STATE OF MICHIGAN

COURT OF APPEALS

GERALD MASON and KAREN MASON, Plaintiffs-Appellees/Cross-Appellants,	FOR PUBLICATION February 26, 2009
v	No. 282714 Menominee Circuit Court
CITY OF MENOMINEE, Defendant-Appellant/Cross-Appellee.	LC No. 02-010066-CH Advance Sheets Version

Before: Saad, C.J., and Sawyer and Beckering, JJ.

BECKERING, J. (*concurring*).

I concur with my colleagues that in this dispute over a 60-foot strip of municipal land adjoining plaintiffs' property, plaintiffs are entitled to quiet title on the basis of the doctrine of acquiescence because the record shows by a preponderance of the evidence that both parties treated the fence installed by defendant as the property line for the requisite 15-year period. *Walters v Snyder*, 239 Mich App 453, 457-458; 608 NW2d 97 (2000) (*Walters II*); MCL 600.5801(4). I write separately, however, to express my concern that in actions involving a dispute over municipal land, the Legislature may not have anticipated the potential for inconsistent outcomes, depending on which party beats the other to the courthouse, given its chosen language in MCL 600.5821(2).

MCL 600.5821 addresses whether a period of limitations applies in actions for the recovery of land when the state or a municipal corporation is involved. As the majority points out, MCL 600.5821(1), pertaining to state land, and MCL 600.5821(2), pertaining to municipal land, are worded differently, and state as follows:

> (1) Actions for the recovery of any land *where the state is a party* are not subject to the periods of limitations, or laches. However, a person who could have asserted claim to title by adverse possession for more than 15 years is entitled to seek any other equitable relief in an action to determine title to the land.

(2) Actions *brought by* any municipal corporations for the recovery of the possession of any public highway, street, alley, or any other public ground are not subject to the periods of limitations. [Emphasis added.]

Notably, subsection 1 states that periods of limitations do not apply in actions for the recovery of any land "where the state is a party . . . ." Given the statute's wording, regardless of whether the state is the plaintiff or the defendant, it does not lose its right to recover possession of its land after a certain period. Subsection 2, on the other hand, applies to actions "*brought by*" a municipal corporation. On its face, the plain language of the statute does not apply in situations where the municipal corporation did not bring the action, which is the present case. While I find that the statute, as worded, creates a rather illusory protection for municipalities, immunizing them from periods of limitations only if they file the action for recovery of their land, it is for the Legislature to fix a statute that is subject to only one, albeit anomalous, interpretation.

Differences in the language between subsections 1 and 2 of MCL 600.5821 have previously been addressed by this Court. In *Adams Outdoor Advertising, Inc v Canton Charter Twp*, 269 Mich App 365; 711 NW2d 391 (2006), this Court summarized the history of adverse possession law in Michigan with respect to state and municipal land leading up to the creation of MCL 600.5821:

> "Under the common law, a party cannot claim ownership of state property by adverse possession. Michigan, however, long ago [statutorily] allowed adverse possession claims by imposing on the state a twenty-year limitations period for recovery of property. See 1897 CL 9724. Municipally owned roads were subject to adverse possession claims under this state's common law and were not exempted by statute.
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> "In 1907, the Legislature enacted a provision stating that adverse possession did not apply against 'the public' regarding 'any public highway, street or alley, or of any public grounds, or any part or portion thereof, in any township, village or city in this State.' 1907 PA 46. This statute used language very similar to that found in the current MCL 600.5821(2), except it did not limit claims by only municipalities but rather 'the public' in general. Eight years later, the Legislature changed the law significantly. The exception still existed in essentially the same form, but was applicable only to municipalities, and a separate provision expressly stated that a fifteen-year limitations period applied to all state property, thus making it clearly susceptible to adverse possession claims. See 1915 PA 314. The same provisions continued to exist for many years, although they were occasionally moved to different statutes as the Legislature reorganized the laws. . . .
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> "What is clear from the legislative history is that, from 1915 to 1988, the Legislature gave municipalities and the state different protection from claims of adverse possession. In 1988, the Legislature enacted the current provisions found in MCL 600.5821(1) and (2). The municipality exception was not altered, but 'any land' owned by the state was no longer subject to the limitations period, eliminating claims of adverse possession. The legislative analysis noted that the

> state had too much property to monitor and the public cost was too great when property was lost by adverse possession. The analysis did not address whether the Legislature intended to make state protection comparable to or greater than municipality protection." [*Adams, supra* at 372-373, quoting *Cascade Charter Twp v Adams Outdoor Advertising*, unpublished opinion per curiam of the Court of Appeals, issued March 9, 2004 (Docket No. 240625) at 3 (citations omitted).]

As the above history illustrates, although MCL 600.5821 subsections 1 and 2 were both enacted in 1988, subsection 1 was newly drafted and reflected a substantial change in the law at that time, whereas the language in subsection 2 remained very similar to its precursor statute, enacted in 1907. This leaves one to wonder whether the Legislature intended the different protections afforded by each subsection, especially with respect to the consequence currently at issue. As stated in *Canton Twp, supra*, it is not clear whether, in enacting MCL 600.5821, the Legislature intended to give comparable or greater protection to the state than was already being provided to municipalities. *Canton Twp, supra* at 373. Nonetheless, judicial construction of an unambiguous statute is neither necessary nor permitted, and courts must give effect to every word, phrase, and clause in the statute and avoid an interpretation that renders any part of the statute nugatory or surplusage. *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002).

At first blush, this Court's opinion in *Canton Twp, supra*, appears to conflict with the idea that MCL 600.5821(2) applies only to actions brought by a municipality. In *Canton Twp*, a billboard company sued a municipality, seeking quiet title to municipal land under a theory of adverse possession.[1] The municipality in *Canton Twp* did not bring the action; rather, it was the defendant. Without citation of authority, this Court stated, "It is . . . undisputed that MCL 600.5821(2) precludes a party from claiming adverse possession against a municipal corporation." *Canton Twp, supra*, at 370. The parties in *Canton Twp*, however, did not raise the issue that is before us. Rather, they were focused on the meaning of the words "public ground" and whether the statutory protection provided to municipalities in MCL 600.5821(2) applied to the subject property. As such, we remain bound to interpret the plain language set forth by the Legislature in MCL 600.5821(2).[2]

/s/ Jane M. Beckering

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[1] *Canton Twp* involved a claim for quiet title on a theory of adverse possession, whereas the trial court in the present case awarded title on a theory of acquiescence. Any distinction between these two theories need not be addressed given our finding that MCL 600.5821(2) does not apply in this circumstance.

[2] It is worth noting that in *Cascade Twp, supra*, the unpublished opinion quoted in *Canton Twp*, a municipality brought the action to recover land being adversely possessed by the defendant, the same billboard company that was involved in the *Canton Twp* case.