STATE OF MICHIGAN

COURT OF APPEALS

ARNOLD WILSON and JUNE WILSON, Plaintiffs-Appellees/Cross Appellants,	UNPUBLISHED April 13, 1999
v	No. 206750 Bay Circuit Court
CLEDITH THOMPSON and LOIS THOMPSON, Defendants-Appellants/Cross Appellees.	LC No. 95-003895 CH

Before: Cavanagh, P.J., and MacKenzie and McDonald

PER CURIAM.

Defendants appeal as of right from a trial court judgment quieting title in favor of plaintiffs, following a bench trial. Plaintiffs cross appeal that part of the trial court's judgment granting defendants a limited license to enter their property. We affirm in part and reverse in part.

This is a quiet title action involving a strip of land that is 35 feet wide by 265 feet long, situated between defendants' and plaintiffs' adjacent lots. Plaintiffs are the record owners of the land, and defendants claim title to the land by adverse possession, acquiescence, or equitable estoppel, based primarily on the use of the land by their predecessor.

I

Defendants argue that the trial court's findings of fact supporting its conclusion that they failed to establish title to the disputed property under theories of adverse possession, acquiescence or estoppel are clearly erroneous. While actions to quiet title are equitable and therefore reviewed de novo, the trial court's findings of fact in a bench trial will not be reversed unless they are clearly erroneous. *Gorte v Department of Transportation*, 202 Mich App 161, 171; 507 NW2d 797 (1993); MCR 2.613(C). A finding is clearly erroneous when, although evidence supports it, this Court is left with a definite and firm conviction that a mistake was made. *Featherston v Steinhoff*, 226 Mich App 584, 588; 575 NW2d 6 (1997). Appellate courts must give regard to the trial court's superior ability and special opportunity to judge the credibility of the witnesses who appeared before it. MCR 2.613(C); *Brooks v Rose*, 191 Mich App 565, 570; 478 NW2d 731 (1991).

A. Adverse Possession

To establish adverse possession, claimants must show that their possession is actual, visible, open, notorious, exclusive, hostile, under cover of claim or right and continuous and uninterrupted for the statutory period of fifteen years. *West Michigan Dock & Market Corp v Lakeland Investments*, 210 Mich App 505, 511; 534 NW2d 212 (1995); *Gorte, supra* at 170; *Kipka v Fountain*, 198 Mich App 435, 439; 499 NW2d 363 (1993). The doctrine of adverse possession is strictly construed, and the party alleging title by adverse possession must prove the same by clear and cogent evidence of possession, which is evidence approaching the level of proof beyond a reasonable doubt. *Strong v Detroit & Mackinac Railway Co*, 167 Mich App 562, 568; 423 NW2d 266 (1988); *McQueen v Black*, 168 Mich App 641, 645; 425 NW2d 203 (1988).

The sole element of adverse possession before this Court is whether defendants' predecessor's use of the disputed land was hostile. The term "hostile" as employed in the law of adverse possession is a term of art and does not imply ill will, and the claimant is not required to make express declarations of adverse intent during the prescriptive period. Rather, adverse or hostile use is use inconsistent with the right of the owner, without permission sought or given, that would entitle the owner to a cause of action against the intruder. *Mumrow v Riddle*, 67 Mich App 693, 698, 242 NW2d 489 (1976); see also *Goodall v Whitefish Hunting Club*, 208 Mich App 642, 646; 528 NW2d 221 (1995). Where a landowner possesses land of an adjacent owner with the intent to hold to the true line, possession is not hostile and cannot establish adverse possession. *Gorte, supra* at 170; *DeGroot v Barber*, 198 Mich App 48, 51-53; 497 NW2d 530 (1993). However, if the possession manifests an intent to claim title to a visible, recognizable boundary, regardless of the true boundary line, the possession is hostile and adverse possession may be established. Simply being mistaken with regard to the true boundary line does not defeat a claim of adverse possession. *Id*.

The trial court did not clearly err in finding that defendants' predecessor's use of the land was not hostile, but was with the implicit permission of plaintiffs. In 1979, defendants' predecessor conveyed the "garden parcel" to plaintiffs; in so doing, defendants' predecessor solely determined the size and location of the parcel, and had his attorney draft the necessary paperwork. Shortly after the 1979 conveyance, a witness, plaintiff Arnold Wilson and defendants' predecessor measured the garden parcel and placed stakes for the purpose of laying drainage tile. According to the witness and plaintiff Arnold Wilson, the measurement showed that plaintiffs' property included all of the old dirt driveway, and that a portion of defendants' predecessor's trailer was over the property line, which was consistent with the survey performed from the warranty deed. Defendants' predecessor was present when the stakes were placed and was not surprised by the placement of the stakes. Everyone who was questioned agreed that defendants' predecessor was mentally competent and not easily influenced. Further, several witnesses testified that defendants' predecessor acknowledged and explicitly recognized the actual boundary line and indicated that his driveway was literally on plaintiffs' property. As such, there was no evidence to suggest that defendants' predecessor ever intended or attempted to take exclusive possession of the property under a claim of right and, therefore, defendants' predecessor continued to use the land with the intent to hold to the true property line. *Gorte, supra*.

In addition, the testimony showed that plaintiff Arnold Wilson and defendants' predecessor lived next door to each other for twenty-two years, that the nephew and uncle shared a father-son-type relationship, and that both plaintiffs and defendants' predecessor gardened in the tilled portion of the parcel and used each other's vegetables from the garden. Considering the relationship between defendants' predecessor and plaintiffs, defendants' predecessor's act of using the disputed property, which included the old dirt driveway, did not deprive plaintiffs of possession of their land. *See Kipka, supra* at 440.[1] Therefore, defendants failed to establish title to the disputed property by adverse possession.[2]

B. Acquiescence

Defendants rely on each of the three theories of acquiescence, which include: (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 v Atyeo*, 217 Mich App 676, 681; 552 NW2d 536 (1996).

1. Acquiescence for Statutory Period

A claim of acquiescence to a boundary line based on the statutory period of fifteen years, MCL 600.5801(4); MSA 27A.5801(4), requires a showing that the parties acquiesced in the line and treated the line as the boundary for the statutory period, regardless of whether there was a bona fide controversy regarding the boundary. *Sackett*, *supra* at 681; see also *Jackson v Deemar*, 373 Mich 22, 26; 127 NW2d 856 (1964). This Court has explained:

> The law of acquiescence is concerned with a specific application of the statute of limitations to cases of adjoining property owners who are mistaken about where the line between their property is. Adjoining property owners may treat a boundary line, typically a fence, as the property line. If the boundary line is not the recorded property line, this results in one property owner possessing what is actually the other property owner's land. Regardless of the innocent nature of this mistake, the property owner whose land is being possessed by another would have a cause of action against the other property owner to recover possession of the land. After fifteen years, the period for bringing an action would expire. The result is that the property owner of record would no longer be able to enforce his title, and the other property owner would have title by virtue of his possession of the land. [*Kipka, supra* at 438-439.]

The trial court's findings of fact in this regard are not clearly erroneous. The record does not support the conclusion that there was any mistake, doubt, or dispute between plaintiffs and defendants' predecessor as to the location of the true boundary line. Even if there was a doubt by plaintiffs when they purchased the property in 1979, that doubt was soon resolved when plaintiff Arnold Wilson, defendants' predecessor, and a witness measured the parcel shortly after the 1979 conveyance. Further, there was no evidence that defendants' predecessor or plaintiffs ever treated the edge of the tilled portion as the property line. To the contrary, plaintiffs testified that they never believed that the edge of the tilled portion was the boundary line, and several witnesses testified as to defendants'

predecessor's acknowledgment of the true boundary line. There was also evidence that plaintiff Arnold Wilson mowed north of the tilled edge, that both plaintiffs and defendants' predecessor gardened in the tilled portion, and that plaintiffs also used the disputed property freely.

2. Acquiescence Following a Dispute and Agreement

> . . . [W]here parties by mutual agreement, and for that express purpose, meet and fix a boundary line, and thereafter acquiesce in the line so established between them, such line will be considered the true line between them, notwithstanding the period of such acquiescence falls short of the time fixed by the statute of limitations for gaining title by adverse possession. [*Pyne v Elliott*, 53 Mich App 419, 427; 220 NW2d 54 (1974)(citations omitted).]

The trial court properly concluded that this doctrine does not apply to the instant case. Here, there was no dispute and agreement between defendants' predecessor and plaintiffs or defendants and plaintiffs that the edge of the tilled portion of the garden parcel would serve as the boundary line, and defendants have failed to indicate what evidence supports such a finding.

3. Acquiescence Arising from Intention to Deed to a Marked Boundary

A boundary line that has been established, even if incorrectly, for so long that a landowner's predecessors in interest intended to deed the property from that line, will not be disturbed. *Pyne, supra* at 427-428. Here, as the trial court found, no credible evidence was presented that defendants' predecessor intended to convey to plaintiffs only the tilled area, and defendants have failed to cite any evidence that supports such a conclusion. The warranty deed from defendants' predecessor to plaintiffs describes a definite width and length. Although defendants' predecessor and plaintiff Arnold Wilson did not measure the parcel until after the conveyance, defendants' predecessor was not surprised by the results of the measurement and did not attempt to alter the warranty deed. Further, several witnesses testified that defendants' predecessor did not intend for the edge of the tilled portion to serve as the property line. We note that the changing nature of the size of the tilled portion makes this claim doubtful. Therefore, this theory is inapplicable to the instant case.

We also note that defendants' reliance on *Geneja v Ritter*, 132 Mich App 206; 347 NW2d 207 (1984), is misplaced. Here, there was no evidence presented of any doubt or agreement between any of the landowners regarding the old dirt driveway being the fixed property line, and no affirmative act by any party, such as pouring a new driveway, that established the old dirt driveway as the fixed boundary line.

C. Estoppel

The doctrine of "equitable estoppel" rests on broad principles of justice. It arises when a party, by his representations, admissions, or silence, intentionally or negligently induces another party to believe certain facts; the other party justifiably relies and acts on this belief; and, the other party will be

prejudiced if the first party is allowed to deny the existence of the facts. *In re Beglinger Trust*, 221 Mich App 273, 276; 561 NW2d 130 (1997).

The trial court's findings in this regard are not clearly erroneous. Defendants have failed to identify any sufficient representation that plaintiffs made that caused them to act to their detriment. After purchasing the property, defendants made certain improvements on *their* property including, building a new home, a new gravel driveway, and a pole barn; defendants did not improve the old dirt driveway. Although the old driveway is on plaintiffs' property, the new gravel driveway provides adequate access to defendants' home, the mobile home, and the pole barn. Further, before defendants purchased the property from defendants' predecessor's estate, they had no conversations with plaintiffs about the boundary line, had no survey performed, and made no measurement of the property. This theory must fail.

In sum, the trial court's findings of fact supporting its conclusion that defendants failed to establish title to the disputed property under theories of adverse possession, acquiescence or estoppel are not clearly erroneous. We therefore affirm that part of the trial court's judgment quieting title in favor of plaintiffs.

II

Plaintiffs argue that the trial court erred in granting defendants a limited license because defendants never pleaded or requested a limited license in their affirmative defenses or countercomplaint as required by MCR 2.111(F)(2). On appeal, defendants do not dispute that they did not plead or request a limited license in their affirmative defenses or countercomplaint, but essentially contend that because the trial court treated their motion for supplemental findings as a motion to amend under MCR 2.118, their lack of pleading was not fatal.

When reviewing an equitable determination reached by the trial court, this Court reviews the conclusion de novo, but the supporting findings of fact are reviewed for clear error. See *Forest City Enterprises, Inc v Leemon Oil Co*, 228 Mich App 57, 67; 577 NW2d 150 (1998).

The trial court erred in granting defendants a limited license where defendants never requested a limited license in their responsive pleading, countercomplaint, or motion for supplemental findings. The only relevant request presented to the trial court was defendants' request for an easement. MCR 2.111(B)(1) states that a countercomplaint must contain a "statement of the facts, without repetition, on which the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend . . . ." Further, MCR 2.111(B)(2) states that a countercomplaint must contain a "demand for judgment for the relief that the pleader seeks." Likewise, MCR 2.111(F)(2) provides:

> A party against whom a cause of action has been asserted by complaint, cross-claim, counterclaim, or third-party claim must assert in a responsive pleading the defenses the party has against the claim. A defense not asserted in the responsive pleading or by motion as provided by these rules is waived, except for the defenses of

lack of jurisdiction over the subject matter of the action, and failure to state a claim on which relief can be granted.

Here, the trial court had no authority to issue a limited license where such was neither pleaded nor requested at any time. See *Peoples Savings Bank v Stoddard*, 359 Mich 297, 325; 102 NW2d 777 (1960); *City of Bronson v American States Ins Co*, 215 Mich App 612, 619; 546 NW2d 702 (1996). Granting a party relief on a claim never pleaded violates principles of due process because the defending party has been given no notice of the need to defend against the claim. "Leaving a defendant to guess upon what grounds plaintiff believes recovery is justified violates basic notions of fair play and substantial justice." *Dacon v Transue*, 441 Mich 315, 329; 490 NW2d 369 (1992). Where the pleadings do not provide reasonable notice to the defendants regarding a theory or claim, the pleadings fail to meet the standard of MCR 2.111, and the theory should be excluded. *Id.* at 327-328.

Further, the issue of a limited license was not explicitly or implicitly pleaded and tried during trial, which is evident by the fact that the trial court took additional testimony from witnesses at the hearing on defendants' motion for supplemental findings. In addition, in their motion for supplemental findings, defendants never requested leave to amend their pleadings or countercomplaint to seek a limited license. We therefore reverse that part of the trial court's judgment granting defendants a limited license to enter plaintiffs' property.

Affirmed in part and reversed in part.

/s/ Mark J. Cavanagh
/s/ Barbara B. MacKenzie
/s/ Gary R. McDonald

[1] Defendants argue that the trial court erred in not giving weight to the testimony of defendants' predecessor's son, who testified that defendants' predecessor told him that the edge of the tilled portion was the property line. However, it is the province of the trial court, sitting as the fact finder, to weigh evidence and to believe or to disbelieve any testimony, and this Court gives regard to the trial court's superior ability and special opportunity to judge the credibility of the witnesses who appeared before it. MCR 2.613(C).

[2] Plaintiffs also argue that defendants failed to establish the other necessary elements of adverse possession, and that defendants were estopped from claiming title to the land because defendants' predecessor gave plaintiffs a warranty deed. Because the trial court did not address these arguments, this Court need not do so. See *Bowers v Bowers*, 216 Mich App 491, 495; 549 NW2d 592 (1996); *Schubiner v New England Ins Co*, 207 Mich App 330, 331; 523 NW2d 635 (1994).