refused to comply citing "squatter's rights."

Plaintiff filed the instant action seeking damages for trespass, ejectment, and compensation for damage to the garage. Defendant answered, alleging that he had gained title to the disputed portion of plaintiff's land by either adverse possession or acquiescence, and that the statute of limitations for a trespass action had run. Defendant also counterclaimed, seeking ejectment and damages for trespass as a result of plaintiff's driveway encroaching on defendant's property. The trial court ordered defendant to move his fence and plaintiff to remove that part of

his driveway that encroached on defendant's property. Following a subsequent bench trial, the trial court rejected the affirmative defenses of acquiescence and adverse possession and thus found for plaintiff on the trespass claim regarding the lot line and ordered defendant to pay plaintiff's costs for removing part of his driveway. At issue on appeal are defendant's adverse possession and acquiescence claims and the trial court's award of plaintiff's costs of removing the part of his driveway that encroached on defendant's property.

II. ACQUIESCENCE

Defendant's first issue on appeal is that the trial court erred in finding that defendant had not gained title to the part of plaintiff's land enclosed by defendant's fence for at least 17 years. We agree.

A. Standard of Review

Actions to quiet title are equitable actions that we review de novo. *Gorte v Department of Transportation*, 202 Mich App 161, 165; 507 NW2d 797 (1993). We may only set aside a trial court's findings of fact in an equity action if they are clearly erroneous. *Attorney General v Lake States Wood Preserving, Inc*, 199 Mich App 149, 155; 501 NW2d 213 (1993) (citations omitted). However, we need not limit our review to clear error where a finding is derived from an erroneous application of law to fact. *Id*.

B. Analysis

A claim of acquiescence to a boundary line based upon the statutory period of 15 years, MCL § 600.5801(4), requires merely a showing that the parties acquiesced in the line and treated the line as the boundary for the statutory period, irrespective of whether there was a bona fide controversy regarding the boundary. *Sackett v Atyeo,* 217 Mich App 676, 681; 552 NW2d 536 (1996). A claim of acquiescence does not require that the possession be hostile or without permission. *Walters v Snyder (After Remand)*, 239 Mich App 453, 457; 608 NW2d 97 (2000). Acquiescence must be shown by a preponderance of the evidence. *Id.* at 455.

Three theories of acquiescence are in fact noted by *Sackett, supra:* (1) acquiescence for the statutory period, (2) acquiescence following a dispute and agreement, and (3) acquiescence arising from intention to deed to a marked boundary. The relevant theories in this case are (1) and (2). Defendant explicitly alleged the first theory, that plaintiff had acquiesced to the fence as the boundary line for more than fifteen years. On appeal, defendant argues his case under this theory. The trial court chose to analyze the case under the second theory, which requires a dispute and an agreement to settle that dispute.

We find that defendant did indeed establish acquiescence for the statutory period and that the trial court erred in failing to quiet title in favor of defendant . *Walters*, *supra*, involves a case remarkably similar to this one, in that plaintiff Walters brought an ejectment action against defendant Snyder when Walters discovered that defendant's fence and part of defendant's garage encroached upon Walters' lot, intruding into the southern portion of Walters' lot. The parties had previously believed a line of bushes several feet north of the fence and garage marked the boundary, when in fact the line was several feet south of the fence. *Walters*, *supra*, 454-455. This Court held that both parties had acquiesced to the mistaken boundary line and reversed the

contrary judgment of the trial court and ordered the boundary to be fixed at the fence (this was the boundary requested by Snyder, despite the fact that it sat two to three feet south of the line of bushes). *Walters*, *supra*, 460. This Court reasoned that, for the statutory period, the parties treated the line of bushes as the boundary, and thus, acquiesced. *Id.*

Similarly, the facts of this case, as determined by the trial court, establish acquiescence by a preponderance of the evidence. Both plaintiff and defendant treated the fence as the boundary between their property for well beyond the statutory 15 years. Plaintiff even asked permission of defendant to access the property on defendant's side of the fence to begin repairs. Plaintiff testified that he knew that defendant's fence extended onto his property for over seventeen years, from 1982 until 1999, yet plaintiff also admitted that 1999 was the first time plaintiff took any action against defendant regarding the property. Thus we remand this case and instruct the trial court to issue a finding of fact regarding the dimensions and legal description of the strip of land possessed by defendant and enter judgment quieting title in the disputed strip of land in favor of defendant.

In light of our conclusions on the issue of acquiescence, we decline to address the issue of adverse possession.

III. COSTS OF DRIVEWAY REMOVAL

Defendant argues that the trial court's award of plaintiff's costs of removing his driveway from defendant's property stem from a clear error in its findings of fact. We disagree.

Despite the conflicting testimony regarding whether defendant agreed with plaintiff and Studstill to allow plaintiff to extend his driveway onto defendant's property, the trial court, as finder of fact in this bench trial, chose to accept plaintiff's version of the facts. This Court must give deference "'to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it.'" *People v Cress*, 250 Mich App 110, 148; 645 NW2d 669, vacated in part on other grounds, remanded in part of other grounds 466 Mich 882 (2002), reversed on other grounds 468 Mich 678 (2003) (quoting MCR 2.613(C)). The facts indicate that there was no boundary dispute to support a claim of acquiescence under the "dispute-agreement" theory, and that the driveway did not encroach for the statutory period of time. Therefore, the trial court properly found that defendant was within his rights to seek removal of plaintiff's driveway from his property. However, the trial court held that this counterclaim was filed in retaliation in response to plaintiff's complaint in this case, given that defendant agreed to allow the driveway to encroach upon defendant's property in the first place. The trial court engaged in a balancing of the equities in this case in coming to its decision and concluded that equity demanded that plaintiff be awarded his costs of removing the driveway to avoid injustice. We conclude that the trial court's findings of fact on this issue were not clearly erroneous. We therefore disagree with defendant that the trial court's findings of fact are clearly erroneous. We further disagree with defendant's argument that the trial court's award of $947.50 for the costs of removing the concrete should be reversed.

IV. CONCLUSION

We affirm the trial court's judgment in favor of plaintiff on defendant's counterclaim. We reverse the trial court's judgment to the extent that it held that defendant had not gained title

to the disputed strip of land enclosed by defendant's fence and remand with instructions for the trial court to make a finding of fact regarding the legal description of that strip and to enter a revised judgment of acquiescence quieting title in the disputed strip in favor of defendant.

/s/ Bill Schuette
/s/ Richard A. Bandstra

S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

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Before: Schuette, P.J., and Murphy and Bandstra, JJ.

Murphy, J. (*concurring in part and dissenting in part*).

I agree with the trial court that defendant did not acquire the disputed property by adverse possession or acquiescence; therefore, I respectfully dissent from the majority's holding that defendant established a claim for acquiescence for the statutory period. I am in agreement with the majority regarding the cost of the driveway removal.

The trial court found that there was no "evidence to indicate that the original fence was located by the parties to designate the boundary line." The trial court further found that "the facts show neither neighbor knew where the boundary line lay, which is why they each went to such trouble to obtain surveys." Implicit in these findings is that the property owners never operated under a mistaken belief that the fence constituted the true boundary line. Plaintiff testified that he was convinced, since 1982, that defendant's fence was located at least partially on plaintiff's property. Plaintiff testified: "I didn't believe it, I knew it, because his fence was attached to my garage[.]" Such a scenario does not result in quieting title to the disputed strip of property in favor of defendant under the theory of acquiescence labeled as acquiescence for the statutory period.

Under the theory of acquiescence for the statutory period, acquiescence to a boundary line may be established where the line is acquiesced in for the statutory period irrespective of whether there was bona fide controversy regarding the boundary. *Sackett v Atyeo,* 217 Mich App 676, 681; 552 NW2d 536 (1996). Here, there is a lack of evidence that the adjoining property owners acquiesced in the fence being the boundary line.

Instructive on the theory of acquiescence for the statutory period is this Court's decision in *Kipka v Fountain,* 198 Mich App 435, 438-439; 499 NW2d 363 (1993), in which the Court stated:

> The law of acquiescence is concerned with a specific application of the statute of limitations to cases of adjoining property owners who are mistaken about where the line between their property is. Adjoining property owners may treat a boundary line, typically a fence, as the property line. If the boundary line is not the recorded property line, this results in one property owner possessing what is actually the other property owner's land. Regardless of the innocent nature of the mistake, the property owner whose land is being possessed by another would have a cause of action against the other property owner to recover possession of the land. After fifteen years, the period for bringing an action would expire. The result is that the property owner of record would no longer be able to enforce his title, and the other property owner would have title by virtue of his possession of the land.
>
> We agree with the trial court that plaintiff did not acquire title by acquiescence. *The record does not reveal any substantial period of time when the adjoining property owners thought that the retaining wall was the boundary line.* Ted Gasper[1] certainly knew it was not. [Citation omitted; emphasis added.]

Likewise, in the case at bar there was no period of time when both adjoining property owners thought that the fence formed the actual boundary line. There was no mistaken belief that the fence represented the true line between the adjoining parcels.[2] Plaintiff testified that he knew the entire fence line did not constitute the actual boundary. See footnote 1. Therefore, it would be improper to quiet title in defendant's favor under the doctrine of acquiescence. I believe that the majority's reliance on *Walters v Snyder,* 239 Mich App 453; 608 NW2d 97 (2000), is misplaced. In *Walters, id.* at 458, this Court stated that "while a precise line was never acknowledged, the boundary was understood to have run along a line approximated by the bushes." Here, in contrast, the evidence failed to show that the boundary was understood by the parties to have run along the entire fence line. Accordingly, the trial court did not err in ruling that defendant failed to gain title by acquiescence albeit for a different reason than that cited by the court.

With respect to adverse possession, I note my belief that the trial court did not err in rejecting defendant's adverse possession claim. Defendant did not satisfy all of the elements, including in particular, the requirement of hostility. See *West Michigan Dock & Market Corp v Lakeland Investments,* 210 Mich App 505, 511; 534 NW2d 212 (1995). In light of the majority's holding, I find it unnecessary to elaborate any further on the claim of adverse possession.

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[1] Gasper was a previous owner of one of the adjoining parcels, and he "knew that the retaining wall had not been built on the property line[.]" *Kipka, supra* at 436.

[2] In *Sackett, supra* at 682, this Court, in finding that a claim for acquiescence was established, noted that the adjoining property owners "mistakenly treated the center of the driveway as the boundary between their property when it was not the recorded property line." The same cannot be said here.

I would affirm the trial court on each of the issues. Thus, in regard to the majority opinion, I dissent in part and concur in part.

/s/ William B. Murphy