STATE OF MICHIGAN

COURT OF APPEALS

ROBERT J. SCHREINER and LAURA L. SCHREINER, Plaintiffs-Appellants, v RICHARD FRANCIS and JANET FRANCIS, Defendants-Appellees.	UNPUBLISHED December 17, 2002 No. 237160 Oakland Circuit Court LC No. 00-025909-CH

Before: Owens, P.J., and Murphy and Cavanagh, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's decision granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(10) in this property dispute involving claims of adverse possession and acquiescence to a four-foot strip of land lying between 592 Lakeside (lot 9), currently owned by plaintiffs, and 600 Lakeside (lot 8), currently owned by defendants.[1] We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiffs filed suit seeking to obtain title to a strip of defendants' property on which they had constructed a driveway by adverse possession or by acquiescence. Defendants moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that plaintiffs' use of the property was not sufficient to establish title by adverse possession, and that plaintiffs could not establish title through acquiescence. The trial court granted defendants' motion, finding that plaintiffs could not establish the elements of adverse possession because plaintiffs could not show that their possession to the disputed parcel was hostile. The trial court also found that plaintiffs had failed to present sufficient evidence to create a question of fact as to whether they had obtained

[1] Three property lines are at the center of the controversy: Line A, the original lot line of lot 9 as recorded in the original legal description to this property; Line B, the new legal boundary after the subsequent conveyance; and Line C, the line thought by plaintiffs to be the boundary after the subsequent conveyance. The disputed parcel lies between Lines B and C and is termed the "gap area" by plaintiffs. The distance from Line A to Line C is approximately eight feet. Plaintiffs own the land to the right of the disputed area (lot 9) and defendants own the land to the left (lot 8).

possession through the doctrine of acquiescence. The trial court subsequently denied plaintiffs' motion for reconsideration. Plaintiffs challenge only the dismissal of the acquiescence claim.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Harrison v Olde Financial Corp*, 225 Mich App 601, 605; 572 NW2d 679 (1997). A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered admissible evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.*

Plaintiffs argue that the trial court erred in finding that they had failed to provide support for their related claim of acquiescence because they were unable to present evidence of mutual mistake. See e.g., *Walters v Snyder*, 239 Mich App 453, 458; 608 NW2d 97 (2000); *Kipka v Fountain*, 198 Mich App 435, 438-439; 499 NW2d 363 (1993). In so finding, the trial court held that plaintiffs could not use testimony relating to the statements of Leahy or Howell to show a mistake regarding the changed boundary line because these statements were hearsay. It also found that plaintiffs had failed to present any evidence that defendants were mistaken as to the actual boundary line. Both of these holdings are erroneous under the circumstances.

Michigan recognizes three theories of acquiescence: (1) acquiescence for the statutory period, (2) acquiescence following a dispute and agreement, and (3) acquiescence arising from an intention to deed to a marked boundary. *Sackett v Atyeo*, 217 Mich App 676, 681; 552 NW2d 536 (1996). For example, under the theory of acquiescence for the statutory period, "where adjoining property owners acquiesce to a boundary line for at least fifteen years, that line becomes the actual boundary line." *Killips v Mannisto*, 244 Mich App 256, 260; 624 NW2d 224 (2001). Acquiescence following a dispute occurs when two owners have a bona fide dispute and later reach agreement concerning the boundary. *Rock v Derrick*, 51 Mich App 704, 708; 216 NW2d NW2d 496 (1974). Acquiescence arising from an intention to deed to a marked boundary occurs when a grantor intends to deed property to a physical boundary but mistakenly uses an incorrect legal description in the actual deed. *Daley v Gruber*, 361 Mich 358, 363; 104 NW2d 807 (1960). Thus, in order to support their claim for acquiescence under any of the three theories, plaintiffs have to show mutual mistake in the initial boundary. *Walters, supra* at 458. In addition, proof of an agreed-to boundary line is crucial to a claim of acquiescence. *Wood v Denton*, 53 Mich App 435, 439-440; 219 NW2d 798 (1974).

Plaintiffs presented evidence that Richard Francis was, in fact, mistaken as to the true boundary line. Although he later recanted, Francis first testified during his deposition that he thought the disputed area was part of plaintiffs' property when he first purchased his own property. He also took other actions consistent with a mistaken belief that the disputed property was part of plaintiffs' land such as failing to comment when plaintiffs paved their driveway and in asking whether plaintiffs wanted to repave their driveway in 1993 when defendants were repaving their portion of the drive. Knowledge and intent can be inferred through circumstantial evidence, including conduct. *Daley, supra* at 362. In addition, contrary to defendants' position on appeal, the absence of action can also indicate acquiescence. *Morrison v Queen City Elec Light & Power Co*, 181 Mich 624, 628-629; 148 NW 354 (1914). Although the trial court, when later sitting as the factfinder in this equitable matter at trial, could choose to credit Francis' later

statement that he always thought that the disputed property belonged to him after hearing testimony by both parties, this remained a disputed question of fact at the time the trial court granted defendants' motion because of the conflicting evidence. Thus, we hold that the trial court erred in granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10) on the ground that plaintiffs failed to present evidence of mutual mistake.

In connection with this ruling, we also hold that the trial court erred in finding that plaintiffs could not use statements or actions by Leahy and Howell in support of their position. This ruling that these statements constituted inadmissible hearsay was apparently made without the benefit of briefing by the parties. Plaintiffs maintain on appeal that any of Leahy's or Howell's statements that are actual assertions could be properly characterized as statements against interest and thus admissible under MRE 804(b)(3).

Our review of this issue reveals that the trial court erred in its analysis of the previous statements allegedly made by Leahy. Leahy's statement that, "this is what I can afford to give up" and his other verbal statements were not inadmissible hearsay because the statements were not being used to prove the truth of the matters asserted, but to show that Leahy believed the new property line to lie at point C. MRE 801(c).

Leahy's concurrent actions in placing a line at the point of the disputed property, while perhaps properly characterized as an assertion, would then fall within conduct designed to evidence an action against his ownership interest in a portion of his property that was contrary to his proprietary interest in his property. A reasonable person would not make such a statement (or take such an action intended as an assertion) unless he believed it to be true. Thus, any statement would arguably fall within the exception under MRE 804(b)(3), if plaintiffs are able to show that Leahy is unavailable for trial. *Sackett*, *supra* at 684.

The trial court erred in finding that plaintiffs had not presented evidence of mistake sufficient to the extent necessary to create a question of fact and survive summary disposition concerning their acquiescence claim.

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

/s/ Donald S. Owens
/s/ William B. Murphy
/s/ Mark J. Cavanagh