STATE OF MICHIGAN

COURT OF APPEALS

RBPM, LLC,

Plaintiff-Appellee,

v

DAVID ALAN KOVALESKI,

Defendant-Appellant.

UNPUBLISHED
December 16, 2021

No. 356267
Lenawee Circuit Court
LC No. 19-006260-CH

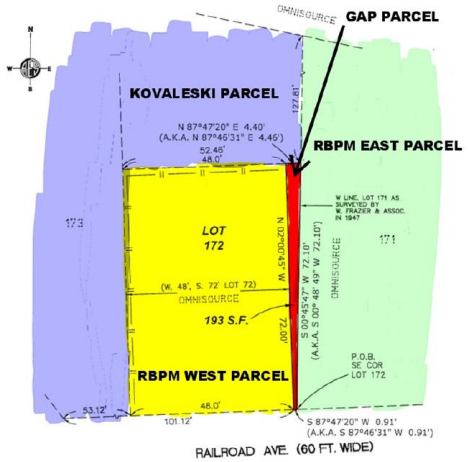
Before: SAWYER, P.J., and RIORDAN and REDFORD, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's judgment quieting title to a piece of property in favor of plaintiff following a bench trial in this adverse-possession action. We affirm.

I. FACTS AND PROCEDURAL BACKGROUND

This case concerns a dispute over a 193-square-foot parcel, referred to as the "gap parcel," located in Adrian, Michigan, between two pieces of property owned, or formerly owned, by plaintiff, and abutting property owned by defendant. Relevant here are four pieces of property: Lot 171, Lot 172, Lot 173, and the gap parcel. A diagram provided in plaintiff's brief on appeal shows the division of property:



Plaintiff's sole member is Floyd Rodgers, Jr., who obtained Lot 171 from his parents in 1993 and conveyed it to plaintiff in 2004. Plaintiff then sold Lot 171 to OmniSource, LLC, in 2018. Rodgers purchased the southern portion of Lot 172 from two individuals not relevant to this appeal on April 26, 1995. Rodgers subsequently conveyed the southern portion of Lot 172 to a trust in his name on May 18, 1997, which then conveyed the southern portion of Lot 172 to plaintiff on May 18, 2004. When Rodgers purchased the southern portion of Lot 172, he installed a fence "at the corner there," seemingly referring to where the gap parcel touches the building located on Lot 171, which ran to the west and south on the property line. Lot 171 and the southern portion of Lot 172, located off of Railroad Avenue, were used for parking related to Rodgers's business, Floyd's Rigging and Machinery Movers, Inc.

Defendant, who lived in Seattle, Washington, from 1989 until either 2013 or 2016, acquired the gap parcel from J&D Electric Motor, Inc., by deed on June 7, 2000. There is no dispute that defendant owns the portion of Lot 172 north of plaintiff's portion of Lot 172, and the portion of Lot 173 west of plaintiff's portion of Lot 172. On July 10, 2000, defendant sent a letter to "Floyd's Rigging" requesting the removal of the "stones-gravel that you placed on my property." Defendant also requested replacement of "the fence that you took down on what is now my property." There appears to be no dispute that neither of these demands were met.

Plaintiff filed a complaint seeking to quiet title to the gap parcel in its favor, asserting that it could satisfy the elements of adverse possession. Defendant denied these allegations. After plaintiff unsuccessfully moved for summary disposition, a bench trial was held over Zoom. Rodgers, defendant, and several individuals who performed landscaping services for defendant testified at trial. Following testimony, the trial court found that plaintiff had established all the elements of an adverse-possession claim. Explaining its findings, the trial court twice asserted that there was no credible evidence presented demonstrating that plaintiff's possession of the property was interrupted or to dispute plaintiff's arguments regarding any of the elements of adverse possession. The trial court thus entered a judgment quieting title to the gap parcel in plaintiff's favor, and this appeal followed.

II. STANDARD OF REVIEW

As explained in *Patel v Patel*, 324 Mich App 631, 633; 922 NW2d 647 (2018):

> This Court reviews for clear error the trial court's factual findings following a bench trial and reviews de novo the trial court's conclusions of law. A finding is clearly erroneous where, although there is evidence to support the finding, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been made. On appellate review, this Court must afford deference to the trial court's superior ability to judge the credibility of the witnesses who appear before it. [Citations and quotation marks omitted.]

"A claim for adverse possession is equitable in nature," and "decisions regarding equitable claims, defenses, doctrines, and issues are reviewed de novo." *Beach v Lima Twp*, 283 Mich App 504, 508; 770 NW2d 386 (2009).

III. ADVERSE POSSESSION

Defendant first contends that the trial court erred by finding that plaintiff established the elements of adverse possession.

"A party claiming adverse possession must show clear and cogent proof of possession that is actual, continuous, open, notorious, exclusive, hostile, and uninterrupted for the relevant statutory period." *Marlette Auto Wash, LLC v Van Dyke SC Props, LLC*, 501 Mich 192, 202; 912 NW2d 161 (2018). The statutory period is 15 years. See *id*.; MCL 600.5801(4). "Determination of what acts or 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).

A. EXCLUSIVE AND CONTINUOUS POSSESSION

Defendant argues that plaintiff failed to establish that it had exclusive and continuous possession of the gap parcel. We disagree.

With regard to the "exclusive" requirement, an adverse possessor must have "the intention of holding [i.e., possessing] the property as his own to the exclusion of all others." *Smith v Feneley*, 240 Mich 439, 442; 215 NW 353 (1927). "Possession refers to an exercise of dominion over the property, and there may be degrees even in the exclusiveness of the exercise of ownership." *Jonkers v Summit Twp*, 278 Mich App 263, 274-275; 747 NW2d 901 (2008) (quotations marks and citation omitted). However, concurrent possession with the true owner is not exclusive. *Id*. at 274.

With regard to the "continuous" requirement, posession of a property must be continuous for the 15-year statutory period, but daily and constant use is not always a requirement. See *Dummer v United States Gypsum Co*, 153 Mich 622, 638; 117 NW 317 (1908). See also *Dyer v Thurston*, 32 Mich App 341, 344; 188 NW2d 633 (1971) (explaining that use can be "continuous" without being constant so long as the use is "in keeping with the nature and character of the right

claimed").[1] The 15-year period need not be satisfied by a single owner, and successive owners who are in privity with each other may "tack" their respective periods of adverse use together. *Siegel v Renkiewicz Estate*, 373 Mich 421, 425; 129 NW2d 876 (1964). Privity is "established by inclusion by reference to the claimed property in the instruments of conveyance or by parol references at the time of the conveyances." *Id.*

The evidence presented at trial clearly and cogently established that plaintiff[2] had exclusive, continuous possession of the gap parcel for a period of at least 15 years. Initially, the fact that defendant's workers did not see vehicles parked in the parking lot or on the gap parcel when they performed landscaping for defendant is not conclusive regarding whether plaintiff's possession was continuous. And in any event, none of those individuals worked for defendant during the relevant statutory period (whether that was 1995 to 2010, 1996 to 2011, or 2000 to 2015). Thus, their testimony is, as plaintiff asserts, "largely irrelevant" because they worked for defendant *after* legal title would have vested in plaintiff. More importantly, despite the fact the headquarters for Floyd's Rigging moved from the Railroad Avenue location in 2005, Rodgers acknowledged parking vehicles on the gravel parking lot continuously since " '96 [sic] probably, when I bought it in '95 [sic]" and up until the instant lawsuit was filed. Rodgers also acknowledged that his use of the southern portion of Lot 172 as a parking lot included parking on the gap parcel, which he had also graveled. Rodgers's testimony also referred to two Google Earth maps showing the property, one of which was a 2014 image that he acknowledged showed vehicles parked on the gravel parking lot, including a red pickup truck that was parked in the area of the gap parcel. True, defendant testified that he "kicked" Rodgers's father, Floyd Rodgers, Sr., off the gap parcel, "always" checked on his properties when he returned to Michigan from Seattle, and even sprayed the fence "with Roundup myself" (in addition to hiring others to landscape for him). However, any conflicts in the testimony of Rodgers and defendant were to be resolved by the trial court and such credibility determinations should not be second-guessed by this Court on appeal. See *Patel*, 324 Mich App at 633 (explaining that "this Court must afford deference to the trial court's superior ability to judge the credibility of the witnesses who appear before it"). The evidence was sufficient to show that plaintiff had both exclusive and continuous possession of the gap parcel.

Additionally, July 2000 letter from defendant was insufficient to interrupt plaintiff's adverse possession of the gap parcel. The statutory period for adverse possession is not interrupted unless the true owner reenters the property and remains in possession for at least a year after reentry or files suit within one year. *Taggart v Tiska*, 465 Mich 665, 672-673; 641 NW2d 240 (2002), citing MCL 600.5868. See also 16 Powell, Real Property, § 91.07[2], pp 91-44 ("The true owner can successfully interrupt the claimant's unwarranted [but otherwise continuous] adverse possession by either obtaining a judgment against the claimant or by entering the disputed property in an open manner with intent to take and hold possession effectively, excluding the possessor."). Although the July 2000 letter from defendant requested that the gravel be removed from the gap

[1] Although cases decided before November 1, 1990, are not binding precedent, MCR 7.215(J)(1), they may be considered as persuasive authority. *Aroma Wines & Equip, Inc v Columbian Dist Servs, Inc*, 303 Mich App 441, 453 n 4; 844 NW2d 727 (2013).

[2] For the purposes of our analysis, we use the term "plaintiff" in this context as contemplating both plaintiff itself and those with which it is in privity.

parcel, the evidence demonstrated that the gravel was not removed from the gap parcel, the gap parcel was still used by Rodgers for his business, and defendant did nothing to prevent that use until he placed the concrete blocks on the gap parcel in August 2020. Defendant also testified that he did not know whether Rodgers continued using the gap parcel after he sent the July 2000 letter, stating, "I didn't see him use it because I left for Seattle." Thus, the evidence shows defendant did not reenter the gap parcel and remain in possession of it for at least one year after reentry. Nor is there evidence that defendant filed suit within one year of the July 2000 letter to obtain a judgment against plaintiff. Accordingly, defendant's July 2000 letter did not interrupt plaintiff's adverse possession of the gap parcel. See *Taggart*, 465 Mich 472-473.

Further, plaintiff and its predecessors were in privity, thereby allowing tacking of the periods of adverse use. Plaintiff's sole member is Rodgers. Plaintiff obtained the southern portion of Lot 172 from the trust on May 18, 2004. In turn, the trust acquired the southern portion of Lot 172 from Rodgers on May 18, 1997. And Rodgers acquired the southern portion of Lot 172 on April 26, 1995. Rodgers acknowledged treating the gap parcel as his own since the mid-1990s, noting that he "graveled the whole thing . . . ." Rodgers also acknowledged parking vehicles on the gravel parking lot, including on the gap parcel, continuously since 1995 or 1996. Additionally, Rodgers acknowledged that OmniSource used the southern portion of Lot 172 "when they were renting it from me . . . ." It is true the instruments of conveyance do not mention the gap parcel. However, it can be inferred that parol references were made regarding the gap parcel—which Rodgers used as part of the parking lot for his business—when Rodgers conveyed the southern portion of Lot 172 to the trust and plaintiff. Accordingly, privity is established for purposes of tacking periods of adverse use together between Rodgers, the trust, and plaintiff.

Defendant relies on his workers' labor on the gap parcel to assert that plaintiff did not have exclusive, continuous possession of the gap parcel throughout the 15-year statutory period. However, this reliance is mistaken. Although exclusivity is undermined by evidence that a party other than the claimant used the property and was not prevented from trespassing, *Dunlop v Twin Beach Park Ass'n, Inc*, 111 Mich App 261, 267; 314 NW2d 578 (1981), "occasional trespasses do not suffice to defeat a claim of exclusivity," *Waisanen v Superior Twp*, 305 Mich App 719, 732; 854 NW2d 213 (2014).[3] Coray Pratt, Gerald Lee Frederick, and Scott Clymer, three individuals who performed landscaping for defendant, testified that they may have occasionally crossed the gap parcel and onto the southern portion of Lot 172 to remove weeds from the fence. However, contrary to defendant's assertions, this does not necessarily defeat plaintiff's claim of exclusive possession of the gap parcel. *Id*. In any event, as noted, none of defendant's workers, who worked on defendant's property in 2016 or later, performed their respective landscaping duties during the relevant statutory period. The exclusive, continuous possession would have taken place between 1995 and 2010, 1996 and 2011, or 2000 and 2015. Therefore, the testimony of defendant's workers is essentially irrelevant to the analysis in this case.

Accordingly, there was clear and cogent evidence that plaintiff's possession of the gap parcel was exclusive and continuous throughout the statutory period.

[3] *Waisanen* was superseded on other grounds by the Legislature's amendment of MCL 600.5821. See 2016 PA 52, effective June 20, 2016.

B. OPEN, NOTORIOUS, AND HOSTILE

Defendant argues that plaintiff failed to establish that its possession was open, notorious, and hostile. We disagree.

"In order to support a claim of title by adverse possession, acts of possession must be open and of a hostile character, but it is sufficient if the acts of ownership are of such character as to indicate openly and publicly an assumed control or use such as is consistent with the character of the premises in question." *Houston v Mint Group, LLC*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 353082); slip op at 8 (cleaned up). Hostility in the context of an adverse-possession claim means the "use of property without permission and in a manner that is inconsistent with the rights of the true owner." *Jonkers*, 278 Mich App at 273. With respect to the requirements that the possession be open and notorious, it must be apparent to the property owner and the public that his or her rights are being invaded in an adverse manner. See *Monroe v Rawlings*, 331 Mich 49, 52; 49 NW2d 55 (1951) (explaining that possession or use must be "of such a character as to openly and publicly indicate an assumed control") (quotation marks and citation omitted). See also *Ennis v Stanley*, 346 Mich 296, 301; 78 NW2d 114 (1956) (stating that absent actual knowledge of a hostile claim, "[t]he 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") (quotation marks and citation omitted).

Clear and cogent evidence established that plaintiff's possession of the gap parcel was open, notorious, and hostile. Most critically, defendant admitted at trial that plaintiff's use of the gap parcel was against his interest in the gap parcel, and the July 2000 letter demonstrates that defendant had actual knowledge of plaintiff's use of the gap parcel and sought to end its adverse use of the gap parcel. Further, Rodgers testified that he graveled the gap parcel and regularly parked vehicles on it. These actions were contrary to defendant's rights in the gap parcel and were sufficient to place the world on notice that plaintiff was assuming control over the gap parcel. See *Monroe*, 331 Mich at 52. Thus, there was clear and cogent evidence that plaintiff's possession of the gap parcel was open, notorious, and hostile.

Defendant argues that plaintiff did not prove its possession of the gap parcel was open because multiple witnesses testified they never saw vehicles parked on the gap parcel. However, Pratt, Frederick, Clymer, and Randy Skinner, another individual who performed landscaping for defendant, each testified they began working on defendant's properties at issue in 2016. The trial court found that plaintiff's possession of the gap parcel began in 1996, 15 years from which would have been 2011. Thus, the testimony of Pratt, Frederick, Skinner, and Clymer sheds no light on the statutory period here. And even if the July 2000 letter restarted the statutory 15-year period, it would have been satisfied in July 2015—still before any of those four witnesses worked on defendant's properties—because no other action was taken by defendant until he installed the concrete blocks in August 2020. Accordingly, as already noted, defendant's reliance on the testimony of Pratt, Frederick, Skinner, and Clymer is misplaced.

Defendant also relies on this Court's holding in *McQueen v Black*, 168 Mich App 641, 644; 425 NW2d 203 (1988), that "if [the] plaintiff took possession of [the] defendant's land with the intent to hold to the true boundary line, rather than to adversely possess the property, his possession is not hostile." Defendant argues that because Rodgers believed that the fence represented the

property line and he "only later discovered he did not own the gap parcel," plaintiff intended to hold true to the boundary line and its possession was not hostile. Indeed, Rodgers assumed he owned, and paid property taxes on, the gap parcel, and indicated it was not until "a few years back, . . . five years or so," that he learned the gap parcel was owned by someone else.

In *Connelly v Buckingham*, 136 Mich App 462, 468; 357 NW2d 70 (1984), this Court articulated two relevant principles regarding boundary lines:

> When a landowner takes possession of land of an adjacent owner, with the intent to hold to the true line, the possession is not hostile and adverse possession cannot be established. The corollary to this rule provides that, when 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. [Citations omitted.]

As this Court observed in *DeGroot v Barber*, 198 Mich App 48, 52; 497 NW2d 530 (1993), although "at first glance" the two principles above "appear incompatible,"

> there is a distinction between the two concepts, albeit a subtle one. In our view, the distinction is between (1) failing to respect the true line, while attempting to do so, and (2) respecting the line believed to be the boundary, but which proves not to be the true line.

A claim of adverse of possession is not barred when it is based on the second of these two principles. *Id*. at 53. "A mistake regarding the true boundary line does not defeat a claim of adverse possession." *Id*. To allow a mistake regarding the true boundary line to preclude an adverse-possession claim

> would be contrary to fundamental justice and public policy to limit the application of the doctrine of adverse possession to those cases where the adverse possessor knew his possession was deliberately wrong, while excluding the adverse possessor whose possession was by mistake. That would serve to reward the thief and punish the innocent, but mistaken, citizen. [*Id*.]

Although this contradicts the holding of *McQueen*, to the extent *DeGroot* and *McQueen* conflict, *DeGroot* controls. See MCR 7.215(J). And under *DeGroot*, because Rodgers was merely attempting to respect the line believed to be the true boundary line, his mistake does not invalidate plaintiff's claim for adverse possession. Therefore, defendant's reliance on *McQueen* is misplaced.

Defendant also argues the fact plaintiff did not pay property taxes on the gap parcel precludes a finding that plaintiff's possession was hostile. We disagree. Payment of property taxes is but one of many factors that may support an adverse-possession claim, and is not by itself conclusive. See *Seifferlein v Foerster*, 218 Mich 179, 186; 187 NW 602 (1922). Thus, the fact plaintiff did not pay the property taxes for the gap parcel (although Rodgers assumed he did) does not defeat plaintiff's claim for adverse possession because the evidence otherwise established the necessary elements of adverse possession.

C. ACTUAL AND VISIBLE

Defendant argues plaintiff failed to prove its possession was actual and visible. Although defendant has arguably abandoned this argument by failing to cite caselaw specific to analysis of the "actual" prong of an adverse-possession claim, see *Houghton ex rel Johnson v Keller*, 256 Mich App 336, 339-340; 662 NW2d 854 (2003), it is meritless in any event.

"[O]ne claiming title by adverse possession must show positive and affirmative acts of ownership." *Barley v Fisher*, 267 Mich 450, 453; 255 NW 223 (1934). Rodgers sufficiently demonstrated that plaintiff's possession of the gap parcel was actual and visible. Rodgers testified that he "graveled the whole parking lot" and put up a fence when he purchased the southern portion of Lot 172 in 1995. Rodgers acknowledged that he had "not occupied" defendant's property to the north and west of the parking lot, and that he was only claiming an interest in the gap parcel. Rodgers also acknowledged that he has treated the gap parcel as his own since the mid-1990s, stating, "Well, sure I did. I graveled the whole thing, as you see." Further, Rodgers testified that the southern portion of Lot 172 and the gap parcel were used for parking related to his business, and that people from RBPM, Floyd's Rigging, and OmniSource were the "only ones that used" the gap parcel. Although the headquarters for Floyd's Rigging moved locations in 2005, Rodgers testified that plaintiff continued to own the southern portion of Lot 172 and acknowledged that vehicles continued to park on it—and the gap parcel—up until litigation began in this case. Defendant asserts Frederick's testimony, that when he took out a part of the existing fence, the southern portion of Lot 172 was mostly grass and dirt, not gravel, demonstrates that plaintiff's possession was not actual or visible. However, Rodgers acknowledged he had treated the gap parcel as his own since the mid-1990s and, despite not "top dress[ing]" the parking lot (aside from the occasional bucket to fill potholes), Rodgers stated he did not have to re-gravel the area because he originally did so "in a manner so it would never have to be re-graveled." The evidence cogently and clearly established that plaintiff had actual and visible possession of the gap parcel.

Accordingly, the trial court did not clearly err in finding that plaintiff had established the necessary elements of an adverse-possession claim.

IV. DEFENDANT'S REPOSSESSION OF THE GAP PARCEL

Defendant argues the trial court erred by failing to find that even if plaintiff acquired the gap parcel by adverse possession, defendant "re[]possessed the gap parcel by adverse possession after [the gap parcel] was dispossessed." We disagree.

An issue must be raised in or decided by the trial court for it to be preserved for appeal. *Glasker-Davis v Auvenshine*, 333 Mich App 222, 227; 964 NW2d 809 (2020). Defendant failed to raise this issue below, and the trial court did not decide it. Therefore, it is unpreserved for appellate review and this Court need not address the issue. *Id*. Nonetheless, we have reviewed the issue and conclude that it is meritless.

Defendant asserts that he "ousted" plaintiff from the gap parcel in 2000 when he told plaintiff to "cease use of the land and sent a letter." Defendant also asserts there was "uncontroverted testimony from several witnesses and [defendant] himself" demonstrating that plaintiff abandoned any adverse interest when Floyd's Rigging moved in 2005. However, the

evidence at trial demonstrated that no action was ever taken to comply with the demands in the July 2000 letter, and that plaintiff continued using the gap parcel well beyond the July 2000 letter and even beyond 2005 when Floyd's Rigging moved headquarters. Indeed, Rodgers testified use of the southern portion of Lot 172 and the gap parcel continued until at least the litigation in this case began. And defendant's testimony that he had "never seen a car parked in the Lot 172 parking lot for the past 20 years" carries little weight when defendant admitted he lived in Seattle from "1989 until 2013, 2016, somewhere around there" and only occasionally returned to Michigan to visit his properties. Therefore, defendant's claim that he repossessed the gap parcel by his own adverse possession is without merit.

V. CONCLUSION

The trial court's factual findings were not clearly erroneous, and it did not err by quieting title to the subject property in plaintiff. Therefore, we affirm.

/s/ David H. Sawyer
/s/ Michael J. Riordan
/s/ James Robert Redford