STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL BAUM and ANNE BAUM,

Plaintiff-Appellees,

v

RITA DUBORD,

Defendant-Appellant.

UNPUBLISHED
August 7, 1998

No. 201247
Delta Circuit Court
LC No. 95-012967 CH

Before: Markman, P.J., and Griffin and Whitbeck, JJ.

PER CURIAM.

Defendant appeals a judgment of the trial court, entered after a bench trial, by which the trial court quieted title in a semicircular portion of land in favor of plaintiffs on the basis of adverse possession. We affirm.

I. Factual Background and Overview

The parties' dispute ownership of a relatively small section of land, referred to at times in the record as a "hump" of land, abutting Round Lake in Delta County. In October, 1958, plaintiffs' predecessors in title, Charles and Eva Alto, bought property abutting Round Lake from Allen and Rose Mercier. On January 24, 1967, defendant and her late husband bought an adjoining parcel of property. The parties provided conflicting testimony regarding their respective use of the disputed property. In short, although disputed, there was evidence that the disputed property was included in the property described in the deed held by defendant and her late husband but that plaintiffs' predecessors in interest, the Altos, used it for decades as if it were part of their property.

II. Standard of Review and General Legal Principles

While this court reviews equitable matters de novo, *Reed v Soltys*, 106 Mich App 341, 346; 308 NW2d 201 (1981), we give due deference to the trial court's findings of fact in light of its superior ability to assess the credibility of the evidence and witnesses and will not overturn or modify a finding of fact unless it is clearly erroneous, *Dunlop v Twin Beach Park Ass'n, Inc*, 111 Mich App 261, 266;

314 NW2d 578 (1981). As we develop in this opinion, the pertinent factual findings by the trial court were not clearly erroneous and, in light of those findings, the trial court properly found that plaintiffs' predecessors had adversely possessed the disputed land. To establish adverse possession, a party must show possession that is actual, visible, open, notorious, exclusive, hostile, "under cover of claim or right," and continuous and uninterrupted for the fifteen-year statutory period.[1] *West Michigan Dock & Market Corp v Lakeland Investments*, 210 Mich App 505, 511; 534 NW2d 212 (1995). The person seeking to claim title adversely must prove each of these elements by "clear and cogent" proof, a standard that is very similar to the "clear and convincing" standard in that "the evidence must clearly establish the fact of possession and there must be little doubt left in the mind of the trier of fact as to the proper resolution of the issue." *McQueen v Black*, 168 Mich App 641, 645 & n, 2; 425 NW2d 203 (1988).

III. Extent of "Exclusivity" Required for Adverse Possession

Defendant challenges the trial court's findings and conclusions with regard to each of the factors needed to establish a claim of adverse possession. Of these factors, *West Michigan Dock, supra,* the most troublesome in this case is whether plaintiffs' predecessors exercised "exclusive" control for fifteen years. Perhaps because it was simply unnecessary to do so, prior Michigan case law has not clearly defined this "exclusivity" element. However, in *Pulcifer v Bishop,* 246 Mich 579, 583-584; 225 NW 3 (1929), a unanimous Michigan Supreme Court held that one of the defendants was entitled to hold title in a parcel of riverbank land by adverse possession although others had made some use of the land:

> [The defendant] claims title by adverse possession to that part of the river bank across the highway and in front of his parcel. His evidence is that he built and maintained a landing or dock, and steps leading down the bank to the same, that he installed a water pipe, that he cut weeds and kept clean that portion of the beach, and used the same, all this for many years, longer than the statutory period. He did it under a claim of ownership long asserted. The dock was replaced from time to time until about 1914, when he hired a spile driver and made a permanent dock extending into the river nearly 100 feet. There is evidence that he warned many people to keep off the premises in question. There is also evidence that some persons, especially his neighbors, used the dock and the beach at times without protest from said defendant. *In view of the well-known tendency of people to make rather free use of shores and beaches, we think defendant exercised all control of these premises that reasonably could be expected in view of their character.* [Emphasis supplied.]

In keeping with *Pulcifer,* we hold that the "exclusivity" required to establish adverse possession does *not* extend so far that a party or parties (or their permissive users) claiming by adverse possession must be the *only* parties to have made any use of the land whatsoever for the fifteen-year statutory period.[2]

In *Roche v Town of Fairfield,* 186 Conn 490; 442 A2d 911, 912-915, (1982), the plaintiffs were the titleholders to a disputed beach area that the defendant town had effectively incorporated into its adjoining public beach during its seasonal use. The Connecticut Supreme Court affirmed the holding

of the trial court in that case that the defendant town acquired title to the disputed land by adverse possession. *Id.* at 919. Pertinent to the issue at hand, the *Roche* court concluded that the use of the disputed land by the plaintiffs did *not* prevent the necessary exclusivity for the defendant town to have acquired the disputed land by adverse possession:

> The defendant, in this case, was possessing the disputed beach area in a manner that an owner of a public beach would ordinarily follow. *That the plaintiffs themselves used this beach area would not negate the exclusive use of the defendant since it did not alter the plaintiffs' knowledge or notice of the adverse claim, nor did it amount to an acknowledgement [sic] of the plaintiffs' title to the land*. "'It is sufficient if the acts of ownership are of such a character as to openly and publicly indicate an assumed control or use such as is consistent with the character of the premises in question.'" Since the defendant was operating the disputed area as a public beach, it certainly would have been inappropriate to exclude the plaintiffs from using it. In fact, there was no evidence presented from which the court could reasonably conclude that the plaintiffs used the beach area in any other capacity than as members of the general public. [*Roche, supra* at 917-918 (citations omitted; emphasis supplied).]

See also *Almond v Anderegg*, 276 Or 1041; 557 P2d 220, 223 (1976) ("occasional allowing of defendant and others to use the roadway does not destroy the element of exclusive possession"); *Hinds v Slack*, 299 So2d 717 (Ala, 1974) (allowing apparent titleholders "to come and go and perform minor functions on the land" did not prevent possessors from acquiring title by adverse possession).

We find this out-of-state authority to be highly instructive. Accordingly, we hold that the "exclusivity" needed for adverse possession is that a party (or multiple parties acting jointly) must have made use of the land in a manner consistent with sole ownership of a section of land. Minimal use of disputed land by a titleholder that is consistent with an adverse possessor's exercise of general control over the land as if the adverse possessor owned the property does not prevent the adverse possessor from acquiring title. A holding precluding adverse possession where the titleholder merely entered or used the disputed property in a *de minimis* fashion would lead to absurd results. For example, it is common knowledge that in many neighborhoods people commonly enter yards belonging to other households in the neighborhood. A party claiming by adverse possession may have maintained and exercised general control over a disputed parcel of land for well over fifteen years although a titleholder, or member of the titleholder's household, sporadically walked across or otherwise used that parcel at various times during that period. In our view, it would be unreasonable to hold that such *de minimis* use of the disputed property precludes a finding of the exclusivity required as one part of an adverse possession claim.

In the case at hand, the trial court found that plaintiffs' predecessors cleared the disputed land of underbrush and used a dock on the property. The trial court further stated in its written findings of fact and conclusions of law:

> The uses made of the "hump" [the disputed property] by the Altos [plaintiffs' predecessors] from 1958 to 1992 varied, but were always consistent with the nature of the property. The acts necessary to constitute adverse possession depend upon the character of the land involved…. The underbrush was cleared in the late '50's, a dock extended from the "hump" for limited summertime use, and the dock stored on the land during winter months. The remnants of that dock presently remain on the "hump" as observed by the Court. The Altos also dragged an ice shanty across the eastern edge of the property, and while the shanty was not stored on Government lot 3, (at that location it would be too close to the water's edge for storage), the Altos used this eastern edge as though it was their land, believing it to be so. While not directly involving the use of the hump, the ice shanty evidence demonstrates the Altos' general intent, claim of right, and use of the land they believed they owned.
>
> It is important to note that the shoreline at this section of Round Lake is not beach front. It is generally bushy and wooded. The uses made by the Altos were consistent with the character of the land: access to and from the lake, storage of a dock and ice shanty, seasonal anchoring of the dock.
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> Although not required to use the property, the uses of the "hump" by the defendant and family were very casual and transient: adults crossing through the "hump" while strolling along the shore or going to and from near-by cottages, the Dubord children fishing or duck hunting in the lake directly in front of the "hump." To the extent the "hump" was used to service any contiguous property, it was used exclusively by the Altos. The Dubord contact with the property was minimal and did not interfere with the exclusive character of Altos' usage.

Based on the evidence presented at trial, the trial court did not clearly err, *Dunlop, supra,* by finding that plaintiffs' predecessors exercised general control over the disputed land consistent with its nature for the fifteen-year statutory period, while defendant and her family made only minimal use of the property. In light of these factual findings, the trial court properly concluded that plaintiffs' predecessors had exclusive possession of the disputed land for purposes of an adverse possession claim.

IV. Other Elements of Adverse Possession

The trial court's finding that plaintiffs' predecessors in title "actually" possessed the disputed land was not clearly erroneous. The uses of the land made by plaintiffs' predecessors were consistent with the character of the land: access to and from the lake, storage of their dock and ice shanty and seasonal anchoring of their dock. The piece of land in question is not beach front, not suitable to build upon, and it would be inconsistent with the nature of the land to require that anyone have built a fence or other permanent structure in order to actually possess it. For these reasons, and because the trial court was in a better position actually to observe the character of the land in question, we conclude that the trial court did not clearly err in finding that plaintiffs' predecessors actually possessed the land.

The trial court's finding that the possession was visible, open and notorious was also not clearly erroneous. The purpose of these elements is to put the record owner on notice that an adverse claim to the property is being made. See *Davy v Trustees of Protestant Episcopal Church*, 250 Mich 530, 533-535; 231 NW 83 (1930) (occupation of land by church "for almost 50 years was … open, distinct, notorious, and hostile"). Defendant was put on such notice. Her own testimony indicated that she had actual knowledge of the intent of plaintiffs' predecessors to claim the land. Defendant testified that she saw plaintiffs' predecessors clearing the land when they first purchased their property in 1958 and that she was aware of the use of the land for storage of their second dock and the ice fishing shanty.

The trial court's finding that the possession of the land was continuous through the statutory period was also not clearly erroneous. Given the nature of the parcel, it would not be reasonable to expect use of the property every day for fifteen years. There was substantial evidence that plaintiffs' predecessors cleared brush from the property, stored their possessions on the property and made continuous and regular use of the disputed area for boating, swimming and other recreational activities. This was sufficient to constitute continuous use of the disputed land. See *Nechtow v Brown*, 369 Mich 460, 462; 120 NW2d 251 (1963) ("regular use of property as a summer home and for recreational purposes is sufficient basis for a claim of adverse possession").

Defendant also argues that the possession of the disputed land by plaintiffs' predecessors was not hostile under a claim of right on two grounds: (1) that plaintiffs' predecessors intended to hold to the true line rather than to occupy defendant's land and (2) that the use of the disputed land by plaintiffs' predecessors was permissive at least to the extent that there was no statutory fifteen-year period during which the use was non-permissive.

In *DeGroot v Barber*, 198 Mich App 48, 52; 497 NW2d 530 (1993), this Court held that a subtle distinction exists between "(1) failing to respect the true line, while attempting to do so, and (2) respecting the line believed to be the boundary, but which proves not to be the true line." In the former situation, title may not be established by adverse possession, while in the latter situation, a successful claim by adverse possession is possible. *Id.* at 52-53. Thus, the fact that possession of property follows from a mistake about the location of the true boundary line does not preclude a successful claim of adverse possession. *Id.* at 53. Further, a successful claim of title by adverse possession may be established where the adverse possessor attempts to hold to "a visible, recognizable boundary" believing it to be the true property line. *Id.* at 52. However, title may not be established by adverse possession where the putative adverse possessor was merely attempting to hold to the "true line" rather than to a particular visible boundary. *Id.* In the case before us, the trial court found that plaintiffs' predecessors intended to hold to the boundary line shown to them in 1958; that is, that plaintiffs' predecessors intended to hold to a visible and recognizable boundary. This finding was well supported by the evidence and, accordingly, was not clearly erroneous. Given this finding, adverse possession was not precluded in this case based on the belief of plaintiffs' predecessors that they were also holding to the true property line in occupying the disputed property.

However, we note that in *McQueen, supra* at 644, this Court stated as part of its holding:

> [I]f plaintiff took possession of defendant's land with the intent to hold to the true boundary line, rather than to adversely possess the property, his possession is not hostile. *Simply put, plaintiff did not adversely possess the four-foot strip of land if he believed the fence accurately reflected the true boundary line.* [Emphasis supplied.]

This holding in *McQueen*, that would preclude adverse possession wherever a party believed that it was holding to the true boundary line, is inconsistent with the holding in *DeGroot* that a party may acquire title by adverse possession in some circumstances where its possession of disputed property results from a mistake about a boundary line. *DeGroot, supra* at 52-53.[3]

Because *DeGroot* is a published opinion of this Court issued after November 1, 1990, we must follow its holding on this point rather than the holding in *McQueen*, which was decided in 1988. MCR 7.215(H) (requiring a panel of this Court to follow the rule of law established by a prior published opinion of this Court issued on or after November 1, 1990). Nevertheless, we would follow *DeGroot* over *McQueen* even if we were not required to do so. We agree with the *DeGroot* panel that "it would be contrary to fundamental justice and public policy to limit the application of the doctrine of adverse possession to those cases where the adverse possessor knew his possession was deliberately wrong." *DeGroot, supra* at 53. A successful assertion of adverse possession should not be precluded merely because the adverse possessor held possession of disputed property for part or all of the fifteen-year statutory period without intending to deprive any other party of its property.

We also note that the term "hostile" does not imply ill will. As this Court observed in *Mumrow v Riddle*, 67 Mich App 693, 698; 242 NW2d 489 (1976):

> *The term "hostile" as employed in the law of adverse possession is a term of art and does not imply ill will.* Nor is the claimant required to make express declarations of adverse intent during the prescriptive period. *Adverse or hostile use is use inconsistent with the right of the owner*, without permission asked or given, use such as would entitle the owner to a cause of action against the intruder. See *Rose v Fuller*, 21 Mich App 172; 175 NW2d 344 (1970); also 25 Am Jur 2d, Easements and Licenses, § 51, pp 460-461. [Emphasis added.]

Defendant further argues that the trial court erred in refusing to hold that any use by plaintiffs' predecessors was permissive. Peaceful occupation or use with acquiescence or permission of the owner cannot ripen into a valid title by adverse possession, no matter how long possession is maintained. *Swartz v Sherston*, 299 Mich 423, 428; 300 NW2d 148 (1941). However, there was conflicting evidence as to when, if at all, defendant gave plaintiffs' predecessors permission to use the property. Defendant testified that she did so during a conversation that occurred in 1967, but other evidence indicated that this conversation did not take place until 1980, after the fifteen-year statutory period had already run. As we must give due deference to the findings of fact of the trial court, especially in light of its superior ability to assess the credibility of the evidence and witnesses, MCR 2.613(C), the trial court's finding that the conversation took place in 1980 and not in 1967 was not

clearly erroneous. Notably, there was evidence of a field survey having been conducted on October 31, 1980, during which a reference marker was placed. This evidence in particular gives credibility to the version of the facts of plaintiffs' predecessors, because it strongly suggests that the parties had some type of verbal confrontation about their respective property rights in 1980, rather than at an earlier time.

Affirmed. Plaintiffs, being the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ Stephen J. Markman
/s/ Richard Allen Griffin
/s/ William C. Whitbeck

[1] See MCL 600.5801; MSA 27A.5801 (generally providing a fifteen-year limitation period for bringing an action for recovery or possession of land).

[2] Indeed, land need not be fenced as a precondition to establishing adverse possession. *Monroe v Rawlings*, 331 Mich 49, 52; 49 NW2d 55 (1951).

[3] *DeGroot* makes no mention of *McQueen*.