STATE OF MICHIGAN

COURT OF APPEALS

JILL D. JOHNSON,

Plaintiff/Counterdefendant-Appellee/Cross-Appellant,

v

SUE A. HALE,

Defendant,

and

LYLE LITCHFIELD and TINA LITCHFIELD,

Defendants/Counterplaintiffs-Appellants/Cross-Appellees.

UNPUBLISHED
September 10, 2020

No. 349594
Midland Circuit Court
LC No. 16-004183-CH

Before: CAVANAGH, P.J., and BORRELLO and TUKEL, JJ.

PER CURIAM.

In this property dispute, defendants/counterplaintiffs, Lyle and Tina Litchfield, appeal by right the trial court's order after a bench trial quieting title to a disputed boundary line area between the parties' properties. The trial court found that the location of the boundary line had been established by acquiescence, and it dismissed defendants'[1] trespass counterclaim. Defendants challenge these decisions on appeal.[2] Plaintiff/counterdefendant, Jill Johnson, also cross-appeals

[1] For the sake of simplicity, we refer to the Litchfields as defendants. Sue Hale was dismissed from this case as a party before the trial and is not a party to this appeal.

[2] The trial court also dismissed defendants' nuisance counterclaim, but defendants do not challenge this ruling on appeal.

by delayed leave granted[3] and argues that although the trial court properly determined that the boundary line had been established by acquiescence, the trial court nonetheless erred in defining the boundary line's location. For the reasons set forth in this opinion, we affirm.

I. BACKGROUND

Plaintiff and defendants own adjacent properties. Defendants' property is east of plaintiff's property, and the western boundary of defendants' property is also the eastern boundary of plaintiff's property. However, the parties dispute the exact location of this boundary line.

Both properties were once owned by Sue Hale. Plaintiff purchased her property directly from Hale by way of land contract executed in September 1999. Hale retained her property to the east and continued to live on it. In the land contract, the property purchased by plaintiff was described by reference to a Section corner and the measurements in feet of each side of the parcel. Hale testified that this legal description described the property that she intended to sell to plaintiff. The land contract did not refer to any other landmarks for purposes of describing the subject property or delineating the eastern boundary of the subject property.

Hale had not obtained a survey of the property and did not know for certain where the boundary line between the property she was retaining and the property she was selling was located. However, both plaintiff and Hale testified that during the course of negotiating the property transaction, Hale showed plaintiff where the eastern boundary of the property to be sold was located. Hale also testified that she showed plaintiff where Hale *thought* the boundary was located. Thus, there was some conflict in Hale's testimony with respect to how certain she was of this location. According to both Hale and plaintiff, Hale indicated to plaintiff that the eastern boundary was located approximately two feet west of a well that was located between the two properties at issue. Plaintiff testified that Hale affirmatively indicated that this was the boundary line rather than suggesting that she only thought this was the boundary line location. Plaintiff testified that Hale told her that the boundary went straight south from that point to the road that formed the southern boundary of the properties, where a metal stake was located, and that a wooden stake located in the northern part of the property also marked the eastern boundary.

Hale further testified that there was a stake in the back portion of the properties marking the boundary line between them but that she "always went by the well." Hale explained that she formed her belief about the location of the boundary line because she "believed [her] boyfriend at the time, which was a builder, he told me that's where he believed it to be so that's what we always went by." Plaintiff testified that the boundary line ran in a straight line north to south from this point to the road that formed the southern boundary of both properties. Neither plaintiff nor Hale obtained a survey at the time of the transaction.[4]

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[3] *Johnson v Hale*, unpublished order of the Court of Appeals, entered January 2, 2020 (Docket No. 351462).

[4] Plaintiff testified that she obtained a survey in 2017 that was consistent with the survey that defendants obtained.

Hale testified that she also erected a small section of fence marking the boundary line between the two properties. During the time that Hale lived on the eastern property, she maintained the property on her side of the fence and mowed her grass up to the fence; Hale did not mow any grass west of the fence. Plaintiff maintained her property up to her side of this boundary, including planting various types of plants.

In 2002, Hale moved away from her property due to foreclosure. Plaintiff testified that Hale's brother lived on Hale's property for approximately one year before the auction occurred. Subsequently, according to plaintiff, nobody lived on the eastern property for "a long time" and nobody maintained the property. The property was sold at auction in 2005.

In 2007, defendants purchased the eastern property and began to reside on the property. There appears to be no dispute that there was no person living on this property between Hale's brother and defendants. The fence was in poor repair when defendants moved in, and they left it up until it fell down. Plaintiff testified that defendants tore this fence down when they moved in. The fence was gone by 2010. Defendants obtained a survey of their property in November 2013. They learned as a result of this survey that part of plaintiff's driveway, which is on the east side of plaintiff's property, was actually on defendants' property. An iron stake marking this boundary was set in plaintiff's driveway. Defendants informed plaintiff of this fact at some point in 2013 or 2014, but they told plaintiff "not to worry about it" and that "we will work this out."

Plaintiff testified that from 2007 to 2016, defendants stored items such as boat trailers, a motor vehicle, and extra car parts along plaintiff's alleged boundary line and on the east side of this line. Plaintiff additionally stated that defendants had a "dog fence" along this alleged boundary line. According to plaintiff, defendants never took any action between 2007 and 2016 to indicate that they did not recognize the boundary line to be where plaintiff believed it was located, east of plaintiff's driveway and approximately two feet west of the well. Plaintiff testified that she first learned of defendants' survey in 2015 or 2016. In 2014 and 2015, contractors hired by plaintiff completed improvements to plaintiff's driveway that involved grading, leveling, adding sand and gravel, resurfacing, and widening the driveway. The 2015 project also included installing a trench on the east side of the driveway. Plaintiff testified that this trench was on her property according to where she believed her eastern boundary line was located. According to plaintiff, defendants never objected to any of this driveway work and defendant Tina Litchfield told plaintiff to "just fix your driveway." Tina testified that plaintiff asked for defendants' permission to fix plaintiff's driveway and defendants agreed. However, plaintiff testified that she did not seek defendants' permission to fix her driveway or have the trench installed.

Following the bench trial, the trial court issued a written opinion and order quieting title to the disputed land in favor of plaintiff and concluding that the boundary line was east of plaintiff's driveway. The trial court found that plaintiff's eastern boundary line had been established in a location two feet east of her driveway under the doctrine of acquiescence.

The trial court relied on two theories of acquiescence in support of this conclusion. First, the trial court concluded that the boundary line had been established by acquiescence for the statutory period of 15 years because defendants' acquiescence could be tacked onto the acquiescence in the boundary line of defendants' predecessors in title and defendants did not prevent plaintiff from completing improvements to her driveway in 2015 and 2016 despite

defendants' knowledge that plaintiff's driveway was on defendants' property according to the survey.

Second, the trial court concluded that the eastern boundary line of plaintiff's property had been established by acquiescence arising from the intention to deed to a marked boundary because Hale, as the common owner of the two subject properties, had expressed her intention to plaintiff to sell the property up to the point two feet west of the well as the eastern boundary and Hale never obtained a survey to ensure the accuracy of the legal description in the land contract or her perceived boundary line. With respect to this theory, the trial court further found that the fence installed by Hale shortly after plaintiff obtained her property also served to mark this boundary line.

Finally, the trial court dismissed defendants' trespass claim based on the trial court's determination that plaintiff held title to the disputed property.

This appeal ensued.

II. STANDARD OF REVIEW

"Actions to quiet title are equitable in nature; this Court reviews such actions de novo." *Sackett v Atyeo*, 217 Mich App 676, 680; 552 NW2d 536 (1996). We review factual findings by the trial court following a bench trial for clear error. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed." *Id*. However, "[w]here the trial court's factual findings may have been influenced by an incorrect view of the law, an appellate court's review of those findings is not limited to clear error." *Id*. We review the trial court's conclusions of law de novo. *Id*.

III. ANALYSIS

On appeal, defendants argue that the trial court erred by finding that the boundary line separating their property from plaintiff's property was established by acquiescence.

Acquiescence may be demonstrated under the following 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." *Sackett*, 217 Mich App at 681. This Court has explained that "Michigan precedent . . . has not defined an explicit set of elements necessary to satisfy the doctrine of acquiescence" and that courts have instead "discussed the doctrine in more general terms." *Walters*, 239 Mich App at 457. The doctrine of acquiescence does not require that a "precise" boundary line be established by the evidence; an approximate boundary is sufficient. *Id*. at 458. "The proper standard applicable to a claim of acquiescence is proof by a preponderance of the evidence." *Killips v Mannisto*, 244 Mich App 256, 260; 624 NW2d 224 (2001).

In this case, the trial court relied on the first and third theories—i.e., acquiescence for the statutory period and acquiescence arising from intention to deed to a marked boundary—in support of its conclusion that the boundary line had been established by acquiescence. With respect to acquiescence arising from the intention to deed to a marked boundary, the establishment of the

boundary line is not dependent on there being acquiescence in its location for any period of time but is instead dependent on the circumstances of the conveyance. See *Maes v Olmsted*, 247 Mich 180, 183-184; 225 NW 583 (1929). In *Maes*, our Supreme Court adopted the following rule for "acquiescence arising out of the practical location of a boundary line by a common grantor":

> Where adjoining owners took their conveyances from a common grantor with reference to a boundary line he had located on the ground, and deeds describing the tracts as certain lots in a block, the location was, irrespective of lapse of time, binding on the owners and those claiming under them. . . .
>
> It is insisted by the defendants that, in order to establish a line by practical location, there must be long acquiescence, not less than twenty years; and this would be so in order to establish a line other than the deed line, so as to make title in the party whose deed did not cover the disputed land, unless there was the element of estoppel in the case; but that rule will not apply where the location is fixed and the boundary marked upon the ground prior to the conveyance, and in reference to which boundary the conveyances have been made. The line established in that manner is presumably the line mentioned in the deed, and no lapse of time is necessary to establish such location. The location does not rest upon acquiescence in an erroneous boundary, but upon the fact that the true location was made, and the conveyance made in reference to it. [*Id*. (quotation marks and citation omitted).]

Our Supreme Court has further explained that this form of acquiescence "arises from the intention to describe in the deed the boundary marked on the ground by a common grantor" and that "[l]apse of time is not involved in the situation, nor a compromise line after dispute, but, rather, an identification of intended location by those who are to be affected." *Daley v Gruber*, 361 Mich 358, 363; 104 NW2d 807 (1960).

Here, the trial court found after the bench trial that Hale had expressed her intention to sell plaintiff the property up to the point two feet west of the well as the eastern boundary of plaintiff's property, that Hale never obtained a survey to ensure the accuracy of the legal description in the land contract or her perceived boundary line, and that the fence installed by Hale shortly after the sale also served to mark this boundary line. The trial court thus concluded that the eastern boundary line of plaintiff's property had been established by acquiescence arising from the intention to deed to a marked boundary.

In challenging this conclusion on appeal, defendants primarily argue that there was "a complete failure of proof" because "the testimony of Sue Hale establishes that she intended to deed the property described in the deed and that her description of where the line was located was an approximation." Defendants claim that there was no physical marker of the alleged boundary line at the time of Hale's conveyance to plaintiff.

However, defendants' arguments ignore the record evidence. There was testimony at trial that Hale showed plaintiff the eastern boundary line at the time of the transaction and that this line was marked by reference to the old well and by stakes located in the northeast and southeast sections of the property purchased by plaintiff. There was also testimony that Hale affirmatively

represented to plaintiff that this was the eastern boundary line. In lieu of no testimony to support plaintiff's theory, the trial court was faced with conflicting testimony as to whether Hale had intended to convey to a marked boundary. It was the responsibility of the trial court as the finder of fact to resolve conflicts in the evidence, and the trial court's factual findings in a bench trial "may not be set aside unless clearly erroneous." MCR 2.613(C). In making this assessment, we must give due regard "to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." *Id*. Defendants' mere citations of evidence favorable to them while simultaneously ignoring unfavorable evidence, evidencing a willful blindness to the existence of conflicting evidence in the record, do not demonstrate that the trial court committed clear error. Based on the record evidence, we conclude that the trial court's factual findings in this case were not clearly erroneous.

To the extent defendants appear to argue that they did not have a common grantor because Hale, due to the foreclosure, did not did not directly convey defendants their property, defendants ignore the fact that Hale once owned both of the subject parcels, that both plaintiff's and defendants' respective chains of title are thus traceable to Hale, and that Hale is the individual who was alleged to have intended to deed to a marked boundary line. Our Supreme Court has treated similar circumstances as sufficient to satisfy the common grantor requirement. See *Maes*, 247 Mich 181, 184. Moreover, defendants have not provided any legal authority to support the contention that such circumstances as were present in this case do not satisfy the common grantor requirement, and defendants have therefore abandoned this argument. *Houghton v Keller*, 256 Mich App 336, 339-340; 662 NW2d 854 (2003) ("An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give issues cursory treatment with little or no citation of supporting authority. An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue.") (citations omitted).

Finally, we glean from defendants' appellate arguments that they are concerned about the public policy ramifications of this theory of acquiescence in light of the conflict between the language in the land contract and the location of plaintiff's eastern boundary line as plaintiff and Hale believed it to be. Defendants' concerns are not unfounded. Unfortunately, however, defendants merely assert these concerns without providing any citations to any pertinent legal authority suggesting that their concerns provide any basis on which we could grant defendants any form of appellate relief.[5] Our Supreme Court recognized that acquiescence by the intention to

[5] Although defendants refer our attention to a statement of this Court that "[i]t is a general rule that in interpreting deeds and other written instruments, the primary object is to determine the intention of the parties from the instrument itself," *Pyne v Elliott*, 53 Mich App 419, 429; 220 NW2d 54 (1974) (quotation marks and citation omitted), defendants do so without further elaboration or discussion of that case. As relevant to the issue now before us on appeal, the *Pyne* Court did not apply the aforementioned rule in the context of its earlier discussion of acquiescence. See *id*. at 425-428. The acquiescence issue and the deed issue were two distinct issues that pertained to ascertaining the location of two separate boundary lines. *Id*. at 425, 428-429. We are unclear how defendants believe the opinion in *Pyne* supports defendants' perceived entitlement to appellate relief because defendants have completely failed to provide any discussion that would make the

deed to a marked boundary is a theory for addressing the difficult situation where "[b]oundaries designated by the parties on the ground conflict with boundaries described in their deeds." *Daley*, 361 Mich at 362. Defendants acknowledge in their appellate brief that *Maes* provides the pertinent rule for this theory of acquiescence, and they do not provide any cogent argument or legal authority demonstrating how the trial court committed any legal error in applying the rule stated in *Maes*. Therefore, defendants have abandoned these arguments. *Houghton*, 256 Mich App at 339-340.

Because defendants have not demonstrated any error by the trial court with respect to its ruling that there was acquiescence arising from the intention to deed to a marked boundary line, we affirm this ruling of the trial court. Having so concluded, there is no need for us to address the trial court's ruling that there was also acquiescence for the statutory period because acquiescence arising from the intention to deed to a marked boundary line is sufficient in itself to establish a boundary line under the doctrine of acquiescence. See *Maes*, 247 Mich at 183-184.

Defendants additionally argue that they were necessarily entitled to prevail on their trespass counterclaim because their property extends onto plaintiff's driveway pursuant to the survey. "[T]respass is an invasion of the plaintiff's interest in the exclusive possession of his land . . . ." *Adams v Cleveland-Cliffs Iron Co*, 237 Mich App 51, 59; 602 NW2d 215 (1999) (quotation marks and citation omitted; alteration in original). In light of our conclusion that defendants failed to show that the trial court clearly erred by quieting title, defendants have also failed to demonstrate any error in the trial court's ruling dismissing defendants' trespass claim because the trial court determined that the boundary line was located two feet east of plaintiff's driveway (rather than on the driveway as defendants had claimed in reliance on the survey) and defendants have therefore not demonstrated an intrusion on their property. *Id*.

Lastly, we turn to plaintiff's cross appeal, in which plaintiff argues that the trial court erred by determining that the boundary line was two feet east of plaintiff's driveway instead of placing it two feet west of the old well. However, at the posttrial hearing on defendants' motion to clarify, the trial court specifically asked plaintiff's counsel if there was any objection to the trial court clarifying its ruling to state that the boundary line would be located two feet east of the driveway, and plaintiff's counsel replied, "I do not." Therefore, this argument has been waived for appellate review. "[W]aiver has been defined as the intentional relinquishment or abandonment of a known right." *Grant v AAA Michigan/Wisconsin, Inc (On Remand)*, 272 Mich App 142, 148; 724 NW2d 498 (2006) (quotation marks and citation omitted). "A party who expressly agrees with an issue in the trial court cannot then take a contrary position on appeal." *Id*. After prevailing on the primary issue that was the subject of the trial, plaintiff affirmatively agreed at the posttrial motion hearing with the trial court's proposed ruling with respect to clarifying the precise location of the boundary line. Plaintiff thereby waived any opportunity to take a contrary position on appeal and challenge the location of the eastern boundary line. *Id*.

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reason for their reliance on this case evident. Any such argument has thus been abandoned. *Houghton*, 256 Mich App at 339-340. Moreover, we do not discern from our reading of *Pyne* the presence of any apparent benefit to defendants' appellate argument.

Affirmed. No costs are awarded. MCR 7.219(A).

/s/ Mark J. Cavanagh
/s/ Stephen L. Borrello
/s/ Jonathan Tukel