STATE OF MICHIGAN

COURT OF APPEALS

GARY GRAY, Plaintiff/Counter-Defendant-Appellee,	UNPUBLISHED January 24, 2012
v	No. 300596 Kalamazoo Circuit Court
JOHN BURNS and SHARI BURNS, Defendants/Counter-Plaintiffs-Appellants.	LC No. 2009-000455-CZ

Before: MARKEY, P.J., and SERVITTO and RONAYNE KRAUSE, JJ.

PER CURIAM.

This property line dispute, which involves parcels of land owned by people who are not parties to this action, arises out of a longstanding discrepancy between the formal description of a particular north-south boundary's location as described in deeds and the assumed location of the boundary as actually relied on by several of the landowners. Plaintiff owns two parcels immediately west of the disputed boundary, and defendants own the property to the west of Plaintiff; defendants' property is bounded to the west by a road. The trial court found in favor of plaintiff and ordered that the parties' deeds be reformed to reflect plaintiff's property being located 34 feet to the west of the formal description in plaintiff's deeds. We reverse and remand for further proceedings.

In 1876, a common owner conveyed a parcel of property by way of a deed that inconsistently specified two acres and contained a metes and bounds description amounting to an acre and a half. It provided that the western boundary was 8 rods (132 feet) west of a section corner. In 1877, a private survey showed the property line 34 feet west of that, consistent with the acreage description. From then on, the metes and bounds descriptions of all of the deeds in the area reflected the boundary being 8 rods west of the section corner, but the landowners all believed the true boundary to be 34 feet west of that. The "two acres" language was deleted from any deeds by the turn of the Twentieth Century, but some time after he took possession of the above-mentioned parcel in 1903, Henry O. Kern erected a massive concrete fencepost on what was believed to be his true western boundary. Although this was not a surveyor's

monument, and no deed ever referred to it,[1] it was subsequently treated as the boundary between Kern's property and what would become plaintiff's property.[2]

All of the deeds to the properties in the area, as far back as the turn of the Twentieth Century, mathematically match up to each other and provide metes and bounds descriptions indicating that the boundary between plaintiff's and Kern's properties lies 8 rods west of the section corner. But all of the property owners in the area, for at least as long, believed the true boundary to lie along Kern's fence line. The discrepancy between the unambiguous record titles and the equally-unambiguous historical usages came to light when plaintiff sought to construct a restaurant and discovered that his eastern property line as described in his deeds ran through a neighbor's garage. Plaintiff devised a plan to bring the neighbors' deeds into conformity with their property usages through a variety of quitclaim deeds, but defendants, unsurprisingly given that their property could not be further "shifted over" so they would be the only property owners to lose land and change their historical usage, refused.[3] This litigation ensued.

"We review the trial court's findings of fact in a bench trial for clear error and conduct a review de novo of the court's conclusions of law." *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001). "When reviewing a grant of equitable relief, an appellate court will set aside a trial court's factual findings only if they are clearly erroneous, but whether equitable relief is proper under those facts is a question of law that an appellate court reviews de novo." *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811 (2008).

Defendants first argue that the trial court erred in holding that the Michigan Marketable Record Title Act (MMRTA), MCL 565.101 *et seq*, was inapplicable and did not resolve this matter. We find that the MMRTA is not completely irrelevant, but the trial court correctly determined that it does not resolve the dispute in this case.

The MMRTA is intended to "'erase all ancient mistakes and errors so that if a party enjoyed record title for forty years,'" any older competing record claims would be extinguished. *Fowler v Doan*, 261 Mich App 595, 602; 683 NW2d 682 (2004), quoting *Henson v Gerlofs*, 13 Mich App 435, 441; 164 NW2d 533 (1968). The MMRTA does not apply to resolve *all* kinds of possible disputes as to ownership of a given area of land, but rather only competing claims *of*

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[1] There was a deed that referred to the boundary of Kern's property, but that deed unambiguously identified that boundary as being 8 rods west of the section corner; the deed did not refer to Kern's fencepost or his fence.

[2] Kern's property is now owned in relevant part by non-parties Jerald Neidlinger to the north and Samuel Dee to the south. For convenience, we will continue to refer to the "Kern fencepost" and to Kern's property, even though strictly speaking Kern's property no longer exists as such.

[3] Plaintiff suggests that defendants acted unreasonably by so refusing. If the record contained any indication that plaintiff intended to compensate defendants for the loss of their historical usage of their property, either financially or by conveying an equivalent portion his own property (e.g., the southern portion of his southern parcel, which we presume might not be crucial to his restaurant project in any event), we might be sympathetic to that argument.

record; it would have no bearing on, for example, a possible adverse possession claim. See *Fowler*, 261 Mich App at 601 n 5.

The only possible claims *of record* that could possibly have any bearing are the 1877 survey and three Nineteenth Century deeds. Irrespective of the fact that the survey was, as plaintiff's surveyor noted, a private survey rather than a government survey; and irrespective of the fact that the Nineteenth Century deeds were ambiguous rather than definitive support for either party's position; all of the record titles and chains thereof in the area have, for significantly more than forty years, been contradictory to the survey and the Nineteenth Century deeds. The MMRTA would extinguish any possible claim based on anything that would have appeared in the property records at the time Kern took possession. However, because all of the present deeds match up *to each other* perfectly, none of the present deeds present competing claims of record.

Because the issue here is that some of the deeds partially diverge from some of the historical *usage* of the land, not that they conflict with any other person's record ownership, the trial court correctly held, on the basis of *Fowler*, that the MMRTA did not resolve the claims in this case.

Defendants alternatively argue that the trial court erred in holding that the boundary between the parties' properties should be shifted 34 feet to the west on the basis of the doctrine of acquiescence. We agree.

We note initially that there is no evidence in the record of exactly when Kern placed the fencepost or whether he was aware of the 1877 survey. Nonetheless, he must have erected it earlier than 1935, and it is not subject to any serious dispute that his fence line was understood by the community to be the true western boundary of his property ever since. Although the present owners of Kern's property, Dee and Neidlinger, are not parties to this action, so this Court cannot adjudicate their rights, there can be no doubt that Kern's fence was treated as Kern's true property line for at least the requisite 15-year period for acquiescence. See *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). However, that property line was not seriously disputed between the parties.

The significant issue is what effect acquiescence to one boundary line has on another boundary line. Whether acquiescence to one property line affects any other property lines turns on the way in which the acquiescence arises. Acquiescence can arise from an intention to deed to a marked boundary, from a dispute and agreement, or from landowners simply treating a particular boundary as the true property line for the statutory period. See *Walters*, 239 Mich App at 457. The evidence unanimously shows that there was never any kind of dispute until the instant litigation. Treating a particular boundary as the true property line means literally that: no specific event or behavior needs to occur beyond parties generally "treating" something, which typically will be a fence, as the property line. *Id*. at 457-458. Intention to deed to a marked boundary involves "acquiescence arising out of the practical location of a boundary line by a common ancestor," where a common grantor set the true location of a boundary and conveyance by referring to some kind of objectively manifested indicator on the ground. *Maes v Olmsted*, 247 Mich 180, 183-184; 225 NW 583 (1929).

Significantly, it is only in the latter kind of acquiescence that acquiescence to one boundary will affect any other boundaries. This is logical and straightforward: where the acquiescence "arises from the intention to describe in the deed the boundary marked on the ground by a common grantor," then that marking on the ground will establish the commencement point of the entire property and all of the other property lines dependent on that commencement point. *Daley v Gruber*, 361 Mich 358, 363; 104 NW2d 807 (1960). In *Daley*, property lines were placed in reliance on metes-and-bounds descriptions, but a survey monument marking the corner of a township quarter turned out, many years later, to have been misplaced. *Id*. at 360. Our Supreme Court concluded that the relevant conveyances must be located in conformity with "an identification of an intended location by those who are to be affected." *Id*. at 363. In contrast, if the parties merely treat a particular boundary as the true boundary, doing so will eventually fix the location of *that* boundary, but not necessarily any others. *Pyne v Elliott*, 53 Mich App 419, 426-427, 431-433; 220 NW2d 54 (1974).

Although it appears that Notley may once have been a common owner of what would become Kern's and the parties' parcels, even the 1877 survey post-dated Notley's grant of Kern's parcel, so it is impossible for a "common grantor" to have relied on any known markings on the ground. There is no evidence that any deed ever intended to describe a boundary as marked on the ground, or that any deed referenced either the 1877 survey or Kern's fence.[4] Therefore, the situation in *Daley* is inapplicable, even if landowners historically *practically* used the Kern fencepost marker to determine where their properties were located. See *Cooley v Marx*, 17 Mich App 470, 473; 169 NW2d 655 (1969). The factual scenario here implicates acquiescence by treating a particular line as the true boundary. Therefore, the Kern fence line is the true eastern boundary of plaintiff's property and the true western boundary of Neidlinger's and Dee's properties, but that has no bearing on the boundary between plaintiff's property and defendants' property.

We note that there is some indication in the record that the parties' predecessors may have *independently* acquiesced to a boundary line between their properties, which may or may not be located where their deeds specify. Apparently, the parties' predecessors regarded a line of trees as indicative of their shared boundary. Furthermore, defendants maintained at least some of their property, including mowing it, up to what they believed to be a particular property line, and they may have done so for the requisite statutory period. We do not have evidence before us from which we can determine that any such acquiescence actually did take place or where the resulting true property line would be if it did. The shared boundary between *the parties'* properties is not affected by the true location of the boundary between plaintiff, Neidlinger, and Dee. But on this record, we cannot determine whether the true boundary line between the parties is as defined by their deeds or whether it is located elsewhere as a result of an independent acquiescence.

[4] As discussed above, one deed did make a reference to Kern's property line. However, that reference indicated that the property line was as described in the Kern's deed, 8 rods west of the section corner. It was therefore not a reference to the fence or the fencepost.

The trial court correctly determined that the MMRTA is inapplicable and that the Kern fencepost identifies the true property line between plaintiff's property and Neidlinger's and Dee's properties. However, the trial court incorrectly found that the acquiescence to the Kern fence line as a true property line affected the property line between the parties' properties. We therefore reverse the trial court's judgment in plaintiff's favor on the complaint and counter-complaint, and we remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Deborah A. Servitto
/s/ Amy Ronayne Krause