STATE OF MICHIGAN

COURT OF APPEALS

ROBERT DOUGLASS and SHARON DOUGLASS,

Plaintiffs/Counter-Defendants-Appellees,

v

CASSANDRA BARRETT and DAVID BARRETT,

Defendants/Counter-Plaintiffs/Third-Party Plaintiffs-Appellants,

v

MARK CLANCY,

Third-Party Defendant-Appellee.

UNPUBLISHED
November 28, 2017

No. 334352
Washtenaw Circuit Court
LC No. 14-000514-CH

Before: O'CONNELL, P.J., and MURPHY and K. F. KELLY, JJ.

PER CURIAM.

Defendants, David and Cassandra Barrett, appeal by delayed leave granted[1] the trial court's judgment following a bench trial in an action for acquiescence, quiet title, unlawful ejectment, and trespass brought by plaintiffs, Robert and Sharon Douglass, to resolve a dispute regarding the use of two driveways. One of the driveways, composed of gravel, originally ran partially on plaintiffs' property and partially on defendants' property. The other driveway, which is paved, runs along defendants' east property line with neighbor and third-party defendant Mark Clancy, then crosses over defendants' property near their house, and finally ends at plaintiffs' property line. The trial court granted judgment and quieted title to the gravel

[1] *Douglass v Barrett*, unpublished order of the Court of Appeals, entered March 24, 2017 (Docket No. 334352)

driveway in plaintiffs' favor on the basis of the doctrine of acquiescence. The trial court also denied defendants' request for a declaratory judgment against Clancy because he had an easement appurtenant to his land that burdened defendants' property, giving Clancy access, via the paved driveway, to the lake on which the parties' properties are situated. We affirm.

Plaintiffs purchased their property, 9719 Textile Road, Ypsilanti Township, in 1988, and have resided there ever since that time. Arlan and Joann Schaffer owned the property next door to the east at 9749 Textile Road, beginning in 1976. Mr. Schaffer died around 2001, and Mrs. Schaffer died around 2010. Defendant Cassandra Barrett purchased 9749 Textile Road in 2012 from the Joann D. Schaffer Trust.[2] Clancy purchased 9795 Textile Road in 1990. His property was once part of a larger tract of land conveyed by an indenture in 1924 to Henry and Clara Ford "[t]ogether with the right of egress and ingress to the pond for the purpose of maintaining the water privileges and all work incidental thereto."[3] Clancy's property is both benefited and burdened by a 10-foot-wide, right-of-way easement on the westerly side of the parcel that extends from Textile Road north to Ford Lake. The paved driveway runs on this right of way. The right of way meanders slightly and goes from Textile Road to Ford Lake over both Clancy's property and defendants' property, ultimately ending at plaintiffs' property line. The paved driveway was a shared drive to Clancy's property, defendants' property, and plaintiffs' property.

Soon after plaintiffs purchased their property, Mr. Schaffer told plaintiffs that the gravel driveway was theirs for access to their house and that the actual boundary line between their properties went down the middle of the gravel driveway. Mr. Schaffer informed Mr. Douglass that plaintiffs' predecessors traded the right to use the paved driveway to access their property for the gravel driveway years earlier.

Later, when Mr. Schaffer's guests used the gravel driveway, Mr. Douglass complained to him. Plaintiffs and the Schaffers resolved the issue by agreeing that, when Mr. Schaffer desired to have boaters come to waterski, he would ask for plaintiffs' permission to use the gravel driveway. Other than that, the Schaffers never used the gravel driveway. Mr. Douglass learned that the Schaffers' water and sewer utility lines ran under the gravel driveway so he asked Mr. Schaffer to remove them. Mr. Schaffer promised to move the utility lines onto his property once the existing lines went bad. Mr. Douglass maintained the gravel driveway year round for over two decades, and Mr. Schaffer cared for the paved driveway. Plaintiffs, therefore, understood that they owned the gravel driveway.

Before Mrs. Barrett purchased 9749 Textile Road in 2012, Mr. Barrett visited the property, introduced himself to Mr. Douglass, and stated that defendants intended to purchase 9749 Textile Road. Mr. Douglass explained to Mr. Barrett that plaintiffs owned the gravel

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[2] The Joann D. Schaffer Trust conveyed 9749 Textile Road to Cassandra Barrett by warranty deed recorded at Liber 4923, Page 722, in the Washtenaw County Register of Deeds.

[3] The right of way was also conveyed by a warranty deed dated June 23, 1948, from Alden and Florence Day to Theodore and Eleanor Neja, as recorded at Liber 494, Page 220.

driveway, having given up their right to use the paved driveway as a right of way. Mr. Barrett told Mr. Douglass that they would see about that claim. When defendants moved into 9749 Textile Road, they began using the gravel driveway.

During 2014, defendants blocked plaintiffs' access to the paved driveway with barrels and parked campers. They also put mounds of dirt along the gravel driveway. Defendants later cut off plaintiffs' use of the gravel driveway with a large log. Consequently, plaintiffs lacked access to their house via both driveways. Around this time, Mr. Douglass suffered a heart attack and had to have attendant nursing care. Because defendants blocked the driveways, Mr. Douglass's nurses were forced to walk down a muddy, utility two-track on plaintiffs' property that ran through the woods from Textile Road to about their house. Mr. Douglass explained that although he could drive down the two-track, it was not accessible throughout the year because it was lower than the surrounding land and wet. For approximately six months while the gravel driveway was blocked, plaintiffs drove down the two-track to their house.

Because defendants blocked the driveways, plaintiffs sued them on May 20, 2014. Defendants filed a counterclaim for quiet title and trespass and contended throughout the litigation that they exclusively owned both driveways. Defendants sought the trial court's declaration that plaintiffs must use the two-track for their driveway.

Defendants and Clancy had altercations over their property line and the paved driveway. During that dispute, the trial court issued personal protection orders in a separate but related case. On January 16, 2015, following an evidentiary hearing in that case, the trial court entered a consent order that resolved their property dispute, declaring that Clancy could use the right of way on the property line but could not communicate with defendants. Nevertheless, on September 15, 2015, defendants joined Clancy in this action, requesting a declaratory judgment that the right-of-way easement along the paved driveway and property line had terminated when Clancy recently bought additional parcels behind his house that fronted the lake.

The trial court held a five-day bench trial at which plaintiffs, Mrs. Barrett, Clancy, two current neighbors, one former neighbor, and two licensed surveyors testified. Plaintiffs testified that they had lived at 9719 Textile Road for 28 years and enjoyed maintaining and using the gravel driveway uninterrupted without any problems with their neighbors until defendants moved next door. Plaintiffs' neighbor to the west, William Harrington, who lived for 32 years at 9709 Textile Road, testified regarding the neighbors' historical use of the driveways. He understood that plaintiffs had the right to use both driveways and confirmed that Mr. Douglass maintained the gravel driveway year round for many years. He also saw the barriers that defendants had erected and placed, preventing others from using both of the driveways. He explained that plaintiffs' two-track was not suitable as a driveway because it was overgrown and stayed too wet to be passable year round. Ralph Rowe, another neighbor, also testified regarding the historical use of the driveways. Ken Yargeau testified that he lived in Harrington's house with his mother before Harrington or plaintiffs lived in the neighborhood. He provided some historical information that was not relevant to the issues before the trial court, given that he had moved away around 1981.

Mrs. Barrett testified that long before purchasing 9749 Textile Road, she had a property dispute with a neighbor in another neighborhood, so she was particularly interested in avoiding that problem again. However, despite knowing the potential for boundary disputes, she never obtained a survey before her purchase of 9749 Textile Road. Instead, she relied on two affidavits signed by David H. Hill, successor trustee of the Joann D. Schaffer Trust, which averred that there were no encroachments or assertions made by other adjoining property owners as to the location of property boundaries and that he was unaware of any boundary disputes. She also relied on her title insurance policy that did not disclose any boundary issues. Her warranty deed's legal description, however, described a 10-foot ingress, egress, and utilities easement on the west side of defendants' property that ran the full length of the boundary between defendants' and plaintiffs' properties. It also described the right-of-way easement on the east side of her property that ran from Textile Road to Ford Lake.

After the dispute arose with her neighbors, Mrs. Barrett commissioned a survey by Gerald Desloover, a licensed surveyor of American Landmark Survey. The survey identified a 10-foot easement of ingress, egress, and public utilities on the borderline between plaintiffs' and defendants' properties from Textile Road to Ford Lake. Additionally, Desloover testified that the paved driveway was situated on a 20-foot-wide easement that was half on defendants' property and half on Clancy's property. He explained that this right-of-way easement went straight across defendants' property and stopped when it hit plaintiffs' property line where a fence ended. The 10-foot easement on the west side of defendants' property was identified in the property's legal description, which expressly stated that there existed an "easement for ingress/egress and public utilities over the west ten feet thereof."

Mrs. Barrett purposely placed the barriers to block plaintiffs' use of both the paved and gravel driveways. She admitted that despite learning of the easement on which the paved driveway existed, she did not remove the barriers. Mrs. Barrett also admitted that she knew Mr. Douglass used the gravel driveway before she bought her property. However, she never knew, prior to the lawsuit, that Mr. Schaffer and plaintiffs' predecessors had traded the gravel and paved driveways years earlier.

Defendants first argue that the trial court erred by granting judgment in favor of plaintiffs and awarding them ownership of the gravel driveway. We disagree.

A quiet title action is equitable in nature. *Canjar v Cole*, 283 Mich App 723, 727; 770 NW2d 449 (2009). We review for clear error a trial court's findings of fact in a bench trial and review de novo its conclusions of law. *Ligon v Detroit*, 276 Mich App 120, 124; 739 NW2d 900 (2007). Factual findings are clearly erroneous when, on review of the whole record, we are left with the definite and firm conviction that the trial court made a mistake. *Castro v Goulet*, 312 Mich App 1, 3; 877 NW2d 161 (2015).

Under Michigan law, parties may acquiesce to a new property boundary line. *Walters v Snyder*, 239 Mich App 453, 456-457; 608 NW2d 97 (2000). "[A]cquiescence is established when a preponderance of the evidence establishes that the parties treated a particular boundary line as the property line." *Mason v City of Menominee*, 282 Mich App 525, 529-530; 766 NW2d 888 (2009) (quotation marks and emphasis omitted). The three theories of acquiescence include:

"(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). At issue here was the first theory. The statutory period for acquiring property by acquiescence is 15 years. MCL 600.5801(4); *Mason*, 282 Mich App at 529. A claim of acquiescence for the statutory period requires a showing that the property owners treated a boundary line as the property line for 15 years. *Walters*, 239 Mich App at 457-458; see also *Killips v Mannisto*, 244 Mich App 256, 260; 624 NW2d 224 (2001) ("The doctrine of acquiescence provides that where adjoining property owners acquiesce to a boundary line for at least fifteen years, that line becomes the actual boundary line."). "The acquiescence of predecessors in title can be tacked onto that of the parties in order to establish the mandated period of fifteen years." *Killips*, 244 Mich App at 260.

Unlike adverse possession, a claim of acquiescence does not require that possession of the land was hostile or without permission. *Walters*, 239 Mich App at 456. Acquiescence may be accomplished where there is "a boundary line long treated and acquiesced in as the true line[.]" *Id*. at 458 (quotation marks omitted); see also *Waisanen v Superior Twp*, 305 Mich App 719, 733; 854 NW2d 213 (2014). The underlying reason for the rule of acquiescence is the promotion of peaceful resolution of boundary disputes. *Killips*, 244 Mich App at 260. Again, the proper standard applicable to a claim of acquiescence is proof by a preponderance of the evidence. *Id.*

In this case, plaintiffs established by a preponderance of the evidence that the Schaffers and plaintiffs had agreed that plaintiffs had the exclusive right to use the gravel driveway. The Schaffers acquiesced to the changed boundary line and plaintiffs' exclusive use of the gravel driveway for over two decades. Multiple witnesses testified that plaintiffs used the gravel driveway and maintained it as their own for over two decades. The trial court, therefore, did not err in finding that plaintiffs owned the gravel driveway by acquiescence, where they had possessed it, used it, and maintained it for more than the 15-year statutory period, and where, during that timeframe, the Schaffers had treated the boundary line between their property and plaintiffs as running along the east side of the gravel driveway. Further, the trial court did not err in relying on plaintiffs' unrebutted testimony that the Schaffers sought permission to use the gravel driveway and did not treat that property as their own.

Defendants first argue that plaintiffs did not adversely possess the gravel driveway. Defendants' argument is inconsequential because plaintiffs never alleged, nor did the trial court rule, that they acquired ownership of the property by adverse possession. From the outset of this case, plaintiffs alleged and endeavored to prove that the gravel driveway was owned by them because the Schaffers, defendants' predecessors in interest, acquiesced to the changed boundary line that resulted in plaintiffs' ownership of the contested gravel driveway. Accordingly, we need not consider the adverse possession argument.

Defendants also argue on appeal that the testimony of plaintiffs' witnesses was not credible and that the evidence failed to establish that the boundary line changed by acquiescence. Defendants, however, fail to show that the trial court clearly erred in its factual findings. Further, when reviewing the trial court's findings of fact, we have long recognized "the trial court's superior ability to judge the credibility of the witnesses who appeared before it." *Ambs v*

Kalamazoo Co Rd Comm, 255 Mich App 637, 652; 662 NW2d 424 (2003) (quotation marks and citation omitted); see also MCR 2.613(C). Accordingly, we defer to the trial court's credibility assessments in this case, wherein the court expressly stated that it found plaintiffs' testimony to be credible. Plaintiffs produced ample evidence supporting their position, including witness testimony and documentary evidence that called for quieting title to the gravel driveway in plaintiffs' favor. Moreover, defendants do not contend that the trial court applied the wrong law to this case. The trial court expressly referenced and applied the law of acquiescence to the facts presented. Thus, defendants' claim of error lacks merit.

Defendants also argue that the statute of frauds, MCL 566.106, prevented plaintiffs from acquiring the gravel driveway from the Schaffers by acquiescence. Defendants, however, cite no authority for that proposition. MCL 566.106 provides:

> No estate or interest in lands, other than leases for a term not exceeding 1 year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by some person thereunto by him lawfully authorized by writing.

Defendants disregard the statute's express provision that land in Michigan may be surrendered "by act or operation of law." In this case, by operation of the law of acquiescence, the gravel driveway was surrendered to plaintiffs by the Schaffers. Consequently, defendants' argument lacks merit.

We hold that there existed a preponderance of evidence supporting the trial court's ruling, absent any clear errors relative to the court's findings of fact. On review de novo, the trial court's conclusions of law were correct and the court properly applied the doctrine of acquiescence in this case. Therefore, we affirm the trial court's ruling that plaintiffs own the gravel driveway.

Defendants next argue that the trial court erred by not declaring the termination of the right-of-way easement along their eastern property line with Clancy. We again disagree.

We review for abuse of discretion a trial court's decision whether to grant declaratory relief. *Allstate Ins Co v Hayes*, 442 Mich 56, 74; 499 NW2d 743 (1993). We give a trial court substantial deference when reviewing its decision regarding declaratory relief. *PT Today, Inc v Comm'r of Office of Fin & Ins Servs*, 270 Mich App 110, 129; 715 NW2d 398 (2006). An abuse of discretion has occurred only when the trial court's decision was outside the range of principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388, 719 NW2d 809 (2006).

"An easement is the right to use the land of another for a specified purpose." *Schadewald v Brulé*, 225 Mich App 26, 35; 570 NW2d 788 (1997). An easement can be created by express grant, by reservation or exception, or it may be created by covenant or agreement. *Rossow v Brentwood Farms Dev, Inc*, 251 Mich App 652, 661; 651 NW2d 458 (2002). Michigan courts recognize two types of easements: easements appurtenant and easements in gross. See *Collins v*

Stewart, 302 Mich 1, 4; 4 NW2d 446 (1942). An appurtenant easement attaches to the land and is incapable of existence apart from the land to which it is annexed. *Schadewald*, 225 Mich App at 35. An easement appurtenant "may pass with the benefited property when the property is transferred." *Heydon v MediaOne*, 275 Mich App 267, 270; 739 NW2d 373 (2007).

An easement in gross benefits a particular person, not a particular piece of land. *Mich Dep't of Natural Resources v Carmody-Lahti Real Estate, Inc*, 472 Mich 359, 379 n 41; 699 NW2d 272 (2005). A deed granting a right of way conveys an easement. *Id*. at 371. Michigan law favors easements appurtenant over easements in gross, and "an easement will never be presumed to be a mere personal right where it can fairly be construed to be appurtenant to some other estate." *von Meding v Strahl*, 319 Mich 598, 610; 30 NW2d 363 (1948). In other words, if the easement in question relates in some way to a particular parcel of property, it is nearly always deemed appurtenant. *Myers v Spencer*, 318 Mich 155, 162; 27 NW2d 672 (1947). In *von Meding*, our Supreme Court explained:

> An appurtenant easement exists for the benefit of the dominant tenement as a whole, and not alone for any particular part thereof. Thus, if the dominant estate is divided, the right is not destroyed. The owner or assignee of any portion of that estate may claim the easement so far as it is applicable to his part of the property, so long as an unreasonable burden is not imposed upon the serviens estate. [*von Meding*, 319 Mich at 611.]

In this case, the 1924 indenture granted an easement appurtenant for the right of ingress and egress to Ford Lake to the land that later became Clancy's property. An easement appurtenant granting a right of way for ingress and egress to Ford Lake was also conveyed by warranty deed on June 23, 1948, from the Days to the Nejas, Clancy's historical predecessors in interest. Historical evidence presented to the trial court supported Clancy's claim to the right-of-way easement. No evidence was presented to the trial court by defendants that established the merger of Clancy's parcels, abandonment of the easement, or termination of that easement. The trial court correctly found that the easement ran with Clancy's land. The trial court, therefore, did not abuse its discretion by denying defendants a declaratory judgment that the easement was terminated.[4]

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[4] Clancy argues that the trial court's decision should also be affirmed because Mrs. Barrett agreed to the trial court's entry of the consent order that established defendants' and Clancy's respective rights to the easement before defendants sued Clancy. Clancy contends that the instant litigation and appeal are an impermissible collateral attack on the earlier consent order's finality because Mrs. Barrett never appealed the consent order. We note that the trial court could have considered the order determinative when Clancy raised this issue during the bench trial, but the trial court held in abeyance its decision and took Clancy's motion to dismiss defendants' claim against him under advisement. Ultimately, the trial court correctly ruled in Clancy's favor as explained above so we decline to address this issue further.

Affirmed. Having fully prevailed on appeal, taxable costs are awarded to plaintiffs and Clancy under MCR 7.219.

/s/ Peter D. O'Connell
/s/ William B. Murphy
/s/ Kirsten Frank Kelly