

STATE OF MICHIGAN
COURT OF APPEALS

HARVEY GABLER and MARY GABLER,

Plaintiffs-Appellees,

v

JAMES L. BEST and MARIE BEST,

Defendants-Appellants.

UNPUBLISHED

November 12, 2002

No. 234241

St. Clair Circuit Court

LC No. 99-003205-CZ

Before: Talbot, P.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

Defendants¹ appeal as of right a judgment quieting title to a disputed area of land in plaintiffs, and awarding plaintiffs \$3,250 for damage defendant James Best inflicted on portions of plaintiffs' deck and seawall that were encroaching on defendants' property. We affirm.

Defendants argue that the trial court erred in granting plaintiffs title by adverse possession because plaintiffs' maintenance and improvement of an encroaching seawall on the lakeside of defendants' property was not hostile. We review the trial court's holdings in an action to quiet title de novo, *Gorte v Dep't of Transportation*, 202 Mich App 161, 165; 507 NW2d 797 (1993), and the trial court's findings of fact for clear error. *Grand Rapids v Green*, 187 Mich App 131, 135-136; 466 NW2d 388 (1991).

To establish ownership through adverse possession, a party must show that possession has been "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); MCL 600.5801(4). These elements must be shown by clear and cogent evidence. *Kipka v Fountain*, 198 Mich App 435, 439; 499 NW2d 363 (1993). We note as a preliminary matter that the trial court's application of the "preponderance of the evidence" standard was harmless because the underlying facts respecting the plaintiffs' use of twenty-eight inches of the lake side of defendants' property were undisputed, leaving only the legal question whether this use was hostile.

¹ Defendant James Best died before trial, but after his deposition was taken.

Defendants argue that plaintiffs' use should not be considered hostile because the parties became related by marriage in 1980 or, alternatively, because the encroaching seawall was beneficial to both properties. However, this argument is based on a misunderstanding respecting the legal definition of "hostility." "The term 'hostile' as employed in the law of adverse possession is a term of art and does not imply ill will"; rather, hostile use is that which is "inconsistent with the right of the owner, without permission asked or given" and "would entitle the owner to a cause of action against the intruder." *Mumrow v Riddle*, 67 Mich App 693, 698; 242 NW2d 489 (1976). Because defendants could have sued plaintiffs for intruding on their land by maintaining and improving encroaching structures regardless of the parties' relationship or the structures' arguable mutual benefit, plaintiffs' use meets the legal definition of hostility. *Id.*

Defendants' attempt to liken the parties' family relationship to the legal relationship of joint tenants is unconvincing. Co-tenants have a legal right to use the property in which they have a joint interest, which is why a co-tenant claiming adverse possession must meet a very high burden in showing that the use was hostile to another co-tenant. By contrast, the fact that plaintiff married defendant's niece did not give him a legal right to use defendants' property, regardless whether that use was mutually beneficial. Therefore, the rationale underlying the higher standard of proof for co-tenant adverse possession is simply inapplicable to this situation.

Defendants also argue plaintiffs failed to establish adverse possession by clear and cogent evidence respecting their boundary on the canal side of the parties' properties. The evidence of this use consisted only of conflicting testimony respecting whether a second seawall was extended before or after the fifteen-year statutory period necessary to establish adverse possession. Although the trial court did not directly state that it found defendant's testimony more credible respecting the date of the steel seawall installation, given the absence of dispositive photographic or documentary evidence, the parties' relative credibility was the only tool at the court's disposal for reaching a conclusion.

Clear error exists only when, on review of the entire record, we are left with the definite and firm conviction that a mistake has been made. *Walters v Snyder (After Remand)*, 239 Mich App 453, 456; 608 NW2d 97 (2000). Because the trial court was in a better position to judge the witnesses' credibility, *State Farm Fire & Cas Co v Couvier*, 227 Mich App 271, 275; 575 NW2d 331 (1998), having reviewed the record, we do not have a definite and firm conviction that the trial court was mistaken in crediting plaintiff's testimony rather than that of defendants' witnesses. *Walters, supra* at 456. Accordingly, we decline to reverse on this ground.

Affirmed.

/s/ Michael J. Talbot
/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald