STATE OF MICHIGAN

COURT OF APPEALS

JOHN WAISANEN, Successor Trustee of The WAISANEN FAMILY TRUST,

Plaintiff/Counter Defendant-Appellee,

v

SUPERIOR TOWNSHIP,

Defendant/Counter Plaintiff-Appellant.

FOR PUBLICATION
June 24, 2014
9:10 a.m.

No. 311200
Chippewa Circuit Court
LC No. 09-010688-CH

Before: BECKERING, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

BOONSTRA, J.

In this action to quiet title, defendant appeals as of right from the order of the circuit court, entered following a bench trial, quieting title in plaintiff's[1] favor. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

In 1971, Kenneth Waisanen purchased property in the Jordan Beach subdivision. The parcel abuts First Street, a lake access roadway dedicated to public use. At the time Waisanen purchased the property, it contained a break wall. In 1981, Waisanen constructed an addition to his home on the property. In 2008, defendant conducted a survey of lake access roadways in the subdivision. According to the 2008 survey and unbeknownst to Waisanen, the break wall encroached approximately ten feet onto First Street, and the addition encroached approximately three feet onto First Street. Following the survey, plaintiff filed an action to quiet title to the portion of First Street that included Waisanen's break wall and addition. Defendant counterclaimed for possession of that same portion of First Street. The circuit court granted plaintiff's request to quiet title in his favor, finding that plaintiff had established the elements of adverse possession or, in the alternative, that plaintiff had acquired title through acquiescence. Defendant argues on appeal that the trial court erred with respect to both theories.

[1] Plaintiff is successor trustee for the Waisanen Family Trust. During the lower court action, Kenneth A. Waisanen was trustee. The term "plaintiff" will be used to refer to both the trustee and successor trustee of the Waisanen Family Trust. See *Waisanen v Twp of Superior*, unpublished order of the Court of Appeals, issued April 7, 2014 (Docket No. 311200) (granting substitution of parties).

II. STANDARD OF REVIEW

We review actions to quiet title de novo, *Sackett v Atyeo*, 217 Mich App 676, 680; 552 NW2d 536 (1996), as well as a trial court's conclusions of law following a bench trial, *Walters v Snyder*, 239 Mich App 453, 455; 608 NW2d 97 (2000). We review a trial court's findings of fact during a bench trial for clear error. *Id*. at 456.

Issues of statutory interpretation are questions of law that we review de novo. *Mason v City of Menominee*, 282 Mich App 525, 527; 766 NW2d 888 (2009).

III. APPLICABILITY OF MCL 600.5821(2)

As a threshold matter, resolution of defendant's appeal requires that we determine whether MCL 600.5821(2) bars a party's claims where, as here, the plaintiff has brought a claim to quiet title and the defendant municipality has counterclaimed for possession of the property. We conclude that it does not.

MCL 600.5821 provides in relevant part 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.

It is undisputed that defendant is a "municipal corporation." See MCL 41.2; *Smith v Scio Twp*, 173 Mich App 381, 388; 433 NW2d 855, 859 (1988). Therefore it is the applicability of MCL 600.5281(2) that is at issue here.

In considering this question, it is useful to review three prior decisions of this Court, although none is dispositive of the precise issue presented in this case. In *Adams Outdoor Advertising v Canton Charter Twp*, 269 Mich App 365; 711 NW2d 391 (2006), this Court considered the plaintiff's appeal from the trial court's grant of summary disposition to the defendant township on the grounds that MCL 600.5821(2) barred the plaintiff's claim for adverse possession. The plaintiff brought suit for adverse possession of township property on which it had placed billboards; the defendant raised MCL 600.5821(2) as an affirmative defense. *Id*. at 367. It does not appear that the defendant township filed a counterclaim.

Notably, *Canton Charter Twp* did not consider the threshold issue of whether MCL 600.5821(2) applies in the first instance, where a municipality is a *defendant* in an action brought by a plaintiff for adverse possession. Although that was the circumstance presented in that case, the Court instead noted that it was "undisputed that MCL 600.5821(2) precludes a party from claiming adverse possession against a municipal corporation," and stated that the "sole issue" before it was whether the disputed property qualified as "public ground" within the

meaning of that statutory subsection. *Id*. at 370. The Court then adopted a broad definition of "public ground" as referring to "'publicly owned property open to the public for common use.'" *Id*. at 398 (citation omitted). On that basis, the Court affirmed the trial court's award of summary disposition to the defendant township on the plaintiff's adverse possession claim.

In *Mason v City of Menominee (After Remand)*, 282 Mich App 525; 766 NW2d 888 (2009), this Court considered a municipal defendant's appeal from an order of the trial court quieting title to a disputed parcel of real property in favor of the plaintiffs based on acquiescence. The plaintiffs had brought an action to quiet title to the property. *Id*. at 526. It does not appear that the defendant municipality raised a counterclaim; instead, the defendant raised the defense that MCL 600.5821(2) shielded it from claims to property based on the theory of acquiescence. *Id*. at 527. This Court disagreed, stating:

> While subsection 1 applies to "[a]ctions for the recovery of any land where the state is a party," subsection 2 applies to "[a]ctions brought by any municipal corporations . . . ." It is evident from the language employed in subsection 1 that the Legislature could have made subsection 2 applicable in all cases brought by or against a municipality. The Legislature, however, chose not to do so. Further, interpreting subsection 2 to apply to any case in which a municipality is a party would render the words "brought by" in subsection 2 nugatory. Finally, an acquiescence claim involves a limitations period. *Kipka v Fountain*, 198 Mich App 435, 438-439; 499 NW2d 363 (1993). The term "periods of limitations" in MCL 600.5821(2) renders that provision applicable to claims asserting acquiescence for the statutory period. Thus, because the language of MCL 600.5821(2) prevents a private landowner from acquiring property from a municipality by acquiescence only if the municipality brings an action to recover the property, it does not preclude plaintiffs' claim. [*Id*. at 529.]

In a concurring opinion in *Mason*, Judge Beckering noted that this interpretation of MCL 600.5821(2) carried the potential, perhaps unrecognized by the Legislature, for "inconsistent outcomes, depending on which party beats the other to the courthouse, given [the Legislature's] chosen language in MCL 600.5821(2)." *Id*. at 533 (Beckering, J., concurring). Nonetheless, she concluded, "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." *Id*. at 534. Judge Beckering noted that "[a]t first blush, this Court's opinion in [*Canton Charter Twp*] appears to conflict with the idea that MCL 600.5821(2) applies only to actions brought by a municipality," but that the parties in that case did not "raise the issue that [was] before" the Court in *Mason*, and that the Court remained "bound to interpret the plain language set by the Legislature in MCL 600.5821(2). *Id*. at 536-537. Judge Beckering declined to address any distinctions between adverse possession and acquiescence, due to the inapplicability of MCL 600.5821(2). *Id*. at 536 n 1.

Finally, in *Beach v Lima Twp*, 283 Mich App 504, 770 NW2d 386 (2009), aff'd 489 Mich 99 (2011), this Court considered a defendant township's appeal from the trial court's grant of summary disposition to the plaintiffs on the basis that the plaintiffs had acquired title to the disputed property by adverse possession. The plaintiffs had brought an action to quiet title, to which the defendant had counterclaimed, also to quiet title. *Id*. at 507. This Court noted both

Canton Charter Twp and *Mason* in considering the defendant's claim that MCL 600.5821(2) rendered it immune to the plaintiff's adverse possession claim, but ultimately concluded that the property at issue was not "public grounds" and that MCL 600.5821(2) was therefore inapplicable. *Id*. at 523.

Neither *Canton Charter Twp*, *Mason*, nor *Beach* is on all fours with the instant case. In all three of those cases, as here, the municipality was named as a defendant. However, whereas the instant case presents both adverse possession and acquiescence theories, *Canton Charter Twp* and *Beach* presented adverse possession theories only, while *Mason* presented only a claim of acquiescence. Further, while the municipal defendant in *Beach* filed a counterclaim, as did defendant in this case, the municipal defendants in *Canton Charter Twp* and *Mason* did not.

Defendant argues that the trial court improperly relied on *Beach*, since the sole and dispositive issue in that case was whether the property at issue was "public grounds." On that point, we agree with defendant; *Beach* simply did not decide the issue that is before us, i.e., whether MCL 600.5821(2) applies in the first instance, regardless of whether property is "public grounds," where the municipality is a *defendant* to a claim for adverse possession or acquiescence and has filed a counterclaim for possession of the property.

Defendant further argues that, under *Canton Charter Twp*, plaintiff's claim for adverse possession is barred by MCL 600.5821(2), and further that *Mason*'s allowance of a plaintiff's acquiescence claim does not apply when, as here, the defendant municipal corporation has filed a counterclaim for possession of the property. Taken in isolation, language from *Canton Charter Twp* indeed would suggest that an adverse possession claim is barred. However, it is clear that the Court in *Canton Charter Twp* was not presented with the issue of whether adverse possession claims are barred in their entirety by MCL 600.5821(2) even when the municipality, as a defendant, and has not initiated the legal proceedings. The Court did not *decide* that issue; rather it stated, without reference to authority, that the issue was "undisputed" and thus did not need to be considered. *Canton Charter Twp*, 269 Mich App at 370. It also noted that the "sole issue" before it was whether the land in question was "public ground." The Court's statements about whether the statute prevented a party from claiming adverse possession against a municipal corporation were not necessary to the resolution of that issue, and thus are not binding. See *Edelberg v Leco Corp*, 236 Mich App 177, 182; 599 NW2d 785, 788 (1999).[2]

[2] We note that the trial court in *Canton Charter Twp* relied upon the reasoning of an unpublished opinion, *Cascade Charter Twp v Adams Outdoor Advertising*, unpublished opinion per curiam of the Court of Appeals, issued March 9, 2004 (Docket No. 240625), in granting summary disposition in the defendant's favor. In that case, the plaintiff township filed a claim against the defendant seeking removal of a billboard and damages, and the defendant counterclaimed for adverse possession. *Id*. at 1. This Court noted that the only issue was whether the land was public, and if it was, it would undisputedly bar plaintiff's claim under MCL 600.5821(2), because a municipal corporation had brought an action for recovery of the property. *Id*. at 3-5. Thus, although the issue to be decided was similar to that in *Canton Charter Twp*, the procedural postures of the two cases were very different. In *Canton Charter Twp*, the parties appear to have

The issue was, however, addressed and decided in *Mason*, where this Court held that MCL 600.5821(2) did not bar an acquiescence claim because the action had been filed by the party seeking possession and had not been "brought by" the municipality. We find that the holding in *Mason* applies equally to an adverse possession claim as to a claim for acquiescence. We note that the language of MCL 600.5821(2) makes no mention of the terms "adverse possession" or "acquiescence," but merely states that "[a]ctions 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). Both adverse possession claims and acquiescence claims seek title to disputed property by virtue of possession, and both involve a limitations period. See *Beach*, 283 Mich App at 524; *Mason*, 282 Mich App at 529. The plain language of the statute thus does not invite us to treat these claims differently.

Further, we find that the rationales of *Mason*, and of Judge Beckering's concurrence, apply equally to both adverse possession claims and acquiescence claims. "The plain language of the statute does not apply in situations where the municipal corporation did not bring the action." *Mason*, 282 Mich App at 534 (Beckering, J., concurring). To hold otherwise would be to not only stray from the plain language of the statute but to "render the words 'brought by' in subsection 2 nugatory." 282 Mich App at 529. Therefore, we hold that MCL 600.5821(2) does not bar claims for either adverse possession or acquiescence unless they occur in an action brought by a municipal corporation for recovery of possession of the property.

Seeking to distinguish *Mason*, defendant cursorily argues that because it brought a counterclaim for possession of the property, the instant case therefore *is* an action "brought by" a municipal corporation for recovery of the public grounds. Defendant provides this Court with no authority, and the Court's own research has located none, where the filing of a counterclaim by a municipal defendant has divested a plaintiff of the right to pursue a claim for adverse possession or acquiescence against a municipal corporation. We could decline to address defendant's argument on that ground. See *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003) ("[a]rgument must be supported by citation to appropriate authority or policy"). Nonetheless, we consider, and ultimately reject, defendant's contention.

Our Rules of Court do not support defendant's position that the case before us is an "[a]ction brought by," MCL 600.5821(2), defendant for recovery of property by virtue of its counterclaim for possession of the property. In Michigan, there is "one form of action, known as a 'civil action.'" MCR 2.101(A). A civil action is "commenced by filing a complaint with a court." MCR 2.101(B). Further, MCR 2.110 defines "pleadings" to include both a "complaint" and a "counterclaim." Thus, had our Supreme Court wished to indicate that an "action" could be "commenced" by filing a "pleading" rather than a "complaint," it could have easily done so. See also MCR 2.203(A) and (B) (governing the compulsory and permissive joinder of "claims" by a

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accepted, perhaps based on mistaken reading of *Cascade Charter Twp*, that if the land in question was public, the plaintiff's claim would be barred, and do not appear to have raised, briefed, or argued the issue of whether MCL 600.5821(2) applied to a case where the plaintiff brought an action for adverse possession against a municipal corporation, rather than a case where a plaintiff merely counterclaimed against the municipality that had initially filed suit.

"pleader", which encompasses both complaints and counterclaims). MCR 2.203(B) also references joining two "claims" in a "single action," further supporting the distinction between a "claim" and an "action." MCR 2.504 provides for the dismissal of an "action," and subpart (2)(a) provides that a court shall not dismiss an "action" if the defendant has pleaded a "counterclaim," unless the counterclaim can remain pending for independent adjudication. Finally, MCR 2.604(A) provides that an order adjudicating fewer than all of the "claims" "does not terminate the action as to any of the claims or parties."

These Court Rules indicate that, as written, MCL 600.5821(2) does not provide protection for a municipal corporation which has merely counterclaimed for possession in an existing action, rather than bringing an action of its own. Issues regarding the application of limitations periods are procedural. See *Gleason v Michigan Dept of Transp*, 256 Mich App 1, 2; 662 NW2d 822, 823 (2003). With regard to procedural issues, the Michigan Rules of Court control. See *Staff v Johnson*, 242 Mich App 521, 533; 619 NW2d 57, 64 (2000).

Further, holding as defendant suggests would render the distinction between "actions for recovery of any land where the state is a party" (in subsection 1) and actions "brought by" municipal corporations (in subsection 2) essentially nugatory, which we decline to do. See MCL 600.5821; see also *Mason*, 282 Mich App at 528-529. Although this holding does not resolve the danger of inconsistent results noted by Judge Beckering in *Mason*, the plain language of the statute and our existing Court Rules compels such a conclusion, absent any clarification from the Legislature or our Supreme Court. See *Mason*, 282 Mich App at 535-536 (Beckering, J., concurring).

Having determined that the trial court did not err in failing to apply MCL 600.5821(2) to plaintiff's claims, we now examine its ruling with respect to each of those claims.

IV. ADVERSE POSSESSION

A claim of adverse possession requires clear and cogent proof that possession of the disputed property has been actual, visible, open, notorious, exclusive, continuous, and uninterrupted for the statutory period. *Kipka v Fountain*, 198 Mich App 435, 439; 499 NW2d 363 (1993). The use of the property must be "hostile," that is "without permission and in a manner that is inconsistent with the rights of the true owner." *Jonkers v Summit Twp*, 278 Mich App 263, 272; 747 NW2d 901 (2008). The statutory period for adverse possession is 15 years. MCL 500.5801(4).

"[W]hat acts or uses are sufficient to constitute adverse possession depends upon the facts in each case and to a large extent upon the character of the premises." *Burns v Foster*, 348 Mich 8, 14; 81 NW2d 386 (1957). In this case, Kenneth Waisanen testified that he purchased the property in 1971. Plaintiff's property shares a boundary line with First Street, a dedicated public access right of way, and the house on the property crosses over the lot line by approximately three feet as measured in the 2008 survey. John Waisanen testified that his father constructed the addition to the house in 1981; it is 3 feet of this addition that encroaches unto First Street. A break wall enclosing plaintiff's purported side yard to the west encroaches on First Street by over ten feet. Kenneth Waisanen testified that the break wall was present when he purchased the property. Further, he had used his property exclusively since purchasing it and neither the public

nor defendant had used the area between the break wall and the house for any purpose. There was testimony by others that members of the public had historically used the right of way to access the beach on Waiska Bay and a state park.

The trial court did not err in concluding that the elements of adverse possession were established. Although, with regard to the exclusivity element, there was some testimony that members of the public occasionally used the area between the break wall and the house to access the beach and state park, such occasional trespasses do not suffice to defeat a claim of exclusivity. See *Doctor v Turner*, 251 Mich 175, 186; 231 NW 115 (1930). The record otherwise supports the trial court's conclusion that plaintiff's possession of the disputed property was visible, open, notorious, exclusive, continuous, and uninterrupted for the statutory period. *Kipka*, 198 Mich App at 439.

V. ACQUIESCENCE

There are three theories of acquiescence to boundary lines: acquiescence for the statutory period, acquiescence following a dispute and agreement, and acquiescence arising from intention to deed to a marked boundary. *Walters*, 239 Mich App at 457. In this case, plaintiff does not assert that defendant acquiesced following a dispute and agreement, or that defendant's acquiescence arose from an intention to deed to a marked boundary. Instead, plaintiff relies on the first theory—acquiescence for the statutory period.

"It has been repeatedly held by this court that a boundary line long treated and acquiesced in as the true line ought not to be disturbed on new surveys. Fifteen years' recognition and acquiescence are ample for this purpose." *Johnson v Squires*, 344 Mich 687, 692; 75 NW2d 45 (1956) (internal quotation marks and citations omitted). The trial court based its finding of acquiescence on what it believed to be considerable evidence that defendant had never complained to anyone in the Waisanen family that the property was encroaching on First Street. The court concluded that the township had put up a guardrail and "some infrastructures" that respected the boundary line claimed by plaintiff. This conclusion is suspect, because of conflicting testimony regarding whether defendant or the county put up these structures. Nonetheless, the point the court was making was that when these structures were built, defendant did not take the opportunity to inform the Waisanen family that they were encroaching on the right of way. This is consistent with the record, and supports the inference that both plaintiff and defendant believed, at least prior to 2008, that the break wall ran along the western border of the property, and that the addition to the house built in 1981 was entirely inside the property boundaries.

The court noted that no complaint was ever made about the addition to the home. There is some dispute, however, whether a building permit was pulled that would have put defendant on notice of the encroachment. Unlike the break wall, the home's encroachment is slight enough to have escaped notice upon a visual inspection of the area. The court also noted that the Waisanen family had maintained and used the area up to the break wall. This is supported by the testimony and documentary evidence.

Thus, given defendant's active and passive acquiescence to the use being made by the Waisanen family up to the break wall for a period well in excess of 15 years, the trial court did not err by granting plaintiff's motion to quiet title under the alternate theory of acquiescence.

VI. CONCLUSION

This action was not "brought by" defendant, nor does defendant's filing of a counterclaim alter that fact. MCL 600.5821(2) is therefore inapplicable and does not bar plaintiff's claims for adverse possession and acquiescence.[3] Further, the trial court did not err in finding that the elements of those claims were established, and in quieting title to the disputed property in favor of plaintiff.

Affirmed.

/s/ Mark T. Boonstra
/s/ Jane M. Beckering

[3] As noted above, this result, while dictated by the plain language of MCL 600.5821, results in a municipal corporation being immunized from periods of limitations only if they win "the race to the courthouse." As Judge Beckering noted in her concurrence in *Mason*, although both subsections of MCL 600.5821 were enacted in 1988, subsection 1 represents a substantial change in the law, while subsection 2 remains very similar to the precursor statute enacted in 1907. *Mason*, 282 Mich App at 535-536 (Beckering, J., concurring). "This leaves one to wonder whether the Legislature intended the different protections afforded by each subsection . . . ." *Id.* at 536. Nonetheless, as judicial construction of an unambiguous statute is neither necessary nor permitted, *Koontz v Ameritech Services, Inc.*, 466 Mich 304, 312; 645 NW2d 34 (2002), it remains for our Legislature, not this Court, to fix such an arguably anomalous result, if the plain language of subsection 2 does not in fact represent the Legislature's intent regarding protection for municipal corporations with respect to actions for recovery of public lands.