STATE OF MICHIGAN

COURT OF APPEALS

JAMES GRUBKA, LINDA GRUBKA, ROY KERBS, JANET KERBS LIVING TRUST U/D, JAMES MCGOVERN, ELAINE MCGOVERN and LUCAS PENDER KOHLER, Plaintiffs/Counter-Defendants-Appellants,	UNPUBLISHED July 10, 2008
v	No. 276322 Barry Circuit Court
DAVID VAN DEUSEN and GRETCHEN VAN DEUSEN, Defendants/Counter-Plaintiffs-Appellees.	LC No. 05-000518-CK

Before: Bandstra, P.J., and Talbot and Schuette, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's ruling of no cause of action as to their claims against defendants. We affirm.

I. FACTS

Plaintiffs and defendants are the owners of adjoining parcels of land in Barry County. The disputed strip of land, approximately 1-1/2 acres, composes the border between plaintiffs' south parcel and defendants' north parcel. An old wire fence runs east and west between the parcels. In 2005, defendants had their property surveyed and erected a fence along the deeded boundary line, which was 91 feet south of the old fence at the west end of the property, and 53 feet south of the old fence on the east end. Plaintiffs brought an action to quiet title and for trespass, based on the doctrine of acquiescence for the fifteen-year statute of limitations period. Defendants brought a counterclaim to quiet title, arguing that their title was superior to plaintiffs' title. Following a bench trial, the trial court held that plaintiffs had no cause of action and dismissed their complaint. Plaintiffs appeal with respect to the quiet title action only.

II. STANDARD OF REVIEW

"An action to quiet title is an equitable action, and the findings of the trial court are reviewed for clear error while its holdings are reviewed de novo." *Fowler v Doan*, 261 Mich

App 595, 598; 683 NW2d 682 (2004). A finding is clearly erroneous if, on all the evidence, this Court is left with a definite and firm conviction that a mistake has been made. *Borgess Med Ctr v Resto*, 273 Mich App 558, 576; 730 NW2d 738 (2007).

III. ANALYSIS

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." *Sackett v Atyeo*, 217 Mich App 676, 681; 552 NW2d 536 (1996). This case involves the first theory, acquiescence for the statutory period of 15 years. MCL 600.5801(4). Acquiescence must be proven by a preponderance of the evidence, which is a lesser standard of proof than clear and cogent evidence. *Walters v Snyder*, 225 Mich App 219, 223; 570 NW2d 301 (1997). A bona fide dispute regarding the boundary is not necessary in order to establish this type of acquiescence. *Sackett*, *supra* at 681. The possession does not need to be hostile or without permission. *Walters*, *supra* at 224.

> 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. [*Kipka v Fountain*, 198 Mich App 435, 438-439; 499 NW2d 363 (1993).]

The Michigan Supreme Court has recognized that "'"a boundary line long treated and acquiesced in as the true line, ought not to be disturbed on new surveys."'" *Sackett*, *supra* at 682-683, quoting *Johnson v* Squires, 344 Mich 687, 692; 75 NW2d 45 (1956), quoting *Dupont v Starring*, 42 Mich 492, 494; 4 NW 190 (1880).

Essential to plaintiffs' claim, however, is a demonstration that *both* plaintiffs and defendants treated the old fence line as the boundary line, although an overt agreement or bona fide dispute is not required. *Walters v Snyder* (*After Remand*), 239 Mich App 453, 458; 608 NW2d 97 (2000). Plaintiffs' evidence merely demonstrated that the *plaintiffs* treated the old fence line as a boundary line. They failed to demonstrate by a preponderance of the evidence that the defendants treated the old fence as the property line as well. There was insufficient proof that defendants or their predecessors treated or acquiesced to the old wire fence as the boundary line.

Plaintiffs testified that they believed the old wire fence marked the northern boundary line of their south parcel. They testified that current and previous owners of the south parcel informed them that the old wire fence constituted the boundary line. They presented evidence that the field on the south side of the fence was cultivated and mowed for many years. The

cultivation and mowing did not reach right up to the fence line, but stopped short due to the stone piles on the edge of the field near the old fence and the overhanging tree branches. There were two south-facing "no trespassing" signs posted on trees located north of the old fence. Plaintiffs' belief that the old fence marked the northern property line originated from information given to them from prior owners or current co-owners/plaintiffs of the south parcel. Other plaintiffs testified that they never discussed the northern boundary line of their property with defendants or any of defendants' predecessors to the north parcel before the events leading up to this litigation. There was no testimony that any owner of the north parcel ever indicated that the old wire fence demarcated their southern boundary.

On the other hand, there was evidence that the old, meandering wire fence was embedded in the forest and down in many places, either lying on the ground or under the ground; and the trial court found it was 80 percent down. It is undisputed that the fence was in poor condition. Defendants asserted, and the trial court's conclusion was not clearly erroneous, that defendants did not treat the old, dilapidated fence as the property line, nor did they acquiesce in plaintiffs' alleged treatment of the fence as the boundary line. It is possible that defendants simply thought the fence served some other purpose long ago, such as confining livestock, and had nothing to do with the boundary line. Further, the evidence showed that the distance between the old fence line and the forest line was inconsistent, ranging from 20 to 10 feet in different locations. The trial court attempted to fix the boundary line along the cultivation line instead, but it found that there was insufficient evidence to determine where the cultivation line existed year to year, let alone for the statutory 15 years. This determination was not clearly erroneous. The fence was barely visible and, it is undisputed that plaintiffs did not farm up to the actual fence line. The evidence reflected that the wire fence was falling down 80 percent of its length. There was no evidence that defendants mistakenly thought the old fence marked the property line, or that they knew it was the property line but took no action to stop plaintiffs' usage or show their disagreement.

Further, defendants testified that the other south-facing signs, which indicated the area belonged to a wildlife management program, were not intended to mark the boundary and were not on the boundary. Defendant David Van Deusen testified that he was unsure where the boundary was located, which was the reason he had the property surveyed. He did not discover the fence until he purchased the property in 1998, even though he spent time on the property in his youth. David also testified that plaintiff Kerbs indicated that he did not know where the property line was. Kerbs testified that defendant's father, who owned the north parcel before defendant, never discussed the fence line or location of the boundary with him. Furthermore, in a conversation before the instant litigation arose, David testified that plaintiff Grubka discussed the tree line with him, but he did not raise the issue of the old wire fence. Defendants' witness, Hulce, testified that, while he observed the old wire fence, he did not believe it marked the property line. Goyings, who knew David's father, testified that his father never discussed that boundary line or the old fence with him

This was not a case of two property owners being mutually mistaken as to the true location of the property line for the statutory period and treating the fence as the true boundary. *Walters*, *supra* at 358. The mistake appears to have been unilateral on the part of plaintiffs. The facts of the instant case resemble *Blank v Ambs*, 260 Mich 589, 592; 245 NW 525 (1932), where an old dilapidated wire fence of unknown origins was located near the boundary line. There was

no proof as to who constructed it and for what purpose, or whether prior owners of the north parcel regarded the fence as demarcating the boundary line. *Id.* "The lack of such showing, with the condition of the fence, at least balances any inference of acquiescence which might be drawn from its location near the true line." *Id.*

Plaintiffs argue that the existence of an ancient fence gives rise to a presumption of acquiescence, citing *Salvatore v NBD Bank NA*, unpublished opinion per curiam of the Michigan Court of Appeals, issued June 3, 1997 (Docket No. 194699).[1] However, an examination of this Court's exact language reveals no such presumption is mandated: "if an established boundary between adjacent landowners is *recognized* for fifteen or more years, then the presumption is raised that the landowners have fixed this boundary by agreement." *Id.* at 2 (emphasis added). The mere presence of an old fence is insufficient to establish that it was a recognized boundary; there must also be some form of acknowledgement by the parties that the fence marks the boundary line, although it need not be explicit, before a presumption arises. "An essential of acquiescence is knowledge." *Maes v Olmsted*, 247 Mich 180, 183; 225 NW 583 (1929), citing 1 C.J. p. 907.

As recognized by this Court in *McGee v Eriksen*, 51 Mich App 551; 215 NW2d 571 (1974), the parties must exhibit some form of acknowledgement or treatment of the ancient fence as marking the property line. Similar to the present circumstances, in *McGee* the fence was located in the woods, there was no historical controversy over the boundary, the origin and purpose of the wire fence was never determined, and parts of the fence wire were imbedded in trees, lying on the ground, or unattached to the rest of the wire, and it did not proceed in a straight line but wove from tree to tree. *Id.* at 553-555. While the plaintiffs asserted that they believed and relied on the wire fence as the boundary line, the defendants testified that they did not, and their grantor also told them not to rely on the fences. *Id.* at 554-556. The defendants posted "no hunting" signs and strung a wire fence to keep hunters out, but did not follow the old fence line, and admitted chasing hunters back across the barrier. *Id.* This Court stated that "[t]he proofs simply established a situation where different persons had purchased property in a sparsely settled area and had randomly erected fences without any real concern as to the outer limits thereof. There was no acquiescence in law or fact. To the extent that there was a misunderstanding about the nature of the fence it was a unilateral mistake by plaintiffs." *Id.* at 557.

Plaintiffs also contend that defendants' inaction created a reasonable inference of acquiescence. Unlike in *Morrison v Queen City Electric Light & Power Co*, 181 Mich 624; 148 NW 354 (1914), however, where absence of action lead to a reasonable inference of acquiescence, the facts of this case do not lend itself to a reasonable inference of acquiescence. In *Morrison*, the defendant constructed a dam near plaintiff's property, and, realizing that it would cause overflow onto the plaintiff's land, sought several times to discuss the issue of paying for the damages. *Id.* at 625-626. The plaintiff, despite knowing the specifics of the dam,

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[1] Unpublished opinions of this Court are not binding precedent. MCR 7.215(C)(1); *In re Application of Indiana Michigan Power Co*, 275 Mich App 369, 380; 738 NW2d 289 (2007).

indicated he did not yet know how much he would charge until the dam was complete. *Id*. at 627-628 Here, defendants were unsure as to where the true boundary was located. Plaintiffs were engaged in farming operations that touched defendants' land, but defendants at the time were unaware that it was their property. The parties did not discuss the fact that plaintiffs would be or were encroaching on defendants' property, causing it damage. Defendants never assented to any encroachment and then later attempted to revoke it. This was not a situation similar to the one in *Morrison* where assent may be reasonably inferred.

Affirmed.

/s/ Richard A. Bandstra
/s/ Michael J. Talbot
/s/ Bill Schuette