

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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KENNETH R. and LAUREL RUTKOWSKI,  
  
Plaintiffs/Counter-Defendants-  
Appellants,

UNPUBLISHED  
October 16, 2012

v

GAIL LEY and JOSEPHINE MAZUR,  
Individually or as the trustee of the JOSEPHINE  
MAZUR TRUST,

No. 307171  
Huron Circuit Court  
LC No. 10-004384-CH

Defendants/Counter-Plaintiffs-  
Appellees.

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Before: OWENS, P.J., and WILDER and GLEICHER, JJ.

PER CURIAM.

Plaintiffs appeal orders of the circuit court denying their claim of acquiescence to real property and denying a motion for new trial based on newly discovered evidence. We affirm.

This dispute arose from a boundary dispute between plaintiffs and defendants who all owned houses on adjoining parcels of lakefront property. The houses were constructed in the 1960s and tilted to the northwest so the homes would squarely face Lake Huron. However, the property lines were drawn straight east/west and not at an angle consistent with the direction the houses were facing. This meant that the lakefront included in each lot was not entirely that property which could be seen when looking out the houses' windows towards the water. From their homes, the property owners could see the northern half of their lakefront property, and the southern half of their next-door neighbors to the north's property. Although plaintiffs have not themselves possessed the land for the fifteen-year statutory period required for an acquiescence claim, MCL 600.5801(4), they endeavor to tack their possession to that of the previous owners, whom plaintiffs assert have treated a wall, wooden steps, and a sand path as the boundary line since 1968.

In 1995 Josephine Mazur purchased Lot 14 from Hope Gee and in 1998 Kenneth and Laurel Rutkowski purchased Lot 13 from Margaret Green, who had purchased it from Hope Gee in the 1960s. Shortly after purchasing Lot 13, Mr. Rutkowski removed wooden steps, regraded what he believed was his land, and installed sod, lights, and a sprinkler system to the portion of property at issue. Before these actions, the land between Lots 13 and 14 was largely

undeveloped with the sand path and wooden steps being the only altered landscape between the lots.

In the winter of 2009, the Mazur defendants erected a sand fence reflecting a new survey of their property, which cut through the land claimed by plaintiffs. In response, plaintiffs filed the instant claim.<sup>1</sup> Under the theory of acquiescence, plaintiffs claimed entitlement to the triangular piece of property to the north of their lot (Lot 13). This property was located between their lot and the Mazur defendants' lot, and was the portion of lakefront they could see from their windows because of the angle of their house (Lot 14). Plaintiffs also asserted that defendant Ley, their neighbor to the south, had acquired a triangular portion of their property to their south. Other neighbors subsequently filed suits asserting rights to triangular portions of their northern next-door neighbors' property.<sup>2</sup> This shift would have given each of the owners an angled lot that included the lakefront property directly in view from the front of their homes.

At trial, two previous residents of Lot 13, Diane Morrow and Carol Eikoff, testified that the sand path used by the owners of Lot 13 ran north of the survey lines. They stated that a person coming out the front door of the cottage on Lot 13 and going "straight out" to the beach, was using a path that was actually on Lot 14. However, using video footage obtained from the son of Josephine Mazur to locate trees on the property, a professional surveyor testified that he believed the path was located fully within the survey lines of Lot 13. On the basis of the physical evidence of the trees still on the property and the testimony of the professional surveyor, the trial court held that plaintiffs could not establish an acquiesced boundary line beyond the survey lines for the fifteen-year statutory period. It concluded that the path was squarely within Lot 13, and not at all on Lot 14 based on the survey line. Therefore, it concluded, the use of the path by the residents of Lot 13 did not constitute proof of a different, acquiesced property line because the path had always been located on plaintiffs' own property.

After trial, plaintiffs met Mary Lou and Sandra Spencer, the stepdaughter and step-granddaughter of Hope Gee, who, as noted, had previously owned Lots 13 and 14. Both Mary Lou and Sandra provided affidavits that stated that the path was north of the survey line between Lots 13 and 14, and not where the trial court had ruled it was located. Plaintiffs moved for a new trial on the basis of newly discovered evidence, but the trial court denied the motion.

The first issue on appeal is whether the trial court's erred in rejecting plaintiffs' property acquiescence claim. We review the findings of fact by a trial court sitting without a jury under

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<sup>1</sup> The Mazur defendants responded by filing a counterclaim seeking damages for water damage to a wall, the removal of numerous encroachments placed on their property by plaintiffs, including a step, sprinkler heads, speakers, debris and a seawall. The trial court concluded that the Mazur defendants were entitled to the removal of all encroachments except a porch step. Plaintiffs do not appeal this decision.

<sup>2</sup> In the other cases, the trial court recognized the original survey lines as the correct property lines and not the alleged "lines of occupation" sought by the parties. None of the other neighbors appealed this decision.

the clearly erroneous standard. *Gumma v D & T Constr Co*, 235 Mich App 210, 221; 597 NW2d 207 (1999). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been made. *Id.*

In order to establish a claim of acquiescence, MCL 600.5801(4), a claimant is required to show “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.” *Sackett v Atyeo*, 217 Mich App 676, 681; 552 NW2d 536 (1996). If the current owner has not established acquiescence for the mandated fifteen-year period, the acquiescence relating to predecessors in title can may tacked onto that of the parties. *Jackson v Deemar*, 373 Mich 22, 26; 127 NW2d 856 (1964).

The Rutkowskis purchased Lot 13 in 1998, thereby requiring acquiescence in connection with their predecessors in title to be tacked onto any acquiescence in connection with their period of ownership in order to satisfy the statutory fifteen-year requirement. Before the Rutkowskis purchased Lot 13, the evidence indicates that all of the land between Lots 13 and 14 remained in its natural state, except for a sand path that was used by the residents of Lot 13 to access the beachfront. Therefore, plaintiffs’ theory of acquiescence necessarily hinges on the location of the sand path to determine an acquiesced boundary line different from the preexisting survey lines.

The trial court relied on photographic evidence and the testimony of a professional surveyor to determine that the sand path was located within the survey lines of Lot 13. Its conclusion was based on expert testimony and physical evidence of trees still present on the land that were depicted in relation to the sand path through photographic evidence. For these reasons, the trial court did not clearly err in finding that plaintiffs had not acquired title to the disputed land through acquiescence.

The second issue is whether the trial court abused its discretion in denying plaintiffs’ motion for new trial under MCR 2.611(A)(1)(f) based on newly discovered evidence. MCR 2.611(A)(1)(f) provides that if substantial rights are materially affected, a new trial may be granted based on, among other things, “[m]aterial evidence, newly discovered, which could not with reasonable diligence have been discovered and produced at trial.” A person seeking a new trial on the basis of newly discovered evidence must satisfy four requirements:

(1) the evidence, not simply its materiality, must be newly discovered, (2) the evidence must not be merely cumulative, (3) the newly discovered evidence must be such that it is likely to change the result, and (4) the party moving for relief from judgment must be found to have not been able to produce the evidence with reasonable diligence. [*South Macomb Disposal Auth v American Ins Co*, 243 Mich App 647, 655; 625 NW2d 40 (2000).]

Plaintiffs assert that Mary Lou and Sandra Spencer were not discoverable by due diligence because they “[G]oogled the names of Wendell Gee and Hope Gee and came up with no references to those people or any of these Spencers who we attached [the affidavits to].” Plaintiffs also contend that they exercised reasonable diligence under the circumstances because

Sandra and Mary Lou do not share a surname with Hope Gee, and because they do not reside in Caseville, where the disputed land lies. We disagree.

Although plaintiffs attempted to Google search Wendell and Hope Gee after trial, the record is silent concerning whether they attempted to locate any Gee family members before trial. It has long been held that Michigan courts will not favorably view a motion for new trial citing newly discovered evidence because parties ought to act with “care, diligence, and vigilance in securing and presenting evidence.” *Garazewski v Wurm*, 204 Mich 227, 235-236, 169 N.W. 871 (1918) (internal quotation omitted). A court should deny a motion for new trial alleging newly discovered evidence where the moving party by exercising ordinary “reasonable diligence” would have known these facts at the time of trial. *Second Michigan Coop. Housing Ass'n v First Michigan Coop. Housing Ass'n*, 362 Mich 460, 463-464; 107 NW2d 905 (1961). Because Mrs. Gee owned both Lots 13 and 14 during the period at issue, and because she was deceased at the time this action was commenced, a cursory look for useful evidence should have included inquiry regarding whether Hope Gee had immediate family who might have used the lots in question.

In addition to having been discoverable through due diligence, plaintiffs’ newly proffered evidence is also cumulative. The respective affidavits state, in differently numbered paragraphs, as follows:

Access to the beach from Lot 13 was always on a perpendicular line (not an angle) from the north end of the home, exiting from a doorway down the wooden steps onto a dirt path to the beach as shown in Exhibits G and H.

\* \* \*

The Rutkowskis have shown me the area where the court ruled the pathway to the lake existed for purposes of ruling against the Rutkowskis, and that area is not where the pathway was.

At trial, both Diane Morrow and Carol Eikoff testified that the path was in a different location from where the court determined. Trial testimony was also consistent with the Spencers’ statements that owners of Lot 13 would exit a door on the north side of the house and use the wooden steps to access the sand path, which led out to the beach. The trial court apparently chose to rely on the expert witness and the videotape of the property, rather than on the testimony of former owners or guests of the properties. Cumulative testimony from the same type of witness is not grounds for a new trial.

Because plaintiffs did not exercise due diligence to obtain the testimony of Sandra and Mary Lou Spencer before trial, and because the new affidavits do nothing more than duplicate testimony presented at trial, the trial court did not abuse its discretion in denying plaintiffs’ motion for new trial.

Affirmed.

/s/ Donald S. Owens  
/s/ Kurtis T. Wilder  
/s/ Elizabeth L. Gleicher