STATE OF MICHIGAN

COURT OF APPEALS

TRAVIS L. PARR and MARGARET A. PARR, Plaintiff-Appellees, v SALVATORE P. SERRA and SUZANNE M. SERRA, Defendant-Appellants.	UNPUBLISHED December 29, 2005 No. 254322 Oakland Circuit Court LC No. 03-048431-CH

Before: Hoekstra, P.J., and Gage and Wilder, JJ.

PER CURIAM.

Defendants appeal as of right from the trial court's judgment in favor of plaintiffs in this action to quiet title and for trespass. We affirm in part, reverse in part and remand for further proceedings consistent with this opinion.

Plaintiffs and defendants own adjoining lakefront lots in the Recreation Heights Subdivision in the Village of Lake Orion. Plaintiffs acquired lot 20 in June 2000; defendants acquired lot 19, which sits to the east of lot 20, in December 1999. The properties share a common boundary that runs from the lakefront to the road in a northerly direction, along the east side of lot 19 and the west side of lot 20. The deed to each lot refers to the subdivision plat, which shows both lots as being forty feet at the lakefront. However at the time this dispute arose, the total amount of lakefront available for lots 19 and 20 was only seventy-one linear feet.

After they purchased lot 19, defendants demolished the existing house and began constructing a new house. As part of their planning process, defendants obtained a survey from Kennedy Surveying, Inc. (the "Kennedy survey"), which depicted a portion of plaintiffs' deck as encroaching onto lot 19 by one foot. After defendants showed them the Kennedy Survey, plaintiffs obtained their own survey from Joseph Bishop (the "Bishop survey"), which placed the common boundary further to the west, such that plaintiffs' deck did not encroach on defendants' property but rather, defendants' new foundation encroached onto plaintiffs' property.

After attempts to reach an amicable resolution failed, plaintiffs filed this action, seeking to quiet title and to recover damages for trespass, nuisance and negligence. Plaintiffs asserted that the property line between lots 19 and 20 was accurately depicted by the Bishop survey; defendants asserted that the parties' respective predecessors in interest had acquiesced in a boundary line represented by a fence no longer present between the properties, but which existed

for a period well in excess of fifteen years, thus creating a new acquiesced boundary that was best depicted in a second survey performed by Kennedy Surveying (the "Kennedy re-survey").[1]

Defendants first argue that the trial court erred in concluding that acquiescence had not been established. We agree.

Actions to quiet title are equitable in nature and therefore the trial court's holdings are subject to de novo review; the trial court's findings of fact are reviewed for clear error. MCR 2.613(C); *Killips v Mannisto,* 244 Mich App 256, 258; 624 NW2d 224 (2001); *Sackett v Atyeo,* 217 Mich App 676, 680; 552 NW2d 536 (1996). "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 has been committed." *Walters v Snyder,* 239 Mich App 453, 456; 608 NW2d 97 (2000) ("*Walters II*").

Where adjoining property owners acquiesce to a boundary line for more than the statutorily required fifteen years, that line becomes the actual legal boundary line between their properties regardless of subsequent surveys or later conduct of the parties to disavow it. *Johnson v Squires,* 344 Mich 687, 692-3; 75 NW2d 45 (1956); *Killips, supra,* 260-261. The acquiescence of predecessors in title can be tacked onto that of the parties on order to establish the required fifteen-year period. *Killips, supra,* 260. See also *Jackson v Deemar*, 373 Mich 22, 25; 127 NW2d 856 (1964).

A claim of acquiescence for the statutory period does not require that the possession of the property be hostile or without permission. *Killips, supra* at 260; *Walters II, supra* at 456; *Walters v Snyder*, 225 Mich App 219, 224; 570 NW2d 301 (1997)("*Walters I*"). Nor does it require that implied or passive assent to a boundary line be based on knowledge or on an objective transaction, and acquiescence can be established where the parties are unaware of the true location of the boundary line dividing their property for all or part of the fifteen-year period. *Walters II, supra* at 457, 459. As this Court explained in *Kipka v Fountain*, 198 Mich App 435, 438-439; 499 NW2d 363 (1993),

> At the root of claims of title. . . by the type of acquiescence plaintiffs claim is the statue of limitations on actions to recover possession of land. . . . The law of acquiescence is concerned with a specific application of the statue 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 this 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

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[1] It is undisputed that the original Kennedy survey contained an error in its depiction of the common boundary. Thus, it was eventually revised; it is this revised survey that defendants' subsequently asserted depicts the acquiesced-to boundary.

> 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.

Similarly, acquiescence is not defeated because one of the parties knows that the line treated as the boundary is not the actual boundary, where that party took no action to stop the other party's use of the property or to disavow the acquiesced boundary. *Killips, supra,* at 260-261.

The evidence presented at trial established that from at least 1964 until after plaintiffs acquired lot 20 in December 2000, the respective owners of lots 19 and 20 regarded and treated a fence and hedgerow, which were immediately adjacent to each other with the fence to the west (or lot 19 side) of the hedgerow, as the boundary between their two properties. Further, evidence also established that each lot's respective seawall and a cement slab over which plaintiffs' waterfront deck was built were present in the same location for a period exceeding fifteen years, and that the meeting point of these seawalls was regarded by all as the boundary point. There was testimony that plaintiffs' predecessor was aware that the actual boundary was other than the fence and hedgerow; however, similar to the defendant in *Killips, supra* at 260-261, he took no affirmative action relating to the boundary line during the time he owned lot 20, from 1964 until 1999. The essence of acquiescence of the type asserted by defendants is that the parties have treated an agreed-upon line as the boundary between their properties. In the instant case, both parties essentially concur that the hedgerow and fence formed such a boundary for a period well in excess of the statutorily-required fifteen years. Thus, this acquiesced-to boundary became the actual legal boundary between lots 19 and 20, regardless of the location of the original platted boundary or of the results of subsequent surveys. Therefore, the trial court clearly erred in concluding otherwise.

Defendant argues that the acquiesced-to boundary is best approximated by the common boundary depicted in the Kennedy resurvey. We disagree. We heed the trial court's well-supported conclusion that the Kennedy resurvey's depiction of the location of the fence, which was not present at the time the survey was prepared, disagreed with the testimony of two of defendants' predecessors in title and with a 1983 survey prepared while the fence was present at the property. Thus, the trial court did not err in determining that the Kennedy survey was inaccurate in this regard.

That said, we also conclude that the trial court clearly erred in determining that the Bishop survey accurately depicted the boundary between the properties.[2] While Bishop testified that the boundary depicted in his survey was consistent with the hedgerow, it is indisputable that the boundary is inconsistent with the uniform testimony of the witnesses that an oak tree near the lake was planted, maintained, owned and cut down by the owners of lot 19, as well as with

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[2] That the trial court may have been correct in concluding that the Bishop survey was *more* accurate than the Kennedy survey does not change the fact that, based on the testimony of each of the owners that testified at trial, that the Bishop survey is also incorrect as to the location of the correct legal boundary, as established by the parties' acquiescence.

testimony and photographs depicting the placement of structures at the lakefront. Contrary to this evidence, the Bishop survey places the stump of that oak tree on lot 20 by five feet and also depicts defendants' seawall as encroaching several feet onto plaintiffs' property. This Court is thus left with a firm conviction that the trial court mistakenly concluded that the Bishop survey identified the correct boundary between the properties. Rather, our review of the evidence leads to the inescapable conclusion that the parties and their predecessors acquiesced in a boundary marked by the hedgerow and fence near the road and by the meeting point of the seawalls at the lakefront. We note that such a result is consistent with plaintiffs' own representation in their compromise proposal to defendants that placement of the boundary line between that depicted in the Kennedy and Bishop surveys "would effectively place [the] mutual property boundary in the same location [the parties] all believed was the original boundary line when [they] both acquired [their] respective home sites" and "would support the long history of the original placement of [their] homes, and corresponding landscaping, walkways, concrete patios, seawalls, etc."

Defendants also argue that the trial court clearly erred in finding that their actions in excavating in a manner that caused damage to plaintiffs' deck constituted a willful, intentional trespass entitling plaintiffs to treble the amount of damages. We disagree.

MCL 600.2919(1) provides that any person who digs up or carries away any "stone, ore, gravel, clay, sand, turf or mould or any root, fruit or plant from another's lands" is liable to the owner of those lands for three times the amount of the actual damages, unless the "trespass was casual and involuntary, or . . . the defendant had probable cause to believe that the land on which the trespass was committed was his own. . ." MCL 600.2919(1)(b) and (c).

Defendants do not contest that plaintiffs' deck was damaged incidental to defendants' construction, nor do they challenge the trial court's measure of the amount of damage incurred. Instead, they argue that at most, they caused erosion of the soil under plaintiffs' deck incident to the construction of their new foundation, but that they did not actively remove or dig up that soil, and therefore, that the trial court erred in characterizing their actions as a willful trespass, and not as casual and involuntary.[3] Further, defendants argue that they believed in good faith reliance on the first Kennedy survey that the deck extended onto their property and therefore, the trial court clearly erred in determining that defendants were without probable cause to believe that the land under plaintiffs' deck was their own.

This Court has explained that "the damages provided for by MCL 600.2919(1) are punitive in nature and are not designed to be imposed in the absence of active misconduct." *Stevens, supra* 121 Mich App at 509. The burden is on plaintiff to prove that a trespass occurred; the burden then shifts to defendant to prove that the trespass was casual and involuntary rather than willful, knowing and intentional. *Iacobelli Construction Co, v The Western Casualty & Surety Co,* 130 Mich App 255, 262; 343 NW2d 517 (1983); *Governale v Owosso,* 59 Mich App

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[3] Because, as defendants concede, the portion of plaintiffs' deck that was damaged does not encroach on defendants' property, regardless whether the property line is determined by the Bishop survey, the Kennedy re-survey or by a line somewhere between the two survey lines, defendants' actions in excavating under plaintiffs' deck constitutes a trespass.

756, 759; 229 NW2d 918 (1975). It is not necessary for plaintiffs to establish that defendants acted with malice or with an intent to damage plaintiffs' land. However, treble damages are not appropriate where the trespass was merely negligent and a trespasser's good faith and honest belief that he possessed legal authority to engage in the complained-of activity is sufficient to avoid liability for treble damages. *Iacobelli, supra* at 262-263; *Governale, supra* at 759.

The trial court determined that defendants continued their aggressive construction despite knowledge of the boundary dispute and that they failed to correct the Kennedy survey for several months, until after their new foundation was in place. Further, the trial court noted the excavator's testimony that, when he informed defendant Salvatore Serra of his concerns about plaintiffs' deck, Serra told him that the deck was on defendants' property and that he was not worried about it. The trial court also heard testimony from plaintiffs' contractor that defendants' actively excavated under plaintiffs' deck. Defendants were apprised of plaintiffs' objection to the Kennedy survey's boundary line, and thus, were well aware that the boundary was in dispute before excavation began; there was testimony that active excavation under plaintiffs' deck continued after defendants became aware of the boundary dispute. While there also was testimony tending to establish that the damage to plaintiffs' deck may have resulted from erosion and not from active excavation, the presence of conflicting testimony as to defendants' actions, knowledge and intent created a question of fact for the trial court. Further, even if defendants were somehow justified initially in relying on the erroneous first Kennedy survey during the excavation, that survey indicated that a portion of plaintiffs' deck encroached onto defendants' property by one foot; there was testimony that the excavation extended under plaintiffs' deck further than one-foot, to within inches of plaintiffs' foundation. Based on the testimony presented at trial, we are not left with a firm conviction that the trial court was mistaken when it concluded that defendants' actions were intentional and willful and not casual and involuntary as contemplated by the statue, and that defendants did not have probable cause to believe – at the time of the excavation – that the land under plaintiffs' deck was their own.

Affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Hilda R. Gage
/s/ Kurtis T. Wilder