

IN THE COURT OF COMMON PLEAS OF BRADFORD COUNTY, PENNSYLVANIA

SOUTH MOUNTAIN HUNTING CLUB,	:	2018-QT-0002
Plaintiff	:	
vs.	:	CIVIL ACTION – LAW
	:	
BRANDON J. FITZWATER,	:	<i>Quiet Title</i>
Defendant	:	

OPINION AND VERDICT

AND NOW, this 1st day of May 2023, after a non-jury trial held on March 16, 2023, the Court issues the following Opinion and Verdict.

BACKGROUND

The procedural history of this case through June 28, 2022 is detailed in this Court's Opinion and Order filed that date. In summary, South Mountain Hunting Club ("SMHC") commenced this action to quiet title to a piece of land at the boundary of SMHC's Property and Defendant Brandon J. Fitzwater's ("Brandon Fitzwater" or "Fitzwater") Property.¹ Following a status conference, the Court determined that prior to adjudicating the merits of the parties' dispute, it was required to first resolve the question of which party, if any, was in present possession of the Disputed Property. The Court held a lengthy evidentiary hearing on that question on January 14, 2022.

¹ This Opinion will use "Fitzwater Property" to denote the eighteen-acre parcel described in Fitzwater's deed, and "Disputed Property" to refer to the easternmost seven acres of the Fitzwater Property, which are located to the east of SMHC's wire fence and to which SMHC claims it has obtained title. This Opinion refers to the boundary between the Disputed Property and the rest of the Fitzwater Property as the "Disputed Boundary." This usage is for clarity and does not reflect any adjudication of ownership.

On June 28, 2022, the Court issued an Opinion and Order holding that neither party had established possession of the Disputed Property, and therefore SMHC's action was appropriately construed as a quiet title action under Rule of Civil Procedure 1061(B), which permits a quiet title action "to determine any right, lien, title or interest in the land or determine the validity of any document, obligation or deed affecting any right, lien, title or interest in the land."²

To reach this conclusion, the Court first discussed the doctrines of adverse possession and consentable lines, which are related but distinct concepts by which parties may acquire or establish property rights and boundaries. Noting that Pennsylvania recognizes a specific standard for determining the present possession of "woodland,"³ the Court concluded that neither party had satisfied that standard.

In finding that neither party "possessed" the woodland as that term is defined in the context of the jurisdictional question of which form of action was appropriate, the Court took pains to note that its determination of that jurisdictional question was not dispositive of the ultimate question of which party holds *title* to the Disputed Property. This is because adverse possession and consentable lines have different standards of proof and different mechanisms by which a party can obtain title to land.

² Had the Court found Fitzwater in possession, SMHC's appropriate action would have been an action in ejectment. Had the Court found SMHC in possession, SMHC's appropriate action would have been a quiet title action pursuant to Rule 1061(b)(1) "to compel [Fitzwater] to commence an action of ejectment...."

³ Here, neither party disputes that the Disputed Property is woodland.

NON-JURY TRIAL

At the March 16, 2023 non-jury trial, the parties first stipulated to incorporate all testimony and exhibits from the January 14, 2022 evidentiary hearing into the trial record. SMHC called two witnesses to augment their case-in-chief and two witnesses as on cross. Fitzwater did not call any additional witnesses.

A. Bruce Springer

SMHC's first witness was Bruce Springer ("Springer"). Springer began going to SMHC's hunting club in 1960 at the age of 6 or 7 years old when his father became a member, and began to engage in club functions – such as hunting and clearing boundaries and trails – in 1964.

Springer testified that SMHC's boundary line upkeep process is similar to that used in Pennsylvania State Game Lands: SMHC uses a single strand of wire to identify its asserted boundary, clearing brush and debris from a strip of land outside of the wire. Springer stated that in his experience with SMHC the club generally maintains the entirety of its asserted boundary in this matter. Springer testified that his father explained this process to him after becoming a member of the club. Springer explained that he had participated in numerous boundary line maintenance projects, and that those who attended were knowledgeable about the club's process.

Springer testified that he went with a team to perform maintenance on the Disputed Boundary at some point between 1964 and 1967. At that time, the team carried a machine with a reel and spool of wire to one end of the area they were

working on. The younger members of the team carried the wire, first descending the hill to the west before wrapping the wire around the tree marking the corner of the disputed boundary and proceeding north. In doing so, Springer testified, they followed the “obvious” boundary to replace all wire that had been there but had fallen, affixing new wire to trees with staples. Springer testified that at the time he worked on the Disputed Boundary in the 1960s, it was marked with pre-existing signage indicating SMHC’s belief that the Disputed Boundary was the edge of its property. Springer did not independently recall the crew replacing these signs when he worked in this area in the 1960s, but believes they would have done so as a matter of course. Springer recalled that the path along the Disputed Boundary was well-cleared in the 1960s, which allowed the team to work quickly while expending little effort to remove debris and vegetation around the wire.

Springer testified that he again did maintenance work on the Disputed Boundary with a crew of three or four people in the 1990s. At that time, the team cleared underbrush and branches, removed fallen trees, recovered and reused downed wire if it was salvageable, and spliced new wire to still-affixed wire as required to maintain a continuous boundary. Springer stated that he again performed similar work in the early-to-mid-2000s, although the crew could not complete the entirety of the area because a new beaver dam had rendered a stream impassable. Springer also stated that numerous crews that he was not a part of performed maintenance on the Disputed Boundary since he became affiliated with the club.

Springer testified that SMHC member Scott Williams was the head of the club's "trails and boundaries crew," and in that capacity organized boundary maintenance. Spring confirmed that the maintenance work he performed on the boundary never resulted in the boundary's relocation, but rather only maintained the already-established boundary.

Springer testified that he was unaware of any dispute over the Disputed Boundary or Disputed Property before Fitzwater informed SMHC in 2017 that he disputed SMHC's claim to the Disputed Property. Springer agreed that he was a teenager in the 1960s and therefore might not be personally involved in any such disputes at that time, but he noted that SMHC did not have any historical reports of disputes or complaints by any past owner of the Fitzwater Property. Springer testified that he did not believe any owner of the Fitzwater Property moved any of SMHC's signs along the Disputed Boundary or otherwise took action to dispute the boundary line, prior to the start of the instant dispute. Springer noted that since he became involved in the club, numerous SMHC members have participated in boundary line maintenance at the Disputed Boundary and elsewhere, including many SMHC members who have since died.

Springer testified that his father relied on boundary lines to hunt, and moved deer by following the boundary lines of SMHC's property. Springer explained the general path of the Disputed Boundary, noting that club members used the boundary

– which is on the side of a hill – as a starting point from which they moved up the slope to direct deer over the crest of the hill.

On cross-examination, Springer testified that the purpose of the wire was primarily to provide notice of the boundary (in conjunction with the cleared path and the signs), but also to provide a physical barrier so that one could not cross the boundary without having to go over or under the wire (save for the places where wire had fallen since the last maintenance). Springer explained that the wire was placed approximately chest-high for this purpose. Ideally, Springer stated, the wire would run continuously from tree to tree along the entire length of the boundary, but snow, falling trees and branches, and other natural events sometimes caused a segment of wire to fall. Springer testified that the club performed maintenance on each section of wire around the boundary every 2 to 3 years, with the event organizer determining which sections of wire needed maintenance at any given time.

B. Thomas Johnson

SMHC next called Thomas Johnson (“Johnson”), who began engaging in certain club activities as a child shortly after his father became a member in approximately 1956. Johnson became a member of SMHC in 1984.

Johnson explained that as a club member he would participate in work parties, which would perform various club tasks at different points in the year. These tasks included cutting firewood, cleaning SMHC facilities, and maintaining SMHC’s boundary line. Johnson testified that at various times a club member would walk the

boundary and determine which areas were in need of maintenance. A crew would then go out to clear vegetation and trees, replace wire as needed, and post private property signs. Johnson described the trail was well marked, and stated the trail “was there long before I was.” Johnson stated that the boundaries were never moved from their boundaries, maintenance of which was part of the club’s legacy.

Johnson testified that he was familiar with the Disputed Boundary, having first been in the area to hunt turkey while he was in high school. Johnson believed he had performed maintenance on that boundary before, and described the wire as a good starting place for turkey hinting. Johnson explained that the club generally endeavors to perform maintenance on each segment of the boundary every two years, though the club focuses on areas that are acutely in need of maintenance.

Like Springer, Johnson testified that he had not heard of any owner of the Fitzwater Property disputing SMHC’s claim to the Disputed Property prior to the instant dispute, and did not know of any previous lawsuits. He was similarly unaware of any action by any owner of the Fitzwater Property, prior to the instant dispute, to alter the location of the Disputed Boundary. Johnson’s understanding was that the Disputed Boundary line had remained unmoved for over fifty years. Johnson testified that during that time, numerous club members performed maintenance on boundary lines, including over three dozen who have since died.

On cross-examination, Johnson testified that the purpose of the boundary line was to demarcate SMHC’s boundaries in a visible way. Johnson stated that the wire

line was intended to go continuously from tree-to-tree, but acknowledged that there were some holes in the line. Johnson testified that when he would arrive at a boundary line to perform maintenance on that segment for the first time in years, approximately 30% to 40% of the wire might have been knocked down, though the majority would remain where it was previously placed.

Johnson explained that each work crew would have two to four workers depending on what maintenance was needed, and would perform maintenance on a segment of boundary measuring in the hundreds of feet. Johnson did not dispute that the Disputed Boundary is approximately 426 feet in length, and testified that a single work crew could perform maintenance on the entire length of that boundary plus an additional segment of boundary line in a single day's work. Johnson stated that most crews did not have to clear too much brush from the three-to-five yard wide cleared strip, generally just removing branches and small trees.

On redirect, Johnson testified that in the 1960s SMHC marked its boundaries with yellow metal ovals, which had a tendency to rust; to avoid this issue, SMHC transitioned to yellow plastic signs. Johnson explained that the purpose of these signs was to visibly identify the boundary lines, and testified that every hunter would know that continuing past a line of yellow signs would be trespassing.

C. Brandon Fitzwater

SMHC next called Fitzwater as on cross. Fitzwater testified that he began hunting on the Fitzwater Property when he was approximately 12 years old in 1998,

though he had been on the property and had first-hand knowledge of it prior to that time. Fitzwater did not have first-hand knowledge prior to 1998 of whether his grandparent disputed the boundary line when they owned the Fitzwater Property or whether SMHC strung wire along the disputed boundary. Fitzwater explained his understanding that his grandfather and other members of his family had long believed that the Disputed Boundary, as asserted by SMHC, was incorrect. Fitzwater explained that for most of Fitzwater's life, his grandfather could not physically walk the steep forest terrain to what the Fitzwaters assert is the correct boundary at the crest of the hill.

Fitzwater testified that he discussed the location of the property line with his grandfather around the time he became the owner of the Fitzwater Property around 2006. Fitzwater testified that no previous owner of the Fitzwater Property had ever posted the Fitzwater's asserted boundary at the top of this hill. Fitzwater was unaware of any prior owner of the Fitzwater Property communicating with SMHC regarding the Disputed Boundary. Fitzwater did not know when SMHC began marking or clearing the Disputed Boundary.

On direct examination, Fitzwater testified that he began going above the Disputed Boundary when he was a teen. Fitzwater explained that the terrain above the Disputed Boundary is very steep, and it is impossible to drive a vehicle up the mountainside. Fitzwater stated that between the Disputed Boundary and the

Fitzwaters' asserted boundary at the top of the mountain there are very few flat clearances.

Fitzwater testified that the area around the Disputed Boundary is very rough and steep. He stated that he had never run into wire when crossing the Disputed Boundary and generally disputed SMHC's characterization of the Disputed Boundary, testifying that the wire was often down, by no means continuously strung from tree to tree, and was not visible on the ground. Fitzwater testified that there was no cleared walking path at the Disputed Boundary. Fitzwater stated that there are visible yellow placards posted at the Disputed Boundary, and that one is far more likely to see the yellow placards than wire at the Disputed Boundary. Fitzwater stated that the Disputed Boundary has never prevented him from using the Disputed Property to the top of the mountain.

On re-cross, Fitzwater testified that he was aware that SMHC marks the Disputed Boundary, and did understand SMHC to be asserting what it believed to be the correct property line.

D. Kirk Bedford

SMHC next called Kirk Bedford ("Bedford") as on cross. Bedford testified that he became familiar with the Fitzwater Property around 1989 or 1990 through his friendship with his brother-in-law, Fitzwater's uncle. Bedford testified that he became aware of the Disputed Boundary in 1990, when members of the Fitzwater family showed him the line and informed him it was incorrect. Bedford understood that the

Fitzwaters believed the Disputed Boundary to be incorrect prior to 1990, but never had the money to legally challenge the Disputed Boundary. In 1990, members of the Fitzwater family showed Bedford their deed to the Fitzwater Property, which stated that the correct boundary was at the top of the hill, and that the property consisted of 18 acres of land.⁴ Bedford elaborated that the Fitzwaters did not want to pursue a legal challenge until they had money to first confirm their belief about the boundary line and then maintain the challenge; no owner of the Fitzwater Property had sufficient resources to do these things until Fitzwater in 2017.

On direct examination, Bedford testified that he hunted on the Fitzwater Property “all the time,” and walked the property recreationally in the summary. He stated that he had gone to the Fitzwater Property every year since 1990. Bedford explained that the property’s terrain, especially in the Disputed Property, was difficult to navigate even for healthy men in their 20s or 30s, and presented a serious challenge for older or untrained people.

Bedford testified that he travels to the top of the hill often, and stated that the wire has never prevented him from crossing the Disputed Boundary. He stated that the wire was typically down in this area, and that there was no path cleared along the Disputed Boundary. Bedford testified that he had hunted since he was a child, and was very familiar with what a typical cleared boundary line looks like.

⁴ There are approximately eleven acres on the Fitzwater Property below the disputed boundary, and seven acres between the disputed boundary and the top of the hill.

On re-cross, Bedford confirmed that he is not a surveyor, and that when he refers to the Fitzwaters' asserted boundary line at the "top" of the hill he means the area where the steepness of the hill stops and the land becomes easy to traverse again.

E. Argument

Following Bedford's testimony, SMHC rested its case in chief. Fitzwater rested as well without calling any additional witnesses.

Counsel for Fitzwater first argued that the sole issue in the case is whether the Disputed Boundary is a consentable line by recognition and acquiescence, and asserted that the Fitzwaters have never acquiesced to the Disputed Boundary. Counsel noted that Fitzwater and all previous owners of the Fitzwater Property have treated the crest of the hill, rather than the Disputed Boundary, as the true boundary between the parties' properties. Counsel argued that Fitzwater and his predecessors in title indisputably have legal title to the Disputed Property dating to 1872 and have always paid taxes on 18 acres of land. Counsel noted that the gas lease on the Fitzwater Property also describes 18 acres. Asserting that one of the elements of a consentable line by recognition and acquiescence is possession, Counsel argued that regardless of any other facts the Disputed Boundary is not a consentable line as a matter of law because SMHC does not possess the Disputed Property. Ultimately, counsel asserted that because there is no consentable line and both parties

occasionally use but do not possess the Disputed Property, the constructive legal title controls.

Counsel for SMHC argued that the Disputed Boundary is indeed a consentable line by recognition and acquiescence, because each party claimed the lands on their side of the boundary and SMHC occupied the Disputed Property without challenge for over 21 years. Counsel argued that the line of cases discussing possession in the context of jurisdiction (as addressed in this Court's June 28, 2022 Opinion and Order) is distinguishable from those cases addressing the merits of consentable lines actions; the first line of cases, counsel suggested, rests on principles of adverse possession, whereas the doctrine of consentable lines turns on different considerations.

The most important factor, counsel for SMHC argued, is the fact that from 1968 to 1990 and beyond the owners of the Fitzwater Property acquiesced to the Disputed Boundary, which they were aware SMHC had clearly marked. This acquiescence for over 21 years, counsel argued, meant that SMHC had obtained title to the Disputed Property by 1990 at the latest. Ultimately, counsel argued that the actions Fitzwater claims demonstrated the Fitzwater Property Owners' lack of acquiescence – such as paying taxes on 18 acres and crossing the boundary line – are insufficient to change the fact that they respected the Disputed Boundary for well over 21 years, never asserting their rights or informing SMHC of the dispute during that time.

APPLICABLE LAW

The doctrine of consentable lines by recognition and acquiescence is related to, though distinguishable from, the doctrine of adverse possession.⁵ At its core, the doctrine of consentable lines “is a form of estoppel, whereby once ‘a consentable line has been clearly established..., the line becomes binding under the application of the doctrine of estoppel after twenty-one years.’”⁶ As such, a court reviewing such a claim may take equitable considerations into account.⁷

A party asserting a consentable line by recognition and acquiescence must show that “each party has claimed the land on his side of the line as his own” and “[the] occupation has occurred for the statutory period of twenty-one years.”⁸ The “acquiescence” inherent in the first of these elements refers to “passive conduct on the part of the lawful owner consisting of failure on his part to assert his paramount rights or interests against the hostile claims of the adverse user.”⁹

A typical manifestation of a consentable line established through recognition and acquiescence is a “boundary, usually marked by a substantial fence, that the parties have consensually accepted for a period of at least twenty-one years.”¹⁰

⁵ The Supreme Court of Pennsylvania explained that “the doctrinal roots of acquiescence are grounded in adverse possession theory.” *Zeglin v. Gahagen*, 812 A.2d 558, 561 (Pa. 2002).

⁶ *Long Run Timber Company v. Department of Conservation and Natural Resources*, 145 A.3d 1217, 1233 (Pa. Cmwlth. 2016) (quoting *Plauchak v. Boling*, 653 A.2d 671, 677 (Pa. Super. 1995)).

⁷ *Id.* (citing *Miles v. Pa. Coal Co.*, 91 A. 211, 212 (Pa. 1914)).

⁸ *Id.* at 561.

⁹ *Long Run Timber Company*, 145 A.3d at 1234.

¹⁰ *Lilly v. Markvan*, 763 A.2d 370, 371 (Pa. 2000).

Adjacent landowners need not explicitly agree to the location of a boundary for the doctrine of consentable lines by recognition and acquiescence to apply; rather, acquiescence may be evidenced by their behavior, such as by each party maintaining the property on their side of the boundary.¹¹

A party need not satisfy all elements of adverse possession to establish a consentable line by recognition and acquiescence. In *Niles v. Fall Creek Hunting Club, Inc.*, two adjacent property owners participated in a survey in 1952, after which a boundary between their properties was marked.¹² The Superior Court discussed the evidence, and its sufficiency under the two theories, in detail:

“The evidence in the instant case was that the disputed land had been used only sporadically by [the plaintiff] and his predecessors in title for the purposes of hunting and removing timber. The land had been partially enclosed by a single strand of wire which had broken and fallen to the ground in several places. This evidence was insufficient to show an inclosure of a substantial character. There was neither the establishment of a residence nor cultivation within designated boundaries. Therefore, the evidence failed to satisfy the essential requisites for proving that [the plaintiff] had acquired title to the woodland by adverse possession.

...

[However], there was evidence that in 1952 [the defendant] had been informed that [the plaintiff's predecessor in interest] was uncertain where the common boundary existed on the ground, that a survey was

¹¹ See *Sorg v. Cunningham*, 687 A.2d 846, 849 (Pa. Super. 1997) (affirming a finding of a consentable line by recognition and acquiescence where “[b]oth parties maintained their lawns to the row of pine trees,” the party claiming to have obtained the disputed area “conducted significant activities... within that [area],” and the party disputing the application of the doctrine and his predecessors in interest “treated the row of pine trees as the boundary... well in excess of the statutory period” of 21 years).

¹² *Niles v. Fall Creek Hunting Club, Inc.*, 545 A.2d 926, 928 (Pa. Super. 1988).

being made, and that [the defendant's] opinion and participation were welcome. The evidence showed further that representatives of [both the plaintiff's predecessor in interest and the defendant] were present when the survey was made. An attorney who then represented [the plaintiff's predecessor in interest] testified that he had gone to the site and had been told by the surveyor that the parties had agreed where the line should be located. Following this survey, a line had been blazed and painted, and the surveyor had prepared a description of the property for his client which described the common boundary as the township line, 'the location of which is verbally agreeable to the adjacent owners.' ... [The plaintiff's predecessor in interest] then caused a wire to be strung along the boundary line, and both parties posted signs in conformance with the 1952 survey line. In the years that followed, according to [the Plaintiff's] evidence, both parties observed this line as a boundary in the use of their respective tracts.

This evidence was sufficient... to support a finding that the 1952 survey line had become a binding, consentable line... by recognition and acquiescence... The jury could... have found that the line had been recognized and acquiesced in by both parties for a period well over twenty-one years.... Under [the theory of consentable lines by recognition and acquiescence], it was not essential that the fence line be substantial."

FINDINGS OF FACT

Fitzwater Property

1. Defendant Brandon J. Fitzwater currently holds the deed to the Fitzwater Property, which has passed to him through the following series of conveyances:
 - a. Deed of September 11, 1872, from Isaac and Mary Jane Williams to Millard T. Fitzwater;
 - b. Deed of November 14, 1930 from Millard J. and Addie Fitzwater to Arthur M. and Helen Fitzwater;
 - c. Deed of February 6, 1968 from Helen Fitzwater to Philip D. and Loretta Fitzwater; and

- d. Deed of December 6, 2007 from Philip D. and Loretta Fitzwater to Brandon J. Fitzwater.
2. Each of these deeds consistently describes the Fitzwater Property as a roughly rectangular plot approximately eighteen acres in size, with shorter boundaries on the east and west and longer boundaries on the north and south.
3. The western portion of the Fitzwater Property is relatively flat, and can be accessed by vehicles and timbered. The eastern portion of the Fitzwater Property lies on a steep slope that is difficult to navigate on foot and cannot be reached by vehicle from the western portion of the Fitzwater Property. Fitzwater has not timbered the eastern portion of the Fitzwater Property for this reason.
4. The majority of the Fitzwater Property, including the entire portion on the slope, is woodland.

SMHC Property

5. SMHC's Property is far larger than the Fitzwater Property, consisting primarily of woodland. SMHC has used its land for hunting and other outdoor activities since prior to 1960.
6. SMHC maintains a wire fence around the boundary of its property. This fence generally consists of a single wire strung from tree to tree around chest height, though due to the character of the land this is not possible in some places. The primary purpose of the wire fence is to physically and visually demarcate SMHC's asserted property line, ensuring those who approach know that they are crossing a boundary. It is not intended to physically exclude any person or animal.
7. SMHC typically clears a lane a few yards wide adjacent to the wire fence in order to create a "noticeable gap in the woods," providing further notice of the SMHC's asserted boundary.
8. SMHC posts yellow signs along the area of the fence, denoting that further advancement would constitute trespass.
9. SMHC regularly sends out crews of members and other persons affiliated with the club to conduct boundary line maintenance. Each crew usually consists of

two to five members, who replace any wire that has fallen, clear vegetation and obstructions from the walking path, and replace no trespassing signs as needed. Each crew works on a segment of the boundary measuring hundreds of feet.

10. Designated members of SMHC determine which areas of the boundary line need maintenance and assign crews to work on specific segments. SMHC endeavors to have a crew address each portion of the boundary at least once every two years, though this is not always possible. SMHC will prioritize areas where the fence is more deteriorated or otherwise in need of acute maintenance.

History of Disputed Property

11. The eastern seven acres of the Fitzwater Property, which consist entirely of woodlands on the steep slope, are the Disputed Property. The easternmost edge of the Disputed Boundary lies at the crest of the hill, to the east of which is much flatter, more navigable terrain. The Disputed Boundary is approximately 426 feet in length.
12. The Disputed Property is included in the description of the Fitzwater Property on the 1872 deed and has been included on each subsequent deed conveying the Fitzwater Property.
13. SMHC maintains historical records. SMHC possesses a map suggesting that SMHC purchased the Disputed Property in 1937, though there is no recorded deed documenting any such conveyance. SMHC has produced no legal document demonstrating that it is the legal title-holder of the Disputed Property.
14. Since 1960 at the latest, SMHC has enclosed the Disputed Property with a wire fence with a cleared path and yellow no trespassing placards.
15. During that time, members and persons affiliated with SMHC have hunted in the Disputed Property, performed maintenance on the Disputed Boundary in accordance with typical SMHC practice, and conducted other outdoor activities in the Disputed Property. In particular, members of SMHC will sometimes travel to the Disputed Boundary and proceed up the slope, driving deer or turkeys over the crest for hunting purposes.

16. SMHC performed boundary maintenance on the Disputed Boundary at least a handful of times between 1990 and 2017.
17. The parties disputed the percentage of the wire fence that would remain at chest height at any given time at the Disputed Boundary, as well as whether there was a visible path cleared of brush and vegetation along the Disputed Boundary. Each time SMHC conducted maintenance on the Disputed Boundary, they would need to restring a significant portion of the wire fence, as at least 20% to 30% - and possibly 50% or more - would have fallen to the ground since the last maintenance session due to falling trees or other natural events. Due to the regrowth of vegetation, especially on the slope where the Disputed Boundary lies, it would sometimes be difficult to see the path that SMHC attempted to keep cleared.
18. Since 1990 at the latest, the owners of the Fitzwater Property have believed that the Disputed Boundary is incorrect, and that the actual easternmost boundary of their property is the crest of the slope.
19. During that time, the Fitzwaters and their guests have routinely crossed the Disputed Boundary, and have never considered it an impediment to their use of the Disputed Property.¹³ The Fitzwaters and their guests have routinely used the Disputed Property for hunting and other recreational activities.
20. Because various parts of the wire fence fall to the ground due to falling trees and other natural conditions, the Fitzwaters have always been able to find a

¹³ There was testimony that Brandon Fitzwater contacted SMHC on a handful of occasions, asking permission to pursue a deer he had shot on the Fitzwater Property onto SMHC Property. SMHC Member Derek Kreisler testified that Fitzwater asked for this permission when he was crossing from the lower portion of the Fitzwater Property onto the Disputed Property; Fitzwater testified that he asked for this permission when he was crossing from the Disputed Property onto the land to the east of the crest of the hill, which is undisputedly SMHC's Property. The Court does not believe that either party gave intentionally false testimony, but rather that the discrepancy is likely the result of miscommunication or misremembering. Given Fitzwater's testimony that he, his family, and his guests routinely disregarded the Disputed Boundary and entered the Disputed Property for hunting and other purposes, the Court finds that Fitzwater would not have asked permission to follow a deer onto the Disputed Property, and instead asked for permission when he pursued a deer over the crest of the hill. Due to the fact that this happened at most three times over a decade, and the lack of testimony about the specifics of these communications or the parties' understanding of them, the Court finds that SMHC did not understand these communications to mean that Fitzwater disputed or disregarded the Disputed Boundary, or asserted that he was the owner of the Disputed Property.

location to cross the Disputed Boundary where the wire had fallen or was otherwise not strung at chest height.

21. At all or almost all locations along the Disputed Boundary, SMHC's yellow no trespassing signs are clearly visible.
22. Regardless of whether the fence remained strung or the cleared path remained visible, the Fitzwaters and their guests were aware of the exact location of the Disputed Boundary, and the fact that SMHC asserted that it owned the Disputed Property, since 1990 at the latest, and likely many decades before.
23. Due to the intermittent nature of the outdoor activities performed by the parties and the size and character of the Disputed Property, the Fitzwaters and SMHC have never encountered each other in the Disputed Property, despite the fact that they both enter the Disputed Property many times each year.
24. Although the Fitzwaters have long believed that the Disputed Boundary was not the actual boundary between the Fitzwater Property and SMHC Property, they did not conduct a survey or otherwise inform SMHC of that belief prior to 2017. The Fitzwaters and their guests did not move or remove the wire fence or no trespassing signs prior to 2017.
25. The Fitzwaters did not conduct a survey prior to 2017 because they did not believe they had sufficient money to prove the location of the correct boundary line and bring a successful legal action if necessary.
26. The Fitzwaters have routinely leased subsurface rights for the entirety of the Fitzwater Property, including the Disputed Property. They have paid taxes on the eighteen-acre parcel described in the various deeds conveying the Fitzwater Property.

Disputed Property from 2017 Onward

27. In 2017, Brandon Fitzwater commissioned a survey of the Fitzwater Property, which was completed on October 3, 2017. The Survey shows the Fitzwater Property as properly including the Disputed Property. The surveyor placed a survey marker on the northeast point of the Fitzwater Property, in the Disputed Property.

28. In late 2017, after learning of the results of the survey, Kirk Bedford removed SMHC's no trespassing signs from the Disputed Boundary to dispute the Disputed Boundary on Fitzwater's behalf.
29. Following the survey, Fitzwater informed SMHC for the first time that he disputed SMHC's ownership of the Disputed Property and asserted that the Fitzwater Property extended to the crest of the slope rather than the Disputed Boundary.
30. Around this time, SMHC ceased activity in the Disputed Property and commenced legal action to determine ownership of the Disputed Property.

DISCUSSION AND CONCLUSIONS OF LAW

1. SMHC's actions from 1960 through 2017 were sufficient to demonstrate to all other persons that it genuinely believed it was the owner of the Disputed Property, and that the Disputed Boundary was located along its property line. SMHC took multiple steps, consistent with the typical practice of owners of woodlands, to convey to any person approaching on foot that the area beyond the Disputed Boundary was its property:
 - a. SMHC strung a wire fence at chest height in an attempt to create a physical and visual demarcation of the Disputed Boundary. Although this fence was not an impediment to interference or entry of the sort that may establish adverse possession of woodlands, it was legally sufficient to provide notice of where SMHC believed its boundary to be.
 - b. SMHC attempted to clear a path along the wire fence, though features of local terrain and the constant regrowth of vegetation meant that the path was less apparent in some areas – such as along the Disputed Boundary – than others.
 - c. SMHC also posted obvious yellow no trespassing signs at regular intervals spaced so that they would typically be visible around the entirety of the Disputed Boundary.
2. SMHC made diligent, consistent effort to maintain multiple methods of advertising its asserted boundary to any persons approaching. Although the Disputed Boundary would be more obvious shortly after maintenance and become less obvious as time passed, at no time did SMHC attempt to hide its

boundary or let it fall into a state of neglect indistinguishable from other areas of woodland.

3. From 1990 to 2017, like SMHC, the owners of the Fitzwater Property genuinely believed that they owned the Disputed Property, and utilized the Disputed Property in a manner consistent with that belief. The Fitzwaters, however, did not convey that belief to SMHC or take any action to assert their ownership of the Disputed Property. Due to SMHC's maintenance of the Disputed Boundary, the Fitzwaters either knew or should have known that SMHC believed itself to be the actual owner of the Disputed Property.
4. In the typical case of consentable lines by recognition and acquiescence, both parties believe that some line is the boundary between their properties and act accordingly for over twenty-one years. The primary consideration is not the character of the occupier's use of the property, but rather the parties' treatment of the boundary. This case presents an unusual factual scenario, in that the owners of the Fitzwater Property *did not* believe the Disputed Boundary was correct but did not inform SMHC of their position for many decades. Thus, the dispositive question in the instant case can be framed as follows: has a deed holder "recognized and acquiesced" to a boundary when he does not respect that boundary through his own actions, but 1) knows that his neighbor believes the boundary to be correct; 2) knows that his neighbor believes it owns the land on its side of the boundary; 3) takes no actions to challenge the neighbor's belief in its ownership of the property; and 4) allows that status quo to persist for longer than twenty-one years? Neither party has provided the Court with a case directly addressing this scenario, and the Court has not found such a case.
5. SMHC has met its burden of showing that the Disputed Boundary is a valid consentable line by recognition and acquiescence, for the following reasons:
 - a. At its core, the doctrine of consentable lines by recognition and acquiescence is a doctrine of estoppel, implicating principles of equity.
 - b. For at least 57 years from 1960 to 2017, SMHC believed that it owned the Disputed Property. Generations of club members utilized the Disputed Property, and SMHC advertised that belief to the world, regularly fighting back against the encroaching forest to ensure that its claimed boundary was visible.

- c. For at least 27 years from 1990 to 2017, and likely far longer, the owners of the Fitzwater Property knew that SMHC believed it owned the Disputed Property, and knew that SMHC made efforts to maintain the boundary. During that time, the owners of the Fitzwater Property took no actions to inform SMHC that they believed their claim to the Disputed Property was superior to SMHC's.
- d. The fact that SMHC's fence did not physically prevent the Fitzwaters from crossing is irrelevant to whether the Fitzwaters knew that SMHC believed itself to be the owner of the Disputed Property. Both parties clearly knew where the Disputed Boundary was, and that SMHC maintained it for the purpose of demarcating what it believed to be the boundary of its property. For the purposes of consentable lines by recognition and acquiescence, it is the location and visibility of the boundary, not its ability to physically impede, that matters.
- e. Acquiescence in the context of consentable lines "is passive conduct on the part of the lawful owner consisting of failure on his part to assert his paramount rights or interests against the hostile claims of the adverse user." The owners of the Fitzwater Property knew of SMHC's hostile claims for over 21 years and failed to assert their rights and interests to the Disputed Property. Although the Fitzwaters' crossing of the Disputed Boundary into the Disputed Property constituted action consistent with their right to the use of the entire Fitzwater Property, it cannot be said to constitute an *assertion* of their rights *against SMHC's hostile claim* to the Disputed Property. Rather, they knew of SMHC's belief, and allowed SMHC to persist in that belief for decades.
- f. The Fitzwaters' delay in informing SMHC of their claim to the Disputed Property justifies the application of estoppel principles for two reasons. First, the delay resulted in SMHC expending time, money, and resources to maintain the Disputed Boundary for at least the 27 years between 1990 and 2017.
- g. Second, the courts generally disfavor allowing parties to sit on ripe claims for years for evidentiary reasons. SMHC's documents suggest that a transaction concerning the Disputed Property occurred in 1937, and that this transaction – rightly or

wrongly – was the basis for SMHC’s belief in its ownership of the Disputed Property. Had the Fitzwaters informed SMHC of their belief in their ownership of the Disputed Property in 1990, that purported transaction would have occurred 53 years prior. Although by no means recent, there would have been a greater chance that evidence – or the testimony of a club member – could have provided first-hand information concerning that purported transaction.¹⁴ The delay of 27 years meant that 80 years, rather than 53, had passed before SMHC learned that the 1937 transaction was disputed, drastically reducing the possibility that a club member could testify as to what occurred at that time. This is a quintessential reason why the law generally prohibits parties from sitting on their claims for decades, especially when they have reason to believe the adverse party is unaware of the possibility of a dispute and has relied upon the status quo in arranging its business.

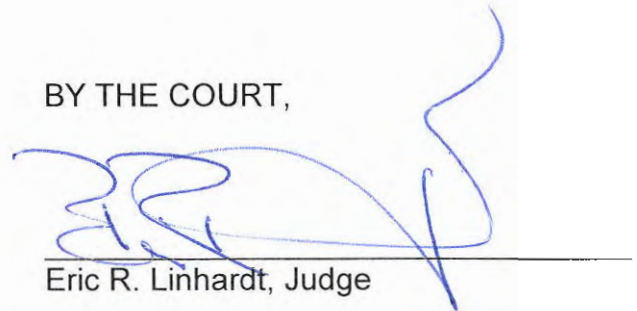
6. The Fitzwaters recognized and acquiesced to the Disputed Boundary for greater than 21 years by acknowledging that SMHC maintained the Disputed Boundary and used the Disputed Property as though it was its own, yet taking no action to inform SMHC of its claim to the Disputed Property.

CONCLUSION

For the foregoing reasons, the Court finds that the Disputed Boundary is a consentable line by recognition and acquiescence, and therefore South Mountain Hunting Club has obtained title to the Disputed Property.

IT IS SO ORDERED.

BY THE COURT,



Eric R. Linhardt, Judge

¹⁴ Witnesses in this trial testified to events occurring as early as 1960, 63 years prior to trial.

ERL/jcr

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