

STATE OF MICHIGAN
COURT OF APPEALS

LAMMI ENTERPRISES, INC.,

Plaintiff-Appellee,

v

DEPARTMENT OF NATURAL RESOURCES,
STATE OF MICHIGAN,

Defendants-Appellants.

UNPUBLISHED

December 10, 2002

No. 235820

Iosco Circuit Court

LC No. 00-002706-CH

Before: Sawyer, P.J., and Gage and Talbot, JJ.

PER CURIAM.

Plaintiff brought this action claiming title by adverse possession, or in the alternative a prescriptive easement, to real property owned by defendants. Defendants moved for summary disposition under MCR 2.116(C)(10). The trial court denied defendants' motion and entered judgment in favor of plaintiff pursuant to MCR 2.116(I)(2), granting plaintiff a prescriptive easement over the property in question. Defendant appeals as of right. We reverse and remand.

This case concerns an advertising sign located on a parcel of real property owned by defendant Department of Natural Resources (defendant). Defendant purchased the property in question (the property) from Consumers Power Company in 1980. The sign has stood on the property since 1958. The sign advertises plaintiff's store (the store) which is located about one mile east of the sign along River Road. Defendant sent a letter to plaintiff demanding that plaintiff remove the sign, which prompted the instant lawsuit. Plaintiff alleged that it has acquired the property by adverse possession, or in the alternative, that plaintiff has acquired a prescriptive easement. Plaintiff alleged that it, as well as its predecessors in title to the store since 1958, have made use of the property to advertise the store and that such use and possession has been actual, open, continuous and visible, notorious, hostile and exclusive for a period in excess of fifteen years prior to March 1, 1988, and has continued uninterrupted since that date.¹

Defendant moved for summary disposition under MCR 2.116(C)(10) on the ground that plaintiff cannot establish hostile, uninterrupted use of the property for the fifteen-year statutory period applicable to adverse possession claims. Defendant argued that plaintiff made use of the

¹ Plaintiff also sought an injunction to prevent the removal of the sign. The trial court granted an injunction prohibiting defendant from removing the sign during the pendency of the litigation.

property for only ten years prior to the effective date of MCL 600.5821, which bars such claims against the state, and that the use of the property by plaintiff's predecessors in title was not hostile for purposes of tacking the possessory periods.

In opposition to defendant's motion, plaintiff offered the affidavit of Carol Parent, plaintiff's secretary. Parent stated that plaintiff's purchase of the store from Joe and Janice Hall in 1979 included the sign on the property in question. Since the purchase, no officer or representative of plaintiff had obtained consent from Consumers Power Company to keep the sign on the property. Parent stated that plaintiff has maintained the sign continuously and exclusively since 1979.

After hearing arguments on the motion, the trial court denied defendant's motion for summary disposition. The court then entered judgment in favor of plaintiff, concluding that plaintiff had acquired rights to the property on the basis of defendant's acquiescence. The court determined that defendant, and Consumers Power Company before defendant, had acquiesced in the use of the property by plaintiff and its predecessors to keep and maintain the sign. The court stated that the sign had been on the property continuously since 1958, which satisfied the requisite fifteen-year statutory period. The court granted plaintiff a prescriptive easement over the property for the purpose of maintaining the sign.

On appeal, defendant argues (1) that the trial court erred in granting summary disposition on the basis of acquiescence, a legal theory which was neither pleaded nor explored during discovery, (2) that plaintiff was not entitled to the equitable relief sought because the evidence shows that plaintiff cannot satisfy the elements of adverse possession, and (3) the trial court should have granted summary disposition in favor of defendant.

We review de novo a trial court's decision on a motion for summary disposition. *Taggart v Tiska*, 465 Mich 665, 669; 641 NW2d 240 (2002). Also, this Court reviews equitable issues de novo. *Martin v Redmond*, 248 Mich App 59, 63; 638 NW2d 142 (2001); *Killips v Mannisto*, 244 Mich App 256, 258; 624 NW2d 224 (2001).

We first address the applicability of acquiescence, which defendant correctly observes was not raised or addressed by either party below. "The law of acquiescence is concerned with a specific application of the statute of limitations to cases of adjoining property owners who are mistaken about where the line between their property is." *Kipka v Fountain*, 198 Mich App 435, 437-439; 499 NW2d 363 (1993). Where adjoining property owners acquiesce to a boundary line for at least fifteen years, that line becomes the actual boundary line. *West Michigan Dock & Market Corp v Lakeland Investments*, 210 Mich App 505, 511; 534 NW2d 212 (1995); *McQueen v Black*, 168 Mich App 641, 644; 425 NW2d 203 (1988). See *Shields v Collins*, 83 Mich App 268, 271; 268 NW2d 371 (1978) (The underlying reason for the rule of acquiescence is the promotion of peaceful resolution of boundary disputes.).

Defendant argues that the doctrine of acquiescence is inapplicable because this case does not involve a boundary dispute. We agree. We are aware of no Michigan case in which a court has applied the doctrine of acquiescence in the absence of a boundary dispute or a question regarding the true location of a property line, and we decline to apply it for the first time in this context. Plaintiff did not plead acquiescence below, and on appeal, plaintiff cites no authority to support upholding the trial court's decision based on acquiescence. Accordingly, we conclude

that the trial court erred in granting judgment to plaintiff on the basis of acquiescence. See also *Siegel v Renkiewicz' Estate*, 373 Mich 421; 129 NW2d 876 (1964); *Jackson v Deemar*, 373 Mich 22; 127 NW2d 856 (1964); *Daley v Gruber*, 361 Mich 358, 363; 104 NW2d 807 (1960); *Killips, supra* at 258; *Walters v Snyder*, 239 Mich App 453; 608 NW2d 97 (2000).

We next address defendant's argument that it was entitled to summary disposition because plaintiff failed to show a genuine issue of material fact regarding the elements of uninterrupted and hostile use required to obtain rights to property by adverse possession or a prescriptive easement. For the following reasons, we agree with defendant.

Adverse possession must be established by clear and cogent proof that the claimant's possession was actual, visible, open, notorious, exclusive, continuous, and uninterrupted for the statutory period of fifteen years. *Burns v Foster*, 348 Mich 8, 14-15; 81 NW2d 386 (1957); *Gorte v Dep't of Transportation*, 202 Mich App 161, 165; 507 NW2d 797 (1993); *Kipka, supra* at 439. If the elements of adverse possession have been established, the rights of the party who has not asserted its rights ends at the expiration of the limitations period, and title is vested in the party claiming adverse possession. *Gorte, supra* at 168.

The possession must be hostile to the title of the true owner and under cover of a claim of right. *Plymouth Canton Community Crier, Inc v Prose*, 242 Mich App 676, 680; 619 NW2d 725 (2000); *Thomas v Wilcox Trust*, 185 Mich App 733, 736-737; 463 NW2d 190 (1990). The term "hostile" as employed in the law of adverse possession is a term of art and does not imply ill will. Nor is the claimant required to make express declarations of adverse intent during the prescriptive period. Adverse or hostile use is use inconsistent with the right of the owner, without permission asked or given, use such as would entitle the owner to a cause of action against the intruder. *Goodall v Whitefish Hunting Club*, 208 Mich App 642, 646; 528 NW2d 221 (1995). Mutual use or occupation of property with the owner's permission is insufficient to establish adverse possession. *West Michigan Dock & Market Corp v Lakeland Investments*, 210 Mich App 505, 511; 534 NW2d 212 (1995), citing *Rozmarek v Plamondon*, 419 Mich 287, 294; 351 NW2d 558 (1984). Further, permissive use of property, regardless of the length of the use, will not result in an easement by prescription. *West Michigan Dock & Market Corp, supra*, citing *Banach v Lawera*, 330 Mich 436, 441; 47 NW2d 679 (1951). An easement by prescription requires elements similar to adverse possession, except exclusivity. *Plymouth Canton Community Crier, supra* at 680.

Governmental entities are generally immune from adverse possession actions. MCL 600.5821; *Goodall, supra* at 647. When the Legislature amended MCL 600.5821, it reinstated the common-law rule that one cannot acquire title to state-owned property through adverse possession. That section now provides, in pertinent part:

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. [MCL 600.5821(1).]

Accordingly, in order to acquire title by adverse possession, plaintiff's rights must have vested prior to March 1, 1988, the effective date of the statute. *Gorte, supra* at 169. Because plaintiff

purchased the store in 1979, in order to satisfy the fifteen-year statutory period prior to March 1, 1988, plaintiff's adverse possession claim depends upon tacking the possessory period of plaintiff's predecessors in title. See *Connelly v Buckingham*, 136 Mich App 462, 474; 357 NW2d 70 (1984), citing *Siegel, supra* at 425-426 ("An adverse claimant is permitted to add his predecessor's period of possession if he can establish privity of estate by mention of the disputed lands in the instrument of conveyance or parol references at the time of the conveyance.")

Assuming that privity can be established, the evidence submitted leaves no question of fact that the Halls' use of the property was not hostile or under a claim of right. Janice Hall testified that she and her husband owned the store from 1968 until 1978, when they sold it to Wesley and Helen Lammi. Janice stated that she and her husband purchased the store with the understanding that Consumers Power Company owned the land on which the sign stood, about one mile east of the store on River Road. The Halls did not have written or verbal permission from Consumers Power Company to keep the sign at that location. With respect to the Halls' sale of the store to the Lammis, Janice Hall testified: "[I]t wasn't our property, so you couldn't sell it to him." Gordon Hauglie, a field investigator for Consumers Power Company, testified that he had discussions with Joe Hall about the sign. During his first meeting with Joe in 1968, Joe raised the subject of the sign "relative to the fact that he wanted to either repaint the sign or do some maintenance of some kind on the sign." Joe asked permission from a Consumers Power Company employee in Hauglie's presence. Hauglie stated that he had similar discussions with Joe about the sign. Hauglie testified that Joe "asked for a lease for the sign a number of times" and Joe "was very concerned about having permission to have the sign there from Consumers."²

On the basis of this evidence, there is no genuine issue of material fact that plaintiff's predecessors in title did not use the property containing the sign under a claim of right. The evidence that the Halls understood that the sign was on land owned by Consumers Power Company and that they asked permission to make changes to the sign and sought a lease from Consumers Power Company defeats the element of adverse possession that use of the land must be hostile, i.e., made under a claim of right, without permission asked or given. *Plymouth Canton Crier, supra* at 681; *Goodall, supra* at 646. Plaintiff offered no evidence to dispute the nature of the Halls' use of the property. Because the Halls did not adversely possess the property, plaintiff cannot establish uninterrupted hostile use of the property for the requisite fifteen-year period.

Reversed and remanded for entry of judgment in favor of defendants. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Hilda R. Gage
/s/ Michael J. Talbot

² At oral argument on the motion for summary disposition, plaintiff's counsel conceded that Joe Hall requested permission to modify the sign.