STATE OF MICHIGAN

COURT OF APPEALS

KENNETH W. KISSEL and MARIE KISSEL,

Plaintiffs-Appellees,

v

LAWRENCE STONE and SALLY STONE,

Defendants-Appellants.

UNPUBLISHED
April 25, 1997

No. 178690
Benzie Circuit Court
LC No. 90-003675-CH

Before: Bandstra, P.J., and Hoekstra and S.F. Cox*, JJ.

PER CURIAM.

Defendants appeal as of right from the judgment for plaintiffs following a bench trial in this property line dispute. We affirm.

Plaintiffs and defendants own adjoining properties in Benzie County, Michigan. According to the legal descriptions of the properties, the boundary line between them is the west eighth line of section 29. In the late 1980's, defendants relocated their driveway and mailbox, made an excavation into a hill, and constructed a logging road. Plaintiffs brought suit seeking a determination of the location of the property boundary line, money damages for trespass and the cost of a survey, an injunction against further encroachment, and an order requiring defendants to move their driveway and mailbox. Defendants counterclaimed, alleging that the boundary between the properties had been established through acquiescence and repose and seeking injunctive relief.

The trial court found for plaintiffs, largely based on the survey work done for plaintiffs. Plaintiffs' survey was based upon the original government surveys of the 1850's, took into account every recorded plat of the area since that time, and was performed in accordance with the survey principles set forth in MCL 54.103; MSA 5.1029. The surveyor hired by defendants was, for all practical purposes, in complete agreement with plaintiffs' surveyor regarding the location of the west eighth line.

* Circuit judge, sitting on the Court of Appeals by assignment.

Defendants argue that plaintiffs' survey should have been rejected under the doctrine of repose, which provides that long established occupational lines and settled boundaries are not to be disturbed by recent surveys. *Adams v Hoover*, 196 Mich App 646, 650; 493 NW2d 280 (1992). On appeal, defendants contend that the trial court clearly erred by failing to extrapolate the west eighth line using a marker in the center of Mollineaux Road, north of the properties, that was mentioned in deeds contained in a trial exhibit. We disagree. To begin with, defendants point to no part of the transcript where this argument, based on this evidence, was presented to the trial court. For example, defendants' closing argument centered primarily, if not exclusively, on the fence line (see discussion *infra*) and the doctrine of acquiescence. No evidence was presented to the trial court to show that locating the boundary line where defendants would have it was necessary to avoid disrupting surrounding property lines. Arguments not presented to the trial court are not preserved for appeal. *In re Forfeiture of Property*, 441 Mich 77, 84; 490 NW2d 322 (1992).

Further, on the merits, we are not convinced that the facts defendants rely upon show that a settled boundary (the west eighth line) had been long established by recognized monuments. That was certainly not the case for the boundary between defendants' and plaintiffs' properties, clearly in dispute as illustrated by this litigation. Defendants argue that the west eighth line as established between points north of the subject parcel should be extended for purposes of this litigation to divide the parties' properties. However, the location of the west eighth line north of the subject parcels is subject to dispute. For example, there was testimony that more than one marker was found on Mollineaux Road and the import of deed references to the eighth line was never established by a survey expert. In fact, defendants' surveyor did not criticize plaintiffs' surveyor for ignoring established monuments although he did testify that he had been retained to review plaintiffs' survey and how it had been conducted. Defendants have made no attempt to relate the boundary line they claim exists to the established section lines, and the fence post at the southeast corner of plaintiffs' property was found by both surveyors to have no relationship to the property line. Defendants' assertion that the split rail fence north of M-115 marks the historic eighth line was flatly controverted by testimony at trial that the fence had been erected within the last seven to ten years. The trial court did not clearly err in failing to find that a conclusively established boundary existed for purposes of the doctrine of repose.

Nor was the trial court's finding clearly erroneous that no established boundary line existed under the doctrine of acquiescence. "It is almost axiomatic that the doctrine of acquiescence is applicable only when a line arrived at is the product of a bona fide controversy followed by agreement and acquiescence which need not continue for the limitations period, or where a boundary is acquiesced in for the statutory period." *McGee v Eriksen*, 51 Mich App 551, 558-559; 215 NW2d 571 (1974). The trial court concluded that, although defendants had shown by a preponderance of the evidence that a fence had existed at one time, they had not demonstrated the location of a presently-existing or former fence line that could be interpreted as marking the boundary between the properties. Both parties were in doubt as to the location of the property line. In this case, just as in *McGee, supra* at 557,

> [t]here always was a doubt as to the true [property] line which was never resolved. … There was no oral agreement with respect to a line between prior owners which was established or demarcated by monuments and maintained as a boundary in fact.

> Whatever fences had been previously constructed by prior landowners…were not erected with the purpose of defining the true property line. The 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 a large extent, the trial judge based his decision on credibility determinations regarding witnesses that testified in this bench trial, as well as his personal observations in visiting the subject parcels. We give deference to the trial judge with respect to these matters, MCR 2.613(C); *Emerald Valley Land Development Co v Diefenthaler,* 35 Mich App 346, 348; 192 NW2d 673 (1971), and we find no clear error in the trial court's conclusion that the doctrine of acquiescence did not apply in this case.

Defendants also argue that plaintiffs had no standing to complain about the location of defendants' mailbox and driveway. Because defendants failed to cite any authority in support of their position, *Winiemko v Valenti,* 203 Mich App 411, 415; 513 NW2d 181 (1994), and because this argument was not made to or decided by the trial court, *In re Forfeiture, supra; Bowers v Bowers,* 216 Mich App 491, 495; 549 NW2d 592 (1996), we decline to review this issue.

We affirm. Plaintiffs, as the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra
/s/ Sean F. Cox