STATE OF MICHIGAN

COURT OF APPEALS

ESTATE OF WYOLENE STERRETT by MICHAEL J. STERRETT, Plaintiff/Counter-Defendant-Appellee/Cross-Appellant,	UNPUBLISHED January 15, 2004
v	No. 241996 Cheboygan Circuit Court
MILTON H. WATSON, Defendant/Counter-Plaintiff-Appellant/Cross-Appellee.	LC No. 00-006746-CH

Before: Markey, P.J., and Murphy and Talbot, JJ.

PER CURIAM.

In this adverse possession case, defendant appeals as of right from a judgment granting plaintiff title by adverse possession to a portion of property owned by defendant.[1] We reverse and remand.

The dispute involves a lot of vacant land in Cheboygan County, identified as lot number 56, that defendant inherited from his cousin, Sally Punch, who purchased the property in 1944. Plaintiff owned the adjacent lot on the west side of Punch's property, identified as lot number 57 and plaintiff's son, David Sterrett owned the adjacent lot to the east side of defendant's property, identified as lot 55.[2] At all pertinent times, plaintiff used her property for vacation purposes in the summer and occasionally in the winter.

Defendant inspected the property several times during the 1950s through the 1970s. In the 1960s, there was a structure on plaintiff's lot. By the 1970s, there was a structure on David's lot. In 1989, defendant's son visited the vacant property and did not notice anything to indicate

[1] Plaintiff Wyolene Sterrett passed away before the commencement of trial and her estate was replaced as plaintiff.

[2] In this case, the trial court ruled that plaintiff failed to establish a claim of adverse possession over another lot owned by defendant. That ruling is not part of this appeal.

that the property was being used by others. However, in a visit to the property in 1993, defendant's son noticed that the grass was mowed and there was a path connecting both sides of the property. He also noticed a trailer and a basketball pole with a backboard and he was uncertain whether they were situated on Punch's or plaintiff's property. He obtained the property specifications for Punch's and the adjacent lots and returned to the property. He received permission to enter onto plaintiff's property on lot 57 and he measured the distances. He determined that the trailer and the basketball pole were not located on Punch's property. He also went to lot 55 and spoke with plaintiff's son, David Sterrett. Defendant's son informed David that his family owned the vacant property and he granted David permission for the Sterretts to maintain the property and to use it for entertainment purposes. He instructed David not to make any changes to the property and not to remove any trees. David inquired whether the vacant property was for sale. When he learned that the vacant property was not for sale, he asked defendant's son to remove himself from David's property. Defendant's son walked back to Punch's property. David did not ask defendant's son to leave Punch's property. In 1999, defendant's son again visited the property and spoke with another of plaintiff's sons, Dr. Michael Sterrett. Again, he stated that his family owned the vacant property and he granted Michael permission for the Sterretts to maintain the property and to use it for entertainment purposes.

In June, 2000, defendant instructed his realtor, John Schulz, to sell the property. Schulz inspected the vacant property and detected nothing to indicate that the property was being used. He testified that the property had not been recently maintained. Schulz secured a purchaser, Maureen Powers who also inspected the property. Powers testified that there was nothing on the property to indicate that it was being used by others. Her immediate offer to purchase the property was accepted and she hired a surveyor to define the property borders. About one month later, before the closing, she visited the property and was surprised to find it fenced. The property now contained a trailer, a flower bed, lawn chairs and "no trespass" signs.

Meanwhile, upon seeing the sale signs on the property, plaintiff's daughter, Saranne Benson, informed plaintiff that she may have an adverse possession claim because she had maintained the property. A few days later, Benson visited Schulz' realty office and asked for the property listing. According to Schulz, Benson said that the listed price was too high for the property. Benson denied that she discussed the price of the property with Schulz. Benson admitted that she did not inform Schulz that her mother was claiming title by way of adverse possession. Shortly thereafter, plaintiff brought the instant lawsuit claiming adverse possession. She claimed that she and her children maintained the property since the 1950s so that her children and grandchildren could use it for recreational purposes.

On appeal, defendant contends that the trial court's findings of fact were clearly erroneous. Actions to quiet title are equitable; therefore, the trial court's holdings are reviewed de novo. *McFerren v B & B Inv Group*, 253 Mich App 517, 522; 655 NW2d 779 (2002). The factual findings of the trial court are reviewed for clear error. *Id*.

To establish adverse possession, the claimant must show that her 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, the true title owner loses the ability to seek the claimant's ejection. *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 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). This Court has previously described the clear and cogent evidence standard as "more than a preponderance of the evidence, approaching the level of proof beyond a reasonable doubt." *Walters v Snyder*, 225 Mich App 219, 223; 570 NW2d 301 (1997), citing *McQueen, supra*. "The evidence offered in support of adverse possession must be strictly construed with every presumption being exercised in favor of the record owner of the land." *Rozmarek v Plamondon*, 419 Mich 287, 292; 351 NW2d 558 (1984).

Evidence presented at trial demonstrated that the trial court clearly erred in finding that plaintiff's use of a portion of the property was under cover of claim or right. As this Court has explained,

> It is not necessary, however, that the party in possession should have expressly declared his intention to hold the property as his own, nor need his claim thereto be a rightful one. That his acts and conduct clearly indicate a claim of ownership is enough. 'Claim of title' is where one enters and occupies land, with the intent to hold it as his own, against the world, irrespective of any shadow or color or right or title. [*Connelly v Buckingham*, 136 Mich App 462, 468-469; 357 NW2d 70 (1984) (citations omitted).]

However, recognition that someone has superior title, as opposed to knowledge or belief someone has superior title, destroys the adverse nature of possession. *Smith v Feneley*, 240 Mich 439, 441; 215 NW 353 (1927). An attempt to purchase property will only defeat a claim of adverse possession where it involved recognition of superior title rather than an attempt to quiet title. *Id*. at 443. Claim of title is asserted by entering and occupying the land with the intent to keep it, regardless of another's right or title. *Id*.

The facts indicate that both plaintiff and her husband recognized defendant's superior title. Plaintiff testified that her husband, who passed away in 1978 or 1979, had inquired about purchasing the vacant land, but she did not know what resulted from the inquiry. Plaintiff testified that an occasional realtor would approach her, inquiring whether she knew the vacant property was for sale. Her answer was that she did not know. This indicates that plaintiff recognized the superior title of the owner of the property. Additionally, plaintiff did not dispute the testimony by defendant's son that her son David inquired whether the property was for sale in 1993. Nor did plaintiff dispute the testimony that David asserted superior title over his own property when he asked defendant's son to leave but did not assert his mother's superiority of title over the property in lot 56 when defendant's son entered upon it after leaving David's property. Plaintiff also did not dispute testimony that her other son, Michael, did not claim superiority of title on behalf of his mother in 1998 when defendant's son granted the Sterrett's permission to maintain and use the property.

Further, the evidence did not establish plaintiff's intent to hold the property as her own. In this case, Plaintiff testified that she believed the land belonged to the state. She specifically stated that she maintained the property to make her own property "look pretty" and because she wanted to keep her own children clean when they played on the property. She also testified that she would have maintained the property even if she knew the owners. Plaintiff's daughter, Benson, testified that her father instructed her to plant trees along the property border to "frame"

the Sterrett lot. Another daughter, Frances Jones, testified that her father instructed the children to keep the property on lot 56 clean because they used it. Further, none of the Sterretts informed defendant's son that they claimed title to the property during the encounters in 1993 and 1999, and Benson did not inform defendant's realtor, Schulz, of any claim of title when she asked for the property listing. The evidence in this case clearly indicated that plaintiff and her husband conducted themselves in a manner that did not show intent to claim superior title or to keep the property or deprive the property from its rightful owner, but merely to instill in their children respect for the property of others.[3] Because plaintiff failed to satisfy the above required element of an adverse possession claim, it is not necessary for this Court to address whether plaintiffs satisfied any of the remaining elements.

Defendant next argues the court failed to address his trespass claim against plaintiff for the fence she erected around the property and for placing a trailer, a flower bed, lawn chairs and "no trespass" signs on the property immediately prior to bringing the instant lawsuit. Because the trial court determined that plaintiff had acquired title by adverse possession, it did not address the trespass issue. Generally, an issue not raised before and considered by the trial court is not preserved for appellate review. *Jerico Constr, Inc v Quadrants, Inc*, 257 Mich App 22, 35 n 6; 666 NW2d 310 (2003). Therefore, we remand the case to the trial court for further proceedings.

In light of our holding, we do not address defendant's remaining claims or plaintiff's counterclaim on appeal. We reverse and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Michael J. Talbot

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[3] In support of his argument that plaintiff expressly testified to her lack of intent to claim title by adverse possession, defendant relies heavily on the fact that plaintiff testified in her deposition that was admitted into evidence that she never intended to possess property that "belonged to anyone" and that she did not want "nothing that belongs to anybody." This Court has held that if the conduct of a plaintiff clearly establishes her intent to claim title, the plaintiff will be held to have acquired title by adverse possession *notwithstanding* her statement at trial that she did not intend to claim any land outside of that identified in the deed. *Connelly, supra* at 469-470. As previously discussed above, plaintiff failed to establish by clear and cogent evidence that she had a claim of title to defendant's property.