

STATE OF MICHIGAN
COURT OF APPEALS

HUNTERS SQUARE OFFICE BUILDING, L.L.C.,

Plaintiff- Appellee,

v

HARTMAN & TYNER, INC., and HUNTERS
RIDGE OF FARMINGTON HILLS
CONDOMINIUM ASSOCIATION,

Defendants- Appellants.

UNPUBLISHED

March 26, 1999

No. 203362

Oakland Circuit Court

LC No. 95-500208 DZ

Before: Doctoroff, P.J., and Smolenski and Whitbeck, JJ.

PER CURIAM.

Defendants appeal as of right from a judgment in favor of plaintiff quieting title to a disputed strip of real property and enjoining defendants from further trespass on the property. We reverse and remand.

Defendants argue that the trial court erred in finding that their use of the disputed property was not hostile. We agree.

While actions to quiet title are equitable and therefore reviewed de novo, the trial court's findings of fact in a bench trial will not be reversed unless they are clearly erroneous. *Gorte v Dep't of Transportation*, 202 Mich App 161, 171; 507 NW2d 797 (1993); MCR 2.613(C). A finding is clearly erroneous when, although evidence supports it, this Court is left with a definite and firm conviction that a mistake was made. *Featherston v Steinhoff*, 226 Mich App 584, 588; 575 NW2d 6 (1997). Appellate courts must give regard to the trial court's superior ability and special opportunity to judge the credibility of the witnesses who appeared before it. MCR 2.613(C); *Brooks v Rose*, 191 Mich App 565, 570; 478 NW2d 731 (1991).

To establish adverse possession, claimants must show by clear and cogent proof that their 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. *West Michigan Dock & Market Corp v Lakeland Investments*, 210 Mich App 505, 511; 534 NW2d 212 (1995); *Gorte, supra* at

170; *Kipka v Fountain*, 198 Mich App 435, 439; 499 NW2d 363 (1993). The doctrine of adverse possession must be strictly construed. *Strong v Detroit & Mackinac Railway Co*, 167 Mich App 562, 568; 423 NW2d 266 (1988).

The sole element of adverse possession that is at issue on appeal is whether defendants' use of the disputed strip of land was hostile. The term "hostile," as employed in the law of adverse possession, is a term of art and does not imply ill will. *Mumrow v Riddle*, 67 Mich App 693, 698, 242 NW2d 489 (1976). The claimant is not required to make express declarations of adverse intent during the prescriptive period. *Id.* Rather, adverse or hostile use is use inconsistent with the right of the owner, without permission sought or given, that would entitle the owner to a cause of action against the intruder. *Id.* "[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." *Thomas v Rex A Wilcox Trust*, 185 Mich App 733, 737; 463 NW2d 190 (1990). "Acts of ownership which openly and publicly indicate an assumed control or use consistent with the character of the premises are sufficient." *Id.*

Where a landowner possesses land of the adjacent owner with the intent to hold to the true boundary line, the possession is not hostile and cannot establish adverse possession. *Gorte, supra* at 170; *DeGroot v Barber*, 198 Mich App 48, 51; 497 NW2d 530 (1993). However, if the possession manifests an intent to claim title to a visible, recognizable boundary, regardless of the true boundary line, the possession is hostile and adverse possession may be established. *Id.* Simply being mistaken with regard to the true boundary line does not defeat a claim of adverse possession. *Id.* In *Davids v Davis*, 179 Mich App 72, 82-83; 445 NW2d 460 (1989), this Court explained:

Generally, the occasional or periodic entry upon land does not constitute actual possession. However, it has been acknowledged that the "[d]etermination of what 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," and that "[i]t is a well-recognized rule in Michigan that the acts required to support a finding of adverse possession are sufficient if those acts are consistent with the character of the premises in question." [*Id.* at 82-83 (citations omitted).]

Defendants rely on *Connelly v Buckingham*, 136 Mich App 462; 357 NW2d 70 (1984), and *Rose v Fuller*, 21 Mich App 172; 175 NW2d 344 (1970), to support their claim of hostile possession. Although the factual scenario in the instant case is not as compelling as in *Connelly* or *Rose*, we find that the trial court clearly erred in finding that defendants' use of the land was not hostile. The uncontroverted evidence showed that the same fence was continuously on the same site until it was torn down by plaintiff in 1995. In addition, the evidence showed that defendants maintained the fence, including making repairs to the fence whenever it was struck by a vehicle that was using defendants' driveway, and that defendants stained the fence more than five or six times. Plaintiff's representative admitted that he had never hired anyone to maintain the fence. Plaintiff also does not claim that it or its predecessors owned the fence. Defendants' representative testified that defendants maintained the grounds on both sides of the fence, including mowing the grass on the disputed strip of land every week or every two weeks. Plaintiff also indicated that it paid a contractor to mow the lawn. However,

plaintiff's representative admitted that he was unsure if the landscaper ever mowed the disputed piece of property. Rather, plaintiff's representative testified that, in 1994, he began paying a maintenance crew to maintain the property to plaintiff's "property line."

In addition, both parties admitted that the fence was visible to passersby by normal, casual observation. Further, the characteristic of the property is telling. The disputed grassy strip is approximately fifteen feet wide and separates the driveway into plaintiff's parking lot and the driveway out of defendants' complex. The six-foot high wooden fence begins and runs south to the end of defendants' condominium complex. The first part of the fence is on plaintiff's property, but the fence continues onto defendants' property. Therefore, when reaching the end of plaintiff's property, the fence continues without interruption until the end of defendants' property. On the west side of the disputed portion of the fence is a three-foot wide bed of small stones. The fence is approximately three-feet from defendants' driveway and is level with the driveway. On the east side of the fence is a grassy area fifteen to twenty feet wide, and the land slopes down from the fence to a retaining wall on the western side of plaintiff's parking lot, which is several feet below street level. As such, the fence is separated from plaintiff's parking lot by a sloping, eighteen-foot wide lawn and a concrete retaining wall that is several feet high. Finally, as the trial court found, the fence appears to be a privacy fence for the benefit of defendants to screen out the view of the large shopping center.

We therefore conclude that, given the open acts of ownership exercised over the property by defendants, performed without permission being either sought or given, which were inconsistent with the rights of anyone who may have claimed ownership to the property and would have prompted and entitled anyone with an ownership interest to have taken legal redress against defendants as trespassers, the trial court's conclusion that defendants' acts were not hostile is clearly erroneous.

We find that plaintiff's reliance on *Kipka, supra*, in which the plaintiffs brought an action to quiet title to a retaining wall and strip of land approximately five feet wide and one hundred feet long, is misplaced. *Kipka* is clearly distinguishable from the instant case, given the relationship between the predecessors of the two parcels. *Kipka, supra* at 436, 440. In addition, the *Kipka* Court ruled that adverse possession had not been established for the statutory period. *Id.* at 442.

Finally, plaintiff and defendants both address the issue of tacking. The trial court did not reach this issue. As a general rule, appellate review is limited to issues decided by the trial court. *Bowers v Bowers*, 216 Mich App 491, 495; 549 NW2d 592 (1996); *Schubiner v New England Ins Co*, 207 Mich App 330, 331; 523 NW2d 635 (1994). Accordingly, we remand this case to the trial court for further consideration and findings on the remaining elements of adverse possession, including whether defendants' hostile possession existed for the requisite statutory period.

Reversed and remanded. We do not retain jurisdiction.

/s/ Martin M. Doctoroff

/s/ Michael R. Smolenski

/s/ William C. Whitbeck