

STATE OF MICHIGAN
COURT OF APPEALS

WILBERT WHEAT,

Plaintiff-Appellee,

v

STEGER HORTON,

Defendant-Appellant.

UNPUBLISHED

February 5, 2004

No. 242932

Wayne Circuit Court

LC No. 99-932353-CZ

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 Gasper¹ 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.

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