STATE OF MICHIGAN

COURT OF APPEALS

ORVILLE J. HOLMES and LEE ANN HOLMES,

Plaintiffs/Counter-Defendants/Appellants,

V

JOHNATHON R. ALTHOUSE and LORI A. ALTHOUSE,

Defendants/Counter-Plaintiffs/Appellees.

UNPUBLISHED
November 16, 2001

No. 222056
Eaton Circuit Court
LC No. 98-000050-CH

Before: Hood, P.J., and Whitbeck and Meter, JJ.

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

I concur with the majority's conclusion that the trial court properly granted the motion of defendants Johnathon and Lori Althouse for summary disposition on the claim of plaintiffs Orville and Lee Ann Holmes for adverse possession of the disputed property. I respectfully disagree, however, with the majority's conclusion that the Holmes' acquiescence claim as to that property was barred on the basis of equitable estoppel. I come to this position for both procedural and substantive reasons, set out below.

I. Basic Facts And Procedural History

At issue here is a wedge-shaped parcel of land in Hamlin Township, Eaton County. A horizontal line runs straight east and west (the "property line") and is the line established, as set out below, in several deeds and surveys. A diagonal line runs from northwest to southeast (the "fence line") and is a line that the Holmes assert was created by a fence. The Holmes own property north of the property line and claim they own a wedge-shaped parcel by adverse possession or acquiescence. The Althouses own property south of the property line and dispute the Holmes' claim to the wedge-shaped parcel.

The Holmes purchased their property in 1992. Their chain of title extends back to 1938 when Alvah Holmes, Orville Holmes' grandfather, purchased that property. The warranty deed recorded as part of that 1938 purchase appears to have *excluded* the wedge-shaped parcel. Similarly, the warranty deed recorded as part of the Holmes' 1992 purchase appears, although it uses a different type of legal description, to have *excluded* the wedge-shaped parcel. For

purposes of this dissent, I have assumed that, in fact, these conveyances *excluded* the wedge-shaped parcel.

The Althouses also purchased their property in 1992. Their chain of title extends back to the Clough family farm, owned by Howard Clough from 1935 to 1976. The Althouses assert, in somewhat convoluted fashion, that the various deeds conveying their property from Howard Clough to his son Edward Clough to them *included* the wedge-shaped parcel and for purposes of this dissent I have assumed that, in fact, these conveyances *included* the wedge-shaped parcel.

The matter is complicated somewhat by the existence of what appears to be three surveys. The first was done by Fred White Engineering for the Holmes in 1991. It apparently *excluded* the wedge-shaped parcel from the Holmes' property. The second was a mortgage survey done by Fred White Engineering for the Althouses in 1992. It apparently *included* the wedge-shaped parcel in the Althouses' property. The third was a survey done by Wolverine Engineers and Surveyors, Inc. for the Holmes in 1998. The Holmes' description of the results of this survey baffles me and I do not consider it further, other than to comment that in some fashion it probably supports the Holmes' claim to the wedge-shaped parcel. However, for purposes of this dissent I have assumed that, in fact, the two Fred White Engineering surveys support the Althouses' claim to the wedge-shaped parcel.

The parties differed considerably as to the use of the wedge-shaped parcel. Johnathon Althouse stated in his deposition that he placed posts on the corners of his property lines and that no one questioned his actions. When he purchased the property, he said, he walked the land with Edward Clough, but they did not discuss the location of the property line nor did he see remnants of the fence on his side of the road. According to Johnathon Althouse, during his first summer in his new home, Orville Holmes advised him to keep brush in the farm lane to prevent people from driving in and dumping garbage but gave no indication that the Holmes, rather than the Althouses, owned the lane or any other land south of the property line. Johnathon Althouse cut trees from the land about once a month to use as firewood. According to him, as he was carrying wood back to his vehicle in the lane. He tripped over remnants of the fence and discovered its existence for the first time. Further, Johnathon Althouse said he never saw Orville Holmes in the lane until after the Holmes notified him that they were claiming ownership of the land. In addition, the Althouses offered an affidavit from Edward Clough in which he asserted that "no one treated the fence line as the property line."

In contrast, the Holmes offered affidavits from long-time neighbors who stated that the fence line had always been treated as the property line, from two Holmes' family members, and from other neighbors who made much the same statements. The Holmes also offered an affidavit from another neighbor, Florence Olson, who shares a boundary with the Holmes family. The Olson affidavit flatly contracted the Edward Clough affidavit. According to Olson, no one disputed that the fence line was the property line until the Althouses purchased their land from Edward Clough. Edward Clough, she asserted, believed his property went to the fence and told his family members not to go north of the fence; indeed, Olson said that Edward Clough had told her not to take down the fence because it marked the property line.

After the Holmes filed suit, both parties moved for summary disposition and, in July of 1999, the trial court granted the Althouses' motion. The trial court stated that many of the affidavits submitted by the Holmes contained hearsay that would not be admissible at trial.

According to the trial court, the claim of acquiescence failed because there was no evidence of a mutual mistake and no evidence of a dispute settled by agreement. The court subsequently issued a judgment establishing the property line as that set forth by the Fred White Engineering surveys and granting summary disposition for the Althouses under an unspecified subsection of MCR 2.116(C). (The Althouses had moved for summary disposition under both MCR 2.116(C)(8), failure to state a claim on which relief can be granted, and MCR 2.116(C)(10), no genuine issue of material fact.) The trial court's statements indicated that it intended to grant summary disposition under MCR 2.116(C)(10) because it discussed the factual evidence available rather than merely the allegations in the Holmes' complaint.

II. Estoppel

A. The Majority Opinion

The majority opinion holds that, based upon the principle of equitable estoppel, the Holmes are precluded from obtaining title to the disputed wedge-shaped parcel through the doctrine of acquiescence. The majority relies on *Pyne v Elliot*[1] and sets out two factual grounds for applying that case: (1) that, following the completion of the 15 year "statutory period" the Holmes' predecessors in title failed to file an action to quiet title to the land and (2) that the Holmes and their predecessors in title failed to maintain the land or the fence such that the Althouses would have been on notice of any claim to the disputed property.

B. *Pyne*

I believe the majority's reliance upon *Pyne* is misplaced. *Pyne* is a marvelously complex case and, surely for that reason, the opinion is less than a model of clarity. As I understand the facts of that case, the defendants Roy and Leslie Elliott were the original owners of Government Lot 4, probably having obtained title in 1937.[2] In 1945, the Elliotts conveyed the south half of Government Lot 4 to one E.G. Tackaberry and his wife while retaining the north half.[3] Both the Tackaberrys and the Elliotts desired to subdivide their properties and both employed an engineering company to do a survey and to draft plats.[4] The survey, however, was inaccurate; it located the east-west boundaries of the various land parcels approximately 240 feet *north* of their actual position.[5] The result was that the Elliotts' subdivision, which was known as the Alcona Sandy Shores Subdivision and consisted of the *north* half of Government Lot 4, was short some "240 feet of lakefront land, triangular in shape."[6] Conversely, the Tackaberrys' subdivision, which was known as Edenwood Subdivision and consisted of the *south* half of Government Lot

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[1] *Pyne v Elliot*, 53 Mich App 419; 220 NW2d 54 (1974).

[2] *Pyne, supra* at 421.

[3] *Id.*

[4] *Id.*

[5] *Id.* at 421-422.

[6] *Id.*

4, gained the same 240 feet of lakefront land.[7] Apparently, Roy Elliott knew of the surveying error as early as 1950.[8]

The plaintiffs were Roy Pyne and his wife along with Ellis Weitzel and his wife. The Pynes and the Weitzels purchased property in the *south* half of Government Lot 4;[9] thus they were in the Tackaberrys' chain of title and benefited from the surveying error. In 1969, Roy Elliott claimed an interest in the south half of Government Lot 4 and, as a result, the Pynes and the Weitzels brought suit to settle the boundary dispute.[10]

The trial court found that all parties had "acquiesced in the erroneously established boundary line between the north and south parts of Government Lot 4."[11] Nevertheless, the trial court essentially split the difference, dividing the contested property between the parties.[12] This Court disagreed and reversed. The *Pyne* panel stated that "Defendant Elliott caused the situation which developed, he did nothing about it, and he should now suffer any loss."[13]

Had the *Pyne* panel stopped there, the case would be relatively easy to interpret. Essentially, the panel held, Roy Elliott had known about the error in the survey and had, for almost 20 years, done nothing about the fact that the error caused him to lose approximately 240 feet of lakefront land. Simply put, Elliott had "acquiesced" in the surveying error as to the 240 feet for longer than statutory 15-year period.

Of course, the *Pyne* panel did not stop there. Rather, it analyzed the three "acquiescence theories." These theories are acquiescence for the statutory period, acquiescence following a dispute and agreement, and acquiescence arising from an intention to deed to a marked boundary.[14] The *Pyne* panel concluded that any one of these theories would be sufficient to support the *north* boundary line of the disputed 240 feet.[15] By reference to the opinion itself[16] and to a 1968 survey attached to the opinion[17] it is apparent that this was the boundary line that the 1946 survey erroneously established.

The *Pyne* panel went on to say, however, that the trial court's determination as to the *south* boundary line of the disputed 240 feet was "not as well supported by the facts or the

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[7] *Id.* at 422.

[8] *Id.* at 423.

[9] *Id.* at 422-23.

[10] *Id.* at 423.

[11] *Id.*

[12] *Id.*

[13] *Id.* at 425.

[14] *Id.* at 426-427.

[15] *Id.*

[16] *Id.* at 425.

[17] *Id.* at 434.

law."[18] Ultimately, the *Pyne* panel established this southern boundary as "line 4 [on the 1968 survey attached to the opinion] along the entire length of the government lot."[19] It did so based upon "a number of considerations."[20] The first was the principle of "estoppel by deed." The panel reasoned that the Elliotts' own deed conveyed the entire south half of Government Lot 4 and they should not be heard to contradict the clear language of that deed.[21] The *Pyne* panel labeled this "estoppel by deed."[22]

The *Pyne* panel's next four paragraphs[23] are those quoted by the majority in the opinion in this case. These paragraphs do not deal with the concept of estoppel by deed. Rather, they introduce the "general principle of equitable estoppel."[24] In essence, the *Pyne* panel here elaborated on the its earlier holding that Roy Elliot had caused the situation and had done nothing about it. In the first paragraph quoted by the majority here, the *Pyne* panel asserted that the Elliotts had "slept on their rights."[25] In the second paragraph, the panel stated that although the Elliotts were "aware of the surveying error" they did "absolutely nothing to protect future purchasers" and should be barred from asserting any claim to the disputed property.[26] In the third paragraph, the panel again stated that the Elliotts "did nothing to correct the erroneous boundary lines and should be estopped from establishing any different boundary lines now."[27] In the fourth paragraph, the panel again stated that the Elliotts were aware of the erroneous survey from at least 1950 and did nothing to correct the error or to assert any claim until 1969.[28]

I think it fair to say, therefore, that in *Pyne*, this Court linked the general principle of equitable estoppel to the specific doctrine of acquiescence. The Elliotts, the *Pyne* panel said, had acquiesced in the erroneous property line for more than 15 years and it would be inequitable to allow them, years later, to succeed in renouncing that acquiescence in an action to settle a newly arisen boundary dispute.

I am at loss to understand how that holding applies here. The Holmes are not attempting to *renounce* any acquiescence. Rather, the Holmes assert that the Althouses, and their predecessors, acquiesced in the use by the Holmes, and their predecessors, of the wedge-shaped property. Simply put, the Holmes are not *renouncing* acquiescence, they are *asserting* it.

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[18] *Id.* at 428.

[19] *Id*. at 429.

[20] *Id.*

[21] *Id.* at 429-430.

[22] *Id.*

[23] *Id* .at 430-431.

[24] *Id.* at 430.

[25] *Id.*

[26] *Id.*

[27] *Id.* at 430-431.

[28] *Id.* at 431.

In this light, the majority's dual assertions simply do not hold up. I see nothing in *Pyne*, or in any other case, that would require, under the principle of equitable estoppel or any other principle, the Holmes to initiate a quiet title action as to land that their predecessors acquired by acquiescence, *prior* to an attempt by the Althouses to renounce that acquiescence. In *Pyne*, Roy Elliott claimed an interest in the south half of Government Lot 4 in 1969, and the Pynes and the Weitzels fairly quickly brought suit to settle the boundary dispute. Here, Orville Holmes apparently notified Johnathon Althouse that the Holmes were claiming ownership of the wedge-shaped parcel shortly after Christmas of 1997, and the Holmes fairly quickly brought suit to settle the boundary dispute. I fail to see how *Pyne* might require the Holmes or their predecessors to initiate *any* action prior to Christmas of 1997. In any event, whether the Althouses or their predecessors acquiesced in the use of the wedge-shaped parcel by the Holmes or their predecessors and, if so, at what time the Althouses or their predecessors might have renounced that acquiescence strike me as questions of fact that, if they are disputed, should not be resolved by summary disposition.

The majority's assertion that the Holmes and their predecessors in title failed to maintain the land or the fence such that the Althouses would have been on notice of any claim to the disputed property stands on no better ground. Here, the majority is engaging in pure fact-finding. Surely, the Holmes' various affidavits, if they are admissible, created a genuine issue of fact as to whether the Holmes and their predecessors used the disputed wedge-shaped property and as to whether the Althouses and their predecessors acquiesced in such use. Whether the Holmes or their predecessors failed to "maintain" the land or the fence strikes me as merely a subset of the larger factual questions.

In the end, the majority's reliance on the principle of equitable estoppel comes down to the implied proposition, entirely unrelated to *Pyne*, that since the Holmes and their predecessors knew of the language in deeds in their chain of title that exempted the wedge-shaped property from their holdings, and since they were aware of the two Fred White Engineering surveys that similarly exempted that property, they cannot now assert that the Althouses and their predecessors acquiesced in their use of that property for the 15-year period. In essence, the majority uses equitable estoppel to *defeat* a claim of acquiescence. I believe such an application to be ill-founded; indeed, I believe that, when extended to its ultimate limits, this application would serve virtually to abolish the doctrine of acquiescence in most of its practical applications. I must admit that, on a practical basis, I have some difficulty distinguishing the doctrine of acquiescence from the more well known doctrine of adverse possession. Nevertheless, I suggest that virtually abolishing the doctrine of acquiescence – particularly when relying solely on *Pyne* in which this Court emphatically embraced the doctrine and struck down the Elliotts' belated attempt to renounce their acquiescence – is full-blown error.

III. Hearsay

As noted above, the Holmes offered a number of affidavits that the trial court refused to consider on the grounds that they were hearsay. If these statements were offered to prove that when the statements were made the fence was indeed the property line, by agreement or by deed, they would be hearsay. A statement is hearsay if it was not made at the trial or hearing and is

offered into evidence "to prove the truth of the matter asserted."[29] It is important to determine the purpose for which the statement was offered.[30] A statement is not hearsay when a witness testifies that a statement was made, rather than about the truth of a statement.[31]

Here, the statements would not be hearsay if what was important was that Alvah Holmes, Howard Clough, and Ed Clough made these statements, not whether their understanding of the boundary line was accurate.[32] Acquiescence existed if the parties treated the fence like it was the boundary.[33] If Alvah Holmes and the Cloughs warned friends and family that they could only grant permission for hunting or wood-cutting up to the fence line, that is evidence that they treated the fence as if it were their property line. Every time they described the fence as the boundary, they were treating it as if it were the boundary. Used for this purpose, the statements are not hearsay.

I do note that this Court assumed, without actually deciding, in *Sackett v Atyeo*,[34] that similar statements by a previous owner regarding the location of the property line were hearsay in an acquiescence case. This Court found that any error in admitting the statements was harmless and therefore did not decide whether they were admissible as statements against the declarant's proprietary interest under MRE 804(b)(3).[35] Here, Howard Clough's statements would be against his proprietary interest and his death made him unavailable for trial. The Althouses, however, argue that the statements would still be inadmissible because hearsay under the statements against interest exception is unreliable unless the declarant was aware that the statement was against his interest. The Althouses cite two federal cases, *Roberts v City of Troy*[36] and *Donovan v Crisostomo*.[37] In *Sackett*,[38] this Court acknowledged *Roberts*, but did not adopt or reject its awareness requirement. This Court stated instead that if such a requirement existed, it was met in that case because the declarant was aware of a survey extending his property beyond the point he identified as the boundary.[39] Here, there is no evidence that Howard Clough had the property surveyed, but he did have a deed that included the disputed wedge-shaped parcel in his property. Therefore, even if Michigan follows *Roberts*, the awareness requirement may be met. Testimony regarding statements by Howard Clough would thus be admissible, even if they were hearsay. However, overall, I believe it correct to conclude that the statements are

[29] MRE 801(c); *People v Harris*, 201 Mich App 147, 150-151; 505 NW2d 889 (1993).

[30] *People v Haney*, 86 Mich App 311, 316; 272 NW2d 640 (1978).

[31] *Harris*, *supra* at 151; *Cornforth v Borman's Inc*, 148 Mich App 469, 483-484; 385 NW2d 645 (1986).

[32] *Harris*, *supra; Cornforth*, *supra*.

[33] *Walters v Snyder*, 239 Mich App 453, 458-460; 608 NW2d 97 (2000).

[34] *Sackett v Atyeo*, 217 Mich App 676, 683-685; 552 NW2d 536 (1996).

[35] *Id.* at 684-685.

[36] *Roberts v City of Troy*, 773 F2d 720, 725 (CA 6, 1985).

[37] *Donovan v Crisostomo*, 689 F2d 869 (CA 9, 1982).

[38] *Sackett, supra* at 684-685.

[39] *Id.*at 685.

not hearsay if admitted for the limited purpose of determining whether the previous owners treated the fence as if it was their property line.

In my view these statements, and the other evidence, were sufficient for summary disposition purposes to show that there was a genuine factual dispute as to whether Alvah Holmes and Howard Clough and Ed Clough treated the fence line as the boundary line, at least since the 1940s. Although Ed Clough's affidavit contradicts this, it is not our role, nor was it the trial court's role at the summary disposition state, to weigh evidence and determine credibility when deciding whether to grant summary disposition.[40]

I also note that either Howard Clough or Ed Clough owned the Althouses' property from 1935 to 1992. It is less clear when Alvah Holmes first owned the Holmes' property, which Alvah Holmes' father purchased in 1938. However, again according to the Holmes' affidavits, a neighbor said that he received permission from Alvah Holmes to hunt on the land beginning in 1972. Another neighbor apparently received permission to hunt in 1961. Alvah Holmes owned the land until his death in 1992. Therefore, if the affidavits are believed, the owners of both properties treated the fence line as if it were the property line for more than fifteen years. That might very well be enough to establish acquiescence. There is no doubt, therefore, when the Holmes' affidavits are considered, that there was a genuine issue of material fact as to the Holmes' claim of acquiescence. I would conclude that the trial court erred when it granted the Althouses' motion for summary disposition of the acquiescence claim. I would reverse and remand for trial on that claim.

/s/ William C. Whitbeck

[40] *Skinner*, *supra* at 161.