STATE OF MICHIGAN

COURT OF APPEALS

JUDITH L. DEGRAFFENREID and JULIA B. LAMAR,

Plaintiffs-Appellants,

v

SILVER-DALE DEVELOPMENT, L.L.C. and FLORA-DALE CONDOMINIUM ASSOCIATION,

Defendants-Appellees.

UNPUBLISHED
February 28, 2012

No. 299521
Oceana Circuit Court
LC No. 09-007635-CH

Before: WILDER, P.J., and HOEKSTRA and BORRELLO, JJ.

PER CURIAM.

Plaintiffs appeal by right from the decision of the circuit court granting summary disposition in favor of defendants pursuant to MCR 2.116(I)(2). We affirm.

The instant case arises out of a property dispute over a small, triangular strip of property ("the disputed property") located immediately east of a plot owned by plaintiffs (lot 3) and immediately west of a road cutting through a plot owned by defendants (lot 4). A survey shows that the disputed property is located entirely within defendants' plot, but plaintiffs and their predecessors in interest allege to have been the sole maintainers of the disputed property from the time it was created by the installation of the road in 1957 until the instant case arose in 2009. Moreover, plaintiffs constructed a number of fixtures on the disputed property in and after the year 2000.

Plaintiffs filed an action claiming title to the disputed property by either adverse possession or acquiescence. Plaintiffs then filed for summary disposition under MCR 2.116(C)(10), and defendants, in response, requested summary disposition under MCR 2.116(I)(2). The trial court granted summary disposition in favor of defendants on the grounds that, based on the evidence submitted by plaintiffs, plaintiffs could not prevail on either of the theories advanced.

A trial court's decision on a motion for summary disposition brought under MCR 2.116(C)(10) is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in

the action or submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 166; 713 NW2d 717 (2006). The motion is properly granted if the evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Michalski v Bar-Levav*, 463 Mich 723, 730; 625 NW2d 754 (2001).

Plaintiffs first argue that the trial court erred in failing to grant them summary disposition based on acquiescence. The three theories of acquiescence are "(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." *Walters v Snyder*, 239 Mich App 453, 457; 608 NW2d 97 (2000). However, only the first theory of acquiescence is applicable in this case. Under this theory, "acquiescence to a boundary line may be established where the line is acquiesced in for the statutory period irrespective of whether there has been a bona fide controversy regarding the boundary." *Sackett v Atyeo*, 217 Mich App 676, 681; 552 NW2d 536 (1996). The relevant statutory period is 15 years. MCL 600.5801(4); see also *Sackett*, 217 Mich App at 681. "This theory of acquiescence does not require that the possession be hostile or without permission as would an adverse possession claim." *Mason v City of Menominee*, 282 Mich App 525, 529; 766 NW2d 888 (2009). "Further, the acquiescence of predecessors in title can be tacked onto that of the parties in order to establish the mandated period of fifteen years." *Id.* (quotation marks and brackets omitted). Lastly, "[a]lthough Michigan precedent 'has not defined an explicit set of elements necessary to satisfy the doctrine of acquiescence,' caselaw has held that acquiescence is established when a preponderance of the evidence 'establishes that the parties *treated* a particular boundary line as the boundary line.'" *Id.* at 529-530, quoting *Walters*, 239 Mich App at 457-458 (emphasis in original).[1]

Plaintiffs assert that a new boundary line was established by the installation of wooden posts sometime between 1959 and 1960 along the eastern edge of the disputed property; several of the posts are still in existence today, but many alleged to have been installed are not. Plaintiffs provided little evidence as to the exact locations of all the posts, as well as to the years in which they stood. Assuming arguendo that a row of small, spaced posts set alongside a road constituted the type of boundary demarcation our case law requires,[2] plaintiffs have failed to

[1] We note that plaintiffs repeatedly stated in their brief on appeal that the elements for acquiescence were to establish "actual, visible, open, notorious, exclusive, continuous and uninterrupted" possession for 15 years. However, plaintiffs failed to provide any citation to authority for this "law" in any of the many instances it was stated in the brief. Moreover, our review of case law shows that these are elements for adverse possession, not acquiescence. See *Gorte v Dep't of Transp*, 202 Mich App 161, 170; 507 NW2d 797 (1993).

[2] Typically, such cases involve clear, established boundaries that are either agreed upon or marked off by man-made or natural barriers such as fences, hedgerows, or tree lines. See, e.g., *Johnson v Squires*, 344 Mich 687, 691-692; 75 NW2d 45 (1956); *Kipka v Fountain*, 198 Mich App 435, 439; 499 NW2d 363 (1993). We have serious doubts that anyone could have viewed the posts at issue and recognized them as a boundary line demarcation because they, instead, appear to be so closely associated with the road, not unlike a primitive guard rail. In fact, the

provide any evidence that *defendants treated* that boundary line as the true boundary line. While plaintiffs presented evidence that defendants did not care for or maintain the property west of the post boundary line, plaintiffs did not present evidence that such behavior was different from how defendants treated the property to the east of the post boundary line. Instead, plaintiffs rely solely on how *they* treated the boundary line. But acquiescence involves how *both* parties treated the boundaries. *Mason*, 282 Mich App at 529-530. Indeed, the word "acquiesce" means "to assent tacitly." *Random House Webster's College Dictionary* (1997). This definition is consistent with our case law, which requires that there must be some proof that the other party tacitly assented to the proposed boundary line. Plaintiffs failed to present any evidence of how defendants tacitly assented or treated the posts as the true boundary line. Therefore, the trial court did not err when it granted summary disposition in favor of defendants on this count.

Plaintiffs also failed to establish a claim of adverse possession, which requires proof of possession that was actual, visible, open, notorious, exclusive, hostile, under cover of claim or right, and continuous and uninterrupted for the statutory period of 15 years. *W Mich Dock & Market Corp v Lakeland Investments*, 210 Mich App 505, 511; 534 NW2d 212 (1995). "[T]he true owner must have actual knowledge of the hostile claim or *the possession must be so open, visible, and notorious as to raise the presumption of notice to the world that the right of the true owner is invaded intentionally*." *Burns v Foster*, 348 Mich 8, 15; 81 NW2d 386 (1957) (emphasis in original). And like in acquiescence cases, tacking is permitted. *Killips v Mannisto*, 244 Mich App 256, 259; 624 NW2d 224 (2001).

In this case, plaintiffs assert that they and their predecessors in interest adversely possessed the disputed property from the time the road was created in 1957 until 2009 by virtue of mowing the property, clearing it of leaves, planting flowers, and utilizing it as extra parking for their cottage. They further assert that such possession was continuous and uninterrupted because defendants made no attempt to maintain the disputed property themselves until 2009, after plaintiffs had already filed this suit.

Regarding the "continuous and uninterrupted" element, "there must be such a continuity of possession as will furnish a cause of action for every day during the whole period required to perfect title by adverse possession." *Doctor v Turner*, 251 Mich 175, 186-187; 231 NW 115 (1930). The testimony established that from 1967 to 1998 the cottage was only used for slightly more than six weeks a year at most. Thus, plaintiffs cannot meet the continuous requirement. A few weeks per year does not properly allow for the true owner a reasonable opportunity to be put on notice of an adverse claim to a strip of land with no structures.[3] Moreover, plaintiffs make no

---

posts spanned, at some point, the entire length of the road, extending to the lots north of plaintiffs' lot.

[3] We note that the Supreme Court has allowed for adverse possession where a cottage was occupied seasonally during the summers. *Cotton v McClatchey*, 277 Mich 109; 268 NW 894 (1936). But in *Cotton*, the issue was not a particular strip of nondescript land; instead, the issue revolved around the summer cottage itself. The existence of the cottage was clearly open since a witness stated, "You could see that cottage from all around the lake, through three sides, from the south, north, and west." *Id.* at 111. Thus, the fact that someone only physically occupied the

claim to have done more than mow, rake, plant flowers, and park upon the disputed property until the year 2000. This "routine maintenance," as plaintiff Judith DeGraffenreid described in her affidavit, is also insufficient as a matter of law to meet the open and notorious requirement. A rational fact-finder could not have concluded that such "possession" was "so open, visible, and notorious as to raise the presumption of notice to the world that the right of the true owner is invaded intentionally." Given the lack of evidence sufficient to show actual and continuous possession of the disputed property prior to the year 2000, plaintiffs cannot prove a claim of adverse possession. Thus, the trial court did not err when it granted summary disposition to defendants on this count as well.

Finally, plaintiffs argue that trial court erred in failing to allow them to submit parol evidence when interpreting the easement agreement signed by plaintiffs' predecessor in interest. The trial court did, however, accept and consider the affidavit of plaintiffs' predecessor in interest with regard to his intent at the time of signing an easement agreement. Therefore, plaintiffs' assertion is without merit. Moreover, because the subjective belief of plaintiffs' predecessor does not affect our analysis of the central issues, any error on this matter would have been harmless. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Joel P. Hoekstra
/s/ Stephen L. Borrello

---

cottage during the summer months was not significant. The Court did stress that the *cottage*, i.e., the property at the heart of the issue, was there continuously, however. *Id.* at 114.