STATE OF MICHIGAN

COURT OF APPEALS

RONALD C. KINGSTROM and DIANA M. KINGSTROM, Plaintiffs-Appellants, v EDMUN KOUTZ and JULIE KOUTZ, Defendants-Appellees.	UNPUBLISHED November 20, 2014 No. 317663 Montcalm Circuit Court LC No. 2011-015569-CH

Before: M.J. KELLY, P.J., and BECKERING and SHAPIRO, JJ.

PER CURIAM.

Following a bench trial in this dispute between plaintiffs, Ronald and Diana Kingstrom, and defendants, Edmun and Julie Koutz, two adjacent landowners, the trial court entered an order on July 18, 2013, dismissing plaintiffs' claims for adverse possession, prescriptive easement, acquiescence and trespass. Plaintiffs now appeal as of right. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Plaintiffs own lot 1 of the Honeymoon Heights development, located at 6001 Honeymoon Drive in Montcalm County. From 1994 until 2007, Michael and Carolyn Holdship owned lot 1; they sold the property to plaintiffs in 2007. Defendants own the adjacent lot to the west, lot 2, located at 6015 Honeymoon Drive. Julie Koutz owned the lot in 1998 with her former husband, and has lived on the lot as a full-time resident since 1998. This appeal concerns a triangular-shaped piece of lakefront property located between plaintiffs' and defendants' lots, 6.7 feet of which abut Townline Lake. The disputed area contains the last 6.7 feet of a seawall, brick patio, and two-tiered retaining wall that start at one end of plaintiffs' property and span the entirety of plaintiffs' lot, extending into defendants' lot. The Holdships installed the seawall, patio, and retaining wall in 1995, intending that the project span the entire length of their shoreline. They also installed plantings inside the tiers of the retaining wall. Unbeknownst to them, the seawall, patio, and retaining wall encroached on defendants' property. In a complaint filed December 29, 2011, plaintiffs claimed that the Holdships adversely possessed the property for a period of 12 years, and that plaintiffs possessed it in an open, notorious, and hostile manner for at least 3 years immediately thereafter, thereby satisfying the 15-year limitations period required for adverse possession. As an alternative, plaintiffs argued that they acquired a prescriptive easement in the disputed area by using the property, along with their predecessors in

interest, for a period of over 15 years. As yet another alternative, plaintiffs claimed ownership of the area under the doctrine of acquiescence, arguing that the respective owners of the affected lots treated the seawall, patio, and retaining wall as the boundary between the properties for over 15 years.

The matter proceeded to trial in June of 2013. At trial, it was established that the Holdships, who believed that they held to the true property line when installing the seawall, patio, and retaining wall, occasionally performed routine maintenance on the disputed area during the years in which they owned the property. Carolyn testified that she never had an agreement with defendants or defendants' predecessors in interest to treat the seawall, patio, or retaining wall as a boundary line. She also testified that when she and Michael sold the property to plaintiffs, they advertised and showcased the entire seawall, patio, and retaining wall, including the portion in the disputed area.

Ronald Kingstrom testified that he believed his purchase of the property included the entire seawall, patio, and retaining wall. He testified concerning routine maintenance that he and Diana performed in the disputed area, including sealing the timbers in the retaining wall and pulling weeds from the plantings. He testified that from 2007 to 2010, defendants never told them that the seawall, patio, and retaining wall encroached onto their property. He did not learn of the encroachment until 2011.

Defendants presented testimony from several neighbors, relatives, and friends who testified that they used the disputed area on several occasions at the behest of defendants. For instance, those witnesses used the disputed area for fishing, swimming, watching fireworks, loading and unloading boat riders and jet skiers, and for storing a paddleboat for up to a month. Those same witnesses also recalled seeing defendants use the disputed area.

Julie testified that she learned that the seawall, patio, and retaining wall encroached on her property after a survey in either 2008 or 2009. At that time, Julie recalled telling others to use the disputed area after learning that she owned it. She testified that she made a point of making sure that she and her guests used the disputed area after finding out that she owned the area. She did this in either 2008 or 2009.[1] She did not address the situation with plaintiffs until 2011, however.

The trial court dismissed all of plaintiffs' claims. With regard to plaintiffs' claims for prescriptive easement and adverse possession, the trial court dismissed the claims following Carolyn's testimony, reasoning that, because plaintiffs were mistaken about the ownership of the disputed area, they could not establish the requisite element of hostility. Concerning plaintiffs' claim for acquiescence, the trial court found that plaintiffs failed to establish that the parties treated the seawall, patio, and retaining wall as a boundary, and, given Julie's assertion of ownership over the area in 2008 or 2009, there could be no acquiescence.

[1] There were surveys performed in 2008 and 2009, and Julie's testimony was unclear with regard to which survey caused her to become more assertive with regard to her ownership of the disputed area.

II. ADVERSE POSSESSION

Plaintiffs contend that the trial court erred by dismissing their claim for adverse possession because it erroneously concluded that mistaken possession could not amount to hostile possession under the circumstances of this case. We disagree.

"Actions to quiet title are equitable in nature; this Court reviews such actions de novo." *Sackett v Atyeo*, 217 Mich App 676, 680; 552 NW2d 536 (1996). Ordinarily, following a bench trial, this Court reviews the trial court's factual findings for clear error and its conclusions of law de novo. *Canjar v Cole*, 283 Mich App 723, 727; 770 NW2d 449 (2009). Here, the trial court granted what it termed a "directed verdict" for defendants. In a bench trial, this Court treats a directed verdict as an involuntary dismissal pursuant to MCR 2.504(B)(2). *Samuel D. Begola Servs, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995). "The involuntary dismissal of an action is appropriate where the trial court, when sitting as the finder of fact, is satisfied at the close of the plaintiff's evidence that on the facts and the law the plaintiff has shown no right to relief." *Id.* (citation and quotation omitted).

"To establish adverse possession, the party claiming it must show clear and cogent proof of possession that is actual, visible, open, notorious, exclusive, continuous and uninterrupted for the statutory period of 15 years, hostile and under cover of claim of right." *Beach v Lima Twp*, 489 Mich 99, 106; 802 NW2d 1 (2011) (citation and quotation omitted). The trial court dismissed plaintiffs' claim because it found that plaintiffs could not establish the element of hostility. "In the adverse-possession context, 'hostility' refers to use of property without permission and in a manner that is inconsistent with the rights of the true owner." *Jonkers v Summit Twp*, 278 Mich App 263, 273; 747 NW2d 901 (2008). In order to establish hostility, the plaintiff must show that his or her "actions were 'hostile' and 'under a claim of right,' meaning that the use is 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.

In this case, it is undisputed that plaintiffs, along with the Holdships, were mistaken about the boundary line of the property, and that the Holdships intended to hold to the true line when they constructed the seawall, retaining wall, and patio. Regarding mistaken possession, our Supreme Court has held that "[w]here the possession is up to a fixed boundary under a mistake as to the true line and the intention of the parties is to hold only to the true line, such possession is not hostile and will not ripen into title[.]" *Warner v Noble*, 286 Mich 654, 660; 282 NW 855 (1938). However, simply being mistaken with regard to the true boundary does not necessarily defeat an adverse possession claim. See *DeGroot v Barber*, 198 Mich App 48, 52-53; 497 NW2d 530 (1993). Caselaw concerning mistaken possession reveals two lines of cases. In *Connelly v Buckingham*, 136 Mich App 462, 468; 357 NW2d 70 (1984), this Court explained two different factual scenarios involving mistaken possession, and that each scenario produces different results regarding hostility:

> 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.]

In *DeGroot*, 198 Mich App at 51-52, this Court reiterated the rule from *Connelly*, and explained the difference between the two concepts noted above. The panel described the difference between the concepts as a distinction 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." *Id.*[2] Under the first scenario—failing to respect the true line while attempting to do so—there is no adverse possession. *Id.* For instance, in a case where the parties intended to hold to the true line, but, because of missighted survey stakes, one of the parties built a cottage that encroached onto a neighboring lot, the encroaching party was unable to establish adverse possession. *Id.*, citing *Warner*, 286 Mich 654. The second scenario listed above—respecting the line believed to be the boundary, but which proved not to be the true boundary—can establish adverse possession. *Id.* at 52-53. As an example of the second scenario, this Court ruled in *DeGroot* that, where the evidence indicated that the plaintiffs, apparently operating under a mistaken belief that Ashard Road was the true boundary line, claimed ownership to that boundary line, including the disputed parcel, the plaintiffs' manifested the requisite intent to establish hostility. *Id.* In *DeGroot*, the parties manifested their intent to possess the disputed parcel by posting "no trespassing" signs and by denying others entry into the parcel. *Id.* at 53.

Turning to the matter at hand, we find that the trial court correctly interpreted and applied the law. The facts in the case at bar are akin to the first type of scenario described in *DeGroot*, 198 Mich App at 51-52, , i.e., a scenario where plaintiffs and their predecessors in interest failed to respect the true line while attempting to do so. Carolyn testified that she believed the seawall, patio, and retaining wall respected the true property line. She testified that she did not intend to encroach onto the neighboring property. Also, there is no testimony in the record that Carolyn intended to install the seawall, retaining wall, and patio up to a certain fixed boundary that subsequently proved to not be the true boundary. Rather, Carolyn testified that she believed she respected the true properly line, but failed to do so. When a party attempts to respect the true line but fails to do so, "there [can] be no adverse possession." See *DeGroot*, 198 Mich App at 52. See also *Warner*, 286 Mich at 660. As such, the trial court did not err when it dismissed plaintiffs' adverse possession claim.[3]

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[2] In a footnote, the panel further expounded on the difference, noting "[t]o phrase this slightly differently, the difference is between erroneously placing a monument, intending to place it on the true line, but failing to do so, and erroneously believing a preexisting monument (either artificial or natural) represents the boundary, and holding to that monument." *Id.* at 52 n 1.

[3] In any event, we find alternative grounds for affirming the trial court's decision, as we find that Julie's efforts to establish her ownership in either 2008 or 2009 would defeat plaintiffs' claim for adverse possession. See *Lavey v Mills*, 248 Mich App 244, 250; 639 NW2d 261 (2001) (explaining that this Court can affirm the result reached by the trial court, albeit on alternate reasoning). The seawall, patio, and retaining wall were constructed in 1995; thus, the 15-year

III. PRESCRIPTIVE EASEMENT

As with the adverse possession claim, the trial court granted defendants what it termed a "directed verdict" on plaintiffs' prescriptive easement claim following Carolyn's testimony. In a bench trial, this Court treats a directed verdict as an involuntary dismissal. See *Samuel D. Begola Servs*, 210 Mich App at 639. "The involuntary dismissal of an action is appropriate where the trial court, when sitting as the finder of fact, is satisfied at the close of the plaintiff's evidence that on the facts and the law the plaintiff has shown no right to relief." *Id.* (citation and quotation omitted).

"An easement is a right to use the land of another for a specific purpose." *Killips v Mannisto*, 244 Mich App 256, 258; 624 NW2d 224 (2001). "An easement by prescription is based upon the legal fiction of a lost grant, and results from action or inaction leading to a presumption that the true owner of the land, by his acquiescence, has granted the interest adversely held." *Slatterly v Madiol*, 257 Mich App 242, 260; 668 NW2d 154 (2003) (citation and quotation marks omitted). There are two ways to establish a prescriptive easement. A prescriptive easement can be established by "a use that is made pursuant to the terms of an intended but imperfectly created servitude, or the enjoyment of the benefit of an intended but imperfectly created servitude." *Plymouth Canton Community Crier, Inc v Prose*, 242 Mich App 676, 684; 619 NW2d 725 (2000) (citation and quotation omitted; emphasis omitted). Alternatively, "[a]n easement by prescription results from use of another's property that is open, notorious, adverse, and continuous for a period of fifteen years." *Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 118; 662 NW2d 387 (2003). Here, the only issue concerns the second method of forming a prescriptive easement—open, notorious, adverse, and continuous use of another's property for the statutory period. "An easement by prescription requires elements similar to adverse possession, except exclusivity." *Id.* "The plaintiff bears the burden to demonstrate entitlement to a prescriptive easement by clear and cogent evidence." *Matthews v Natural Resources Dep't*, 288 Mich App 23, 37; 792 NW2d 40 (2010).

For the reasons discussed above, we find that the trial court did not err by dismissing plaintiffs' prescriptive easement claim because there was no evidence of hostility. See *Mulcahy v Verhines*, 276 Mich App 693, 702; 742 NW2d 393 (2007); *Connelly*, 136 Mich App at 472-

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statutory period would expire in 2010. Here, Julie's actions in 2008 and/or 2009 were sufficient to break the period of adverse possession in this case. Although Julie did not address the matter with plaintiffs, she took actions to enable plaintiffs, through the use of reasonable diligence, to discover her reentry. See *Warner*, 286 Mich at 668-669. For instance, Julie testified that she made a point of using the disputed area after learning that she owned the disputed area, and that she made a point of telling her friends and guests to use the disputed area because she owned the property. The record reveals that this use was more frequent than as asserted by plaintiffs on appeal, as Julie maintained the property, advised multiple guests that they could, on multiple occasions, use the property for fishing and beach access, and testified that she went out of her way to demonstrate ownership of the property. Had plaintiffs exercised reasonable diligence, they could have discovered this use of the property. As such, Julie's actions constituted reentry, and plaintiffs could not establish by clear and cogent evidence that their possession was uninterrupted for the requisite statutory period. *Warner*, 286 Mich at 668-669.

473; *Mumrow v Riddle*, 67 Mich App 693, 698; 242 NW2d 489 (1976) (applying the same law regarding hostility to claims for prescriptive easements as is used in claims for adverse possession). As noted, plaintiffs and their predecessors in interest believed that the disputed portion of the land belonged to them, and they were mistaken while attempting to hold to the true boundary line. Therefore, plaintiffs were unable to claim that they used the property in a hostile manner, under a claim of right, see *DeGroot*, 198 Mich App at 53, which is essential to showing adverse use, see *Outhwaite v Foote*, 240 Mich 327, 329; 215 NW 331 (1927).[4]

IV. ACQUIESCENCE

Lastly, plaintiffs argue that the trial court erred when it dismissed their claim for acquiescence. "Actions to quiet title are equitable in nature; this Court reviews such actions de novo." *Sackett*, 217 Mich App at 680. Following a bench trial, this Court reviews the trial court's factual findings for clear error and its conclusions of law de novo. *Canjar*, 283 Mich App at 727. "A factual finding is clearly erroneous if there is no substantial evidence to sustain it or if, although there is some evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed." *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 172-173; 848 NW2d 95 (2014).

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." *Walters v Snyder*, 239 Mich App 453, 457; 608 NW2d 97 (2000). The only theory plaintiffs claim is the first theory—acquiescence for the statutory period. This theory "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 Michigan Dock & Market Corp v Lakeland Investments*, 210 Mich App 505, 511; 534 NW2d 212 (1995). "This theory of acquiescence does not require that the possession be hostile or without permission as would an adverse possession claim." *Mason v City of Menominee*, 282 Mich App 525, 529; 766 NW2d 888 (2009). "Although Michigan precedent has not defined an explicit set of elements necessary to satisfy the doctrine of acquiescence, caselaw has held that acquiescence is established when a preponderance of the evidence establishes that the parties treated a particular

[4] We also find alternative grounds for affirming the trial court's decision, notably, that plaintiffs' failed to provide clear and cogent proof of open, notorious, and continuous use of the disputed area. "An easement is a right to use the land of another *for a specific purpose*." *Killips*, 244 Mich App at 258 (emphasis added). Continuous use need not be constant used, particularly where, as in this case, the property at issue is vacation property. *Dyer v Thurston*, 32 Mich App 341, 344; 188 NW2d 633 (1971). The use must be of a similar character as the right claimed. *Id.* Here, there was little testimony as to how plaintiffs and the Holdships used the disputed area, and what little testimony was presented merely demonstrated that they performed routine maintenance in the disputed area. Such routine maintenance, which, according to testimony, was not regular, does not suffice to establish clear and cogent proof of a specific use that could ripen into a claim for a prescriptive easement. See *Killips*, 244 Mich App at 258; *Dyer*, 32 Mich App at 344.

boundary line as the property line." *Id.* at 529-530 (citation and quotations omitted; emphasis omitted).

The evidence produced at trial demonstrates that plaintiffs did not have a viable claim for acquiescence. As noted by the trial court, Carolyn, Ronald, and Julie testified that they never had an agreement to treat the seawall, patio, and retaining wall as a boundary between the properties. In addition, Julie testified that she made a point of establishing her ownership of the disputed area in 2008 or 2009, which is before the statutory period would have expired. This does not demonstrate any semblance of an agreement to treat the seawall, patio, and retaining wall as a boundary between the properties. When the evidence produced at trial demonstrates that the parties did not treat the seawall, patio, and retaining wall in the disputed area as a boundary line for the requisite period, plaintiffs cannot establish, by a preponderance of the evidence, that the parties acquiesced in the property line alleged by plaintiffs. See *Mason*, 282 Mich App at 529-530; *West Michigan Dock & Market Corp*, 212 Mich App at 511.

Affirmed.

/s/ Michael J. Kelly
/s/ Jane M. Beckering
/s/ Douglas B. Shapiro