# STATE OF MICHIGAN

# COURT OF APPEALS

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MARILYN STOUTENBURG,

Plaintiff-Appellee,

v

MARSON MA and MILA MA,

Defendants-Appellants.

UNPUBLISHED
May 12, 2009

No. 282880
Sanilac Circuit Court
LC No. 06-031091-CH

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MARSON MA and MILA MA,

Plaintiffs-Appellants,

v

MARILYN STOUTENBURG,

Defendant-Appellee.

No. 282891
Sanilac Circuit Court
LC No. 06-031171-CZ

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Before: Servitto, P.J., and O'Connell and Zahra, JJ.

PER CURIAM.

In these consolidated cases, after a bench trial, the court entered an order granting appellee Marilyn Stoutenburg's claim to a disputed boundary by acquiescence and further granted appellee a three-foot prescriptive easement just north of that boundary. Appellants Marson and Mila Ma appeal as of right. We affirm.

First, appellants argue that the circuit court erred in finding that the parties had acquiesced to a boundary line other than the actual line identified by survey. "Actions to quiet title are equitable, and this Court reviews de novo equitable decisions." *Wengel v Wengel*, 270 Mich App 86, 91; 714 NW2d 371 (2006). However, we will only reverse the trial court's findings of fact if they are clearly erroneous; we find clear error only if we are left with the definite and firm conviction that a mistake has been made. *Jonkers v Summit Twp*, 278 Mich App 263, 265; 747 NW2d 901 (2008). We review a trial court's conclusions of law de novo, and where the trial court's factual findings may have been influenced by an incorrect view of the law, our review of those findings is not limited to clear error. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

The purpose of the rule of acquiescence is to promote the peaceful resolution of boundary disputes. *Killips v Mannisto*, 244 Mich App 256, 260; 624 NW2d 224 (2001). A claim that a boundary line was acquiesced to requires a showing that the parties acquiesced in the line and treated the line as the boundary for the statutory period of 15 years. *Sackett v Atyeo*, 217 Mich App 676, 681; 552 NW2d 536 (1996); MCL 600.5801(4). If the owner of property that is contained within the recorded property boundaries does not take action against the possession of this property by another within the statutory period, the owner is barred from disputing the new property line because she acquiesced in its establishment. *Id.* at 681-682.

There is no specific set of elements required to satisfy a claim of acquiescence. *Walters, supra*, 239 Mich App at 457. In determining acquiescence, the relevant inquiry is whether the evidence presented demonstrates that the parties treated a particular boundary line as the property line. *Id.* at 458. Both parties must merely think that the boundary is the property line and treat it as such. *Kipka v Fountain*, 198 Mich App 435, 439; 499 NW2d 363 (1993). At trial, this standard for establishing a boundary under the doctrine acquiescence is preponderance of the evidence. *Walters v Snyder*, 225 Mich App 219, 223; 570 NW2d 301 (1997).

The Mas purchased their lakefront property in 2004. Stoutenburg acquired title to the property immediately south of the Mas from her family in 1976, and she has held title to the property since that time. At the time of purchase, the Mas had notice from a 1999 survey, as well as their own survey, that the surveyed property line shared with Stoutenburg went through Stoutenburg's garage and a portion of her home. Stoutenburg claimed during the bench trial that she and her family, the predecessors in interest to her property, as well as the Mas' predecessors in interest, treated a line from a maple tree seven feet north of her carport to the edge of a planter near the lake as the boundary between the two parcels. The court concluded that it could not "find by a preponderance of the evidence that there was an acquiesced boundary line running from the flower planter at the east to the former maple tree at the west end of the property."

Evidence at trial established that this line was not treated as the boundary. The Mas' predecessors in title, David Brown and Lee and Timothy Cesarz, testified that they did not consider the maple tree and the planter as the boundary markers. Further, without any objection, the Mas' predecessors in title testified that they freely and regularly used the disputed area for their own purposes, such as lawn maintenance and parking. Even though Stoutenburg and her predecessors in title also used the disputed area without objection, there was clearly no established boundary and no acknowledgment that Stoutenburg's property began at the maple tree.

However, the court also found that the predecessors in title of the two involved parcels never observed the surveyed line as the boundary. This finding is also supported by the evidence adduced below. David Brown, whose family owned the Mas' parcel from approximately 1917 until the mid 1990s, stated that he considered the edges of Stoutenburg's structures to be the boundary between the properties. Brown stated that he and his family treated Stoutenburg's structures as the boundary by maintaining and using the property up to Stoutenburg's structures.

Stoutenburg and her predecessors in title certainly treated at least the edge of the structures on her property as the boundary line because, presumably, the structures were constructed on what they thought was their property. The parties presented no evidence indicating that the Brown family or the Cesarzs alleged that Stoutenburg and her predecessors

did not own the property that Stoutenburg's cottage is on until the Cesarzs disclosed the findings of the 1999 survey. Further, Stoutenburg and her predecessors used the cottage and the immediately adjacent area for their own uses—they maintained the grass, planted flowers, and placed decorative items on the disputed area of the property immediately adjacent to the cottage, and they used this area to access the beach, walk the dog, and clean the house. The parties' conduct established by a preponderance of the evidence that the northern edges of Stoutenburg's structures were treated as the property boundary. The circuit court's findings are not erroneous.

The boundary had to be acquiesced in for at least a 15-year period. Brown testified that his knowledge of the boundary dates back to 1949, and Stoutenburg testified that her knowledge goes back 60 years. The first acknowledgement or conversation that the acquiesced line was not the same as the surveyed property line occurred when the Cesarzs had the property surveyed in 1999. The record established that the acquiesced boundary existed at least from when appellee took title in 1976 through 1999, and likely much longer.

Next, the Mas argue that the circuit court violated their due process rights by granting an easement by prescription to Stoutenburg when she had never requested such an easement. "Generally, due process in civil cases requires notice of the nature of the proceedings and an opportunity to be heard." *People v Pitts*, 222 Mich App 260, 263; 564 NW2d 93 (1997). "The notice must be reasonably calculated to apprise any interested parties of the pendency of the action and must afford them an opportunity to present objections." *Id*. Leaving a defendant uninformed about the grounds under which the plaintiff seeks recovery violates basic notions of fair play and substantial justice. *Dacon v Transue*, 441 Mich 315, 329; 490 NW2d 369 (1992).

After concluding that a boundary by acquiescence had been shown, the circuit court stated that the proofs established the existence of a three-foot-wide path north of this boundary that Stoutenburg had used for various purposes. Noting that the legal theory underlying a prescriptive easement is analogous to that of adverse possession, the court concluded that the proofs "established a right by prescription" permitting Stoutenburg to continue to use this strip of land.

The Mas correctly note that Stoutenburg never mentioned a prescriptive easement in the pleadings or at trial. However, Stoutenburg pleaded and argued a claim for adverse possession, and as the court observed, a prescriptive easement is similar to a claim for adverse possession except that the use does not have to be exclusive. *West Michigan Dock & Market Corp v Lakeland Investments*, 210 Mich App 505, 511; 534 NW2d 212 (1995). Moreover, Stoutenburg sought title to the disputed area and "other equitable relief that this [c]ourt deems just." Under these circumstances, we conclude that the circuit court did not err in exercising its equitable powers to issue the prescriptive easement.

We also reject the Mas' argument that Stoutenburg was not able to prove all the elements to establish a prescriptive easement.

> An easement is a right to use the land of another for a specific purpose. An easement by prescription arises from a use of the servient estate that is open, notorious, adverse, and continuous for a period of fifteen years. A party may "tack" on the possessory periods of predecessors in interest to achieve this fifteen-

> year period by showing privity of estate. [*Killips, supra* at 258-259 (citations omitted).]

The burden is on Stoutenburg to show that the use of the Mas' property was of such character and continued for the requisite length of time as to ripen into an easement by prescription. *Plymouth Canton Community Crier, Inc v Prose*, 242 Mich App 676, 679; 619 NW2d 725 (2000).

In this case, the Mas argued that Stoutenburg's use of the disputed area was not continuous. Stoutenburg testified that she typically was at her cottage only a few weeks each summer. However, an easement to a summer cottage is considered to be in continuous use if it is used merely seasonally because this use would be in keeping with the nature and character of the right claimed. *Dyer v Thurston*, 32 Mich App 341, 344; 188 NW2d 633 (1971). Here, Stoutenburg's use, although infrequent, was in keeping with the seasonal aspects of the cottage. There was testimony that the Mas and their neighbors knew of the nature of her use.

The Mas also argued that Stoutenburg's use of the disputed area was not adverse, but mutual. See *Wood v Denton*, 53 Mich App 435, 441; 219 NW2d 798 (1974) (mutual use of a disputed area is not use that is adverse or hostile). "Adverse or hostile use is use inconsistent with the right of the owner, without permission asked or given, use such as would entitle the owner to a cause of action against the intruder for trespassing." *Plymouth Canton Community Crier, Inc, supra* at 681, quoting *Goodall v Whitefish Hunting Club*, 208 Mich App 642, 645; 528 NW2d 221 (1995). An express statement of adverse intent is not required, but the use must be made under a claim of right when no right exists. *Id*. Permissive use of another's property will not create a prescriptive easement. *Id.* at 679.

In this case, the critical determination is whether Stoutenburg and her predecessors in title used the area of the easement under a claim of right. Both Stoutenburg and her immediate predecessor in title testified that they believed that their property extended at least beyond the three feet immediately adjacent to the northern edge of their buildings, and that this belief existed for at least the past 50 years. The surveyed property line was not discovered until 23 years after Stoutenburg acquired title to the property. Further, Stoutenburg evidenced her belief that this land belonged to her by making permanent improvements to the area (in particular, building a carport and planting flowers) and by routinely using the area to clean her home, access the beach, and walk her dog when she was at her cottage. Her use was never disputed and her improvements were allowed to stand unimpeded. Stoutenburg's use was under a claim of right, rather than permissive. A prescriptive easement is generally limited in scope by the manner in which it was acquired, the previous enjoyment, and what is reasonable under the circumstances. *Heydon v MediaOne of Southeast Michigan, Inc*, 275 Mich App 267, 271; 739 NW2d 373 (2007). Here, the circuit court's determination that Stoutenburg had acquired a prescriptive easement to a narrow portion of the disputed area for use to access the lake, maintain her home, and plant flowers was not clearly erroneous.

Finally, the Mas argue that the circuit court erred when it chose not to permit Theresa Brown, David Brown's wife and a predecessor in title to the Mas' property, to testify.[1] Although the Browns had not been subpoenaed, they were present in court during the bench trial, and the trial court permitted David, but not Theresa, to testify. The circuit court refused to permit Theresa to testify because the Mas did not disclose her identity to the circuit court when they were asked to identify their potential witnesses. Although the circuit court did not require the parties to file a witness list in this case, on two occasions it asked the parties to identify the witnesses that they planned to call. The trial court first asked the parties to identify their witnesses before either party presented witnesses at the bench trial; the Mas stated that they had "the predecessor and titlist coming in," among others. The Mas presented the testimony of both Lee and Timothy Cesarz, their immediate predecessors in title. At the end of the second day of trial, the judge again asked the Mas who their remaining witnesses were. The Mas responded that, among others, David Brown was expected to testify as a predecessor to their title. Almost a month later, on the third day of trial, the judge refused to allow Theresa Brown to testify.

The Mas claim that they were prejudiced by Theresa Brown's exclusion because she was a predecessor in title who could testify to the perceptions regarding the boundary between the relevant parcels. However, the Mas did not disclose what Theresa Brown would testify to or how the exclusion of her testimony would prejudice their case. Without a showing of prejudice, defendant cannot establish that the circuit court abused its discretion. *People v Shepherd*, 263 Mich App 665, 679; 689 NW2d 721 (2004), rev'd on other grounds 472 Mich 343 (2005). Further, David Brown, two other predecessors in interest, and some neighbors were all able to testify about the activities of the parties surrounding the disputed boundary. The circuit court did not abuse it discretion in excluding Theresa Brown's testimony.

Affirmed.

/s/ Deborah A. Servitto
/s/ Peter D. O'Connell
/s/ Brian K. Zahra

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[1] We review a trial court's decision determining whether a witness may testify for an abuse of discretion. *Leavitt v Monaco Coach Corp*, 241 Mich App 288, 296; 616 NW2d 175 (2000). The trial court does not abuse its discretion when it chooses an outcome within the range of reasonable and principled outcomes. *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008).