STATE OF MICHIGAN

COURT OF APPEALS

EDWARD F. ANDREWS, JR., and ALAN B. ANDREWS, Plaintiffs/Counter-Defendants-Appellees/Cross-Appellants,	UNPUBLISHED July 30, 2013
v DENISE ALTER, Defendant/Counter-Plaintiff-Appellant/Cross-Appellee.	No. 305666 Oakland Circuit Court LC No. 2009-102648-CE

Before: BORRELLO, P.J., and JANSEN and M. J. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment determining title to real property following a bench trial. Plaintiffs cross-appeal as of right from the same judgment. For the reasons set forth in this opinion, we affirm in part, reverse in part, and remand for entry of a judgment in favor of defendant.

I. BASIC FACTS

These appeals arise out of a property dispute between plaintiffs and defendant, who own adjoining parcels of lakefront property on Pine Lake in West Bloomfield, Michigan. Plaintiffs own Lot 32 of Beardsley & Smith's Plat of "Orchard Beach" subdivision, commonly known as 3193 Interlaken Road. Defendant owns the southeasterly half of Lot 31, commonly known as 3199 Interlaken Road. Lot 31 is northwest of Lot 32. Interlaken Road is to the northeast of the properties, and Pine Lake is on the southwestern side. In 1983, plaintiffs' father, who then owned Lot 32, granted a five-foot maintenance easement to defendant's predecessors-in-interest, Joe Cabot and Ruth Cabot, to allow set-back for the construction of a house on Lot 31 at the border with Lot 32, in order to comply with West Bloomfield zoning laws. The parties had been

using and maintaining their property without an extensive property survey[1] to mark their respective boundary lines until plaintiffs had their property surveyed in 2008. Shortly thereafter, this suit was commenced.[2]

II. DEFENDANT'S APPEAL

Defendant argues that the trial court erred by failing to find that plaintiffs acquiesced to a purported acquiescence line as the true boundary between the parties' properties. An action to quiet title is an equitable action that is reviewed de novo. *Beach v Lima Twp*, 489 Mich 99, 106; 802 NW2d 1 (2011). A trial court's findings of fact in a bench trial are reviewed for clear error, while its conclusions of law are reviewed de novo. *Ligon v Detroit*, 276 Mich App 120, 124; 739 NW2d 900 (2007). In applying the clearly erroneous standard, "regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed." *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). "Furthermore, where the trial court's factual findings may have been influenced by an incorrect view of the law, an appellate court's review of those findings is not limited to clear error." *Id*.

"There are three theories of acquiescence. . . . . They include: (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 theory at issue here is acquiescence for the statutory period. "Under this theory of acquiescence, acquiescence to a boundary line may be established where the line is acquiesced in for the statutory period irrespective of whether there has been a bona fide controversy regarding the boundary." *Id*. A claim of title by acquiescence under this theory is rooted in "the statute of limitations on actions to recover possession of land. In most cases, an action for the recovery or possession of land must be brought within fifteen years after the cause of action first accrues." *Kipka v Fountain*, 198 Mich App 435, 438; 499 NW2d 363 (1993), citing MCL 600.5801.

> 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. 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

[1] Testimony revealed that defendant had a mortgage survey done when she purchased the property in 1988. However, that survey was found deficient at trial, i.e., it did not disclose the existence of any encroachments.

[2] Further facts relating to the specific findings of the trial court are set forth more fully below.

> 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. [*Kipka*, 198 Mich App at 438-439.]

Thus, "[t]he doctrine of acquiescence provides that, where adjoining property owners acquiesce to a boundary line for a period of at least fifteen years, that line becomes the actual boundary line." *West Mich Dock & Market Corp v Lakeland Investments*, 210 Mich App 505, 511; 534 NW2d 212 (1995). "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). "Unlike a claim based on adverse possession, an assertion of acquiescence does not require that the possession be hostile or without permission." *Id*. "Although Michigan precedent has not defined an explicit set of elements necessary to satisfy the doctrine of acquiescence, case law has held that acquiescence is established when a preponderance of the evidence establishes that the parties *treated* a particular boundary line as the property line." *Mason v City of Menominee*, 282 Mich App 525, 529-530; 766 NW2d 888 (2009) (internal quotation marks omitted; emphasis in original). In assessing whether a party has established acquiescence, a court should view the evidence as a whole. *Walters*, 239 Mich App at 458.

In *Walters*, 239 Mich App at 458, this Court held that the defendant proved by a preponderance of the evidence that the parties had treated a line of bushes as the approximate property line. This Court explained:

> The testimony in this case reveals that, until 1991, the owners of both lots were ignorant of the true location of the boundary line that divided lots 3 and 4. However, evidence established that the respective owners of lot 3, dating back to at least 1973, believed that the north boundary to lot 3 was the bush line. According to the testimony, all owners of lot 3 consistently mowed grass to the immediate south side of the bushes. In addition, previous owners of lot 3 commonly stacked firewood immediately adjacent to the bushes. Eventually, improvements of some cost were made on the disputed property when in 1984 or 1985 the garage and fence were built. A neighbor also testified that the belief in the community was that the bushes marked the boundary between lots 3 and 4. On this evidence it is clear that defendant's predecessors in title treated the line of bushes as the boundary between lots 3 and 4 for the statutory period. [*Id*. at 459.]

Likewise, in *Sackett*, 217 Mich App at 682-683, this Court held that the parties had acquiesced in a boundary line in the middle of a driveway:

> In this case, plaintiffs and the Whites mistakenly treated the center of the driveway as the boundary between their property when it was not the recorded property line. Because the entire driveway was actually on the Whites' property, plaintiffs' and the Whites' treatment of the center of the driveway as the boundary resulted in plaintiffs possessing what was actually the Whites' land. Until the fifteen-year period expired, the Whites would have had a cause of action against

> plaintiffs to recover possession of the western half of the driveway. Here, however, the statutory period was satisfied. The Whites, although the true owners of the entire driveway, treated the center of the driveway as the true boundary between their property and plaintiffs' property from 1963 until 1989, a period of about twenty-six years. In 1972, plaintiffs' survey revealed that the driveway was actually located on the Whites' property. Despite this knowledge, the Whites continued to acquiesce to the boundary line being the center of the driveway from 1972 until 1989, a period of seventeen years. As the Supreme Court has noted: "'It has been repeatedly held by this Court that a boundary line long treated and acquiesced in as the true line, ought not to be disturbed on new surveys. Fifteen years' recognition and acquiescence are ample for this purpose.'" *Johnson v Squires*, 344 Mich 687, 692; 75 NW2d 45 (1956) (citations omitted), quoting *Dupont v Starring*, 42 Mich 492, 494; 4 NW 190 (1880). The Whites acquiesced that the center of the driveway was the boundary line between their property and plaintiffs' property for more than fifteen years. Accordingly, the trial court properly determined that plaintiffs owned the western half of the driveway under the doctrine of acquiescence.

Here, there are undisputed facts establishing that the parties treated the purported acquiescence line, i.e., a line extending from an elevated metal pole in the seawall on Pine Lake to a narrow point between the parties' driveways at Interlaken Road, as the boundary line between the properties. Defendant and her late husband, Dr. John Alter, bought their property in 1988. The 1988 mortgage survey did not show that the existing improvements on the lot encroached on anyone else's property. Defendant has always maintained the property from the road at a narrow point between her and plaintiffs' driveways, to the elevated metal pole in the seawall on the lake. The pole was there from the time she purchased the property until the week before trial; she did not know who removed the pole, but defendant did not remove it.

In 1988, defendant hired Robert Mulligan to mow her lawn, and Mulligan has done so every year since defendant bought the property, except for a period of one year after Dr. Alter died and defendant was watching her budget. Defendant testified that Mulligan would mow from defendant's asphalt driveway along the side of the house to the pole in the seawall. Mulligan testified that he had no discussions with defendant about where the property lines were located, but that he knew where to mow because he could tell where plaintiffs had left off cutting their lawn. According to Mulligan, plaintiffs stopped cutting at a line between the two homes going down to the metal pole in the seawall; the line was very obvious. There were planters next to the metal post. Mulligan would follow that line back to the street, toward the parties' two driveways that butt against each other; there is about one foot between the driveways, and Mulligan would mow up to that point. He has mowed the lawn this way since 1988. No one has ever challenged Mulligan or said that he was mowing on the wrong side of the property line. Defendant likewise testified that for 20 years, she received no complaints from plaintiffs about her lawn maintenance, fertilization, or the location to which the lawn was cut.

Plaintiffs presented no evidence disputing the testimony of defendant and Mulligan regarding the manner in which the lawns were mowed. Although plaintiff, Edward F. Andrews, Jr. (Edward), claimed that when defendant's predecessors-in-interest, Joe Cabot and Ruth Cabot, owned defendant's property, Edward and the Cabots' son, John, would take turns cutting the

lawns for both properties, Edward offered no testimony disputing Mulligan's and defendant's testimony regarding where and how the lawns were mowed after defendant bought her property in 1988. Further, Edward admitted that he never objected to the manner in which defendant's mowing service was cutting the lawn. Thus, the evidence unequivocally establishes that (1) Mulligan mowed defendant's lawn to the acquiescence line from 1988 to the present, based on the way that plaintiffs mowed their lawn, and (2) plaintiffs never objected to the mowing by Mulligan. The conduct of the parties in mowing the lawn establishes that they treated the purported acquiescence line as the boundary line between the properties. Cf. *Walters*, 239 Mich App at 459 (noting that owners of a lot had "consistently mowed grass to the immediate south side of the bushes.")

The trial court found that Mulligan's mowing did not reflect defendant's belief regarding the property line because she did not inform him of the property line. Further, the court stated, the record did not show who mowed plaintiffs' lawn to the acquiescence line, i.e., whether it was plaintiffs themselves or an agent of plaintiffs. Thus, the trial court held the record was lacking to decide who knew or believed where the boundary line was located based on the mowing practices. The trial court's reasoning on this point was influenced by an incorrect view of the law. Under the theory of acquiescence asserted by defendant, it is not the parties' *actual* knowledge or beliefs that are considered. Instead, the pertinent inquiry is whether the parties *treated* a particular boundary line as the property line. *Mason*, 282 Mich App at 529-530. Here, defendant acted through her agent, Mulligan, in treating a particular boundary line, i.e., the line from the metal pole in the seawall to the point between the parties' driveways, as the property line. "An agency relationship may arise when there is a manifestation by the principal that the agent may act on his account. The test of whether an agency has been created is whether the principal has a right to control the actions of the agent." *Meretta v Peach*, 195 Mich App 695, 697; 491 NW2d 278 (1992) (citation omitted). It is undisputed that defendant hired Mulligan to mow her lawn in 1988 and that he has done so for all but one year since then. It is thus beyond contention that Mulligan was defendant's agent as he acted on her account in mowing the lawn, and she had the right to control his actions. And there is nothing in the record to suggest that plaintiffs' lawn was cut by anyone other than plaintiffs or a person that they hired to mow the lawn. Accordingly, the parties' conduct in mowing their respective lawns, either directly or through their respective agents, to the line extending from the pole in the seawall to the point between the driveways, reflected that they *treated* this line as the boundary line between the properties for longer than the statutory period of 15 years.

Moreover, no requirement exists that the line acquiesced to be a definite, identifiable line, such as a fence. For example, in *Walters*, 239 Mich App at 458, 460 n 3, this Court held that, although "a precise line was never acknowledged," acquiescence was established where a preponderance of the evidence showed that the parties "treated" a "bush line" ("a row of sporadically planted bushes and small trees") as the "approximate property line." Here, although no fence or line of bushes marked the acquiescence line, defendant and Mulligan both testified that the line extended from the metal pole on the seawall to a narrow point between the two driveways that approach one another at the road, and Mulligan indicated that the line was very obvious based on where plaintiffs or their agents had mowed their yard. We conclude that the evidence demonstrated the existence of a line that the parties treated as the boundary line for the statutory period.

In addition to the parties' mowing practices, another critical factor supports a finding of acquiescence. The trial court failed to consider the undisputed evidence that the deck and driveway encroachments onto plaintiffs' property existed when defendant bought her property in 1988 and yet plaintiffs never objected to those encroachments until 2008. Defendant testified that she and her late husband added no structures to the property after buying it in 1988, other than a garage that is not near the boundary line. Defendant explained that her deck is the same today as it was in 1988, and it has the same railing. Defendant's testimony in this respect is supported by the testimony of plaintiffs' own surveyor, Timothy Hart. When shown the 1988 mortgage survey of defendant's property, Hart admitted that it did not disclose the existence of any encroachments, but that the encroaching improvements he found were there; the same deck on the 1988 drawing existed when Hart did his 2008 survey. Thus, persons relying on the 1988 mortgage survey would not have been made aware of any encroachments. Hart further explained that the encroachments were there in 1988, but the mortgage surveyor did not use the true property lines or stakes. The mortgage surveyor in 1988 used a fence line rather than the iron stakes off the north property line. Thus, a person buying a new home would not have been made aware from the 1988 survey of the driveway and deck encroachments. Further, Edward acknowledged that from 1988 to 2008, he never objected to defendant's use of her home, the stairs, the deck, the deck walkway, the trellis, or the vegetation along the side of her home. Edward testified that he did not know if the driveway, deck walkway, deck, and landscaping were in place since 1988 or before, but he did not object to them whenever they came in.

It is beyond contention, then, that the deck and driveway encroachments into the purported acquiescence area were present in 1988, and plaintiffs did not object to the encroachments until 2008. The presence of the encroachments without objection for this period of time, together with the parties' undisputed mowing practices during the same period, resulted in defendant possessing what was actually plaintiffs' land for longer than the statutory period of 15 years. Therefore, we conclude that plaintiffs are no longer able to enforce their title, and defendant has obtained title to the acquiescence area by virtue of her possession of the land. *Sackett*, 217 Mich App at 682-683; *Kipka*, 198 Mich App at 438-439.

We agree with the trial court that the remaining evidence is generally equivocal and unhelpful. The presence of a sandbox on plaintiffs' side of the acquiescence line does not establish that the parties intended to use the sandbox as marking a boundary, as opposed to providing a safe place for children to play. The invisible dog fence wires offer scant support for the establishment of a boundary because there is no evidence that plaintiffs were on notice of the location of the wires, and defendant admitted that the invisible fence did not follow precisely along the purported acquiescence line at all points.[3] The evidence regarding the parties' respective sprinklers was conflicting regarding precisely where and how far water was sprayed in

[3] It could be argued that the paint marks on the grass left by defendant's contractor afforded notice to plaintiffs that the invisible fence was located on plaintiffs' property, but it is not clear from the record whether or how plaintiffs should have known that the paint marks represented the location of the invisible fence wires.

relation to the acquiescence line. No basis exists to question the trial court's findings regarding this evidence.

Nonetheless, given the undisputed evidence that (1) the parties or their respective agents mowed to the purported acquiescence line from 1988 to 2008, (2) plaintiffs never objected to this manner of mowing for 20 years, (3) the deck and driveway encroachments existed when defendant bought her property in 1988, and (4) plaintiffs did not object to the encroachments from 1988 to 2008, we hold that the trial court erred in concluding that defendant failed to establish her claim of acquiescence. The evidence demonstrates that the parties treated the acquiescence line as the boundary line for longer than the statutory period of 15 years.[4]

In light of our resolution of the above issue and the issues raised by plaintiffs on cross-appeal, we need not address the other issues raised by defendant on appeal.

III. PLAINTIFFS' CROSS-APPEAL

Plaintiffs first argue on cross-appeal that the trial court abused its discretion in permitting defendant to amend her counterclaim to assert a claim of prescriptive easement regarding the placement of her seasonal dock in Pine Lake.[5] This Court reviews for an abuse of discretion a trial court's decision whether to grant leave to amend a pleading. *Boylan v Fifty Eight LLC*, 289 Mich App 709, 727; 808 NW2d 277 (2010). This Court will reverse the trial court's ruling only if it occasions an injustice. *Id*. A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Id*.

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[4] It is also notable that, according to defendant, in describing the property line to potential buyers of her home in 2007, she described the property line as extending from the metal pole in the seawall to the point of the road between the two driveways, and she informed defendant, Alan B. Andrews (Alan), that she was describing the boundary line in this manner to potential buyers. Although Alan expressed concern that potential buyers should not think defendant's spreading junipers represented the property line, he expressed no objection to defendant's description of the property line as running from the pole in the seawall to the asphalt driveway. Plaintiffs presented no evidence to counter defendant's testimony on this point; indeed, the trial court found that this testimony regarding defendant's representations to potential buyers slightly supported her acquiescence claim. Our analysis does not rely on this testimony, however, given that it pertains to representations made in 2007, and the parties' historical treatment of the purported acquiescence line as the boundary line dating back to 1988 is more relevant.

[5] The trial court's order stated that it would "interpret and consider" defendant's counterclaim as presenting issues of prescriptive easement regarding the placement of the dock. However, the parties frame this issue as involving an order permitting amendment of the counterclaim to conform to the proofs. Given that the counterclaim did not expressly refer to a prescriptive easement, and that defendant had included in her motion on this issue a request that the pleadings be amended to conform to the evidence, we conclude that it is appropriate to review the trial court's decision as permitting amendment of the counterclaim to conform to the proofs.

MCR 2.118(C) provides:

> (1) When issues not raised by the pleadings are tried by express or implied consent of the parties, they are treated as if they had been raised by the pleadings. In that case, amendment of the pleadings to conform to the evidence and to raise those issues may be made on motion of a party at any time, even after judgment.
>
> (2) If evidence is objected to at trial on the ground that it is not within the issues raised by the pleadings, amendment to conform to that proof shall not be allowed unless the party seeking to amend satisfies the court that the amendment and the admission of the evidence would not prejudice the objecting party in maintaining his or her action or defense on the merits. The court may grant an adjournment to enable the objecting party to meet the evidence.

"MCR 2.118(C)(2) applies only where a party objects to admission of *evidence*." *Zdrojewski v Murphy*, 254 Mich App 50, 61; 657 NW2d 721 (2002) (emphasis in original). Thus, if the party opposing a motion to amend has not objected to the admission of evidence, the requirement of MCR 2.118(C)(2) that the moving party show a lack of prejudice does not apply. *Id*. "That requirement of subsection C(2) is not included in subsection C(1). To the contrary, subsection C(1) is liberal and permissive, treating issues tried by consent of the parties 'as if they had been raised by the pleadings.' The only requirement is that the party seeking amendment move to have the court amend the pleadings[.]" *Id*.

Here, defendant's counterclaim did not expressly refer to a prescriptive easement regarding the seasonal dock. But the counterclaim, in addition to seeking relief under the acquiescence doctrine, asked the trial court to "[g]rant [defendant] such other and further relief as shall be agreeable to equity and good conscience." Plaintiffs' own complaint also requested "such other or further relief as is just and equitable[.]" Moreover, in her trial brief, filed *before* trial, on October 27, 2010, defendant expressly argued that a prescriptive easement existed regarding the dock. Defense counsel also asserted the existence of a prescriptive easement regarding the dock in his opening statement at the beginning of trial on November 1, 2010. Plaintiffs' counsel then noted that a prescriptive easement was not pleaded, but did not otherwise state an objection or move to exclude consideration of prescriptive easement as a theory on which the dock issue could be tried.

After the close of proofs on November 2, 2010, but before closing arguments and the trial court's issuance of its findings of fact and conclusions of law, defendant filed on November 12, 2010, a motion to clarify or amend the issues regarding the seasonal dock, contending that the parties had presented facts necessary for the court to find that a prescriptive easement existed regarding the location of the dock. Defendant asked the court to rule that the issue of a prescriptive easement regarding the dock had been adequately raised by the pleadings and supported by the facts, or to permit amendment of the pleadings to conform to the evidence. In opposition to defendant's motion, plaintiffs argued that an amendment would be futile because there was no evidence that defendant's dock placement was hostile, and that plaintiffs would be prejudiced by an amendment because trial had already occurred.

At the motion hearing on November 24, 2010, plaintiffs' counsel asserted that he would have cross-examined defendant on the elements of a prescriptive easement if he had known that was the theory on which she was proceeding. Plaintiffs' counsel indicated he would have inquired into whether the parties' neighbors moved their docks over time to accommodate one another. The trial court stated that it would recognize defendant's counterclaim as including a prescriptive easement claim. The court also stated: "I will, I'm not declaring this, but if someone files a praecipe to reopen proofs or to do whatever because of what you've just indicated Mr. Horton [plaintiffs' counsel], I'll cross that bridge when we get to it, but that's the ruling of the Court concerning this Motion." The parties then addressed in their proposed findings of fact and conclusions of law the issue whether a prescriptive easement existed regarding the dock.

The record supports the conclusion that the existence of a prescriptive easement was tried by the implied consent of the parties. Plaintiffs were on notice before trial began that defendant was asserting the existence of a prescriptive easement, as defendant made this assertion in her trial brief, and her attorney also referred to it in his opening statement. Plaintiffs' counsel could have cross-examined defendant regarding the elements of this claim or presented other evidence if necessary. The court suggested at the motion hearing that it would entertain a motion to reopen proofs if that was necessary based on plaintiffs' counsel's assertion of prejudice, but plaintiffs did not seek to reopen proofs. Nor did plaintiffs seek an adjournment under MCR 2.118(C)(2).[6] The parties had the opportunity to, and in fact did, address the prescriptive easement issue in their proposed findings of fact and conclusions of law. In his closing argument, plaintiffs' counsel expanded on his argument that the manner of placing docks in the lake was permissive rather than hostile. Thus, the issue was tried by the implied consent of the parties.

Notably, the difference between acquiescence and adverse possession or a prescriptive easement is that a claim of acquiescence does not require proof that the possession was hostile or without permission. *Killips*, 244 Mich App at 260; *West Mich Dock*, 210 Mich App at 511. However, "the term 'hostile' is a term of art and does not imply ill will. Instead, 'hostile' merely means a use that is inconsistent with the rights of an owner." *Killips*, 244 Mich App at 259. Evidence was presented at trial regarding defendant's use of plaintiffs' riparian land in a manner that was inconsistent with plaintiffs' rights as the owners. It was undisputed that defendant's dock was not within her riparian property lines, as her own surveyor conceded this fact. Defendant testified that she has never changed the location or direction of the dock since buying the property in 1988, other than adding a platform that she later moved to the side of the dock away from plaintiffs' property at their request. Defendant also testified that from 1988 to 2008, no members of plaintiffs' family ever protested the location of defendant's dock.

[6] It is notable that closing arguments were held in March 2011, several months after the proofs were presented in November 2010, and after the trial court granted the motion to interpret the counterclaim as including a prescriptive easement claim in December 2010; plaintiffs thus had ample opportunity to request that the proofs be reopened, to seek an adjournment if necessary, and to prepare closing arguments regarding the theory of prescriptive easement.

Further, Edward admitted that he never objected to the location of defendant's dock until 2008 and that he used defendant's dock for fishing "[a]ll the time." Edward explained that plaintiffs have the biggest piece of property in the area so they attempted to accommodate their neighbors regarding the placement of the docks. Edward stated that he did not want to "chump" defendant by pushing his dock out so it would touch her dock. Edward explained, "If I go out this way (indicating) to the center of the lake I would close [defendant] off from getting into her dock. We're friends, we're not – I mean, who wakes up in the morning and says, 'I'm going to pimp the guy next door to me.'"

Thus, the evidence presented at trial reflects that the parties litigated the element of hostility that is encompassed in a prescriptive easement claim. The testimony that defendant's dock had been in the same location without objection for 20 years, and the undisputed fact that the dock crossed into plaintiffs' riparian land, was relevant to whether defendant had used plaintiffs' riparian land in a manner that was inconsistent with plaintiffs' rights as owners. This use reflects the type of "hostility" to title that is an element of a prescriptive easement claim. Edward's testimony that he attempted to accommodate neighbors regarding the placement of the docks was presented to support plaintiffs' position that they implicitly granted permission for defendant's use of the dock on plaintiffs' riparian land. If plaintiffs wished to present additional evidence on this point, they were free to ask the trial court to reopen the proofs, as the court indicated it would consider such a request, but no such request was made. Further, plaintiffs' counsel discussed in closing argument his view that defendant's use of the dock on plaintiffs' riparian land was permissive because the neighbors accommodated one another in the manner of placing their docks. Accordingly, we conclude that the elements of a prescriptive easement were tried by the implied consent of the parties, and the trial court did not abuse its discretion in interpreting or permitting amendment of the counterclaim to include a prescriptive easement claim regarding the dock in conformity with the proofs.

Plaintiffs next argue that the trial court erred in concluding that defendant was entitled to a prescriptive easement regarding the placement of her seasonal dock.

"An easement is a right to use the land of another for a specific purpose. An easement by prescription arises from a use of the servient estate that is open, notorious, adverse, and continuous for a period of fifteen years." *Killips*, 244 Mich App at 258-259 (citation omitted). "[P]ermissive 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. A use of property is adverse or hostile when it is inconsistent with the rights of the owner, without permission, and would entitle the owner to sue for trespassing. *Plymouth Canton Community Crier, Inc v Prose*, 242 Mich App 676, 681; 619 NW2d 725 (2000). In other words, the term "hostility" in this context does not refer to ill will but rather to a use of the property that is inconsistent with the rights of the owner. *Killips*, 244 Mich App at 259.

The trial court properly concluded that the evidence presented at trial established the elements of a prescriptive easement regarding the placement of the seasonal dock. It is uncontested that defendant's dock was placed outside her riparian property lines, as both parties' surveyors concluded that the dock encroached on plaintiffs' riparian property. Defendant testified that she has not changed the location or direction of the dock since buying the property in 1988, other than adding a platform that she later moved to the side of the dock away from

plaintiffs' property at their request. She testified that the dock has always been perpendicular to the seawall, i.e., at a 90 degree angle. The evidence is also undisputed that plaintiffs failed to object to defendant's placement of her dock from 1988 to 2008. Thus, it is beyond contention that defendant used plaintiffs' riparian land openly, notoriously, and continuously[7] for a period in excess of 15 years.

Plaintiffs challenge, however, the trial court's finding that the use was hostile, arguing that it was instead permissive. As the trial court noted, there is no evidence that express permission was granted. Plaintiffs seem to suggest that permission was impliedly granted as they accommodated defendant's dock placement in order to be good neighbors. Edward testified that he did not want to "chump" defendant by pushing his dock out so that it would touch hers. However, there is no evidence that plaintiffs were aware before the 2008 survey where their riparian property rights began. Indeed, Edward admitted that he did not know the exact boundary line between the properties before this litigation arose. Thus, the trial court did not err in rejecting plaintiffs' after-the-fact suggestion that defendant's use of their riparian land was somehow permissive. The trial court correctly concluded that the use was hostile to plaintiffs' title given that the use of the dock on plaintiffs' riparian land was inconsistent with their rights as owners, there is no evidence permission was granted, and the dock placement would have afforded the grounds to file an action for trespass during the statutory period.

Affirmed in part, reversed in part, and remanded for entry of a judgment in favor of defendant, in accordance with this opinion. We do not retain jurisdiction. Defendant, having prevailed, may tax costs. MCR 7.219(A).

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Michael J. Kelly

[7] Although the dock was used seasonally, plaintiffs do not contest the continuous nature of its use. See *Dyer v Thurston*, 32 Mich App 341, 344; 188 NW2d 633 (1971) (noting that the seasonal use of a pathway to a summer cottage was considered continuous given the nature and character of the right claimed).