STATE OF MICHIGAN

COURT OF APPEALS

FRED BAKI and JUDITH BAKI,

Plaintiffs-Appellees,

v

PATRICK KELLY and WENDY KELLY,

Defendants-Appellants.

UNPUBLISHED
January 29, 2002

No. 226780
Genesee Circuit Court
LC No. 95-040507-CH

Before: White, P.J., Whitbeck, C.J., and Holbrook, Jr., J.

PER CURIAM.

Defendants Patrick and Wendy Kelly appeal as of right from a judgment settling a property line in favor of plaintiffs Fred and Judith Baki. We affirm.

I. Basic Facts And Procedural History

The Kellys and Bakis own adjacent pieces of property in Fenton, Michigan. The Bakis own what is known as lot 7 and the Kellys own what is known as lot 8, with lot 7 situated north of lot 8. Margaret Drive sets the western boundary of the two lots and Lake Fenton serves as the eastern boundary. Around 1965, the Kellys' predecessors in title, Arthur and Virginia Phelon, installed a split-rail fence at a position they believed to be about two inches south of the boundary between the lots. The fence, which was subsequently replaced, runs approximately 50 feet, with bushes and shrubs marking the remainder of the boundary. The Phelons, their successors in title, as well as the owners of lot 7 and their successors in title, cared for the property on their respective sides of the fence.

A dispute arose between the parties in May or June 1995 when the Kellys claimed that landscaping ties the Bakis were installing in the ground encroached on the Kellys' land. Though the trial testimony is conflicting about what occurred next, it is clear that Wendy Kelly and Judith Baki began to fight and, eventually, the police had to intervene. Each woman blamed the other for the scuffle.

In October 1995, the Bakis filed this lawsuit, asking the trial court to settle the line marked by the fence and tree line as the legal boundary between lots 7 and 8. The Bakis set forth three grounds for establishing title to the disputed property: adverse possession, easement by prescription, and acquiescence. The Kellys later filed a counter complaint alleging intentional trespass, but this claim was dismissed at trial and is not at issue on appeal.

At trial, the past and present owners of the two lots testified concerning the property line and the fence line, as well as the trees, bushes, and flowers on the disputed area. Arthur Phelon testified that he built the split-rail fence in the 1960s to support grape vines, not to mark the property as a boundary. In fact, Phelon indicated, there never was any specific agreement about where the fence line was, and he never intended the boundary between the two lots to be anything other than the surveyed line. In what would later prove to be significant to the trial court's ruling, Phelon said that after the fence was installed, he would mow the grass on his side of the split rail fence and Mr. Smith, who owned lot 7 at that time, would mow the grass on the other side of the fence. Phelon also noted that he did not store anything on the Smiths' side of the fence. Although Phelon stated that he occasionally mowed on the Smiths' side of the fence and that he sometimes picked grapes from that side of the fence, the Smiths and Phelons essentially stayed on their respective sides of the fence. After selling lot 8 to the Rowlands in July 1977, on the occasions he drove or walked past the fence, Phelon observed that the Rowlands and Smiths also stayed on their respective sides of the fence.

At the close of the Bakis' case, the Kellys moved for a directed verdict on all three of the Bakis' claims. The trial court took the motion under advisement and proceeded with the Kelly's case. In early May 1999, the trial court issued its opinion in the case, ruling that the Bakis had failed to establish a right to the land based on adverse possession because they failed to show that the "Kellys, Phelons or Rowlands understood their property interest was being invaded." Further, the Bakis failed to satisfy the 15-year statutory period for adverse possession. The trial court, however, found that the Bakis had established a right to the land under their theory of acquiescence. The trial court noted that the testimony showed that after the Phelons erected the fence, the various property owners "through their conduct alone, accepted, recognized acquiesced in and used the fence line . . . as the boundary between Lots 7 and 8." The trial court was careful to distinguish between the fence line and the vegetation between the two pieces of property, which the trial court found had not been respected as a boundary between the lots. In the end, with it unnecessary to address whether an easement existed, the trial court adjusted the legal boundary between the two lots to reflect the position of the fence for its length and the original survey line where the fence ended and the vegetation continued.

On appeal the Kellys challenge the trial court's decision that the Bakis demonstrated possession by acquiescence. They claim that the trial court erred by construing the property owners' decision to say on their respective sides of the fence as a tacit agreement that the fence was a boundary line in light of the testimony that the fence line was never intended to set the boundary line.

II. Standard Of Review

This Court reviews a trial court's factual findings under the clearly erroneous standard.[1] "A finding is clearly erroneous when, although there is evidence to support it, the reviewing

[1] MCR 2.613(C).

court on the entire record is left with the definite and firm conviction that a mistake has been committed."[2]

III. The Doctrine Of Acquiescence

"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."[3] As this Court has pointed out, Michigan case law does not set out a list of explicit elements necessary to satisfy the doctrine of acquiescence.[4] Instead, our courts have outlined the doctrine more generally[5] in relation to its goal and purpose of promoting "peaceful resolution of boundary disputes."[6] Consequently, the proper inquiry is "whether the evidence presented establishes that the parties treated a particular boundary line as the property line."[7]

In this case, there was ample evidence that the parties and their predecessors in title actually treated the fence as the boundary between the two lots even if the fence was not designed to serve that purpose. Yet, the Kellys claim that the trial court erred in finding that this de facto attitude toward the fence was sufficient in the absence of a specific agreement to make the fence the legal boundary. While the Kellys' underlying proposition that property owners may acquiesce to a boundary by entering into an explicit agreement is correct, they fail to recognize that it is not the exclusive way to establish acquiescence.[8] Rather, "treating" a line established by some marker other than an accurate deed line as the boundary for the statutory period is enough to satisfy this doctrine.[9]

If the Kellys intend to argue that there can be no acquiescence in this case because none of the individuals who owned lots 7 and 8 were "mistaken" concerning whether the fence established the true property line,[10] they do not say so explicitly. More importantly, though many acquiescence claims involve some sort of mistaken belief concerning the property line,[11] there was testimony that the landowners in this case perceived the fence to be a boundary. For instance, Patrick Kelly testified that he did not go on the Bakis' side of the fence because he did

[2] *Walters v Snyder (After Remand)*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

[3] *Killips v Mannisto*, 244 Mich App 256, 260; 624 NW2d 224 (2001). But see *Walters*, *supra* at 457, citing *Sackett v Atyeo*, 217 Mich App 676; 552 NW2d 536 (1996) (there are three theories of acquiescence, one of which is acquiescence for the statutory period under MCL 600.5801(4), the other two of which are "acquiescence following a dispute and agreement, and . . . acquiescence arising from intention to deed to a marked boundary.").

[4] *Walters*, *supra* at 457.

[5] See *id.* at 456-458.

[6] *Killips*, *supra* at 260.

[7] *Walters*, *supra* at 458.

[8] *Id*. at 457; see also *Kipka v Fountain*, 198 Mich App 435, 438; 499 NW2d 363 (1993).

[9] See *Sackett*, *supra* at 682-683.

[10] *Id*.

[11] See *Kipka*, *supra* at 438-439. But see *Killips*, *supra* at 259.

not believe it was his property, not just because he chose to remain on his side of the fence. Further, the other owners' behavior was consistent with this belief that the fence marked the boundary and this Court has previously cautioned that it is inappropriate to inquire into the property owners' "perceptions and behavior" at a minute level at the expense of a view of the circumstances as a whole.[12] Thus, we can discern no clear error in the trial court's finding that the owners' overall conduct amounted to acquiescence for the mandatory period.

Affirmed.

/s/ Helene N. White
/s/ William C. Whitbeck
/s/ Donald E. Holbrook, Jr.

[12] *Walters*, *supra* at 458.