STATE OF MICHIGAN

COURT OF APPEALS

GARY J. MORRIS and LAURA S. MORRIS, Plaintiffs/Counterdefendants-Appellants,	UNPUBLISHED May 7, 2002
v	No. 223866 Monroe Circuit Court
MICHAEL MADDUX and MARTHA MADDUX, Defendants/Counterplaintiffs-Appellees.	LC No. 97-006610-CH

Before: Neff, P.J., and Wilder and Cooper, JJ.

PER CURIAM.

In this boundary dispute, plaintiffs appeal as of right from a judgment in favor of defendants. We affirm.

I. Facts and Proceedings

In 1970, defendants bought approximately 8.75 acres of real property by land contract. In 1973, defendants decided to split this property into two separate parcels, and hired the surveying company of Nowak and Kraus to split the property and mark the appropriate boundaries. After the split, one parcel consisted of approximately 4.25 acres and the other parcel was approximately 4.4 acres.[1] Defendants then built a house on the 4.25 acre parcel and, in 1974, decided to sell the 4.4 acre parcel to the Rushlow family. Subsequently, the Rushlow family deeded the 4.4 acre parcel to Francis Mary Collins.

Neither the Rushlow family nor Collins ever disputed the boundary line for the two parcels. In 1995, plaintiffs bought the 4.4 acre parcel of land from Collins. After plaintiffs purchased the land, defendants showed plaintiffs the Nowak and Kraus survey that had established the original boundary lines. However, the original stakes could not be found to confirm the survey and a boundary dispute arose between the parties. According to plaintiffs, defendants had informed them the hedgerow was on the boundary line. Defendants, on the other hand, maintained that the hedgerow (which they had planted in 1980) was actually four feet from the boundary line and that it therefore did not represent the boundary between the parties'

[1] Although 4.4 and 4.25 do not equal 8.75, these are the dimensions established at trial.

property. In addition, defendants had maintained the property up to the dead furrow,[2] which, undisputedly, is part of plaintiffs' property.

In 1996, plaintiffs had the property surveyed by David Arthur Consultants. The David Arthur surveyors were unable to find the front boundary stakes, and therefore calculated the property line based on the back stakes and the deed description. This survey concluded that the back stakes were about four feet off the 1973 deed description. Subsequently, the original 1973 front stake was apparently found, having been buried during the installation of a water line in 1988 and later uncovered. There was a 15 foot difference in the boundary line location claimed by plaintiffs, who relied on the David Arthur survey, and the boundary asserted by defendants, who relied on the location of the original stake.

Plaintiffs filed the instant complaint, alleging trespass and conversion. The complaint also asked the trial court to determine the property line between the parcels and to quiet title. Defendants then filed a counter-complaint arguing trespass on the part of plaintiffs, and seeking to quiet title and to prohibit plaintiffs from further trespass. Defendants also sought award damages, costs, and attorney fees. Following a bench trial, the trial court found there was acquiescence in "the Maddux claimed boundary" and ruled in favor of defendants, without providing a definitive legal description of the boundary. Instead, the court suggested another survey be done "so that we know exactly where that line is that was acquiesced to because it isn't what the latest surveyor has said by any means."

Plaintiffs subsequently objected to the proposed judgment, arguing that since the judgment did not include a legal description of the boundary, the boundary would continue to be disputed and the chain of title would be clouded. The trial court then ordered that an additional survey be completed to establish where the original stakes had been placed by Nowak and Kraus. Defendants obtained a new survey and filed a motion for entry of judgment requesting the trial court to adopt the results of the most recent survey to establish the legal description for the boundary line in contention. The trial court entered a judgment on November 10, 1999, stating in relevant part:

> IT IS FURTHER ORDERED AND ADJUDGED that the attached legal description (attached hereto and incorporated by reference as a part hereof and as though restated herein), insofar as it delineates the common boundary line of the above-described parcels of property involved in this action, and the cement markers placed by the surveyor in creating said property description establish the boundary line between the above-described parcels of property.

This appeal ensued.

II. Standard of Review

This Court reviews a trial court's factual findings in a bench trial for clear error, MCR 2.613(C); *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000), however we review de novo the trial court's conclusions of law. *Id.* A finding is clearly erroneous when, although

[2] A "dead furrow" is similar to a ditch.

there is evidence to support it, the reviewing court, considering the record as a whole, is left with the definite and firm conviction that a mistake has been made. *Id*. In addition, in boundary and survey dispute cases, the findings of the trial court will not be reversed unless they are clearly contrary to the overwhelming weight of the evidence. *Kahn-Reiss, Inc v Detroit & Northern Sav & Loan Ass'n*, 59 Mich App 1, 17; 228 NW2d 816 (1975), citing *Hustina v Indian Refining Co*, 222 Mich 369, 372; 192 NW2d 718 (1923).

III. Analysis

Plaintiffs' first argue that the trial court erred in establishing the boundary line by acquiescence. We disagree.

In *Sackett v Atyeo*, 217 Mich App 676, 681; 552 NW2d 536 (1996), this Court found that acquiescence in a property boundary could occur under any one of three theories: (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. See also *Walters*, *supra* at 457. In the instant case, the evidence supports the trial court's decision under both the first and third theories. A claim of statutory acquiescence to a boundary line is based upon a statutory period of fifteen years. *Killips v Mannisto*, 244 Mich App 256, 260; 624 NW2d 224 (2001); MCL 600.5801. In order to establish the statutory acquiescence, the evidence must "merely [] 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*, *supra*. An assertion of acquiescence does not require that the possession be hostile or without permission. *Killips, supra*. Further, "acquiescence of predecessors in title can be tacked onto that of the parties in order to establish the mandated period of fifteen years." *Jackson v Deemar*, 373 Mich 22, 26; 127 NW2d 856 (1964); *Killips, supra*.

Here, the evidence introduced at trial established that in 1973, defendants hired Nowak and Kraus to split their property into two separate parcels, and that the boundary established by that survey was never questioned by the predecessors in interest until 1996 when plaintiffs had a new survey conducted. Thus, the trial court's finding that plaintiff's predecessors in interest acquiesced in the boundary line and that the total period of acquiescence amounted to approximately twenty-two years, satisfying the statutory requirement, is supported by the evidence. *Killips, supra*. MCL 600.5801(4).

The trial court's findings are also supported by evidence that established the intention by a common grantor to deed to a marked boundary. *Sackett, supra*, 217 Mich App 681. When adjoining landowners buy their conveyances from a common grantor with reference to a boundary line that was located on the ground, the location, irrespective of lapse of time, is binding on the owner. *Daley v Gruber*, 361 Mich 358, 363; 104 NW2d 807 (1960); *Maes v Olmsted*, 247 Mich 180, 184; 225 NW 58 (1929); see also *Adams v Hoover*, 196 Mich App 646, 650; 493 NW2d 280 (1992). Therefore, a period of fifteen years is not needed for this type of acquiescence to occur. *Daley, supra*; *Maes, supra*. Thus, if the boundary is fixed and the grantor intended to sell the land according to this fixed boundary, then no specific lapse of time is necessary to establish the boundary. *Maes, supra*.

The evidence established that before 1973, defendants owned the two parcels of land at issue here as one parcel of real property, and that Nowak and Kraus was retained to divide the

property into two distinct parcels. In so doing, Nowak and Kraus created a fixed boundary line between the parcels by placing stakes in the ground. These stakes were present in 1974 when defendants sold one of the parcels to the Rushlow's. Hence, because the property was sold to plaintiff's predecessors in interest pursuant to a fixed boundary line (e.g. the stakes placed by Nowak and Kraus), and that property line was maintained, acknowledged, and in existence until plaintiffs challenged the accuracy of the line in 1996, it is of little relevance that the original stakes were covered up in 1988 while installing a water line. See *Maes*, *supra*. Because defendants intended to deed the parcel of land based on the stakes placed as a result of the Nowak and Kraus survey (e.g. a marked boundary), see *Sackett*, *supra*, the fact that the original survey may not have been completely accurate is of little import. See *Diehl v Zanger*, 39 Mich 601, 605 (1878) (Cooley, J., concurring.), where Justice Cooley stated:

> The question is not how an entirely accurate survey would locate these lots, but how the original stakes located them. . . . If they no longer discoverable, the question is where they were located; and upon that question the best possible evidence is usually to be found in the practical location of the lines, made at a time when the original [stakes] were presumably in existence and probably well known.

See also *Maes*, *supra*, and *Adams*, *supra*.

Plaintiffs also argue that the trial court's finding that the boundary had been set by acquiescence was clearly erroneous and against the great weight of the evidence. Again, we disagree. Because the boundary was marked by stakes at the time of the sale in 1974, and that boundary remained uncontested until 1996, the 15 years statutory for acquiescence is clearly satisfied. Further the trial court's finding that defendants intended the boundary set by Nowak and Kraus to be the boundary line between the parcels was not clearly erroneous or against the great weight of the evidence.

Plaintiffs also argue that the trial court abused its discretion when it allowed new evidence to be introduced to the record eleven months after it had rendered its initial decision in this case. We disagree. We review a trial court's evidentiary rulings for an abuse of discretion. *Krohn v Sedgwick James of Michigan, Inc*, 244 Mich App 289, 295; 624 NW2d 212 (2001). "A trial court must be accorded considerable latitude in fashioning remedies commensurate with the equities of the case." *Governale v Owosso*, 59 Mich App 756, 762; 229 NW2d 918 (1975). Relief must be fair and appropriate. *Id*.

Here, the trial court determined that although the property boundary had been established by acquiescence, because the most recent survey done of the property did not comport with the 1973 survey, another survey should be done to establish exactly where the original line had been established. It is clear that the trial court's order requiring the property to be resurveyed was intended to verify the acquiesced 1973 boundary line to prevent future clouding of title, and was not intended to constitute the reopening of evidence in this case. Accordingly, the trial court's directive that the property be resurveyed to establish the original line was not erroneous.

Finally, plaintiffs contend that the trial court committed reversible error by examining and relying upon evidence not admitted at trial. Specifically, plaintiffs argue that the deeds marked as defendant's exhibits one, two and three should not have been considered by the trial

court in making findings of fact and conclusions of law, because these exhibits were never admitted into evidence. Plaintiff's further contend that without these exhibits, the trial court could not establish the necessary time frame for acquiescence. Even assuming such reliance to be erroneous, we find any such error in this regard to be harmless. First, there were no objections to these exhibits, and it seems likely the exhibits would have been admitted into evidence if they had been offered. Second, the exhibits were cumulative to other evidence regarding acquiescence, since the testimony of Michael Maddux also established that the property was originally separated in 1973 and sold in 1974, that the original stake was buried in 1988, and that plaintiffs challenged the boundary in 1996. Further, since the evidence supported a finding of acquiescence under the theory of the intent of the common grantor, the testimony of Maddux alone as the common grantor was sufficient and the deeds were not required evidence. Accordingly, reversal is not warranted. Cf. *Solomon v Shuell*, 435 Mich 104, 145-146; 457 NW2d 669 (1990), citing MCR 2.613; *Stitt v Holland Abundant Life Fellowship (On Remand)*, 243 Mich App 461, 469; 624 NW2d 427 (2000).

Affirmed.

/s/ Janet T. Neff
/s/ Kurtis T. Wilder
/s/ Jessica R. Cooper