STATE OF MICHIGAN

COURT OF APPEALS

DARRELL WIERGOWSKI and FRANCES WIERGOWSKI , Plaintiffs/Counter-Defendants/Appellants,	UNPUBLISHED September 4, 2001
V	No. 219824 Tuscola Circuit Court
WISNER UNITED METHODIST CHURCH, Defendant/Counter-Plaintiff/Appellee.	LC No. 98-16990-CH

Before: Jansen, P.J., and Collins and Cooper, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's judgment for defendant (Wisner United Methodist Church) regarding a disputed piece of land. We reverse.

Plaintiffs held legal title to a parcel of land in Tuscola County. In this action, plaintiffs sought quiet title to a 22.2-foot-wide strip of land along the northern edge of their parcel that the church had been using as an extension of its parking lot. Defendant counter-sued, claiming title to the disputed strip of land under the doctrines of adverse possession and acquiescence.[1] At trial, defendant presented evidence of a 1951 "handshake agreement" between plaintiffs' predecessor in title and officials of the church, in which plaintiffs' predecessor agreed to give the disputed strip of land to the church in return for a strip of land along the western portion of the church's property. The trial court quieted title of the disputed strip of land to defendant.

Plaintiffs first argue that the trial court should not have quieted title of the disputed strip of land under an acquiescence theory because defendant failed to show that the landowners mistakenly treated something other than the correct survey line as the actual boundary line for at least fifteen years. We agree. Actions to quiet title are equitable and are reviewed de novo by

[1] The trial court granted plaintiff's motion for summary judgment, pursuant to MCR 2.116(C)(10), and dismissed the church's claim of adverse possession. This issue is not before us on appeal.

this Court. *Beulah Hoagland Appleton Qualified Personal Residence Trust v Emmet Co Rd Comm'n*, 236 Mich App 546, 550; 600 NW2d 698 (1999). The factual findings of the trial court are reviewed for clear error. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

In an action to quiet title, the burden of proof is on the plaintiff to make out a prima facie case of title. *Beulah*, *supra* at 550. The defendant then has the burden of proving superior right or title in itself by a preponderance of the evidence. *Id.* at 546; *Walters, supra* at 455. There are three theories of acquiescence: (1) acquiescence for the statutory period; (2) acquiescence following a dispute and agreement; and (3) acquiescence arising from intention to deed to a marked boundary. *Walters*, *supra* at 457. The trial court found for the church on the theory of acquiescence for the statutory period.

It was uncontested that plaintiffs were the legal title holders of the disputed property. Therefore, the burden shifted to defendant to prove superior right to the land by acquiescence. This Court recently stated that to establish acquiescence to a boundary line for the statutory period of fifteen years, pursuant to MCL 600.5801(4), "requires merely a showing that the parties acquiesced in the line and treated the line as the boundary for the statutory period . . . ." *Walters, supra* at 456. While *Walters* concluded that the elements to establish acquiescence have not been clearly established in Michigan caselaw, the Court cited with approval the fact that the doctrine arose when owners mistakenly treated a boundary line as the property line. *Id*. at 457-458, citing *Sackett v Atyeo*, 217 Mich App 676, 681-682; 552 NW2d 536 (1996).

In fact, the element of mistake as to the disputed boundary is a theme that runs through virtually all Michigan case law on acquiescence. See *Smith v Hamilton*, 20 Mich 433, 438 (1870); *Blank v Ambs*, 260 Mich 589, 592; 245 NW 525 (1932); *Walters, supra* at 458; *Sackett, supra* at 681; *Kipka v Fountain*, 198 Mich App 435, 438; 499 NW2d 363 (1993). Our Supreme Court addressed the issue of mistake and acquiescence in *Smith*, *supra*, when it stated that:

> [i]t has been held very generally, that when there has been an honest difficulty in determining the lines between two neighboring proprietors, and they have actually agreed by parol upon a certain boundary as the true one, and have occupied accordingly with visible monuments or divisions, the agreement long acquiesced in shall not be disturbed, although the time has not been sufficient to establish an adverse possession. Where the transaction has not been such as to amount merely to an honest attempt to determine a doubtful line, the authorities have not permitted an agreement to stand which would operate as a violation of the statute of frauds. But where the parties have only tried to find the true boundary, it has been held that the statute was not infringed, and the line was fixed by acquiescence. [*Id*. at 438.]

The Supreme Court subsequently found that "[w]here the parties attempt to find the true line and are mutually mistaken, subsequent acquiescence under the mistake of fact does not establish the boundary, at least unless continued for the statutory period . . . ." *Blank*, *supra* at 592. Furthermore, this Court in *Kipka*, *supra*, expressly stated that "[t]he 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." *Id*. at 438 (emphasis

added). Thus, in the absence of an initial mistake as to the location of the actual boundary, the doctrine of acquiescence for the statutory period as an equitable remedy does not apply.[2]

Defendant cites to *Sackett*, *supra*, for the proposition that no mistake was required for acquiescence. However, after careful examination we find that that *Sackett* opinion did not so hold. In fact, *Sackett* specifically noted that the parties were initially mistaken about the location of the correct boundary line. *Id*. at 682. While the mistake in the boundary line was discovered after the original acquiescence, it appears that *Sackett* found for the plaintiffs because the acquiescence arose from the mistaken boundary and continued for the statutory period. *Id*. at 681-683.

Thus, the trial court erred when it quieted title to defendant because defendant failed to show that the parties to the land exchange were originally mistaken about the true location of the boundary. Plaintiffs' predecessor and the church representatives knew the location of the correct boundary and agreed to an oral land trade based on that knowledge. This transaction was not an acquiescence but a transfer of interests in land that required a written transfer to be legally enforceable. MCL 566.106.

Moreover, the fact that the trial court "[took] into consideration the use and character of the land, and the actions that were taken by the church, the church members in improving upon that property since that date," was an inappropriate basis on which to find acquiescence. Considerations with respect to the use and character of the land are more appropriate for an adverse possession analysis. See *Denison v Deam*, 8 Mich App 439, 442-444; 154 NW2d 587 (1967) (use of land for summer living purposes and recreational activities can support a claim of adverse possession where such use is consistent with the character of the property). Rather, the trial court's focus should be on how the parties recognized and treated the boundary line. *Walters*, *supra* at 457-458. Therefore, we hold that legal title to the disputed strip properly belongs to plaintiffs.

We note that plaintiffs also argue that defendant's acquiescence claim was barred by laches. For an affirmative defense of laches to succeed, there must have been an unreasonable delay that would prejudice and render it inequitable to grant relief to the other party. *In re Contempt of United Stationers Supply Co*, 239 Mich App 496, 503-504; 608 NW2d 105 (2000). We do not find any unreasonable delay in this case as defendant raised its counter-claim of acquiescence within two months of plaintiffs' lawsuit. Nor have plaintiffs established any prejudice because credible testimony was given by individuals with personal knowledge of the land exchange.

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[2] Recently, in *Killips v Mannisto*, 244 Mich App 256; 624 NW2d 224 (2001), this Court upheld a claim of acquiescence despite the fact that a mistake in the boundary line was not apparent. However, that case is distinguishable on its facts from the instant case as it involved the use of an easement and did not involve a true boundary line dispute. *Id*. (Hoekstra, dissenting) at 262.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Jeffrey G. Collins
/s/ Jessica R. Cooper