STATE OF MICHIGAN

COURT OF APPEALS

RONALD N. CALOVECCHI and SHARON R. CALOVECCHI, Plaintiffs/Counterdefendants-Appellees, v CAROL S. ELDER-BIRNBAUM, as Trustee of the CAROL S. ELDER-BIRNBAUM LIVING TRUST, Defendant/Counterplaintiff-Appellant.	UNPUBLISHED October 16, 2018 No. 340690 Marquette Circuit Court LC No. 16-054872-CH

Before: MURPHY, P.J., and SAWYER and SWARTZLE, JJ.

PER CURIAM.

In this boundary line dispute, defendant appeals as of right the trial court's opinion and order, entered after a bench trial, quieting title in favor of plaintiffs under the doctrines of adverse possession and acquiescence. We affirm.

The parties are neighboring landowners, and a long-existing chain-link fence and a retaining wall, which wall was razed and replaced with a new wall by plaintiffs in 2011, were not consistent with the surveyed lot line between the properties, revealing an encroachment by the fence and wall onto defendant's property. In August 2016, plaintiffs filed a two-count complaint to quiet title, alleging ownership of the disputed area under the doctrines of adverse possession and acquiescence. In answering the complaint, defendant admitted plaintiffs' allegation "[t]hat for a period in excess of 15 years the [p]laintiffs and their predecessors in title and the [d]efendant and her predecessors in title have recognized a fence between their respective properties as being the actual and legal lot line." Defendant filed a counterclaim, alleging nuisance per se and trespass. Defendant claimed that the new retaining wall built in 2011 constituted an intentional nuisance per se that was constructed absent the necessary city permits and was causing "water drainage and soil erosion to flow onto [defendant's] property."

Defendant also asserted that the new retaining wall constituted a trespass and that plaintiffs, in constructing the new wall, trespassed on defendant's property and damaged the property, including by cutting down several trees.[1] Defendant sought removal of the retaining wall from her property, along with an order requiring plaintiffs to take all necessary steps to prevent water and erosion sediment from flowing onto defendant's property.

In February 2017, plaintiffs filed a motion for summary disposition regarding defendant's counterclaim for nuisance and trespass, arguing that the counts were time-barred under the applicable three-year statute of limitations. By order dated March 23, 2017, the trial court granted plaintiffs' motion under MCR 2.116(C)(7) (action barred by statute of limitations), summarily dismissing defendant's counterclaim as to both the trespass and nuisance counts. At that time, defendant did not file a motion for reconsideration relative to the trial court's order granting plaintiffs' motion for summary disposition. The case proceeded to a two-day bench trial on August 22 and 23, 2017, with respect to plaintiffs' claims of adverse possession and acquiescence. The trial court concluded that plaintiffs established both of their claims, quieting title in plaintiffs' favor to the disputed area. With respect to acquiescence, the court determined that "based on the conduct of the parties and their predecessors, the chain-link fence as depicted in the Survey was understood to be and acquiesced to as the east/west property boundary between . . . [the] respective lots." The court noted that the chain-link fence had been present since at least 1983 and was treated by all as the boundary line between the parcels.[2] In regard to adverse possession, the trial court found that there was sufficient evidence establishing possession of the disputed area by plaintiffs that was actual, visible, open, notorious, exclusive, continuous, and uninterrupted for the statutory period.

On September 13, 2017, defendant, represented by new counsel, filed a motion for reconsideration and rehearing, arguing that "corrected facts" did not support the adverse possession and acquiescence claims, that "corrected facts" established the commission of a trespass and nuisance by plaintiffs, and that the retaining wall was a nuisance per se. Defendant attached a plethora of new documentary evidence to the motion, including freshly-executed affidavits by defendant and her son, both of whom had previously testified at the trial.

The trial court, after directing plaintiffs to file a response to defendant's motion for reconsideration and rehearing, which was done, entered an order denying defendant's motion. The trial court initially stated that defendant's motion was timely pursuant to MCR 2.119(F), which is unmistakably true in regard to reconsidering the claims litigated in the bench trial, yet, as explained below, is not true with respect to reconsidering the order granting plaintiffs' motion for summary disposition regarding the counterclaim disposed of a half-year earlier. The trial court, ostensibly not recognizing that defendant was seeking reconsideration of not only the ruling pertaining to the adverse possession and acquiescence claims but also the earlier summary

[1] Defendant later dropped any allegations or arguments regarding tree removal.

[2] Much of the fence had been removed by defendant's son shortly before the litigation commenced.

disposition ruling, solely addressed, at a substantive level, reconsideration of the trial-litigated claims.[3] On those claims, i.e., adverse possession and acquiescence, the court stated that defendant had "not offered any authority or evidence that was unavailable at the time of the bench trial." The trial court also observed that defendant had not provided any new evidence or changes in the controlling law that would encourage the court to reconsider its ruling. The court then discussed the fact that defendant, in her answer, had admitted "[t]hat for a period in excess of 15 years the [p]laintiffs and their predecessors in title and the [d]efendant and her predecessors in title have recognized a fence between their respective properties as being the actual and legal lot line." The trial court explained that the admission removed the issue from contested litigation, reflecting an agreement that the underlying allegation was true. The court rejected defendant's arguments that she was not given a copy of the answer until after her attorney filed it and that she had not signed the answer. The trial court indicated that there was no attempt to withdraw or amend the answer and that the answer to the allegation constituted "a binding judicial admission." The court also noted that the answer was signed by her attorney, which was all that was necessary. Finally, the trial court found that, on top of the admission, there was testimony by several witnesses "that the chain-link fence marked the boundary line."

On appeal, defendant's numerous arguments can be divided into two general categories: (1) those arguments concerning the trial court's ruling that plaintiffs established their claims for adverse possession and acquiescence; and (2) those arguments addressing the summary dismissal of the trespass and nuisance counts contained in defendant's counterclaim. This Court reviews a trial court's findings of fact in a bench trial for clear error and its conclusions of law de novo. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003), citing MCR 2.613(C) and *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001). Similarly, equitable decisions are reviewed de novo, and the underlying factual findings made by a trial court in support of its equitable rulings are subject to the clearly erroneous standard of review. *Wengel v Wengel*, 270 Mich App 86, 91; 714 NW2d 371 (2006). In the application of the clearly erroneous standard, "regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake was made. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). Questions of law, in general, are reviewed de novo. *Richards v Tibaldi*, 272 Mich App 522, 528; 726 NW2d 770 (2006). "We review a trial court's ruling on a motion for reconsideration for an abuse of discretion." *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009).

We find it unnecessary to address defendant's arguments pertaining to adverse possession, given that there is no basis to reverse the trial court's ruling on acquiescence, which alone is sufficient to warrant quieting title in favor of plaintiffs. With respect to the doctrine of

[3] We acknowledge that it is possible that the court was fully aware of the arguments connected to the grant of summary disposition and simply denied reconsideration of those matters outright absent any substantive discussion whatsoever.

acquiescence, defendant maintains that she had never acquiesced to the fence line or retaining wall serving as the property line, arguing that the evidence did not support such a conclusion. Defendant acknowledges her contrary admission in her answer, simply retorting, absent any citation of supporting authority that would render the response relevant, that she "strenuously objects to previous counsel's response and testifies in her affidavit that that answer is clearly erroneous."

In the order denying reconsideration, the trial court placed significant weight on the admission.[4] Defendant responded with "an explicit admission," MCR 2.111(C)(1), in her answer with regard to the allegation about the parties treating the fence line as the actual boundary in excess of 15 years. This Court in *Lichnovsky v Ziebart Int'l Corp (On Remand)*, 123 Mich App 605, 607-608; 332 NW2d 628 (1983), stated:

> In paragraph three of plaintiff's complaint, he alleged that the license agreement gave him the exclusive right in Genesee County to operate an auto body rustproofing business using "the name Ziebart." In their answer, defendants admitted the truth of that allegation. Defendants did not move to amend their pleadings thereafter. Therefore, they are bound by their admission.

Here, defendant is similarly bound by the admission, regardless of whether she was aware of the answer given by her attorney in responding to the allegation or whether it was an inaccurate response. See MCR 2.114 (signatures of attorneys). Defendant provides no law to the contrary.

Under Michigan law, parties may acquiesce to a new property boundary line. *Walters*, 239 Mich App at 456-457. "[A]cquiescence is established when a preponderance of the evidence establishes that the parties treated a particular boundary line as the property line." *Mason v City of Menominee*, 282 Mich App 525, 529-530; 766 NW2d 888 (2009) (quotation marks and emphasis omitted). The three theories of acquiescence are: "(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." *Sackett v Atyeo*, 217 Mich App 676, 681; 552 NW2d 536 (1996). At issue here is the first theory – acquiescence for the statutory period. The statutory period for acquiring property by acquiescence is 15 years. MCL 600.5801(4); *Mason*, 282 Mich App at 529. A claim of acquiescence for the statutory period requires a showing that the property owners treated a boundary line as the property line for 15 years. *Walters*, 239 Mich App at 457-458; see also *Waisanen v Superior Twp*, 305 Mich App 719, 733; 854 NW2d 213 (2014); *Killips v Mannisto*, 244 Mich App 256, 260; 624 NW2d 224 (2001) ("The doctrine of acquiescence provides that where adjoining property owners acquiesce to a boundary line for at least fifteen years, that line becomes the actual boundary line."). Our Supreme Court has repeatedly held that a boundary line long acquiesced in and treated as the true line should not be disturbed on the basis of new surveys. *Johnson v Squires*, 344 Mich 687, 692;

[4] The trial court also relied on the admission when entering judgment at the conclusion of the trial.

75 NW2d 45 (1956). "The acquiescence of predecessors in title can be tacked onto that of the parties in order to establish the mandated period of fifteen years." *Killips*, 244 Mich App at 260.

Once again, defendant admitted "[t]hat for a period in excess of 15 years the [p]laintiffs and their predecessors in title and the [d]efendant and her predecessors in title have recognized a fence between their respective properties as being the actual and legal lot line." Accordingly, the trial court did not err in quieting title in favor of plaintiffs under the doctrine of acquiescence. Moreover, aside from the admission and as noted by the trial court, there was an abundance of trial testimony supporting the acquiescence verdict premised on the determination that the parties and their predecessors viewed and treated the chain-link fence as the boundary line, including some testimony by defendant herself.

Furthermore, the trial court did not abuse its discretion in denying defendant's motion for reconsideration relative to the acquiescence claim. Defendant could not undo the admission and trial testimony through her self-serving affidavit averring that she never believed that the fence "constituted the legal boundary line" and that, instead, she believed that "the legal lot line" was the one depicted in a 2016 survey. On a motion for reconsideration, a trial court has the discretion to reject the motion if it merely presents the same issues already decided by the court, MCR 2.119(F)(3), and a court also has the discretion to decline consideration of new evidence and legal theories, *Yoost v Caspari*, 295 Mich App 209, 220; 813 NW2d 783 (2012). In the instant case, the trial court did not abuse its discretion by denying the motion for reconsideration and rehearing, which reflected an attempt by defendant to litigate anew the acquiescence claim.[5]

With respect to the counterclaim alleging counts of trespass and nuisance, defendant argues that the trial court erred in granting plaintiffs' motion for summary disposition. The trial court dismissed the counts on the basis of the statute of limitations, without stating anything to the contrary or otherwise in denying defendant's motion for reconsideration and rehearing. On appeal, defendant contends that actions by plaintiffs in the summer of 2016 to remove the retaining wall's cap and top two courses of blocks created new paths to discharge water and sediment onto defendant's property. Thus, according to defendant, the wrong occurred and the causes of action for trespass and nuisance accrued in 2016, with defendant filing the counterclaim shortly thereafter in the fall of 2016, which was well within the three-year period of limitations.

At the motion for summary disposition, defendant did not reference the work done on the retaining wall in 2016, although the main thrust of defendant's argument was that the retaining wall with its embedded drainage pipes was directing water onto defendant's property and

[5] And for the reasons stated earlier, defendant's averments in her affidavit attempting to disavow the answer to plaintiffs' complaint are irrelevant, including her assertion that she planned to grieve prior counsel.

causing damage, including to defendant's basement.[6] Defendant's position appears to be that water and sediment intrusion resulted from the construction of the new retaining wall in 2011, which worsened with the alterations made to the wall in 2016, triggering a new accrual date. However, defendant did not argue that the wrong occurred or the causes of action accrued in 2016; rather, defendant contended that, post 2011, the regular flow of water onto her property constituted a continuous tortious act for purposes of the statute of limitations. The argument concerning the work done on the retaining wall in 2016 and the setting of a new accrual date based on that work was first raised in defendant's motion for reconsideration and rehearing, reflecting a new legal theory. Similarly, documentary evidence of the wall's 2016 alteration and the alleged worsening of the water-intrusion situation were first submitted to the court as part of the motion for reconsideration and rehearing, reflecting new evidence, characterized by defendant as "corrected facts."[7] As we observed earlier, when addressing a motion for reconsideration, a court has the discretion to decline consideration of new evidence and legal theories. *Yoost*, 295 Mich App at 220. The trial court did not abuse its discretion in denying defendant's motion for reconsideration and rehearing relative to the trespass and nuisance counts contained in the counterclaim.[8]

We are a bit leery of the prospect that the trial court may not have actually reached the issues concerning defendant's counterclaim when ruling on the motion for reconsideration and rehearing, and we do not wish to overstep our appellate role. However, as explained below, we conclude that the motion for reconsideration and rehearing was untimely with respect to challenging the order granting plaintiffs' motion for summary disposition on the counterclaim.

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[6] In the response to plaintiffs' motion for summary disposition, defendant attached her affidavit, in which she averred as follows:

> [The] retaining wall includes a drain that is attached to the top of the retaining wall and 7 other distinct drains within the wall. These drains are slanted towards my property . . . and causes all water and sediment to flow onto my property at all elevations of the retaining wall, which further cause water and sediment to flow into and through my foundation, and inside my basement causing obvious compromise to the integrity of my foundation.

[7] Defendant does not argue that the trial court erred in finding the counterclaim time-barred *as based on the theory and evidence presented to the court at the time of summary disposition.* We also note that, to the extent that defendant's trespass and nuisance claims are based on the retaining wall encroaching on defendant's property, they must be rejected given our affirmance of the court's ruling quieting title in favor of plaintiffs.

[8] In light of the fact that we are affirming the trial court's ruling that the counterclaim was time-barred in regard to both the trespass and nuisance counts, we need not address defendant's *substantive* arguments concerning those counts, which, we note, were never reached by the trial court on the merits.

MCR 2.119(F)(1) states that "[u]nless another rule provides a different procedure for reconsideration of a decision (see, e.g., MCR 2.604[A], 2.612), a motion for rehearing or reconsideration of the decision on a motion must be served and filed not later than 21 days after entry of an order deciding the motion." Defendant failed to file a motion for reconsideration within 21 days after the trial court granted plaintiffs' motion for summary disposition relative to the counterclaim. MCR 2.612 simply concerns relief from judgment and was not implicated in this case. And MCR 2.604(A) provides that "an order or other form of decision adjudicating fewer than all the claims, or the rights and liabilities of fewer than all the parties, does not terminate the action as to any of the claims or parties, *and the order is subject to revision before entry of final judgment* adjudicating all the claims and the rights and liabilities of all the parties." (Emphasis added.) Defendant's motion for reconsideration and rehearing was not filed before entry of the final judgment in this case. Therefore, with respect to the trial court's order granting plaintiffs' motion for summary disposition, defendant's motion for reconsideration or rehearing was untimely and could not be considered.

Affirmed. Having fully prevailed on appeal, plaintiffs are awarded taxable costs under MCR 7.219.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Brock A. Swartzle