STATE OF MICHIGAN

COURT OF APPEALS

RICHARD ARBOUR and DEBRA ARBOUR née LAMONT, Plaintiffs-Appellants	UNPUBLISHED May 23, 2013
v	No. 307234 Delta Circuit Court
KATRINA ALBERT, Defendant-Appellee.	LC No. 10-20800-CH

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

PER CURIAM.

Plaintiffs Richard and Debra Arbour purchased a lot along the Escanaba River in 1994. Because untrained individuals imprecisely divided and described the lots decades earlier, the Arbours believed that their northern border was a triangle marked by a copse of trees. That triangular piece of land actually belonged to the Arbours' northern neighbor, currently Katrina Albert. In 2010, after two years of disagreement regarding the boundary line, the Arbours filed suit to quiet title to the disputed land. The Arbours claimed title by adverse possession or, in the alternative, that the neighbors had acquiesced to a new border for the statutory period.

During a bench trial, the parties presented conflicting evidence regarding their historical use of the disputed land and the dates on which significant events occurred. The court gave greater weight to Katrina Albert's evidence and determined that the Arbours' use of the land was neither exclusive nor continuous for the required 15-year period. Although the trial court committed clear error in determining that the Arbours' possession of the land was not continuous for the statutory period, there was clear and cogent evidence from which the court could determine that their possession was not exclusive and that the parties did not acquiesce to a new boundary line. Because we defer to the trial court's determinations regarding the weight of the evidence and the credibility of the witnesses, we affirm the judgment in Katrina Albert's favor.

I. BACKGROUND

In 1989, Michael and Loretta Albert purchased a rectangular lot along the Escanaba River in Cornell. In 1994, the Arbours purchased the parcel to the south. In the spring of 1995, the Arbours moved a house to their property and began extensive work on their land. At that time, the Arbours installed a large garden on their property that extended 36 feet into the triangle-shaped disputed area. They leveled a sand hill on the disputed land to use as fill for their home

construction. At some point, the Arbours also created a small garden to grow horseradish and asparagus.

Michael Albert, the only member of his family to use the northern lot, also made use of the disputed area. The Arbours conceded that Michael created a pet cemetery and erected a satellite dish on the land. Both Michael and the Arbours planted trees in the area. Michael assisted in the gardening and his daughter Katrina remembered that the large garden was purposely placed straddling the boundary line because it was a joint venture. After Michael's death, the Alberts used sand from the disputed land to fill in an old outhouse pit on the Albert property.

Michael Albert passed away in 2007 and the land passed to his wife Loretta. In 2010, Loretta transferred the property to their daughter Katrina. In early 2008, the Alberts removed the satellite dish from the land. In the spring of 2008, the Alberts indicated their intent to construct a privacy fence along the property line. The neighbors could not agree on the line and the Alberts consulted a surveyor. The land survey was conducted on June 17, 2009, and definitively established that the disputed area was part of the Albert land. This suit followed.[1]

After hearing the evidence and visiting the property, the trial court concluded that the Arbours' adverse possession claim was meritless because of their failure to meet the 15-year statutory period and the lack of exclusivity. Specifically, the court ruled:

> The occupation began at its earliest in the spring of 1995. It ended in 2008 when . . . Loretta Albert[] contested the location of the line as the parties were discussing a privacy fence, or at the latest in the spring of 2009 when Katrina Albert asserted Albert family right to the land. [Emphasis omitted.]

In relation to exclusivity, the court found: "The history of usage after 1994 is replete with examples of Michael Albert's periodic planting of trees, the mutually created small garden, and the placement of a very large satellite dish which serviced his camp." The court rejected that these uses were de minimis.

Similarly, the court found that the Arbours could not establish acquiescence to a different boundary line for the statutory 15-year period because any agreement reached in 1995 was negated in 2008 or 2009. Moreover, the court was "not convinced that Michael Albert ever did acquiesce to any particular line" as "[t]he only evidence on this issue comes from partisan sources and does not bear the indicia of reliability." (Emphasis omitted.) As evidence against acquiescence in a new border, the court noted Michael's usage of the disputed area and the fact that "no definitive line of trees stands out, prompting a viewer to wonder which particular line of trees or other markers form" the alleged border line. (Emphasis omitted.)

[1] Katrina Albert filed a counter-complaint for trespass, seeking damages for the sand removed from the area. The trial court rejected her claim and she has not appealed that ruling.

II. ADVERSE POSSESSION

The trial court did not err in determining that the Arbours failed to gain title to the disputed land through adverse possession. Actions to quiet title are equitable and are reviewed de novo. *Gorte v Dep't of Transp*, 202 Mich App 161, 165; 507 NW2d 797 (1993). We review the trial court's underlying factual conclusions for clear error. *Jonkers v Summit Twp*, 278 Mich App 263, 265; 747 NW2d 901 (2008).

The party claiming ownership by adverse possession has the burden to establish all the required elements, *Yatczak v Cloon*, 313 Mich 584, 589; 22 NW2d 112 (1946), by "clear and cogent" evidence.[2] *Beach v Lima Twp*, 489 Mich 99, 106; 802 NW2d 1 (2011), citing *Burns v Foster*, 348 Mich 8, 14; 81 NW2d 386 (1957). When considering an adverse possession claim, a court must strictly construe the evidence "with every presumption . . . in favor of the record owner of the land." *Rozmarek v Plamondon*, 419 Mich 287, 292; 351 NW2d 558 (1984). To acquire title to land by adverse possession, the invader "must have had actual, visible, open, notorious, exclusive, uninterrupted possession, hostile to the owner and under cover of claim of right," *id.*, for a period of 15 years. MCL 600.5801(4).

> [T]he person claiming by adverse possession must show that his possession has been actual, visible, open, and notorious to demonstrate that the owner of record has been dispossessed of the land, and must show that his possession has been exclusive, continuous, and uninterrupted to demonstrate that no new cause of action has accrued. [*Kipka v Fountain*, 198 Mich App 435, 440; 499 NW2d 363 (1993).]

The evidence clearly establishes that although they purchased their property in 1994, the Arbours made no use of the disputed area until the spring of 1995. At that time, the Arbours removed sand from a hill on the triangular plot. Spring 1995 is also the earliest date given for the creation of the garden straddling the property line. In 2008, Loretta and Katrina Albert expressed their opinion that the disputed area belonged to them and removed the satellite dish. In 2008 or 2009, Katrina Albert demanded that the Arbours stop removing sand from the site but the Arbours refused. In June 2009, the Alberts had the land surveyed and determined their ownership interest.

The trial court found that the Alberts interrupted the Arbours' possession of the property no later than the June 2009 survey, one year short of the statutory adverse possession period. We disagree that the Alberts' acts sufficed to interrupt the Arbours' adverse possession. The running

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[2] "[C]lear and cogent evidence" is more than a preponderance of evidence, approaching the level of proof beyond a reasonable doubt. . . . . [I]n an adverse possession case, for a party to establish possession by "clear and cogent evidence," the evidence must clearly establish the fact of possession and there must be little doubt left in the mind of the trier of fact as to the proper resolution of the issue. [*McQueen v Black*, 168 Mich App 641, 645 n 2; 425 NW2d 203 (1988).]

of a period of 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, *Place v Place*, 139 Mich 509; 102 NW 996 (1905). See also 16 Powell, Real Property, § 91.07[2], p 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 possession."). Nothing that the Alberts did in relation to the disputed property interfered with the Arbours' possession of the land. The Alberts did not build the threatened privacy fence and failed to end the Arbours' use of the land. Even after the surveys revealed that the Arbours did not own the disputed land, the Alberts failed to file suit. Accordingly, the trial court erred in this regard.

However, the trial court correctly found based on the evidence presented that the Arbours' use and possession of the property was never exclusive, negating any claim of adverse possession. "[P]ossession concurrent with that of the true owner is [not] exclusive." *Hamilton v Weber*, 339 Mich 31, 53-54; 62 NW2d 646 (1954) (quotation marks and citation omitted). "'Possession' refers to an exercise of dominion over the property," and the manner of exercising this dominion depends "on the character of the premises." *Jonkers*, 278 Mich App at 274. The disputed property was part of the Alberts' yard and was considered by the Arbours as their own yard. Each neighbor used the property in a manner consistent with a yard in a rural area. They each participated in gardening on the disputed land. They each planted trees. Michael Albert installed a satellite dish and created a pet cemetery, while the Arbours parked farm vehicles on the land and made use of its natural resources. Both neighbors maintained the land by mowing the grass, with the Alberts hiring a caretaker to do so. This mutual use occurred from the beginning of the Arbours' alleged occupation of the land. Accordingly, the trial court properly rejected the Arbours' adverse possession claim.

III. ACQUIESCENCE

The trial court also did not err in finding that the Arbours' acquiescence claim lacked merit. The doctrine of acquiescence provides a manner for quieting title when neighbors have acquiesced to a boundary line between their properties. *Killips v Mannisto*, 244 Mich App 256, 260; 624 NW2d 224 (2001). The claimant must establish acquiescence by a preponderance of the evidence, rather than by the stricter clear-and-cogent-evidence standard. *Id.* "There are three theories of acquiescence . . . : (1) acquiescence for the statutory period; (2) acquiescence following a dispute and agreement; and (3) acquiescence arising from intention to deed to a marked boundary." *Sackett v Atyeo*, 217 Mich App 676, 681; 552 NW2d 536 (1996). The Arbours attempted to establish the first type of acquiescence: that the parties had acquiesced for 15 years to a property boundary following a line of trees marking the triangular piece of land. For this type of acquiescence, the Arbours were not required to establish any historical dispute regarding the proper boundary line; a mere mistake about the actual boundary suffices. *Id.* at 681-682. Proof that parties have treated a boundary as the property line for the statutory period suffices to prove acquiescence. *Mason v City of Menominee*, 282 Mich App 525, 529-530; 766 NW2d 888 (2009).

Although the Alberts' acts in 2008 and 2009 were insufficient to interrupt the Arbours' adverse possession of the disputed area, their conduct does suffice to cut off the neighbors' acquiescence to an alternate property line. In 2008 or 2009, when Katrina Albert interfered with Richard Arbour's attempts to use sand from the disputed area, she expressly indicated that she did not agree with the Arbours' belief about the property line. The 2009 land survey conclusively resolved that the copse of trees was not the boundary as claimed by the Arbours. Any previous acquiescence in the border ended after 13 to 14 years, before the Arbours could meet the required statutory period.

Moreover, the trial court gave little weight to the Arbours' self-serving testimony that Michael Albert believed that the copse of trees served as the property line. The trial judge personally visited the site and noted that the subject trees were of different ages and species and therefore did not appear to have been planted to delineate a property line. The judge also noted gaps in the trees making the property easily accessible from the Albert cabin. The trees more closely resembled a "copse" rather than a "line" that could be treated as a property border. Moreover, Michael Albert's historical use of the property was consistent with a belief of ownership beyond the tree "line." We will not interfere with the trial court's resolution of this issue, which essentially involved a credibility contest.

Affirmed.

/s/ Amy Ronayne Krause
/s/ Elizabeth L. Gleicher
/s/ Mark T. Boonstra