STATE OF MICHIGAN

COURT OF APPEALS

MARGARET DRAKE,

Plaintiff-Appellant,

v

CARLL CONVERSE and DONNA CONVERSE,

Defendants/Counter-Defendants-Appellees,

and

LEIF A. HOLDEN and AMBER M. HOLDEN,

Defendants/Counter-Plaintiffs-Appellees.

UNPUBLISHED
July 18, 2006

No. 259929
Hillsdale Circuit Court
LC No. 03-000835-CH

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

PER CURIAM.

In this boundary dispute and trespass action, plaintiff appeals as of right the trial court's judgment of no cause of action and its award of attorney fees and costs to defendants on the basis that plaintiff's action was frivolous. We reverse and remand for further proceedings.

In 1989, plaintiff Margaret Drake purchased a parcel of property from Edward Guajardo. Betty Charles owned the lot to the east of Guajardo's lot. Charles, who had owned the lot since 1984, sold it to defendants Carll and Donna Converse in 2003. The Converses later sold the lot to defendants Leif and Amber Holden. An old wire farm fence, running northwesterly, appeared to separate the adjoining lots. While the wire fence did not extend to the southern boundary of the properties, Guajardo, Charles, the Converses, and plaintiff treated the wire fence, and the invisible line extending southeasterly from the fence, as the boundary line between the adjoining properties. However, a 1989 survey of plaintiff's property showed that the boundary line in the northern portion of the property was to the east of the wire fence, and the surveyed boundary line in the southern portion of the property was to the west of the wire fence line. The 1989 survey also indicated that the southeast corner of plaintiff's porch actually encroached on the adjoining lot.

In December 2003, plaintiff initiated this action seeking a declaration that the boundary line between the parcels had been established as a line east of the wire fence line through adverse possession or acquiescence. Plaintiff requested that the court enjoin defendants from trespassing on plaintiff's property and order defendants to remove all encroachments from plaintiff's property, including dirt and a wood fence that crossed the invisible line extending southeasterly from the wire fence. Finally, plaintiff asserted that defendant Carll Converse (Converse) trespassed when he entered her property and cut two trees without permission. The trial court granted defendants' motion for a directed verdict on all counts, concluded that plaintiff's action was frivolous, and awarded attorney fees and costs to defendants.

Plaintiff first contends the trial court erred in granting defendants' motion for a directed verdict. We review de novo a trial court's decision on a motion for a directed verdict. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). The evidence presented up to the time of the motion is viewed in a light most favorable to the nonmoving party to determine whether a question of fact existed. *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 701-702; 644 NW2d 779 (2002), citing *Thomas v McGinnis*, 239 Mich App 636, 643-644; 609 NW2d 222 (2000).[1] In granting defendants' motion, the trial court did not specifically rule on plaintiff's theory of acquiescence. A plaintiff may establish acquiescence through one of three theories. *Sackett v Atyeo*, 217 Mich App 676, 681; 552 NW2d 536 (1996). The theory applicable to the instant case is acquiescence for the statutory period. *Id.*

> "[A] claim of acquiescence to a boundary line based upon the statutory period of fifteen years, MCL 600.5801(4); MSA 27A.5801(4), requires merely a showing that the parties acquiesced in the line and treated the line as the boundary for the statutory period, irrespective of whether there was a bona fide controversy regarding the boundary. [*Sackett, supra* at 681.] A claim of acquiescence does not require that the possession be hostile or without permission." [*Walters v Snyder (Walters II)*, 239 Mich App 453, 456; 608 NW2d 97 (2000), quoting *Walters v Snyder (Walters I)*, 225 Mich App 219, 224; 570 NW2d 301 (1997).]

The doctrine of acquiescence commonly arises when adjoining property owners mistakenly treat a boundary line such as a fence as the property line. *Id.* at 458. In the instant case, plaintiff's predecessor testified that he treated the fence and the imaginary line extending from the fence as the property line from the time he purchased the lot in 1985 or 1986 until he sold it to plaintiff in 1989. Although defendants' predecessor testified that she weekly mowed the lawn to within a lawnmower's width of plaintiff's porch, she also stated that she treated the fence and the imaginary line extending from the fence as the property line during the time she owned the property from 1984 to 1999. Hence, the fence line, including the imaginary line extending from

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[1] Plaintiff failed to brief the issue of adverse possession on appeal. Therefore, the issue of adverse possession is abandoned, see *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 471; 628 NW2d 577 (2001), and we address plaintiff's acquiescence and trespass claims only.

the fence, initially was mistakenly treated as the fence line. Acquiescence by predecessors may be tacked onto that of the parties. *Jackson v Deemar*, 373 Mich 22, 26; 127 NW2d 856 (1964).

It is true that plaintiff was aware of the surveyed boundary line in 1989. However, we find that this is not fatal to plaintiff's claim. In *Sackett, supra,* the defendants' predecessors became aware after nine years that a driveway previously thought to be located on both parcels of property was actually located on the predecessors' parcel. *Id.* at 682. Nevertheless, they continued to acquiesce to the boundary line for another seventeen years. *Id.* This Court found that the center of the driveway was the new boundary line between the parcels under the doctrine of acquiescence. *Id.* at 683. And in an earlier case, *Kipka v Fountain*, 198 Mich App 435, 439; 499 NW2d 363 (1993), this Court noted that there was no substantial period of time when adjoining property owners believed the retaining wall was the property line, thus suggesting that the parties need not be mistaken with respect to the location of a boundary line the entire statutory period. Moreover, in *Walters II, supra* this Court emphasized that the key was whether the parties *treated* a particular line as the property line. *Id.* at 458.

We further conclude that the trial court erred in granting a directed verdict on plaintiff's trespass claim. It is well established that "every unauthorized entry upon the private property of another constitutes a trespass." *Gelman Sciences, Inc v Dow Chemical Co*, 202 Mich App 250, 253; 508 NW2d 142 (1993), citing *Giddings v Rogalewski*, 192 Mich 319, 326; 158 NW 951 (1916). Here, Converse cut two large branches from a box elder tree located thirty-three inches west of the wire fence line on plaintiff's property. When a tree stands on the land of one owner and the branches extend over the dividing line above the land of the other owner, the latter may cut off the branches over his land, but not beyond the boundary line. *Newberry v Bunda*, 137 Mich 69, 70; 100 NW 277 (1904). Mark Wonders, who owned the property to the east of the Converses' lot, testified that when Converse cut the branches from the box elder tree, he cut the branches flush with the trunk of the tree. The trial court granted defendants' motion for a directed verdict because plaintiff failed to establish damages. However, plaintiff's purported failure to establish damages was not fatal to her cause of action. "The party whose private possession has been thus interfered with has a right of action for the protection of his property, and is entitled to at least nominal damages, which are presumed to follow from such invasion of another's rights." *Giddings, supra* at 326.

Next, plaintiff contends that the trial court erroneously concluded that her claims were frivolous within the meaning of MCL 600.2591. We agree.

We review a trial court's determination that an action is frivolous for clear error. *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002), citing *In re Attorney Fees & Costs*, 233 Mich App 694, 701; 593 NW2d 589 (1999). "A decision is clearly erroneous where, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id.* at 661-662, citing *In re Attorney Fees, supra* at 701. MCR 2.114(F) provides that a party pleading a frivolous claim is subject to costs pursuant to MCR 2.625(A)(2). MCR 2.625(A)(2) states that costs shall be awarded under MCL 600.2591. Pursuant to MCL 600.2591(3)(a), an action is frivolous if: (1) "the party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party;" (2) "the party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true;" or (3) "the party's legal position was devoid of arguable legal merit." The record does not support that plaintiff's primary purpose in initiating this action was

to harass, embarrass, or injure defendants. Moreover, as noted by our disposition of the case on appeal, plaintiff had a reasonable basis to believe that the facts underlying her legal position were in fact true, and her claims were not devoid of arguable legal merit. *Walters II, supra.* Therefore, the court clearly erred in finding plaintiff's action frivolous.

In light of our conclusion, plaintiff's argument that the trial court erred in assessing the attorney fees and costs solely against plaintiff, and not against her and her counsel jointly is moot. See *City of Romulus v Michigan Dep't of Environmental Quality*, 260 Mich App 54, 66 n 10; 678 NW2d 444 (2003).

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

/s/ Michael J. Talbot
/s/ Donald S. Owens
/s/ Christopher M. Murray