STATE OF MICHIGAN

COURT OF APPEALS

JEANIE A. YOUTSEY and SHERMAN E. YOUTSEY,

Plaintiffs/Counter-Defendants-Appellees,

v

MURLIN W. WAGNER, Deceased,

Defendant,

and

MAUREEN MARKS and TERRI L. WAGNER, Individually and as Co-Personal Representatives of the Estate of MURLIN W. WAGNER,

Defendants/Counter-Plaintiffs-Appellants.

UNPUBLISHED
October 22, 2009

No. 285765
Wayne Circuit Court
LC No. 06-630300-CH

Before: Davis, P.J, and Whitbeck and Shapiro, JJ

PER CURIAM.

In this property dispute, defendants/counter-plaintiffs[1] appeal as of right the trial court's judgment that plaintiffs/counter-defendants owned the disputed property by adverse possession. We affirm.

Defendants first argue that the trial court erred in concluding that all of the elements of adverse possession were established. We disagree.

We review de novo actions that are equitable in nature, such as quiet title actions, but the trial court's factual findings are reviewed for clear error. *Sackett v Atyeo*, 217 Mich App 676,

[1] Murlin Wagner died while this case was pending before the trial court.

680; 552 NW2d 536 (1996). Conclusions of law are also reviewed de novo. *Ambs v Kalamazoo Co Road Comm*, 255 Mich App 637, 651; 662 NW2d 424 (2003).

To establish adverse possession, a party must show that his or her possession is actual, visible, open, notorious, exclusive, hostile, under cover of a claim of right, and continuous and uninterrupted for the statutory period of fifteen years. MCL 600.5801(4); *West Michigan Dock & Market Corp v Lakeland Investments*, 210 Mich App 505, 511; 534 NW2d 212 (1995). The party claiming title must prove adverse possession with clear and cogent evidence. *Killips v Mannisto*, 244 Mich App 256, 258; 624 NW2d 224 (2001).

The fifteen-year period begins when the rightful owner has been disseised of the land. MCL 600.5829. "Disseisin occurs when the true owner is deprived of possession or displaced by someone exercising the powers and privileges of ownership." *Kipka v Fountain*, 198 Mich App 435, 439; 499 NW2d 363 (1993).

Defendants, in effect, concede that plaintiffs' possession of the disputed property was actual, visible, open, notorious, and exclusive because they do not provide any argument to the contrary. Further, the testimony from five of plaintiffs' neighbors, who were all familiar with the 20 feet wide by 300 feet long strip of disputed property ("disputed property"), supported the trial court's findings because the testimony indicated that plaintiffs were the only ones they saw using, maintaining, and improving the disputed property. Plaintiffs did so by mowing the grass and removing snow, adding a paved driveway to a portion of the disputed property, parking vehicles on the disputed property, and also using the disputed property as the sole means to access the barn in the back of their property.

Disseisin occurred in 1988 when plaintiffs moved into the house at 20081 Inkster Road in Brownstown Township, Michigan, ("parcel A") and began using the disputed property, which was a part of the vacant lot at 20101 Inkster Road ("parcel B"). Defendants argue that plaintiffs' claim must fail because the use of the disputed property was permissive. Defendants assert that this permission began while plaintiff Jeanie Youtsey ("plaintiff Jeanie") grew up on parcel A as a child. However, after moving out and then returning some years later when she purchased parcel A in 1988, there is no evidence that plaintiffs were given permission to use the disputed property. Although the testimony from the mother of plaintiff Jeanie, Kathleen Wagner, and defendants purported to show that there were no restrictions on the use of the disputed property, the same testimony established that explicit permission was never given. A lack of restrictions does not equate to permission. Further, the testimony from Kathleen and plaintiff Jeanie also showed that the issue of whether plaintiffs had permission to use the disputed property was not discussed when plaintiffs assumed ownership of parcel A in 1988. Additionally, as plaintiffs argue, although plaintiff Jeanie may have implied permission from her parents, Murlin Wagner ("Murlin") and Kathleen to use the disputed property on parcel B while growing up, there is no evidence that this implied permission included plaintiffs exercising the powers and privileges of ownership by adding a paved driveway, planting trees and other shrubbery, keeping vehicles on the disputed property, mowing and removing snow, and allowing their children to play on the disputed property for a continuous period of over 15 years.

Defendants also argue that plaintiffs failed to establish that they were making their claim under the cover of a claim of right because plaintiffs were aware they did not have title to the property. However, "claim of right" means that the adverse claimant claims title to the property

by openly exercising acts of ownership with the intention of holding the property as his own to the exclusion of all others. *Walker v Bowen*, 333 Mich 13, 21; 52 NW2d 574 (1952). It is not necessary for the party in possession to expressly declare his intention to hold the property as his own or for his claim to be a rightful one. *Id*. Further, that the acts and conduct clearly indicate a claim of ownership is sufficient. *Id*. Here, the use of the disputed property by plaintiffs that was described above establish that they were openly exercising acts of ownership with the intention of holding the property as their own. Further, plaintiff Jeanie specifically testified that it was their intent to hold the disputed property as their own.

Defendants also argue that plaintiffs did not establish that their claim was hostile because they did not notify plaintiff Jeanie's father, Murlin, of an intention to make a hostile claim to the property. "Hostile" means that the use is "inconsistent with the right of the owner, without permission asked or given, and which use would entitle the owner to a cause of action against the intruder." *Wengel v Wengel*, 270 Mich App 86, 92-93; 714 NW2d 371 (2006) (quotation marks and citation omitted). There is no requirement that a party notify the true owner about their claim. Rather, as was the case here, actions such as using, maintaining, and improving the disputed property on a continuing basis were actions inconsistent with the rights of the owners and establish that plaintiffs were acting in a hostile manner for the purposes of a claim of adverse possession. Therefore, on the totality of the record, we agree with the trial court's conclusion that the elements of adverse possession were established.

Next, defendants argue that the trial court erred by not considering the fiduciary relationship between plaintiff Jeanie and Murlin. Defendants contend that a presumption of undue influence arose because plaintiff Jeanie had the opportunity to influence Murlin, and benefited from Murlin by adversely possessing the disputed property. We disagree.

Because this issue is unpreserved, we review for plain error. *Kloian v Schwartz*, 272 Mich App 232, 242; 725 NW2d 671 (2006). To avoid forfeiture under the plain error rule, an error must have occurred, it must have been plain, i.e., clear or obvious, and it must have affected substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

A presumption of undue influence attaches to a transaction where the evidence establishes:

> (1) the existence of a confidential or fiduciary relationship between the grantor and a fiduciary, (2) that the fiduciary (or an interest which he represents) benefits from the transaction, and (3) that the fiduciary had an opportunity to influence the grantor's decision in that transaction. [*In re Peterson Estate*, 193 Mich App 257, 260; 483 NW2d 624 (1991), *In re Estate of Mikeska*, 140 Mich App 116, 121; 362 NW2d 906 (1985).]

A confidential or fiduciary relationship exists when one party has placed complete trust in the other party who has the requisite knowledge, resources, power, or moral authority to control the subject matter at issue. *In re Karmey Estate*, 468 Mich 68, 74-75; 658 NW2d 796 (2003). Moreover, a fiduciary relationship is a broad term that focuses on relationships involving inequality. *Id*. at 74 n 3.

Although there was evidence the plaintiff Jeanie provided care for Murlin after he had suffered a stroke and while he was living next-door on parcel B, there was no evidence that this was a relationship where Murlin had placed complete trust in plaintiff Jeanie. Further, there was no evidence that plaintiff Jeanie ever exercised a power of attorney on behalf of Murlin or that plaintiff Jeanie engaged in any behavior that involved handling Murlin's affairs. See *In re Estate of Swantek*, 172 Mich App 509, 514; 432 NW2d 307 (1988). Also, there is no evidence that shows plaintiff Jeanie was making any decisions for Murlin. In light of this lack of evidence, we conclude that the trial court did not commit plain error in failing to address whether there was a fiduciary relationship existed. Additionally, even if a fiduciary relationship did exist, there was no evidence to establish the presumption of undue influence because there was no evidence of an actual transaction between Murlin and plaintiff Jeanie regarding the disputed property. Therefore, defendants' claim must fail.

Defendants also argue that if the trial court found in favor of plaintiffs on the basis of the doctrine of acquiescence then its decision was in error. Again, unpreserved issues are reviewed for plain error. *Kloian, supra* at 242.

The trial court clearly stated, "So I'm going to gran[t] judgment in favor of the plaintiff quieting title on adverse possession to that property." Further, at no time did plaintiffs base their claim on the doctrine of acquiescence. Therefore, the record is clear that plaintiffs did not raise the doctrine of acquiescence and the trial court made its decision solely on the ground of adverse possession alone. Defendants' argument is unsupported by the record and without merit.

Lastly, defendants argue that the trial court erred by relying on *Stanford v Baublis*, unpublished opinion per curiam of the Court of Appeals, issued April 17, 2008 (Docket No. 270751), because it is entirely distinguishable from the instant case. We disagree.

As the parties acknowledge, "[a]n unpublished opinion is not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1). However, an unpublished opinion may be relied upon by a trial court if it is on point and persuasive. *Vanzandt v State Employees Retirement System*, 266 Mich App 579, 595 n 9; 701 NW2d 214 (2005).

This issue is largely a reprise of defendants' argument that the trial court erred in finding that plaintiffs' had obtained title of the disputed property through adverse possession. Defendants contend that because *Stanford* is entirely distinguishable from the instant case, the trial court erred by relying on it. In *Stanford*, *supra*, this Court affirmed the trial court's judgment for the plaintiffs on a claim of adverse possession. *Id* at. 1. The plaintiffs in *Stanford* disseised the defendant's predecessor when they started using the disputed property as if they owned it, which included removing snow, planting vegetation, and parking their car on it. *Id*. at 2. This Court held in *Stanford* that although a person may have consent to use property, this does not necessarily equate to permission, rather, depending on the circumstances, a person can give compliance or yield to the actions of another without giving permission. *Id*. at 3.

The trial court in the instant case found the analysis in *Stanford* persuasive because of the similar facts and its on point analysis. We agree with the trial court's view that *Stanford* is analogous. Both cases involve use of a disputed piece of property involving a driveway, where the plaintiffs in each case used, maintained, and improved the disputed property. Further, although the defendants and the predecessors to the defendants in each case were aware of the

use of the disputed properties, merely yielding, or in the instant case, not placing restrictions on the use, did not constitute permission. Defendants point out that the family dynamic present here was not present in *Stanford*. However, regardless of the family relationship between the parties, there was not any testimony regarding explicit permission to use the disputed property in either case. Therefore, because *Stanford* is analogous, defendants' argument must fail.

Affirmed.

/s/ Alton T. Davis
/s/ William C. Whitbeck
/s/ Douglas B. Shapiro