STATE OF MICHIGAN

COURT OF APPEALS

THOMAS R. OKRIE,

Plaintiff/Counter-Defendant-Appellant,

v

ETTEMA BROTHERS, TROMBLEY SOD FARM, and MRS. TERRY TROMBLEY,

Defendants-Appellees,

and

WILMA ETTEMA, DORIS ETTEMA, and ELAINE ETTEMA,

Defendants,

and

TERRY TROMBLEY,

Defendant/Counter-Plaintiff-Appellee.

UNPUBLISHED
May 13, 2008

No. 275630
St. Clair Circuit Court
LC No. 03-002526-CZ

Before: Kelly, P.J., and Owens and Schuette, JJ.

PER CURIAM.

In this action to quiet title, the trial court concluded, following a bench trial, that plaintiff failed to establish his claim to the disputed property based on adverse possession or acquiescence. We disagree.

I. FACTS

This lawsuit arises out of a property line dispute between property owned by plaintiff Thomas R. Okrie (the "Wright/Okrie property") on the one hand, and property owned by defendant Ettema Brothers Limited Partnership (the "Ettema property") on the other hand. Okrie's claims are dependent upon tacking on more than two years of similar claims of Michael Wright, Okrie's predecessor in interest.

The Wright/Okrie property is 2.77 acres and is bordered on the east, west, and south by the Ettema property. Root Road borders the Wright/Okrie property on the north. The Ettema property is 157 acres and is used for farming. The dispute is primarily over the southern border of the Wright/Okrie property.

This dispute began in the summer of 2002 when Bernard Ettema hired surveyors to determine the deeded property boundaries between the Wright/Okrie property and the Ettema property. Before this survey was conducted, the parties, and their predecessors in interest, did not know where the deeded property boundaries were, and they were relying on visible geographical features of the property as the recognized borders. When the survey was completed, both parties were surprised at how far north the southern border of the Wright/Okrie property was.

Okrie commissioned a staked survey to lay out the boundaries between the two adjacent properties both as described in the parties' deeds and as allegedly occupied by Okrie and his predecessor in interest. Okrie allegedly occupied approximately 0.82 acres of land (the "disputed property") that was owned by defendants.

Shortly after conducting this survey, Okrie filed suit, seeking to quiet title to the 0.82 acres of disputed property based on the theories of adverse possession and acquiescence. The trial court dismissed Okrie's suit by summary disposition based on an affidavit from Michael Wright. On appeal, this Court found that the trial court's reliance on Wright's affidavit was erroneous because questions of fact existed as to the authenticity and credibility of the averments in the affidavit. *Okrie v Ettema Brothers*, unpublished opinion per curiam of the Court of Appeals, issued December 13, 2005 (Docket No. 260828). This Court also held that permissive use did not, under the facts of this case, provide a defense to plaintiff's acquiescence theory. *Id.*

On remand, the trial court held a bench trial and found that Wright's use of the land outside of the deeded boundary line was permissive. The court therefore concluded that Okrie was not entitled to ownership under the doctrines of adverse possession or acquiescence, and it quieted title in favor of defendants. Okrie now appeals.

II. STANDARD OF REVIEW

"An action to quiet title is an equitable action, and the findings of the trial court are reviewed for clear error while its holdings are reviewed de novo." *Fowler v Doan*, 261 Mich App 595, 598; 683 NW2d 682 (2004). A finding is clearly erroneous if, on all the evidence, this Court is left with a definite and firm conviction that a mistake has been made. *Borgess Med Ctr v Resto*, 273 Mich App 558, 576; 730 NW2d 738 (2007).

III. ANALYSIS

Plaintiff argues that the trial court erred in concluding that both his adverse possession and acquiescence claims failed. We agree that the evidence at trial established that a line nine to ten feet south of the large pond became the southern boundary under the doctrine of acquiescence. Therefore, we need not address plaintiff's adverse possession claim.

There are three distinct ways in which the doctrine of acquiescence, which operates under the principle that a boundary line that has been accepted by the parties should stand, may be asserted: "(1) acquiescence for the statutory period, (2) acquiescence following a dispute and agreement, and (3) acquiescence arising from an intention to deed to a marked boundary." *Walters v Snyder*, 239 Mich App 453, 456-457; 608 NW2d 97 (2000).

At issue in the present case is acquiescence for the statutory period. In *Kipka v Fountain*, 198 Mich App 435, 438-439; 499 NW2d 363 (1993), this Court explained that this form 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 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 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.

Michigan case law has not delineated specific elements necessary to establish a claim of acquiescence. *Walters*, *supra* at 457. Decisions "have merely inquired whether the evidence presented establishes that the parties *treated* a particular boundary line as the property line." *Id.* at 458. In addition, a claim of acquiescence does not require that possession be hostile or without permission, and the acquiescence of predecessors in interest may be tacked onto that of subsequent titleholders to establish the mandatory 15-year period. *Killips v Mannisto*, 244 Mich App 256, 260; 624 NW2d 224 (2001). The standard of proof is preponderance of the evidence, which is "less stringent than the clear and cogent evidence standard used in adverse possession … cases." *Id.* at 260.

In the instant case, Okrie claims he acquired title to the disputed property through acquiescence for the statutory period. Okrie's claim requires a showing that the parties treated a "particular boundary line as the property line" for the statutory period of 15 years. *Walters, supra* at 458; MCL 600.5801(4).

In the earlier appeal of this case, this Court rejected defendants' reliance on *West Michigan Dock & Market Corp v Lakeland Investments*, 210 Mich App 505, 512; 534 NW2d 212 (1995) for the proposition that Wright's "permissive use" defeated Okrie's claim of acquiescence. This Court stated:

> [I]n *West Michigan*, the use that occurred involved 'property that was acknowledged to belong to the plaintiff.' … Unlike the *West Michigan* case, the present case involves the parties' dispute regarding the recognized boundary line versus the boundary line contained in the deeds. [*Okrie, supra* slip op at 4, n 2.]

On remand, the lower court relied on essentially the same "permissive use" position in *West Michigan*, but used *Ryckman v Barrows*, unpublished opinion per curiam of the Court of Appeals, issued June 20, 2006 (Docket No. 259620). We find that the trial court erred in relying on the "permissive use" position in *Ryckman* to defeat Okrie's acquiescence claim.

In *West Michigan*, *supra* at 507, there was a dispute between two waterfront industrial property owners as to ownership and rights to a boat slip on Muskegon Lake. The boat slip was within the deeded borders of the plaintiff's property, and the defendants used forty feet of the boat slip for dockage of their business vessels for over 15 years. *Id*. at 508. Evidence was presented at trial showing that the plaintiff and the defendant understood that the boat slip was on the plaintiff's property and that the defendant and its predecessor in interest used the slip with the plaintiff's permission. *Id*. at 512. This Court affirmed the trial court's ruling that there was no acquiescence because the defendant and its predecessor in interest **knew where its deeded borders were** and had not treated another line as if it were the boundary. *Id*. (emphasis added).

Rickman, *supra* slip op at 1, involved a dispute between a commercial owner of a contiguous row of lots (lots 80-84) and a residential owner of lot 36, which bordered lot 80 on the rear. The defendant left lot 80 undeveloped as a buffer zone between its commercial property and the residential area, and the plaintiff used lot 80 as an extension of their backyard, installing landscape, gardens, a fountain, and an automatic sprinkler system. *Id*. At a bench trial, the court quieted title in favor of the defendant, finding that the plaintiff was not entitled to ownership under the doctrine of acquiescence because the defendant and its predecessors in interest permitted the plaintiff to use lot 80, and the plaintiff never used it without the defendant's consent. *Id*. On appeal, this Court stated that "[t]he trial court correctly concluded that there was no acquiescence to a boundary line because the owners **were aware of the true boundary** and permitted plaintiffs to use lot 80 while it was convenient for them to do so." *Id.* at 2 (emphasis added).

First, we note that *Ryckman* is an unpublished opinion; therefore, it is not binding on this Court. MCR 7.215(C)(1). Further, in contrast to *West Michigan* and *Ryckman*, in this case, the property owners and predecessors in interest were unaware of the true, deeded property boundary. The evidence presented at trial established that every party and witness thought that the borders were established by reference to natural geographical features. All parties and witnesses testified that they believed that the eastern border could be determined by reference to the east ditch, the western border could be determined by reference to a line of trees, and the southern border could be determined by reference to either some point south of the large pond or by the north edge of a farm road. None of the parties or previous owners thought that (as the trial court ruled) the southern border of the Wright/Okrie property was north of the southern edge of the large pond. In fact, Bernard Ettema testified he was surprised to see how far north the southern border of the Wright/Okrie property was when a stake survey of the 2.77 acres was done in 2002.

The trial court also erroneously relied on the parties' knowledge of the overall acreage of the Wright/Okrie property, i.e., 2.77 acres, to defeat Okrie's claim of acquiescence. The trial court's reliance on the parties' knowledge of overall acreage to defeat a claim of acquiescence involves circular logic and is not supported by *West Michigan* or *Ryckman*. A party's knowledge of their overall acreage does not translate into knowledge of where, on the ground, the delimitations of that acreage are positioned. Knowledge of where, on the ground, the boundary

lines are, is the test in both *West Michigan* and *Ryckman.* This is especially true, as in the immediate case, where every party and witness thought that the borders were established by reference to natural geographical features, and where neither party had a stake survey done to see where the delimitations of the 2.77 acres were positioned.

The essence of acquiescence of the type asserted by plaintiff 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 somewhere south of the large pond formed such a boundary for a period well in excess of the statutorily required 15 years. Thus, this acquiesced-to boundary became the legal boundary between the Wright/Okrie property and the Ettema property, regardless of the location of the original deeded boundary. *Kipka*, *supra* at 438-439. Furthermore, a claim of acquiescence does not require that possession be hostile or without permission. *Killips, supra* at 260. The trial court clearly erred in concluding otherwise.[1]

It is indisputable that the southern boundary line set by the trial court is inconsistent with the near uniform testimony that the southern border of the Wright/Okrie property was south of the large pond. We are left with a firm conviction that the trial court mistakenly concluded that the deeded boundary line identified the correct boundary between the properties. *Borgess*, *supra* at 576. Our review of the evidence leads us to the conclusion that the parties and their predecessors acquiesced in a southern boundary nine to ten feet south of the large pond.

Based on Wright's testimony regarding his perception of the eastern and western boundary lines, we conclude that the trial court did not err in using Okrie's deeded description to set the border on the east and west. What Wright and the Ettemas treated as the eastern and western boundaries turned out to be nearly identical to the deeded description.

We reverse and remand for entry of judgment in plaintiff's favor, quieting title as follows: the trial court is to exercise its best judgment, based on the existing record, in setting a southern boundary line nine to ten feet south of the large pond; the eastern and western boundary lines are not to be disturbed. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Donald S. Owens
/s/ Bill Schuette

[1]The trial court was correct in concluding that Okrie's alleged southern border does not represent the southern border acquiesced to. This does not change the fact that, based on the testimony at trial, the southern, deeded border line is also incorrect as to the location of the acquiesced-to border.