STATE OF MICHIGAN

COURT OF APPEALS

MIKULAS KUZDAK and CHRISTY P. KUZDAK, Plaintiffs/Counter-Defendants-Appellants,	UNPUBLISHED January 8, 2008
v	No. 269777 Macomb Circuit Court
FRANK ELLERO and C. ELLERO, Defendants/Counter-Plaintiffs-Appellees.	LC No. 2004-002611-CZ

Before: Owens, P.J., and White and Murray, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's judgment requiring defendants to deed certain property to plaintiffs in exchange for plaintiffs paying defendants $100 a square foot. We affirm in part, vacate in part, and remand for further proceedings.[1]

Plaintiffs first contend that the trial court should have disqualified itself because it actively engaged in settlement negotiations with the parties, encouraging a settlement that was virtually identical to its opinion and order rendered after a bench trial. Generally, to preserve this issue for appellate review, a motion to disqualify must be filed within 14 days after discovering the basis for disqualification and must be accompanied by an affidavit attesting to all grounds for disqualification asserted in the motion. MCR 2.003(C)(1) and (2); *Kloian v Schwartz*, 272 Mich App 232, 244; 725 NW2d 671 (2006). Further, if the trial court denies the motion for disqualification, the moving party must then request referral to the chief judge of the trial court. MCR 2.003(C)(3)(a); *Welch v Dist Court*, 215 Mich App 253, 258; 545 NW2d 15 (1996). Plaintiffs did not preserve this issue for appeal because they did not file their motion within 14

[1] We disagree with defendants' argument that this Court lacks jurisdiction over this appeal. Although plaintiffs' claim of appeal lists the order denying their motion for a new trial, rather than the final judgment as defined by MCR 7.202(6)(a)(i), as the order being appealed, plaintiffs timely filed their claim of appeal and the erroneous reference to the order denying their new trial motion does not affect this Court's jurisdiction regarding the final judgment.

days after discovering the basis for disqualification, the motion was not accompanied by an affidavit, and they did not request referral to the chief judge following the trial court's denial of their motion. As such, our review is limited to plain error affecting substantial rights. *Veltman v Detroit Edison Co*, 261 Mich App 685, 690; 683 NW2d 707 (2004); *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

Plaintiffs rely on MCR 2.403, MCR 2.404, and *Bennett v Medical Evaluation Specialists*, 244 Mich App 227; 624 NW2d 492 (2000), which involve case evaluation. In *Bennett, supra* at 233, this Court held that when a party violates MCR 2.403(N)(4) by revealing the results of case evaluation before the judge has rendered judgment, the only appropriate sanction is disqualification of the judge and reassignment to a different judge for retrial. Here, however, the trial court participated in settlement discussions with the parties' attorneys, which is permitted by MCR 2.401(C)(1)(g). Plaintiffs also rely on MCR 2.003(B)(2), which provides that a judge is disqualified when he cannot impartially hear a case, including when he "has personal knowledge of disputed evidentiary facts concerning the proceeding." Plaintiffs have not, however, established that the court had personal knowledge of disputed facts, or that the court could not impartially hear the case. Because the court's settlement discussions were explicitly authorized under the court rule and plaintiffs have not shown actual bias, we find no plain error in the court's failure to grant the untimely motion to reassign the case.

Plaintiffs next argue that the court clearly erred in rejecting their claim that they acquired the disputed property by acquiescence. A finding of fact is clearly erroneous where, although there exists evidence to support the finding, this Court is left with a definite and firm conviction that a mistake has been made. *City of Essexville v Carrollton Concrete Mix, Inc*, 259 Mich App 257, 265; 673 NW2d 815 (2003).

There are three theories of acquiescence, including "(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." *Sackett v Atyeo*, 217 Mich App 676, 681; 552 NW2d 536 (1996). The first theory is involved here, and the statutory period is 15 years. MCL 600.5801(4); *Kipka v Fountain*, 198 Mich App 435, 438; 499 NW2d 363 (1993).

> The 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. Adjoining property owners may treat a boundary line, typically a fence, as the property line. If the boundary line is not the recorded property line, this results in one property owner possessing what is actually the other property owner's land. Regardless of the innocent nature of this mistake, the property owner whose land is being possessed by another would have a cause of action against the other property owner to recover possession of the land. After fifteen years, the period for bringing an action would expire. The result is that the property owner of record would no longer be able to enforce his title, and the other property owner would have title by virtue of his possession of the land. [*Id.* at 438-439.]

Our case law has not delineated specific elements necessary to establish a claim of acquiescence. *Walters v Snyder*, 239 Mich App 453, 457; 608 NW2d 97 (2000). Rather, a court's inquiry should focus on "whether the evidence presented establishes that the parties *treated* a particular

boundary line as the property line." *Id.* at 458 (emphasis in original). In addition, a claim of acquiescence does not require that possession be hostile or without permission, and the acquiescence of predecessors in interest may be tacked onto that of subsequent titleholders to establish the mandatory 15-year period. *Killips v Mannisto*, 244 Mich App 256, 260; 624 NW2d 224 (2001).

The trial court's opinion and order recited the parties' claims and positions regarding acquiescence as well as the controlling issues of law. The opinion then states:

> Keeping in mind the equitable nature of the Court's decision, the Court concludes the following. Defendants' actions regarding the driveway and parking area in front of the residences and alongside plaintiffs' patio have little impact on plaintiffs' use and enjoyment of their property. These property lines shall remain as is. To the extent that plaintiffs[,] lawn sprinkler encroaches upon defendants' property, it shall be rendered inoperable. Plaintiffs are free, of course, to reinstall new sprinkler lines on their side of the property line.
>
> The property line running from the base of defendants' terraced area to the waterfront has great impact on plaintiffs' use and enjoyment of their property, and little impact on defendants'. To this end, if left intact, considering the animosity between the parties, defendants are positioned to cut off approximately 20-30% of plaintiffs' view of the water. Plaintiffs could conceivably be viewing shrubs, tall ornaments, and for that matter, defendants themselves, instead of a pleasant, peaceful vista. It is the Court's view that the negative impact would be detrimental to the parties' use and enjoyment of the land.
>
> Therefore, defendants shall deed this property in conformance with the lines drawn on defendants' exhibits C and D and plaintiffs' exhibit 17. Exact placement of the property line is left to the parties, but should conform with the natural line of sight from plaintiffs' patio to the base of the hill and thence to the water's edge. Plaintiffs shall pay defendants $100,00 per square foot in consideration for the deeded property.
>
> The owner of any buried improvements will be [sic] capped/removed/disconnected to the extent that they cross the property line into the non-owner's land.

While it is unclear from the opinion whether the court accepted or rejected the claim of acquiescence, the court subsequently made clear, in denying plaintiffs' motion to amend judgment, that it rejected plaintiffs' acquiescence claim. In the earlier opinion and order, the court had specifically stated that it was not swayed by the parties' testimony because it was self-serving and contradictory, but that it did credit the testimony of Richard DeGreef, plaintiffs' former neighbor and the ex-husband of defendants' immediate predecessor in interest. The trial court's finding that the parties' testimony was contradictory and self-serving is not clearly erroneous. Plaintiffs maintained that they landscaped their yard in accordance with stakes that their builder positioned to demarcate their lot line. They denied that there existed any dispute regarding the lot line before 2004. On the other hand, defendants testified that a dispute arose regarding the property line on the day that they moved into their residence and that plaintiffs

asked their permission to landscape areas that plaintiffs now claim were their own. The trial court's decision to grant little weight to the parties' testimony is not clearly erroneous.

Further, the testimony that the court did credit supports that plaintiffs had known the correct location of their lot line since they bought their property, and the court's conclusion that plaintiffs and DeGreef did not regard plaintiffs' maintenance of the disputed areas as an assertion or reflection of ownership. Considering DeGreef's testimony, the trial court's decision is not erroneous. Contrary to plaintiffs' argument, it does not appear that the trial court simply ignored the statutory 15-year requirement in favor of resolving this case on equitable grounds. Rather, it appears that the court determined that plaintiffs failed to show that the parties treated plaintiffs' proposed boundary line as the true property line.

Plaintiffs next argue that the trial court erred by placing a value on the property absent evidence regarding such value.[2] At this juncture, we note that apart from plaintiffs' claims on appeal that the court erred in requiring that it pay for the property because plaintiffs established ownership by acquiescence, and that, in any event, the price set by the court has no support in the record, neither party challenges the court's underlying ruling that equity required defendants to deed a portion of the disputed property to plaintiffs in exchange for payment. Thus, while we share Judge Murray's concerns regarding the propriety of this aspect of the court's order, we do not set it aside because the court's authority to enter such an order has not been challenged.

A person need not qualify as an expert in order to testify regarding the value of land. *In re Brewster Street Housing Site*, 291 Mich 313, 345; 289 NW 493 (1939); *Equitable Bldg Co v Royal Oak*, 67 Mich App 223, 226-227; 240 NW2d 489 (1976). Rather, "[a]ny ordinary individual who has the testamentary qualification of knowledge of the question about which he attempts to testify may testify as to the value of land." *In re Brewster Street Housing Site*, *supra* at 345. However, although the trial court viewed the property at issue in this case, neither party testified regarding its value, and nothing in the record supports that the court was able to determine its value from the view. Without any evidence indicating the value of the property, we are unable to determine whether the assessment of $100 a square foot is clearly erroneous. We therefore vacate that portion of the trial court's order requiring plaintiffs to pay defendants $100 a square foot for the property and remand this case for a determination regarding the property's value.

---

[2] We reject defendants' assertion that plaintiffs failed to preserve this issue by failing to introduce valuation evidence at trial or in support of the motion for new trial. No valuation testimony was offered at trial because ownership, rather than value, was at issue. Further, plaintiffs were not obliged to file a motion for new trial on this basis to preserve this issue for appeal. See MCR 7.211(C)(1)(c) (an objection going to the weight of the evidence following a bench trial does not require motion before the trial court to preserve the issue).

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Helene N. White