STATE OF MICHIGAN

COURT OF APPEALS

BRUCE K. NARA and TRACY L. NARA,

Plaintiff-Appellees,

v

CATHERINE A. DINE, individually and as Trustee of the CATHERINE A. DINE REVOCABLE TRUST,

Defendants-Appellants,

and

ABN AMRO MORTGAGE GROUP, INC. and DAVID RIALS,

Defendants.

UNPUBLISHED
June 4, 2009

No. 281354
Oakland Circuit Court
LC No. 2003-054052-CH

Before: Whitbeck, P.J., and O'Connell and Owens, JJ.

PER CURIAM.

Defendant Catherine A. Dine, individually and as Trustee of the Catherine A. Dine Revocable Trust,[1] appeals as of right the June 29, 2007 bench trial judgment in favor of plaintiffs Bruce and Tracy Nara. This action stems from a property line dispute over a small strip of land on the parties' adjoining property line. We affirm in part and reverse in part.

I. Basic Facts And Procedural History

Dine is the owner of the home and property located at 63 Park St. in Oxford, Michigan. The Naras are the owners of the home and property located at 67 Park St., just west of Dine's property. Dine's and the Naras' properties are part of Lots 11 and 12, respectively, of Denison's Division, a subdivision originally platted in 1871.

[1] Catherine Dine quitclaimed her property to the Catherine A. Dine Revocable Trust.

The Naras purchased their property (Lot 12), from James and Linda Salego on June 25, 1996. James and Linda Salego purchased the property from Claire Jane Allen (formerly Middleton) on January 31, 1990. Claire Jane Allen purchased the property from her parents, the Lompreys, on July 19, 1963. However, Claire Jane Allen had lived on the property with her parents since the 1930s. Dine purchased her property (Lot 11), from Chauncey and Eileen Brooks on April 30, 1984. And the Brooks purchased the property from the Goodwins in 1971.

In Claire Jane Allen's affidavit (submitted in support of the Naras' first motion for summary disposition, which the trial court denied), Allen explained that during the entire time she lived in the home on Lot 12, it was agreed that certain trees, bushes, flowers, and other landscape located between the two properties were owned by her parents and then herself, and established the boundary line between the two properties. Indeed, Allen averred that when she and her parents moved into the home, the boundary line was already established, "beginning at the end of the driveway and going North along the West boundary of [Lot 11]: a Bridal's [sic] Veil Spirea bush, a lilac bush, two mock orange bushes, another lilac bush, then two more mock orange bushes, a rose bush, an olive tree and then, a peony bush." Allen attested that, in about 1935, she and her mother planted a sugar maple tree in between the first two mock orange bushes. Allen further stated that initially there was a grapevine "near the front of [Lot 12] near the East boundary line next to the driveway" that they relocated in 1983 to a grape arbor constructed by her son in the rear of the property.

The parties to this case, the Naras and Dine, coexisted for several years on their neighboring properties without dispute. However, in September 2000, Dine obtained a survey of Lot 11 from Kennedy Surveying, Inc. (the Kennedy Survey). Thereafter, the Naras advised Dine of a 1949 Final Decree that had purportedly moved the boundary line to the east of the boundary line as originally platted.

The boundary line between the two properties at issue was previously the subject of a prior action to quite title, brought in the Oakland County Circuit Court in 1936-1937, *Lomprey v Goodwin*.[2] The Lompreys, then owners of Lot 12, brought the action as the result of a survey taken of Lot 11 by the defendants, the Goodwins, that "established the boundary line westerly from the old boundary line of the common user as established by a prior survey and as known to the plaintiffs and their predecessors in the chain of title over a period of many years." Based on the survey, the Goodwins attempted to erect a fence along the new boundary line, which would have required removal of the Lomprey's buildings, driveway, and shrubs. Judge George B. Hartrick rendered judgment in favor of the Lompreys, awarding them the disputed property and establishing the boundary line as the easterly line of the disputed area. Judge Hartrick later adopted his June 1937 ruling in a Final Decree entered in September 1949.[3] According to Judge Hartrick's decree, the "strip in dispute does not exceed 4½ feet at the front line and 2 feet at the rear lot line," and included shrubs, trees, part of the Lomprey's driveway, cherry tree stumps, a rose bush, and part of a chicken coop. Although Judge Hartrick acknowledged that an iron stake

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[2] *Lomprey v Goodwin*, Oakland Circuit Docket No. 20083.

[3] Apparently, there is no indication in that record why the Final Decree was not entered until over 12 years later.

on the sidewalk was indicative of a prior surveyed boundary line, he found that there was "an old established definite boundary line between these two parcels of land which has been in existence for many years in excess of the statutory period." Judge Hartrick stated, "A boundary line recognized and acquiesced in for fifteen years should not be disturbed by reason of new surveys."[4] Judge Hartrick also concluded that the Lompreys' and their predecessor's use of the disputed property was open and notorious, noting the placement of the chicken coop, driveway, shrubs, and cherry trees.

According to the Naras, beginning in October 2001, Dine began to enter the disputed property and remove landscape and flowers, including large shrubs, rose bushes, one lilac bush, one Mock Orange bush, and vegetables and berries from a garden. The Naras alleged that Dine's intent was to remove evidence of the boundary line established by a 1949 Final Decree.

The 1949 Final Decree was recorded with the Oakland County Register of Deeds on or about March 14, 2002. And on April 15, 2002, the Naras provided a copy of the 1949 Final Decree to Kennedy Surveying, Inc. Surveyor Huston Kennedy thereafter sent a letter to Dine, stating that he had "no idea" how the 1949 Final Decree "will affect your West property line which was surveyed based upon the property description that you provided." Regardless, on May 8, 2002, Dine cut down the pine tree and the two Arbor Vitae bushes. On May 11, 2002, Dine cut down the grape vines and destroyed most of the grape arbor. And on November 6, 2003, Dine cut down the sugar maple tree, despite the fact that in June 2003, she agreed that she would not take any further actions "by way of cutting trees or shrubs along the boundary line" until the property dispute was resolved.

The June 2003 agreement was allegedly contingent on the completion of another survey, which the Naras hoped would resolve the dispute. Surveyor Lawrence Feindt completed this survey in June 2003 (the first Feindt survey). Feindt explained that he did not base his placement of the boundary line on any of the adjacent items or landscape; rather, he based his placement of the boundary line on the 1949 Final Decree. Feindt said that he could not tell where any of the original lot markers were. However, Feindt acknowledged that there were no exact dimensions included in the 1949 Final Decree. Feindt used a lot description from documents created during a 1950s dispute between Lots 10 and 11 to aid in creating his survey. Ultimately, Feindt placed the south/front end of the boundary line at 2.37 feet east of the Kennedy survey line and placed the north/rear end of the boundary line at 1.64 feet east of the Kennedy survey line.

On November 10, 2003, the Naras filed a complaint, seeking to acquire and/or quiet title to the disputed property. The Naras alleged that the boundary line, as established by the 1949 Final Decree had since been continually treated as such, until Dine began seeking new surveys in 2000, and that they therefore had a superior claim of right to the said property based on the doctrines of adverse possession and acquiescence. The Naras also alleged a count of trespass and sought to enjoin Dine from further entering the property. The Naras claimed actual damages of $5,434.82 and sought treble damages in the amount of $12,874.82.

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[4] Citing *Bunde v Finley*, 224 Mich 634; 195 NW 425 (1923).

Trial commenced in May 2006. Allen, through her deposition testimony, testified that she and her parents moved into the residence at 67 Park St. in Oxford, Michigan (Lot 12), in 1933, when she approximately 15 years old. Consistent with her affidavit, Allen testified that along the eastern boundary of Lot 12, she and her parents owned and maintained the sugar maple tree that they planted in 1935, the spirea bushes, the lilac bushes, another maple tree, the olive tree, the rose bush, the peony bush, and the grape arbor. Allen added that they also owned a barn and chicken coop near the rear of the property. Allen stated that all of these items (with the obvious exception of the sugar maple tree) were located on their property when they bought it, that her parents continued to maintain those items following the Judge Hartrick's judgment, and that she likewise maintained those items throughout her ownership of the property. Allen stated that at some point, she had the barn and chicken coop bulldozed, and replaced them with a garage. Allen denied that Dine ever maintained the grape arbor.

Tracy and Bruce Nara, testified that when they bought Lot 12 in 1996, they and James Salego (their immediate predecessor in interest) discussed the landscape, and it was their understanding that the land they were buying included the garden that was to the east of the driveway and that it included the grape arbor that was in the back of the property. According to Tracy and Bruce Nara, after they moved in, Bruce Nara maintained both sides of the shrubs east of the driveway and mowed the area directly east of the garden, and Tracy Nara would do the gardening. More specifically, Tracy Nara testified that Bruce would mow one tractor width to the east of the grape arbor and the front garden bed. Bruce Nara explained that Salego had told him that he had always mowed one tractor width to the east of the grape arbor, so he just continued that practice. Bruce Nara denied that Dine ever maintained the shrubs, even on the side facing her property. However, Tracy Nara also testified that there was never a "specific boundary line" that she could point to. All she knew is that it was somewhere east of the landscaping. Similarly, Bruce Nara testified that he could not identify a specific line as the official boundary line; however, he stated that "there has been a boundary established, I guess you could call it a common user, that over here is mine, and over there is yours[.]"

The Naras described their initial relationship with Dine as cordial. Shortly after moving in, Tracy Nara asked Dine about the age of the garden, and Dine told her that it was Allen's garden. Dine also told Tracy Nara that the garden and the trees now belonged to the Naras: "everything in that garden all the way back was ours." Bruce Nara specifically recalled Dine telling him that the Naras owned the Chinese elm near the rear corner of the property. Tracy Nara stated that over the next few years, she and Dine had several conversations in which Dine stated that the gardens along the driveway belonged to the Naras. Tracy Nara testified that on one specific occasion, in the fall of 1996, she offered Dine some grapes from the grape arbor, but Dine declined, explaining that Allen had previously given her some of the grapes from which Dine attempted to make wine that did not turn out very well. Tracy Nara testified that she "had always known" that the grape arbor was hers. According to Tracy Nara, Dine never objected to the Naras' maintenance and use of the items along the boundary line until after the Kennedy survey. Indeed, the Naras testified that Dine originally told them not to worry about the survey because she had gotten it to resolve a dispute with her neighbors on the other side of her property. Tracy Nara also denied that she and Dine ever discussed a joint project regarding the landscape along the boundary line.

Tracy Nara testified that James Salego had given her a copy of the 1949 Final Decree when she and her husband purchased the home. But Tracy Nara did not begin to question the significance of the document until after Dine began claiming that the subject landscaping was hers. The Naras' suit essentially sought to quiet title in the land using the boundary set according to the terms of the 1949 Final Decree: "[f]our and a half feet at the front of the property and two feet at the back of the property."

James Salego testified that when he bought the property from Allen in 1990, she showed him all the flowers and tree line and explained that she had planted and maintained it. James Salego averred that during the entire time he lived on Lot 12, he alone maintained and owned the trees, bushes, flowers, and other landscape in the now disputed area, "beginning from the front or South of the property to the North of the property along the East Boundary line, a rose bush near the front sidewalk of the property, a Bridal's [sic] Veil Spirea, a lilac bush, a mock orange bush, two additional mock orange bushes, another rose bush, an olive tree, a peony bush, a Silver Maple tree, a Pine tree, another rose bush, two Arbor Vitae bushes, and a grape arbor with grape vines all along the East boundary line of the property." Salego testified that he knew he owned the grape arbor because it was part of the property that Allen had told him he owned. Salego stated that in 1993, he removed the olive tree but the stump was still there, and Dine never objected when he cut it down. Salego further attested that he mowed the lawn along the eastern boundary line of Lot 12, "including a couple feet East of the landscape along the boundary line[,]" including along the east side of the grape arbor. However, Salego further testified that although he initially mowed the area immediately to the east of the shrub line near the front of the property, at some point he stopped mowing that area and Dine took over mowing there. Salego later clarified that he continued to maintain the shrubs themselves and that Dine "never" maintained the shrubs. Salego testified that he had a great relationship with Dine, but he never discussed with Dine nor did she ever object to his maintenance of the landscape along her boundary line. Salego confirmed that he pointed out to the Naras all of the property that he took care of, including the grape arbor, and explained that it would now belong to them. On cross-examination, Salego confirmed that he did not know "exactly" where the property line was, but that he knew "approximately." However, on redirect examination, Salego confirmed that the shrub line approximately delineated the boundary line to him: he believed that his property extended as far as the shrub line went, including Dine's side of the shrubs.

Surveyor Lawrence Feindt testified that in December 2005, he created a second survey of the boundary line between Lots 11 and 12 (the second Feindt survey). This time, his intent was to create a line that comported with the information from the Naras regarding where they believed the boundary to be in accord with the landscaping. According to Feindt, this new survey showed the boundary line as "a little bit" farther east than in his first survey.

At the close of the Naras' proofs, Dine moved for a directed verdict, arguing that the Naras' claims must fail because (1) none of the Naras' witnesses could say exactly where the agreed to boundary line was; (2) the purpose of the 1949 Final Decree was actually to place the boundary line back on the original line as platted; (3) every deed that was exchanged between the parties described that same lot dimensions; (4) they paid taxes on the land as deeded; and (5) the

evidence established, at most, that the Naras occupied the disputed property on the mistaken belief that they owned it, and adverse possession required knowledge that the land was not that of the claimant. The trial court disagreed with Dine's argument, citing *DeGroot v Barber*,[5] in which this Court held that a mistake regarding the true boundary line did not defeat a claim of adverse possession. The trial court noted that the same rule applied to a claim of acquiescence. Accordingly, the trial court denied Dine's motion for a directed verdict.

Trial continued in February 2007. Chauncey Brooks (Dine's immediate predecessor in interest) testified that when he bought Lot 11 from the Goodwins in the early 70s, it was a vacant lot. Brooks testified that he never met the Goodwins because they were already living in Florida at the time of the sale; the transaction was carried out by correspondence through a real estate agent. Brooks later built a home on the lot, but he could not say exactly when. Brooks testified that he maintained the property during the time he owned it. During the time that he lived there, Allen owned Lot 12. Brooks stated that he never had any discussion with Allen regarding where the property line was and that he never knew anything about the 1949 Final Decree. According to Brooks, he never knew exactly where the boundary line was, but he mowed up to the Lot 12 driveway and garage because "what was the point of leaving a little section like that unmowed." Brooks stated that he never did anything to maintain the spirea bush. Brooks further testified that he maintained a vegetable garden at the back of his lot that extended all the way from his farthest eastern line to the western line, or rather, admittedly, where he thought the western line was. Brooks stated that there were couple trees between the two lots near the Lot 12 driveway, and he took care of his side and Allen's husband took care of his side. Brooks assumed that the trees set out the lot line.

Dine attested that she had no knowledge of the 1949 Final Decree when she purchased Lot 11, and she claimed that there was no defined boundary line established when she moved in. Dine testified that the only discussion she ever had with the previous Lot 12 neighbors was when she first moved in: she claimed that she asked Allen's mother where the property line was, and Allen's mother responded that she did not know where it was exactly "but it's somewhere in the middle of those bushes" (near the front of the properties). Dine attested that she was the one who maintained the grass, trimmed the bushes and maple tree, and maintained the grape arbor. Indeed, she averred that at the time that she purchased the property she was under the "clear understanding" that the maple tree was on her property. Dine also believed that grape vines were hers. Dine further stated that she mowed up to her side of the bushes, weeded under them, raked leaves out from under them, and cut off broken branches. Dine denied that Salego or Bruce Nara ever mowed on her side of the bushes. Dine testified that when the Salegos moved in, she asked them if they knew where the property line was, and they said that they did not. According to Dine, the Salegos never objected to her maintenance of the now disputed area. Dine further testified that when the Naras moved in she did discuss the boundary with them, but she said she told them that she was never really sure where the exact boundary was located. Dine denied that she ever told the Naras that the garden and landscaping was theirs. Dine also denied telling the Naras not to worry about the Kennedy survey. Dine testified that she cut down the sugar maple tree because it was damaged and she was afraid that it would fall on her house.

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[5] *DeGroot v Barber*, 198 Mich App 48; 497 NW2d 530 (1993).

On June 29, 2007, the trial court issued its opinion in favor of the Naras. The trial court first acknowledged that the original deeds, plats, and other documents clearly set out the original boundaries of the lots at issue. The trial court then rejected the Naras' reliance on the 1949 Final Decree. The trial court recognized that the prior ruling addressed a similar dispute between the parties' predecessors. The trial court explained, however, that:

> those rulings simply do not identify with sufficient specificity the boundary that was established thereunder, as they refer to landmarks that are no longer in existence and whose location cannot otherwise be determined accurately enough to establish a precise boundary line.

Turning to the Naras' claims under the theories of acquiescence and adverse possession, the trial court found as follows:

> [The Naras] have provided evidence regarding the specific trees, bushes, and shrubs that were planted in the disputed strip, going back to the 1930s, as well as evidence that [the Naras] and their predecessors were the only parties who maintained these plaints or the disputed area since that time. In addition, [the Naras] provided evidence that their predecessors installed a grape arbor partially in the disputed strip, and later cut down an olive tree, also in the disputed strip. [Dine] did not object to any of these activities, or participate in them in any way. Rather, [Dine] did not begin to assert any control over the disputed area until 2002, when she began to remove items, based on the results of a survey she had commissioned in 2000. [Dine's] evidence on this issue consists primarily of testimony that she and others living on her premises mowed the grass in the disputed strip.

Accordingly, the trial court concluded that the Naras had established that they and their predecessors had installed and maintained the items in the disputed strip with no objection from Dine or her predecessors until 2002, and that these activities, which had taken place in excess of 15 years, were sufficient to entitle the Naras to possession of the property under the doctrine of acquiescence. In so ruling, the trial court cited this Court's decision in *Sackett v Atyeo*[6] for the proposition that the doctrine of acquiescence applies where adjoining property owners are mistaken regarding where a true boundary line is located and treat another boundary line as the true line. The trial court then found that the second survey created by Lawrence Feindt accurately described the area in question and, therefore, "shall become the new boundary line between the parties."

Finally, turning to the issue of damages, the trial court first noted that, for the purposes of treble damages, because the trespass statute stated that treble damages are not to be awarded where the trespasser had probable cause to believe that she had title to the premises, it was significant that Dine did not start removing any items from the disputed strip until after her 2000 survey that indicated the property belonged to her. The trial court found that although that first

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[6] *Sackett v Atyeo*, 217 Mich App 676; 552 NW2d 536 (1996).

survey did not actually establish Dine's ownership of the disputed area, it was sufficient to give her probable cause for her conduct and, therefore, precluded an award of treble damages. The trial court then stated that it was unwilling to impose on Dine the full replacement costs of the removed items, "as there is little evidence that the removal of the shrubbery impaired the value of the [Naras'] property, or otherwise caused any meaningful damage." Accordingly, the trial court awarded the Naras damages in the amount of $3000.

Dine then moved for reconsideration, arguing that the trial court failed to comply with MCR 2.517 by failing to state specific findings of fact regarding how it determined the applicable boundary line and how it arrived at a damages award of $3000. Dine further argued that the trial court's conclusion with respect to the 1949 Final Decree was against the great weight of the evidence. In its ruling, the trial court stated that the 1949 Final Decree "simply [did] not identify with sufficient specificity the boundary that was established thereunder[.]" Dine argued, however, that all three expert witnesses testified that the 1949 Final Decree placed the boundary line at the original platted boundary line. Therefore, Dine argued, the trial court's conclusion that the 1949 Final Decree did not establish an identifiable boundary line was clearly erroneous. Dine argued that this was significant, based on the Naras' reliance on the 1949 Final Decree as establishing the proper boundary. Turning to the trial court's ruling on the doctrine of acquiescence, Dine argued that the trial court erred in applying the doctrine because the facts did not support that there was a visibly occupied and readily observable or maintained lot line. Dine further argued that, given the equitable nature of the case, the trial court erred by not addressing the doctrines of laches and estoppel in its opinion. Dine contended that the doctrine of laches should have barred the Naras' claim because they did nothing to dispute the surveys until March 2002.

Thereafter, the trial court entered an order denying the substance of Dine's motion for reconsideration. The trial court ruled that Dine's arguments did not cause it to "question the soundness of its initial ruling." Dine now appeals.

II. Acquiescence And Adverse Possession

A. Standard Of Review

Dine argues that the trial court lacked legal or factual authority to apply the doctrine of acquiescence in the absence of some agreement as to a definite, readily observable line or boundary between the parties or their predecessors in interest for the statutory period. She argues that the trial court further erred in applying the doctrine of acquiescence because the Naras are unable to tack their alleged use of the property in the absence of privity of estate. Moreover, she contends that the Naras are unable to overcome the statutory presumption in favor of the record owner,[7] and the taxpayer presumption.

[7] See MCL 600.5867.

We review de novo a suit to quiet title, which is equitable in nature.[8] "[N]evertheless, this Court will give great weight to the findings of fact made by the trial court and usually will not disturb those findings unless convinced that it would have reached a different result had it been in the lower court's position."[9] A trial court's findings of fact are clearly erroneous only if, on review of the entire record, this Court is left with the definite and firm conviction that a mistake has been made.[10]

B. Basic Principles Of Acquiescence

To prevail on a claim of acquiescence to a boundary line based upon the statutory period of fifteen years,[11] requires a showing, by a preponderance of the evidence,[12] "that the parties acquiesced in the line and treated the line as the boundary for the statutory period, irrespective of whether there was a bona fide controversy regarding the boundary."[13] Unlike a claim of adverse possession, "[a] claim of acquiescence does not require that the possession be hostile or without permission."[14] A fence or a line of trees, shrubbery, etc., is sufficient to mark the line.[15] This Court has further explained the doctrine of acquiescence as follows:

> 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 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.[16]

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[8] *Geneja v Ritter*, 132 Mich App 206, 209; 347 NW2d 207 (1984).

[9] *Id*.

[10] *Peters v Gunnell, Inc*, 253 Mich App 211, 221; 655 NW2d 582 (2002).

[11] MCL 600.5801.

[12] *Killips v Mannisto*, 244 Mich App 256, 260; 624 NW2d 224 (2001).

[13] *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000) (quotation and citation omitted); *Sackett*, *supra* at 681-682.

[14] *Walters*, *supra* at 456 (quotation and citation omitted).

[15] *Renwick v Noggle*, 247 Mich 150, 151; 225 NW 535 (1929); *Sackett*, *supra* at 681.

[16] *Kipka v Fountain*, 198 Mich App 435, 438-439; 499 NW2d 363 (1993).

"[A] boundary line long treated and acquiesced in as the true line ought not to be disturbed on new surveys. . . . Fifteen years' recognition and acquiescence are ample for this purpose."[17]

C. Tacking

Under either theory of adverse possession or acquiescence, a claimant may "tack" his or her use of the disputed property to the use of prior owners to achieve the requisite 15-year period.[18] Dine argues that the Naras' case should fail on this ground because in order to successfully tack a prior owner's use, there must be privity of estate, which is established either (1) by including the description of the disputed acreage in the deed of transfer, or (2) an actual transfer or conveyance of possession of the disputed acreage by parol statements made at the time of conveyance.[19] On this point, Dine points out that the evidence showed that a description of the disputed property was never included in any of the deeds and that the evidence regarding any parol statements made at time of the transfers was "sketchy at best." Therefore, Dine argues that because the Naras could not show privity, their claims should fail because without tacking, the trial court was limited to assessing the Naras' conduct since 1996, which clearly failed to meet the 15-year statutory period.

However, the Michigan Supreme Court has stated that, unlike the doctrine of adverse possession, the doctrine of acquiescence does not require proof of privity to employ tacking of holdings to obtain the 15-year minimum statutory period.[20] Mere use of and acquiescence to a certain line by successive neighboring landowners for a period of 15 years will fix the property line by acquiescence.[21] As will be discussed below, the record supported that the successive neighboring landowners here used and acquiesced to a certain boundary. Therefore, we conclude that Dine's argument on the issue of tacking must fail.

D. Analysis Of The Trial Court's Ruling Under The Doctrine of Acquiescence

Dine contends that in order to prevail on a claim of acquiescence, a plaintiff must show that the parties *agreed* to a certain, *definite and identifiable boundary line*. However, as Dine herself admits, there need not necessarily be evidence of an affirmative agreement between the parties; rather, a mutually shared assumption[22] or even mere failure of the defendant to object[23] is sufficient. Moreover, there is no requirement that the line acquiesced to be a definite, identifiable line, like, for example, a fence. Indeed, in *Walters v Snyder*, this Court found that,

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[17] *Walters*, *supra* at 458 (quotations and citations omitted).

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

[19] *Id*. at 259.

[20] *Siegel v Renkiewicz Estate*, 373 Mich 421, 426; 129 NW2d 876 (1964); *Killips*, *supra* at 260.

[21] *Siegel*, *supra* at 426; *Killips*, *supra* at 260-261.

[22] See *Walters*, *supra* at 458.

[23] *Killips*, *supra* at 260-261 (awarding property to plaintiff where "defendant did nothing to stop the usage").

although "a precise line was never acknowledged," it was sufficient that the plaintiff showed by a preponderance of the evidence that the parties "treated" a "bush line" ("a row of sporadically planted bushes and small trees") as the "approximate property line."[24]

Here, we agree with the trial court that the Naras provided evidence regarding the specific trees, bushes, and shrubs that were planted in the disputed strip, going back to the 1930s, as well as evidence that the Naras and their predecessors were the only parties who maintained these plants or the disputed area since that time. In addition, the Naras provided evidence that their predecessors installed a grape arbor partially in the disputed strip, and later cut down an olive tree, also in the disputed strip. Dine did not object to any of these activities or participate in them in any way. Rather, Dine did not begin to assert any control over the disputed area until 2001-2002, when she began to remove items, based on the results of a survey she had commissioned in 2000.

Dine did testify that she always believed that certain items in the disputed strip, like the sugar maple tree and the grape arbor, belonged to her. However, this testimony was against the weight of the testimony, and the trial court was in the best position to judge the credibility of the witnesses who appeared before it.[25] Moreover, Dine herself admitted that Allen told her that the line was "somewhere in the middle of those bushes" and Dine's witness, Chauncey Brooks, testified that he believed that the tree line set out the lot line.

We therefore conclude that the testimony in this case revealed that, until 2000, the owners of both lots were ignorant of the true location of the boundary line that divided Lots 11 and 12. However, evidence established that the various owners of Lot 12, dating back to the 1930s, believed that the eastern boundary to Lot 12 was the eastern edge of the line of bushes, trees, etc. According to the testimony, all owners of Lot 12 consistently maintained the area to the immediate west side of the bushes, and maintained both sides of the bushes. Testimony did indicate that Salego and Bruce Nara both briefly mowed the area immediately to the east of the bushes, but they stopped, thinking that they might be encroaching onto Dine's property, thereby supporting that they believed the bush/tree line to be the extent of their property. On this evidence, it is clear that both parties and their predecessors treated the line of bushes, trees, etc. as the boundary between Lots 11 and 12 for the statutory period.

Accordingly, we conclude that the trial court properly found that the Naras proved by a preponderance of the evidence that all relevant parties acquiesced to the line of trees, shrubs, landscape, etc. as the boundary line of the two lots for well in excess of the requisite statutory period.

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[24] *Walters*, *supra* at 458, 460 n 3.

[25] *Brooks v Rose*, 191 Mich App 565, 570; 478 NW2d 731 (1991).

E. Legal Presumptions

Dine points out that in actions for the recovery of land there is a statutory presumption in favor of the record owner[26] and that the payment of taxes creates a rebuttable presumption in favor of the title owners.[27] However, Dine offers no argument regarding how the Naras failed to overcome these presumptions when they fulfilled their burden to show acquiescence by a preponderance of the evidence. Therefore, we deem these arguments without merit.

F. The Trial Court's Judgment And The Doctrine Of Adverse Possession

The Naras contend that they established their entitlement to the disputed property under the doctrine of adverse possession and that the trial court partially based its award of the land to them under this doctrine. We disagree with the Naras' interpretation of the trial court's opinion. After deciding that the Naras were not entitled to relief under the terms of the 1949 Final Decree, the trial court turned to the Naras' claims "[w]ith respect to adverse possession and acquiescence," and recounted the evidence submitted by the parties. The trial court then went on to state:

> Based on the evidence presented, the Court finds in favor of [the Naras] on their fundamental factual allegations, i.e., that they and/or their predecessors installed and/or maintained the items in the disputed strip, all without the participation of or objection from [Dine] or her predecessors until 2002. *The Court also finds that these activities were sufficient to entitle [the Naras] to possession of the property under the doctrine of acquiescence.* That doctrine applies where adjoining property owners are mistaken as to where a true boundary line is located, and treat another boundary line as the true line. So long as this conduct is maintained for a 15-year period, the line to which the parties acquiesced becomes the legally enforceable boundary line, regardless of the innocent nature of the mistake. *[The Naras'] evidence establishes by a preponderance of the evidence that the parties and their predecessors acquiesced to the boundary line* asserted by [the Naras] in this action for well in excess of the 15-year period prior to [Dine's] objections in 2002. [Emphasis added.]

Therefore, the trial court's opinion and judgment were clearly based solely under the doctrine of acquiescence. The trial court twice clearly stated that it was applying the doctrine of acquiescence and specifically concluded that the Naras had met the preponderance of the evidence burden of the proof associated with acquiescence claims.[28] In contrast, other than acknowledging that the Naras were asserting a claim of adverse possession, the trial court never again mentioned that doctrine, nor did it make any ruling on the Naras' fulfillment of the more

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[26] MCL 600.5867; see also *Rozmarek v Plamondon*, 419 Mich 287, 294; 351 NW2d 558 (1984).

[27] *Monroe v Rawlings*, 331 Mich 49, 51; 49 NW2d 55 (1951); *Bachus v West Traverse Township*, 107 Mich App 743, 748-749; 310 NW2d 1 (1981).

[28] See *Killips*, *supra* at 260.

stringent clear and cogent burden of proof.[29] Therefore, there is no merit to the Naras' interpretation of the judgment as applying the doctrine of adverse possession. Accordingly, in light of our conclusion that the trial court properly found in the Naras' favor under the doctrine of acquiescence, we need not consider the merit of the Naras' claims under the alternative doctrine of adverse possession.

III. The 1949 Final Decree

A. Standard Of Review

Dine argues that the trial court erred by failing to make a clear and complete finding with regard to all of the contested issues—specifically, that the Oakland County Circuit Court's 1949 Final Decree set the boundary line at the original 1871 boundary line. That is, according to Dine, contrary to the Naras' interpretation, the 1949 Final Decree did not award any additional property to Lot 12; rather, the decree simply located and set the boundary line as the original boundary line established in 1871. Dine also argues that the equitable defense of laches applies and that the 1949 Final Decree was unenforceable as against her because she was a bona fide purchaser for value with no notice of that non-recorded judgment.

We may not set aside a trial court's findings of fact unless they are clearly erroneous.[30] A trial court's findings of fact are clearly erroneous only if on review of the entire record, this Court is left with the definite and firm conviction that a mistake has been made.[31]

B. Analysis

In an action tried without a jury, a trial court is required to find the facts specifically, state separately its conclusions of law, and then direct entry of an appropriate judgment.[32] The purpose of this requirement is to reveal the law applied by the factfinder with such specificity as to aid appellate review.[33]

Here, the trial court expressly dismissed use of the 1949 Final Decree to determine the boundary for the parties to this case because it

> simply [did] not identify with sufficient specificity the boundary that was established thereunder, as they refer to landmarks that are no longer in existence

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[29] *Wengel v Wengel*, 270 Mich App 86, 92; 714 NW2d 371 (2006) (stating that to prevail on a claim of adverse possession, a plaintiff must present *clear and cogent proof* that possession has been actual, visible, open, notorious, hostile, exclusive, under cover of claim of right, continuous, and uninterrupted for fifteen years); see also MCL 600.5801.

[30] MCR 2.613(C).

[31] *Peters*, *supra* at 221.

[32] MCR 2.517(A)(1).

[33] *Federal Deposit Ins Corp v Garbutt*, 142 Mich App 462, 469; 370 NW2d 387 (1985).

and whose location cannot otherwise be determined accurately enough to establish a precise boundary line.

We cannot conclude that the trial court clearly erred in disregarding the 1949 Final Decree when it was not accurate enough to determine a boundary line. Accordingly, Dine's argument that the trial court erred in not making a clear and complete finding regarding the correct interpretation of the 1949 Final Decree is irrelevant. Additionally, there is no need for us to consider Dine's argument to the extent that she argues that the 1949 Final Decree was unenforceable as against her because she was a bona fide purchaser for value with no notice of that non-recorded judgment.

IV. Admission Of Deposition

A. Standard Of Review

Dine argues that the trial court committed reversible error in allowing Claire Jane Allen's deposition to be admitted as evidence. More specifically, according to Dine, (1) the Naras failed to properly issue Allen a subpoena or make good faith efforts to attempt to compel her presence, (2) Dine's counsel did not have a full opportunity to question Allen, and (3) Allen's deposition testimony was unreliable.

We review for an abuse of discretion a trial court's decision to admit or exclude evidence, including deposition testimony.[34] An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes.[35] We review de novo preliminary questions of law, like whether a rule of evidence or statute precludes admissibility of the evidence.[36] An error in the admission of evidence is not a ground for vacating, modifying, or otherwise disturbing a judgment unless refusal to take such action would be inconsistent with substantial justice.[37]

B. Motions To Admit Allen's Deposition Testimony At Trial

In February 2005, the Naras moved for the admission of Claire Jane Allen's September 10, 2004 deposition at trial. The Naras noted that, due to her age, Allen was not able to complete the full deposition that day and thereafter returned to her home in Florida. And, because of her poor health, Allen had advised counsel that she would be unable to complete the deposition before the start of trial in March 2005. The Naras contended that, pursuant to MRE 804(b)(5), Allen was an unavailable witness because she was more than 100 miles away, but that her testimony was essential to the trial court's determination of the boundary issue at trial.

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[34] *Barrett v Kirtland Community College*, 245 Mich App 306, 325; 628 NW2d 63 (2001); *Bonelli v Volkswagen of America, Inc*, 166 Mich App 483, 502; 421 NW2d 213 (1988).

[35] *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

[36] *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999); *In re Utrera*, 281 Mich App 1, 15; ___ NW2d ___ (2008).

[37] MCR 2.613(A).

Therefore, the Naras requested that they be allowed to submit a transcript of Allen's deposition testimony at trial.

Dine objected to the admission of the deposition testimony, arguing that she had no notice that the deposition was being taken for use at trial. Moreover, she argued that the questioning period for each attorney was not equal, contending that, while the Naras' attorney was able to question Allen for over an hour and a half, Dine's attorney was only able to question her for about 15 minutes before she claimed she could not continue for health reasons. Dine further claimed that the Naras' attorney's questioning was leading and suggestive, and Allen was evasive while being questioned by Dine's attorney. Dine argued that, other than the word of the Naras' counsel, they had no proof that Allen was unavailable or that they had tried to issue a subpoena or reschedule the deposition. Essentially, Dine argued that the Naras' request should be denied because Allen was available, the deposition was not lawfully noticed, and that she did not have the opportunity to cross-examine Allen.

The trial court denied without prejudice the Naras' motion to admit Allen's deposition testimony. In its order, the trial court stated that, to be admissible, the Naras needed to take further efforts to make Allen available.

Shortly thereafter, the Naras renewed their move for the admission of Allen's deposition at trial. The Naras contended that they did notice Dine that Allen's deposition would be a Deposition Duces Tecum De Bene Esse, that the attorneys both had equal time to question Allen, and that attempts were made to reschedule a deposition with Allen in Florida but Allen was unable to participate due to her health problems. The Naras provided letters and other documentary evidence in support of their assertions. The Naras argued in the alternative that the trial court could adjourn the trial to wait and see if Allen adhered to her plan of returning to Michigan in May 2005, at which time another attempt could be made to reschedule her deposition. Accepting the Naras' alternative proposal, the trial court entered an order adjourning trial. The trial court also entered an order directing the Naras to attempt to subpoena Allen in Florida and appointing a commissioner to take Allen's deposition in Florida.

In May 2005, the Naras filed their third motion to admit Allen's deposition testimony. The Naras explained that, as the trial court had ordered, they procured a subpoena to depose Allen on May 24, 2005, in Florida. However, process was unable to be completed. The process server explained that he could not locate Allen at her home, and although he was able to speak with Allen's daughter, the daughter told him that Allen was now residing in a nursing home and that she did not want to be bothered anymore. Further efforts to find Allen were unsuccessful. The Naras again stressed how valuable Allen's testimony was for trial and that Dine had in fact already had sufficient opportunity to question her.

The trial court granted the Naras' motion, finding that Dine's attorney was present for the deposition and was allowed to cross-examine Allen, noting that approximately half of the deposition transcript consisted of cross-examination. The trial court further noted that Dine's counsel had not identified any questions that they were not allowed to ask or explained what further testimony they hoped to elicit. Because Allen now lived out of state and the Naras' "significant steps" to subpoena her were unsuccessful, the trial court concluded that the necessary elements of MRE 804(b)(5) had been satisfied.

C. Applicable Legal Principles

The burden of establishing admissibility of evidence rests with the party seeking admission.[38] Generally, deposition testimony is considered hearsay, defined in MRE 801(c) as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[39] And, pursuant to MRE 802, hearsay is not admissible except as provided by the rules of evidence.

Among the various hearsay exceptions, MRE 804(b)(5) provides that deposition testimony is not excluded if: (1) the deposed person is unavailable as a witness; (2) the deposition was taken in compliance with law in the course of the same or another proceeding; and (3) the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

> Generally, a declarant is considered unavailable as a witness when the declarant:
>
> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
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> (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
>
> (3) has a lack of memory of the subject matter of the declarant's statement; or
>
> (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
>
> (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance . . . by process or other reasonable means, and in a criminal case, due diligence is shown.
>
> A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.[40]

For the purposes of MRE 804(b)(5), however, "unavailability of a witness" also includes situations in which:

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[38] *Bonelli, supra* at 502.

[39] *Shields v Reddo*, 432 Mich 761, 766; 443 NW2d 145 (1989).

[40] MRE 804(a).

> (A) The witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or
>
> (B) On motion and notice, such exceptional circumstances exist as to make it desirable, in the interests of justice, and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

D. Analysis

We first note that Dine no longer argues the second prong regarding the admission of deposition testimony at trial; that is, Dine no longer disputes that the deposition was taken in compliance with law in the course of the same or another proceeding.

With respect to the third prong (counsel's opportunity to question), based on our review of the deposition transcript, there is no indication that Dine's attorney did not have ample opportunity to cross-examine Allen. The Naras' attorney's questioning of Allen took up approximately the first 38 pages of the deposition transcript. And Dine's attorney's cross-examination of Allen then took up approximately the latter 37 pages of the deposition transcript. Moreover, Dine's attorney went through several exhibits with Allen and even worked with her to draw a rough diagram of the various trees and bushes along the boundary line.

Turning back to the first prong regarding the admission of deposition testimony at trial (unavailability of the witness), we conclude that it was sufficient that the Naras showed that Allen was more than 100 miles away from the place of trial and that there was no indication that the Naras procured Allen's absence from the state.[41] Moreover, in light of Allen's illness,[42] and refusal to cooperate[43] and/or return to Michigan, despite Naras' counsel's attempts to contact her,[44] the interests of justice made it desirable to allow her deposition to be used.[45]

Dine additionally argues that Allen's testimony was unreliable due to age and poor health. However, the trial court was in the best position to judge the credibility of the witnesses.[46] And although Allen might have had a few lapses in memory, her testimony was significant to the case, and we cannot say the trial court abused its discretion in allowing admission of the deposition.

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[41] See MRE 804(b)(5)(A).

[42] See MRE 804(a)(4).

[43] See MRE 804(a)(2).

[44] See MRE 804(a)(5).

[45] See MRE 804(b)(5)(B).

[46] *Brooks, supra* at 570.

V. Damages

A. Standard Of Review

Dine argues that the trial court's damages award lacked any legal basis and, therefore, must be vacated. More specifically, Dine contends that the trial court never provided any explanation for its $3000 judgment in favor of the Naras.

As with other findings of fact, we review for clear error an award of damages.[47] A trial court's findings of fact are clearly erroneous only if on review of the entire record, this Court is left with the definite and firm conviction that a mistake has been made.[48]

B. Analysis

In an action tried without a jury, a trial court is required to find the facts specifically, state separately its conclusions of law, and then direct entry of an appropriate judgment.[49] "A finding of fact made by a trial court sitting without a jury is essentially a verdict, which may include an award of damages."[50] "Findings of fact regarding matters contested at a bench trial are sufficient if they are 'brief, definite, and pertinent,' and it appears that the trial court was aware of the issues in the case and correctly applied the law, and where appellate review would not be facilitated by requiring further explanation."[51] The purpose of this requirement is to reveal the law applied by the factfinder with such specificity as to aid appellate review.[52]

In its ruling, the trial court stated that it was unwilling to impose on Dine the full replacement costs of the removed items, "as there is little evidence that the removal of the shrubbery impaired the value of the [Naras'] property, or otherwise cause any meaningful damage." The trial court then awarded the Naras damages in the amount of $3000. As Dine points out, despite the trial court's comments regarding the negligible nature of the damages that the Naras suffered, its award was still approximately 55 percent of Naras' requested damages. We therefore agree with Dine that the trial court erred in not explaining how it arrived at its $3000 award.

We further note that this error was not harmless because it is impossible from the existing record for us to even piece together how the trial court might have arrived at that amount. During trial, Tracy Nara testified that she had gotten estimates regarding the value of the sugar maple tree and the arbor vitaes. And she used a "Bordine's catalog" to estimate the value of the

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[47] *Triple E Produce Corp v Mastronardi Produce*, 209 Mich App 165, 177; 530 NW2d 772 (1995).

[48] *Peters*, *supra* at 221.

[49] MCR 2.517(A)(1).

[50] *Triple E Produce Corp*, *supra* at 176.

[51] *Id*., quoting MCR 2.517(A)(2).

[52] *Federal Deposit Ins Corp*, *supra* 469.

various flowers, like the lilies and peonies. However, Tracy Nara never stated on the record what the estimated values were. Further, during trial, the Naras submitted a proposal from the Steinkopf Nursery, which ostensibly set the damages amount at $5,434.82. However, we could not find a copy of the proposal in the lower court record, and the parties have not provided a copy of it on appeal.

We acknowledge that "[b]revity alone is not fatal to a trial court's opinion"; however, the trial court still must reveal the factual basis for its ultimate conclusions.[53] Because further explanation from the trial court would have better facilitated appellate review on the issues of damages, we conclude that the trial court erred by not offering any explanation for its $3000 judgment in favor of the Naras. Accordingly, we reverse and remand the matter for the trial court to make a proper finding based on the evidence presented.

VI. Hearsay Evidence

A. Standard Of Review

Dine argues that the Naras' Exhibit 19—the Steinkopf Nursery proposal that placed a value on various trees/shrubs removed from the disputed property—is hearsay, not subject to any of the hearsay exceptions. Therefore, Dine contends, the trial court erred by allowing the admission of the hearsay testimony regarding the value of the trees and shrubs that Dine removed from the disputed area.

We review for an abuse of discretion a trial court's decision to admit or exclude evidence.[54] An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes.[55] We review de novo preliminary questions of law, like whether a rule of evidence or statute precludes admissibility of the evidence.[56] An error in the admission of evidence is not a ground for vacating, modifying, or otherwise disturbing a judgment unless refusal to take such action would be inconsistent with substantial justice.[57]

B. Analysis

During trial, counsel for the Naras sought to admit a proposal from the Steinkopf Nursery. Counsel for Dine objected, arguing that the document was hearsay evidence because he would not have the opportunity to cross-examine the person who prepared it, but the trial court allowed its admission, stating that Dine's counsel could call that person as a witness if he wanted to. Tracy Nara then testified that she provided the nursery with pictures and information

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[53] *Birkenshaw v Detroit*, 110 Mich App 500, 509; 313 NW2d 334 (1981).

[54] *Barrett v Kirtland Community College*, 245 Mich App 306, 325; 628 NW2d 63 (2001).

[55] *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

[56] *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999); *In re Utrera*, 281 Mich App 1, 15; 761 NW2d 253 (2008).

[57] MCR 2.613(A).

regarding the measurements of the sugar maple tree. Tracy Nara claimed that the sugar maple tree was in healthy condition.

The burden of establishing admissibility of evidence rests with the party seeking admission.[58] MRE 801(c) defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." And, pursuant to MRE 802, hearsay is not admissible except as provided by the rules of evidence. The Naras do not dispute that the Steinkopf Nursery proposal was hearsay evidence. However, Dine did not offer any contrary evidence to rebut the amount arrived at by the proposal, and the proposal was material and the best evidence regarding the issue of damages. Therefore, we cannot conclude that the trial court abused its discretion in allowing admission of the proposal. Moreover, as the Naras point out, the trial court apparently did not rely on the proposal in rendering its damages award anyway.

Accordingly, we conclude that the trial court did not abuse its discretion by allowing admission of the Steinkopf proposal. However, on remand, the trial court should explain if, and to what extent, it did rely on the proposal in making its determination of damages.

We affirm in part, reverse in part, and remand for further proceedings on the issues of damages. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Peter D. O'Connell
/s/ Donald S. Owens

[58] *Bonelli, supra* at 502.