STATE OF MICHIGAN

COURT OF APPEALS

ORVILLE J. HOLMES and LEE ANN HOLMES, Plaintiffs/Counterdefendants-Appellants,	UNPUBLISHED November 16, 2001
v	No. 222056 Eaton Circuit Court
JOHNATHON R. ALTHOUSE and LORI A. ALTHOUSE, Defendants/Counterplaintiffs-Appellees.	LC No. 98-000050-CH

Before: Hood, P.J., and Whitbeck and Meter, JJ.

PER CURIAM.

Plaintiffs/counterdefendants (hereinafter plaintiffs) appeal as of right from the trial court's order granting defendants/counterplaintiffs' (hereinafter defendants) motion for summary disposition. We affirm.

In 1938, property was sold to the Holmes family. The deed of sale indicated that four acres were expressly exempted from the sale. In 1968, the property transferred within the family; a transaction established by a quitclaim deed. This deed continued to exempt the same four acres. On March 4, 1992, a personal representatives' deed transferred the property within the family to plaintiffs. This deed also exempted the four acre property in dispute in this litigation. A survey of the land occurred in anticipation of this transfer, and it did not include the property in dispute. Plaintiffs did not object to the description contained in the language of the deed or the results of the survey.

The disputed property was part of a three hundred acre farm owned by the Clough family since 1935. Edward Clough purchased the four acre parcel in dispute in 1976 from his father, Howard Clough. Edward Clough acknowledged that a fence had been placed on a portion of the four acre parcel in the 1950s, but the fence did not represent a property line. Furthermore, the fencing was not maintained and had been in a state of disrepair for at least thirty years. In 1991, a survey of the property occurred, and the stakes placed on the property did not recognize the fencing as the true boundary line. In 1992, in anticipation of the sale of the property, a second survey occurred that corresponded to the 1991 survey. On May 15, 1992, a warranty deed transferred the disputed property from Edward and Catherine Clough to defendants.

Shortly after defendants purchased their property, plaintiffs allegedly advised defendants that the lane of travel needed to be blocked to prevent individuals from dumping trash in the back area of the property. Plaintiffs did not assert a claim to the disputed property at that time. In 1998, plaintiffs filed this lawsuit seeking title to the disputed property through adverse possession or acquiescence. Defendants alleged that they discovered the dilapidated fence after tripping over it. Defendants alleged that after they began efforts to remove the fencing, plaintiffs objected to their ownership and filed this litigation.

Defendants moved for summary disposition of plaintiff's complaint, alleging that plaintiffs could not satisfy the elements of adverse possession or acquiescence and that estoppel precluded plaintiffs' claim. Plaintiffs alleged that the boundary line had been established. They acknowledged that the predecessors in title to the disputed property were unavailable to testify regarding any acquiescence to the boundary line. However, plaintiffs presented affidavits of individuals who allegedly were told that the predecessors in title recognized the boundary line as the fence line. The trial court granted defendants' motion for summary disposition. The trial court held that plaintiffs could not satisfy the elements of adverse possession or acquiescence. The trial court also noted that an unjust result would occur when evidence of the understanding by the original parties regarding the boundary line was unavailable.

Plaintiff first argues that the trial court erred in granting summary disposition of their adverse possession claim. We disagree. Our review of a summary disposition decision is de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Irrespective of whether plaintiffs can demonstrate all the elements of a claim of adverse possession, the failure to include the disputed property in the deed of transfer precludes plaintiffs' adverse possession claim. In *Sheldon v Michigan Central Railroad Co*, 161 Mich 503, 510-511; 126 NW 1056 (1910), our Supreme Court held:

> It seems to be undoubted that separate successive disseisins[1] cannot be tacked so as to constitute one and a single continuous possession, unless there is privity of estate between the successive parties in possession, each coming in as the transferee of the possessory rights of his predecessor.
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> It seems to us to be very clear that the complainant cannot rely upon his deed to show privity of estate, because the disputed premises are not mentioned in the deed. Where the grantee relies upon the deed to show privity of estate, he cannot have the benefit of the grantor's possession of lands which are not mentioned in the deed. The general rule is that possession cannot be tacked to make out title by prescription where the deed under which the last occupant claims title does not include the land in dispute. It must clearly appear in the deed that the particular premises were embraced in the deed, or transfer, in whatever form it may have been made. [Citations omitted.]

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[1] "Disseisin occurs when the true owner is deprived of possession or displaced by someone exercising the powers and privileges of ownership." *Kipka v Fountain*, 198 Mich App 435, 439; 499 NW2d 363 (1993) citing Black's Law Dictionary (4th ed.), pp 558-559.

In the present case, plaintiffs purchased their property in 1992. The plaintiffs received a deed that excluded the property owned by defendants. Additionally, the survey that occurred at plaintiffs' request did not include the disputed property. Defendants' purchase, also in 1992, did not reveal any encumbrance or title claim by plaintiffs or plaintiffs' predecessors in interest. Consequently, defendants were unaware of plaintiffs' claim at the time of purchase. In fact, plaintiffs waited until 1998 to file a complaint requesting title to the property based on adverse possession and acquiescence. The doctrine of adverse possession will not occur in this instance when the alleged entitlement to the property was not included in the deed of sale and plaintiffs rely on their predecessors' period of occupancy. *Sheldon, supra*. In *Hanlon v Ten Hove*, 235 Mich 227, 229-230; 209 NW 169 (1926), our Supreme Court acknowledged the rule set forth in *Sheldon*:

> While the members of this court have not always been in accord on the question, a majority of the court has consistently held that where a grantor conveys a specific piece of property, the grantee may not tack on to the period of his holding of an additional piece of property the period of his grantor's occupancy thereof to make up the statutory period. His grantor has not conveyed such property or his interest therein and there is no privity. Illustrative of such cases, see *Sheldon* v. *Railroad Co.*, 161 Mich. 503 [126 NW 1056 (1910)]; *Lake Shore, etc., R. Co.* v. *Sterling*, 189 Mich. 366 [155 NW 383 (1915)]; *Wilhelm* v. *Herron*, 211 Mich. 339 [178 NW 769 (1920)]; *Robertson* v. *Boylan*, 214 Mich. 27 [181 NW 989 (1921)]; *Bunde* v. *Finley*, 224 Mich. 634 [195 NW 425 (1923)]. The rule of these cases is not a harsh rule. If "A" purchases and holds the record title to 40 acres of land and by adverse possession obtains title to an adjoining 40 acres, it would hardly be contended that a conveyance by him of the 40 acquired by deed would carry with it title to the 40 acquired by adverse possession. So if "A" acquires by deed a 40 acres and obtains an adjoining strip 2 rods wide or some interest in it, his conveyance of the 40 acquired by deed does not carry with it his interest in the adjoining strip.

Pursuant to *Hanlon, supra*, plaintiffs' predecessors in title were obligated to quiet title and include the property acquired by adverse possession in the deed of transfer. The statute of frauds, MCL 566.108, provides that contracts for the sale of land, other than one year leases, must be in writing. The purpose of this rule is to prevent fraud or the opportunity for fraud. *Hunter v Slater*, 331 Mich 1, 7; 49 NW2d 33 (1951), quoting *Cramer v Ballard*, 315 Mich 496; 24 NW2d 80 (1946). In the present case, plaintiffs seek to enforce property rights not based on the deed of sale, but based on acts and intentions of individuals who are unavailable to testify to the occurrences in the 1940s and 1950s. Plaintiffs cannot circumvent the statute of frauds in this manner. Accordingly, the trial court properly granted defendants' motion for summary disposition of the adverse possession claim.

Plaintiff next argues that the trial court erred in granting summary disposition of their acquiescence claim. We disagree. Our review of this issue is de novo. *Spiek, supra*. Based on the principle of equitable estoppel, plaintiffs are precluded from obtaining title to this property through the doctrine of acquiescence. *Pyne v Elliott*, 53 Mich App 419, 430; 220 NW2d 54 (1974). In *Pyne*, a survey error occurred in the 1940s. The defendants were aware of the survey error as early as 1950. Despite the knowledge of the error, the defendants failed to act for

twenty-two years to correct the error. The trial court divided the contested property between the parties. On appeal, this Court reversed and stated:

> If the Elliotts had any right to any part of the south one-half of Government Lot 4, they slept on their rights and cannot equitably be allowed to enforce them now. The defendant Elliott himself concedes that he knew about the surveying error in 1950. This admission is confirmed by the testimony of a disinterested witness. The defendants also make this concession in their brief and it was so found by the trial court.
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> Although aware of the surveying error, the defendants did absolutely nothing to protect innocent future purchasers, such as the plaintiffs in this case. Having allowed this condition to arise and to continue, the defendants Elliott should be barred from asserting any claim to the disputed property. *McGee v Eriksen*, 51 Mich App 551; 215 NW2d 571 (1974).
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> Under the general principle of equitable estoppel, the defendants should be allowed to achieve no advantage. The defendants knew that the Tackaberrys were buying this land for commercial development, since it was surveyed for all the land owners under a joint agreement when they had the land platted. The defendants did nothing to correct the erroneous boundary lines and should be estopped from establishing any different boundary lines now. *Cleveland-Cliffs Iron Company v Gauthier*, 143 Mich 296, 298, 299; 106 NW 862 (1906). Also see *Snider v Schaffer*, 276 Mich 92, 100; 267 NW 791 (1936), and *Burrell v Brugger*, 1 Mich App 486, 488; 136 NW2d 730 (1965).
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> The defendants knew about the erroneous surveys from at least 1950; they did nothing to correct the error or to assert any claim to the disputed land until July 11, 1969. This is longer than the 15-year limitation fixed by law, and laches can be applied. *Lowry v Lyle*, 226 Mich 676, 684; 198 NW 245 (1924). [*Id.* at 430-431.]

Likewise, in the present case, plaintiffs are estopped from claiming the property in dispute. Plaintiffs allege that the boundary line was established in the late 1930s and ran for the fifteen year statutory period. See MCL 600.5801(4). However, following the completion of the statutory period, plaintiffs' predecessors in title failed to file an action to quiet title to the land. Additionally, the acts that allegedly led to the acquisition of the property were not maintained. Specifically, plaintiffs and their predecessors in title failed to maintain the land or the fence such that defendants would have been on notice of any claim to the disputed property. Based on estoppel, the trial court properly granted defendants' motion for summary disposition. *Pyne*, *supra*.

The *Pyne* decision may not be "on all fours" with the facts presented in this case. However, if parties could only obtain relief based on precedent involving exactly the same factual scenario, the appellate process would not serve the public interest or needs. "If relief had been granted only where precedent could be found for it, this great system would never have been developed; and, if such a narrow view of equitable powers is adopted now, the result will be the return of the rigid and unyielding system which equity jurisprudence was designed to

remedy." *Spoon-Shacket Co, Inc v Oakland Co*, 356 Mich 151, 163; 97 NW2d 25 (1959), citing *Bowen v Hockley*, 71 F2d 781, 786; 94 ALR 856 (CA 4, 1934). Furthermore, where relief is equitable in nature and not of legal cognizance, the remedy is of a purely equitable nature that follows its own rules. *Lothian v Detroit*, 414 Mich 160, 170; 324 NW2d 9 (1982).

In the present case, a survey prepared at plaintiffs' request did not include the disputed property. Defendants, in preparing for the purchase, also had a survey prepared that did not reveal any encumbrance. Defendants purchased the property, and plaintiffs remained silent regarding any interest in the property. Thus, traditional protections such as a writing to reflect a land purchase, a survey, and a title search did not reveal any encumbrance on the property for defendants, innocent purchasers. The dissent, however, would seem to impose an additional requirement upon all real estate purchases. That is, to protect an interest in land from a belated claim of adverse possession or acquiescence, a real estate purchaser must also canvas the prospective neighborhood and interview current occupants to determine any prior *unrecorded* interest in the land. It would be insufficient to interview current neighboring occupants of the surrounding properties. Rather, predecessors in title must also be tracked and interviewed to determine if a claim of acquiescence can be raised based on a period of time that extends back to, in this case, approximately sixty years. Yet, this litigation might have been avoided if plaintiffs had examined the language of their own survey, filed an action to quiet title prior to defendants' purchase, or asserted their interest in the property immediately rather than years after defendants' purchase.

We impose time limitations on the filing of a complaint to compel a plaintiff to exercise a right of action within a reasonable time to give the opposing party a fair opportunity to defend, relieve the court system from dealing with stale claims, and protect potential defendants from protracted fear of litigation. *Chase v Sabin*, 445 Mich 190, 194-201; 516 NW2d 60 (1994). The same considerations apply here. A plaintiff who alleges a property interest acquired through adverse possession or acquiescence, but fails to timely raise its interest in the property or move to quiet title to the property must be barred by equity from obtaining title from an innocent purchaser.[2]

Affirmed.

/s/ Harold Hood
/s/ Patrick M. Meter

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[2] Additionally, we disagree with the dissent's assertion that we have engaged in improper fact finding. Principles of equity bar the acquiescence claim because of the lack of notice of the claim to defendants. Plaintiffs do not dispute that they did not advise defendants of their claim at the time of the purchase. However, the photographs submitted of the area in dispute indicates that an identifiable property line through fencing was not established.