STATE OF MICHIGAN

COURT OF APPEALS

DONNA M. HEWITT, Plaintiff-Appellant,	UNPUBLISHED March 17, 2011
v	No. 295521 Washtenaw Circuit Court
GARRETT JARVIS and BARBARA JARVIS, Defendants-Appellants.	LC No. 09-000170-CH

Before: SERVITTO, P.J., and GLEICHER and SHAPIRO, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's November 6, 2009 order, which granted defendants summary disposition. We reverse and remand for further proceedings because questions of fact exist concerning whether plaintiff acquired an interest in the property at issue under her claims of adverse possession, prescriptive easement and acquiescence.

I. FACTS

In 1950, plaintiff and her husband, Frank Hewitt, purchased a home in Augusta Township on a parcel of land approximately 86 by 165 feet. Plaintiff's house faces west onto Whittaker Road, which runs north and south. Three or four feet to the north of plaintiff's house is plaintiff's driveway, which runs east and west and extends from Whittaker Road to a one-stall garage. A few feet north of the driveway is the original property line separating plaintiff's property from her neighbor to the north. The property line runs close to and parallel to plaintiff's driveway from Whittaker Road to the east.

The disputed piece of property, which is the basis of this lawsuit, extends from the original property line just north of the driveway to a line of mature trees approximately twenty feet to the north and running parallel to plaintiff's driveway and the actual property line.[1] The property to the north of the tree line is undeveloped brush and field, with part of it apparently

[1] The disputed area of property runs from the front edge of the property and is 165 feet deep.

fenced in and in use as pasture when defendants had horses; while the property to the south of it is landscaped as is plaintiff's lot.

Defendants purchased their approximately thirty acre parcel in 1983 from Ervin and Christina Lamkin.[2]

In their briefs below, the parties presented affidavit and deposition testimony concerning the use of the disputed parcel. Plaintiff and her daughter Sharon Hewitt stated that plaintiff had regularly mowed the disputed parcel since 1950.[3] Plaintiff also routinely pushed snow onto the 20 foot wide strip when clearing her driveway. In approximately 1953 or 1954, plaintiff's husband, Frank, planted a 10 by 20 foot perennial flower garden, which extended from the property line to the north, and which plaintiff and Sharon had used and tended continuously since then. In approximately 1979, plaintiff planted a lilac bush on the property near the garden. Plaintiff also asserted that since 1950, she and her family members had parked vehicles on the 20 foot wide strip. She also asserted that both she and her daughter had used the strip as a turnaround for her car, and that they increased this use of it to daily use in approximately 1999. The daughter, Sharon, testified that she had parked on the disputed strip regularly until Frank Hewitt passed away, and continued to do so to leave the driveway clear for her mother.

When asked whether she had ever had any specific conversation with defendants concerning the boundary line, plaintiff replied that she had not. However, she also testified that she believed Garrett Jarvis agreed to the boundary line, because he knew that his daughter was mowing the disputed parcel for plaintiff and had asked to have the checks made out to him because his daughter was not able to cash them. Neither plaintiff nor Sharon had ever seen Garrett Jarvis mow the disputed strip. In addition, both averred that plaintiff's family, the defendants and the Lamkins, defendant's predecessors in interest, had always treated the tree line as the boundary between their respective parcels. They testified that neither the Lamkins nor defendants had ever objected to the actions of plaintiff or her family, or indicated that they were providing permission for plaintiff to use the disputed parcel.

Defendant Barbara Jarvis testified that the tree line had existed for at least twenty to thirty years and that she was aware that someone was mowing the strip. She provided inconsistent statements concerning her discussion with plaintiff about the boundary line. When asked whether she discussed the boundary of the property with plaintiff, she first replied that she had not. However, she then testified that, after plaintiff removed a pine tree at some time

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[2] The materials presented to this Court do not state when the Lamkins purchased the property; however, the parties appear to agree that their ownership of the adjoining parcel predated plaintiff's ownership of her own.

[3] Barbara Jarvis, who was also deposed, acknowledged that plaintiff had also paid Jarvis' daughter Lee Riley to mow the property for plaintiff at some point. When asked how often the grass was mowed, plaintiff stated that it was mowed every two to three weeks.

between 1997 and 1999, she called plaintiff and the two had a conversation about the line, testifying:

> I called Mrs. Hewitt and I talked to her and I told her I said I think you cut down our tree. And she said something about the line. And I said I think it's on our line. I said have you ever had it surveyed? And she said no. She said maybe that would be a good idea to have it done and we could share the costs, but we never pursued it.

Barbara Jarvis further testified that she had not spoken with her predecessors in interest, the Lamkins, about the property line. She acknowledged that since she had moved in, plaintiff had placed snow on the disputed parcel. When asked whether she had objected to this practice, she replied that she had not because she did not want to cause trouble.

Defendant Garrett Jarvis, Barbara's husband, testified that he had never discussed the boundary line with plaintiff or her family. He agreed that had seen Sharon park and turn around on the property. He testified that he had mowed the disputed parcel from four to six times since 1983. He testified that he had spoken with Ervin Lamkin "approximately fifteen years ago" and that Lamkin had told him that Lamkin had not had the property surveyed; but that Lamkin remembered where the old markers used to be and that, according to them, there would not be room enough for a person to walk between a fence placed on the property line and plaintiff's driveway.

II. ACQUIESCENCE, ADVERSE POSSESSION AND EASEMENT BY PRESCRIPTION

Plaintiff appeals the trial court's grant of summary disposition in defendants' favor concerning her claims for adverse possession, acquiescence and easement by prescription. Because these issues were raised and decided by the trial court, we have been presented with the materials submitted to the trial court, and review of the trial court's decision on a motion for summary disposition is de novo, *Coblentz v Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006), we find that review of this issue is appropriate.

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). In evaluating the motion for summary disposition, we consider affidavits, pleadings, depositions, admissions and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. *Coblentz*, 475 Mich at 567-568. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10); MCR 2.116(G)(4); *Coblentz*, 475 Mich at 568.

A. ACQUIESCENCE

There are three distinct ways in which the doctrine of acquiescence, which operates under the principle that a boundary line that has been accepted by the parties should stand, may be asserted: "(1) acquiescence for the statutory period, (2) acquiescence following a dispute and agreement, and (3) acquiescence arising from an intention to deed to a marked boundary." *Walters v Snyder (After Remand)*, 239 Mich App 453, 456-457; 608 NW2d 97 (2000). Given the facts above, the present case involves an alleged period of acquiescence in excess of the

statutorily required period. In *Kipka v Fountain*, 198 Mich App 435, 438-439; 499 NW2d 363 (1993), this Court explained that this form 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. Adjoining property owners may treat a boundary line, typically a fence, as the property line. If the boundary line is not the recorded property line, this results in one property owner possessing what is actually the other property owner's land. Regardless of the innocent nature of this mistake, the property owner whose land is being possessed by another would have a cause of action against the other property owner to recover possession of the land. After fifteen years, the period for bringing an action would expire. The result is that the property owner of record would no longer be able to enforce his title, and the other property owner would have title by virtue of his possession of the land.

Michigan case law has not delineated specific elements necessary to establish a claim of acquiescence. *Walters* (*After Remand*), 239 Mich App at 457. Decisions "have merely inquired whether the evidence presented establishes that the parties treated a particular boundary line as the property line." *Id*. at 458.[4] "The underlying reason for the rule of acquiescence is the promotion of peaceful resolution of boundary disputes." *Killips v Mannisto*, 244 Mich App 256, 260; 624 NW2d 224 (2001), citing *Shields v Collins*, 83 Mich App 268, 271-272; 268 NW2d 371 (1978). Thus, a claim of acquiescence does not require that possession be hostile or without permission. *Id*., citing *Walters* (*After Remand*), 239 Mich App at 456-457; see also *Jackson v Deemar*, 373 Mich 22, 26; 127 NW2d 856 (1964) ("if the whole period of acquiescence exceeds 15 years, the line becomes fixed, regardless of whether there had been a bona fide controversy as to the boundary." [internal quotations omitted]). In addition, the acquiescence of predecessors in interest may be tacked onto that of subsequent titleholders to establish the mandatory 15-year period. *Killips*, 244 Mich App at 260, citing *Jackson*, 373 Mich at 26. The standard of proof is preponderance of the evidence, which is "less stringent than the clear and cogent evidence standard used in adverse possession cases." *Id*. at 260, citing *Walters* (*After Remand*), 239 Mich App at 455.

In the instant case, the materials submitted by the parties shows that a material factual dispute exists concerning whether plaintiff has acquired the disputed property by acquiescence. Specifically, plaintiff and her daughter averred that plaintiff, her family, defendants, and defendant's predecessors in interest have always treated the tree line as the boundary line. Because acquiescence is subject to tacking, and plaintiff has resided at the property since 1950,

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[4] In at least one instance, this Court has held that a claim for acquiescence can be sustained even though one party is aware that the actual boundary is not the line that the other party treats as the boundary, as long as no action is taken by the owner to prohibit the nonowner's use of the property or the owner does not indicate to the nonowner that the acquiesced boundary is not the actual boundary. *Killips v Mannisto*, 244 Mich App 256, 260; 624 NW2d 224 (2001).

this creates a question of fact as to whether she and the Lamkins acquiesced in this boundary line before defendants purchased the property. Garrett Jarvis testified that Ervin Lamkin made comments to Jarvis to suggest otherwise. However, even to the extent these hearsay statements would be admissible, the decision whether to believe plaintiff or Lamkin rests in the hands of the factfinder. See *Metropolitan Life Ins Co v Reist*, 167 Mich App 112, 121; 421 NW2d 592 (1988) (when the truth of an assertion of material fact depends on the credibility of a witness, a genuine issue of fact exists and summary disposition cannot be granted); see also *Morris v Allstate Ins Co*, 230 Mich App 361, 364; 584 NW2d 340 (1998) ("the court may not make factual findings or weigh witness credibility in deciding a motion for summary disposition"). In addition, plaintiff testified that she had not had a conversation of the boundary line with Garrett Jarvis, but that she believed he knew the tree line to be the boundary line by his actions. Garrett Jarvis' testimony supported this assertion in part, when he stated that he had not had a conversation with plaintiff about the line and acknowledged that his daughter had mowed the parcel for plaintiff. To the extent that Barbara Jarvis' alleged conversation with plaintiff about the boundary line contradicts plaintiff's testimony about the parties' beliefs concerning the boundary line, plaintiff has created a question of fact for the factfinder to address. Given the evidence presented, the trial court erred in granting summary disposition in favor of defendants.

B. ADVERSE POSSESSION/PRESCRIPTIVE EASEMENT

Plaintiff also argues that the trial court erred in granting summary disposition in defendants' favor on plaintiff's claims of adverse possession and easement by prescription. We agree.

To establish a valid claim of adverse possession, the person claiming title must show that that person's possession was actual, visible, open, notorious, exclusive, continuous, and uninterrupted for the statutory period of fifteen years. *Canjar v Cole*, 283 Mich App 723, 731; 770 NW2d 449 (2009), citing *Kipka*, 198 Mich App at 439; MCL 600.5829. In addition, the claimant must demonstrate that the use of the land was hostile and under claim of right, meaning "'inconsistent with the right of the owner, without permission asked or given, and which use would entitle the owner to a cause of action against the intruder.'" *Canjar*, 283 Mich App at 731-732, quoting *Wengel v Wengel*, 270 Mich App 86, 92-93; 714 NW2d 371 (2006). "An easement by prescription requires similar elements, except exclusivity." *West Mich Dock & Mkt Corp v Lakeland Invs*, 210 Mich App 505, 511; 534 NW2d 212 (1995), citing *St Cecelia Society v Universal Car & Service Co*, 213 Mich 569, 576; 182 NW 161 (1921). Establishing hostile possession does not require a showing of ill will toward the original owner. *Wengel*, 270 Mich App at 92. Rather, to satisfy that element, the claimant must use the property without permission and otherwise in a manner inconsistent with the rights of the true owner. *Id*. Thus, "[m]utual use or occupation of property with the owner's permission is insufficient to establish adverse possession [, and] permissive use of property, regardless of the length of the use, will not result

in an easement by prescription." *West Mich Dock*, 210 Mich App at 511 (citations omitted).[5] As to notorious,

> To make good a claim of title by adverse possession, the 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).]

Moreover, whether a party can establish adverse possession depends "upon the facts of each case and the character of the premises. . . . Acts of ownership which openly and publicly indicate an assumed control or use consistent with the character of the premises are sufficient." *Thomas v Wilcox Trust*, 185 Mich App 733, 737; 463 NW2d 190 (1990), quoting *Caywood v Dep't of Natural Resources*, 71 Mich App 322, 331; 248 NW2d 253 (1976). The character of the premises or easement also impacts whether a use is found to be continuous. A daily, constant and unintermittent use is not always necessary; instead, "the acts constituting the use shall be of such frequency as to give notice to the owner of the land of the right claimed against him." *Dummer v United States Gypsum Co*, 153 Mich 622, 631; 117 NW 317 (1908). See also Dyer *v Thurston*, 32 Mich App 341, 344; 188 NW2d 633 (1971) (observing that seasonal use of a pathway to a summer cottage is considered continuous use, given that it is "in keeping with the nature and character of the right claimed").

Here, plaintiff has presented a question of material fact concerning whether she has acquired title to the disputed property through adverse possession, or acquired an easement by prescription over the property. Taken in a light most favorable to plaintiff, the asserted facts show that since 1950 she, or others under her direction, used the disputed property exclusively and as plaintiff's own by mowing it, shoveling snow onto it, turning around on it, establishing a garden on it, and planting and removing trees. Given the nature of the property, all of these actions taken together, whether seasonal or otherwise, could be fairly said to amount to conduct that is so continuous, open, visible, and notorious as to raise the presumption of notice to the world that the right of the true owner is invaded intentionally and that plaintiff intended to claim the disputed property as her own. *Smith v Feneley*, 240 Mich 439, 441-442; 215 NW 353 (1927). The trial court thus erred in granting summary disposition on plaintiff's claims for adverse possession and easement by prescription.

III. THE FILING OF PLAINTIFF'S BRIEF IN OPPOSITION TO SUMMARY DISPOSITION

Plaintiff's response to defendant's motion for summary disposition was due on October 30, 2009, for the hearing scheduled on the motion on November 6, 2009. Plaintiff's brief in response to defendant's motion is date stamped November 4, 2009, which would be untimely under the court rule. On November 3, 2009, apparently based on the fact that plaintiff had not

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[5] Initially permissive use can, however, later become adverse use under certain limited circumstances. *Kipka*, 198 Mich App at 438.

filed a responsive brief, the trial court cancelled oral argument and issued an order granting defendant's motion.

Plaintiff then filed a motion for reconsideration. In that motion, plaintiff's counsel explained that plaintiff's brief and supporting materials were mailed to the court on Tuesday, October 27, 2009, three days before the deadline. Plaintiff also asserted that the defense counsel's copy of the response and plaintiff's copy were mailed simultaneously with the court's copy and that both defense counsel and plaintiff had received their copies on October 29th or 30th. Defense counsel, the court and plaintiff's counsel are all in the same county. Plaintiff attached affidavits in support of these assertions. While we cannot determine whether the post office simply took several more days to deliver the court's copy or whether the court's copy was delivered to the clerk's office in timely fashion, but was not date stamped and sent to the judge for several days, we do note that the trial court's Tuesday, November 3, 2009 order granting summary disposition in defendant's favor and cancelling oral argument was itself not date stamped until Friday, November 6, 2009. Moreover, "a paper or document is filed when it is delivered to and received by the proper officer to be kept on file, and the endorsement of the officer with whom it is filed is but evidence of the time of filing." *Biafore v Baker*, 119 Mich App 667, 669; 326 NW2d 598 (1982), citing *People v Madigan*, 223 Mich 86, 89; 193 NW 806 (1923); *Hollis v Zabowski*, 101 Mich App 456, 457; 300 NW2d 597 (1980); *King v Calumet & Hecla Corp*, 43 Mich App 319, 325; 204 NW2d 286 (1972).

The trial court has authority to manage its docket and to dispose of oral argument pursuant to MCR 2.119(E)(3). However, our review of defendant's motion for summary disposition reveals factual information contained within it and in the documents attached to it, upon which summary disposition should have been denied. Indeed, even if the plaintiff failed to timely file its summary disposition response and the trial court's refusal to consider it in the context of the motion for summary disposition was proper, we would still be inclined to reverse. The photographs attached to defendant's summary disposition motion, as well as portions of the depositions that were attached thereto, demonstrate, in and of themselves, that a question of material fact existed on plaintiff's property claims. See *Oliver v Smith*, 269 Mich App 560, 563-564, 566-567; 715 NW2d 314 (2006).

We also conclude that the trial court erred by denying plaintiff's motion for reconsideration. If the trial court did so based on the merits of the summary disposition motion after a review of plaintiff's briefing and exhibits, its conclusion was in error for the reasons set forth above. Having had to issue an initial ruling without the benefit of plaintiff's brief led the trial court to a palpable error. If, on the other hand, the trial court denied the motion for reconsideration without considering plaintiff's response to the summary disposition motion despite the fact that plaintiff raised a credible claim that her response was received by the court clerk on or before the deadline, then its decision was outside the range of reasonable and principled outcomes. *In re Kostin Estate*, 278 Mich App 47, 51; 748 NW2d 583 (2008). Moreover, the order denying reconsideration did not address any of plaintiff's additional arguments, such as whether it would have been appropriate to consider other options to dismissal of plaintiff's claim, or whether relief from judgment would have been appropriate in such circumstances under MCR 2.612(C)(1)(a) or (f).

As there are genuine issues of material fact as to plaintiff's claims, we reverse the grant of summary disposition and remand for further proceedings. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Elizabeth L. Gleicher
/s/ Douglas B. Shapiro