# STATE OF MICHIGAN

# COURT OF APPEALS

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CHARLES A. HARPER, SR. and CAROLINE L. HARPER,

Plaintiffs/Counter Defendants/Appellants-Cross Appellees,

v

LESLIE ANN LAMAR and MARK W. BOURQUIN,

Defendants/Counter Plaintiffs/Appellees-Cross Appellants.

UNPUBLISHED
August 18, 2009

No. 282498
Clinton Circuit Court
LC No. 05-009801-CH

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Before: Bandstra, P.J., and Whitbeck and Shapiro, JJ.

PER CURIAM.

This quiet title action arises out of a dispute regarding ownership of a parcel of real property (Parcel B), which is a plot of land that was previously owned by a railroad company and then purportedly transferred to plaintiffs Charles and Caroline Harper by quitclaim deed. However, the owners of a neighboring parcel, defendants Leslie Ann Lamar and her husband Mark Bourquin, contend that they acquired Parcel B through adverse possession. The Harpers now appeal as of right from the judgment and order that quieted title of Parcel B in defendants. Defendants cross-appeal as of right from the same order denying them costs and attorney fees. Because we conclude that defendants and their predecessors failed to meet the statutory 15-year requirement necessary to establish adverse possession, we conclude that the trial court erred in quieting title to defendants based on adverse possession. We also conclude that defendants have not met the requisite elements to establish possession by acquiescence. And we conclude that because defendants are no longer the prevailing party, they are not entitled to costs pursuant to MCR 2.625. However, because questions remain regarding whether the State of Michigan might still have an interest in Parcel B due to its prior ownership as a railroad line, we order title to Parcel B be quieted in the Harpers without prejudice to parties not involved in the lawsuit. Accordingly, we reverse and remand for further proceedings.

The Harpers purchased Parcel B from CSX, a railroad company, by quitclaim deed in 1994. CSX had acquired Parcel B and some other property in fee from George and Calanthe McCrumb in 1899 (the CSX Deed). It is undisputed that Parcel B was part of the railroad right

of way. In 1997, CSX filed a request to abandon 1.32 miles of its railroad line, ending in Eagle, MI, which included Parcel B. After its investigation, the Federal Surface Transportation Board (STB)[1] authorized CSX to abandon the line.

Parcel B's northern boundary is the southern boundary of defendant's property (the Post Office Property). The Post Office Property contains the Eagle post office, which was built in 1962 and has been continuously leased to the United States Postal Service (USPS) since that time. Who originally built the post office and leased it to the USPS is unclear. Jerry VanderLaan[2] testified that his family's company (VanderLaan Land Company) acquired the Post Office Property in the late 1970s or early 1980s and then leased it to the USPS.

The first transfer of the Post Office Property noted in the trial court record occurred in 1992, when Margaret Lilley (Leslie Ann Lamar's mother), her husband Richard Lilley, and Harry and Sharin Holden purchased the property from VanderLaan Land Company by land contract. In 1995, the four purchasers assigned the land contract to Leslie Ann Lamar and her son. In May 1996, Leslie Ann Lamar and her son received a warranty deed from the VanderLaan Land Company for the Post Office Property in fulfillment of the land contract. Four months later, Leslie Ann Lamar and her son transferred title to the Post Office Property by quitclaim deed to Leslie Ann Lamar and Mark Bourquin.[3]

Each of the above title transfers identically described the Post Office Property, including that the boundary was "on the North right of way line of the C&O Railroad, said right of way being 75 feet, measured at a right angle, from the center line of the C&O Railroad tracks." As for the leases, Jerry VanderLaan testified that, although he assumed that Parcel B was part of the leased property and part of the legal description, he never reviewed the legal description. Bourquin also assumed that Parcel B was part of the leased property, but did not have the property surveyed or determine where the property lines actually were. Although references are made in the record to other leases dating back to 1960, the only lease that we could locate in the trial court record was between the USPS and defendants, for a term of years beginning in August 2003. But during closing arguments, the Harpers' counsel indicated that all of the leases were identical and that the legal descriptions included in the leases did not describe Parcel B. And defendants did not dispute this.

It is also undisputed that the post office's septic system and wellhead were built on Parcel B. Before the Harpers' closing on Parcel B in 1994, they learned from a survey where the property lines were and that the Post Office Property's well and septic system were located on Parcel B. When these items were constructed, however, was in dispute. Margaret Lilley stated that when she, her husband, and the Holdens purchased the Post Office Property in 1992, they were shown the wellhead and septic system, which were in the same location on Parcel B as they

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[1] Formerly the Interstate Commerce Commission (ICC).

[2] This is the spelling/capitalization contained in both the VanderLaan deed and land contract. However, other spellings/capitalizations within the record include Vanderlaan and VanDerlaan.

[3] Thus, it appears that Leslie Ann Lamar was both a grantor and a grantee in this transaction.

currently occupy. Bourquin averred that when he received the property and postal lease assignment, he was told that the parking lot, well, and septic system were included in the conveyance and that the lease, which included well and septic system, had been in place since 1961. However, a letter sent in 1994 by the Harpers' counsel to Harry and Sharin Holden noted that "the *recent* well you drilled to supply water to the U.S. Post Office Eagle Branch is on Mr. Charles Harper's property" and that "Mr. Harper is willing to supply water to you." Charles Harper testified that Richard Lilley offered to move the well and septic system onto his own property, but that he gave Lilley permission to use them.

Before the Harpers' closing on Parcel B in 1994, they also learned from the survey that the Post Office Property's parking lot was located on Parcel B. Part of Parcel B was converted into a gravel parking area that was used by postal service employees for many years and was later blacktopped. Charles Harper testified that he used the paved parking lot to store vehicles for his car parts sales and salvage operation both before and after he purchased it, but the majority of the cars stored behind the post office were on other property he owned, not Parcel B. However, defendants towed several cars that the Harpers had parked on the blacktop, which sparked this cause of action.

The Harpers originally sued defendants for trespass and conversion. Defendants answered, arguing that title vested in their predecessors in 1976. Defendants also filed a counterclaim to quiet title based on acquiescence to a boundary line and adverse possession and alleged that it was the Harpers who were trespassing.

Both parties moved for summary disposition, which the trial court denied. The trial court concluded that although the Harpers clearly had record title, there were outstanding issues regarding whether defendants had adversely possessed the property, whether a railroad could be divested of property by adverse possession, and whether there truly was a previous dispute and subsequent agreement as to a new boundary line.

At the end of the Harper's proofs, defendants moved for a directed verdict claiming, in part, that because there was a reversionary interest in the CSX Deed requiring a depot to be "always" maintained on the property, the depot's destruction divested the railroad of any interest in the property such that it had no interest to convey to the Harpers by quitclaim deed. The trial court agreed and quieted title in defendants. The Harpers objected to the proposed order, arguing that if ownership had reverted, it went back to the McCrumbs' heirs and that defendants had presented no evidence to establish any right or interest in Parcel B. The trial court amended its order to quiet title in defendants by limiting the ruling "to the parties to this action without prejudice to the rights of any party not included in this action."

The Harpers appealed to this Court, which concluded that the CSX Deed created only a right of reentry and that the McCrumbs' heirs had failed to divest CSX of its interest within the statutory period such that CSX "could convey the interest to plaintiff." *Harper v Lamar*, unpublished opinion per curiam of the Court of Appeals, issued June 12, 2007 (Docket No. 267206), slip op p 2. This Court therefore concluded "that the trial court erred when it found that plaintiff did not have title based on the 1899 deed's reversionary interest," but noted that defendant was claiming title to Parcel B through adverse possession and acquiescence and that the trial court had heard no evidence in this regard. *Id.* at 2-3. It remanded the case to the trial court "to determine whether defendants' claims have merit." *Id.*

On remand, the Harpers argued that Parcel B was railroad property that could not be adversely possessed and that the parcel was subject to the exclusive jurisdiction of the STB until it was conveyed to the Harpers and the STB gave CSX an abandonment certificate in 1997. In other words, the Harpers argued that until the STB permitted CSX to abandon the line in 1997, Parcel B could not be adversely possessed by any actions of defendants' predecessors. Thus, the Harpers concluded, because defendants could not meet the 15-year adverse possession requirement, using either 1994 (when CSX conveyed the property to the Harpers) or 1997 (when the certificate of abandonment was issued), defendants had no claim. The Harpers also argued that defendants' actions on the property were not sufficient to constitute adverse possession and that there could be no acquiescence because defendants had simply drawn a random line on the survey. Defendants argued that railroad property could be adversely possessed and that they had established ownership through both acquiescence and adverse possession.

The trial court concluded that there were two questions at issue: (1) whether defendants established adverse possession with clear and convincing evidence "by himself or his predecessors in title"; and (2) whether "adverse possession run[s] against a railroad before its lines are abandoned." Answering the second question first, it concluded as follows:

> [T]he question here . . . is whether or not adverse possession on the subsequently abandoned line can be considered during a period before the line is abandoned, and I think for purposes of our record purposes, the best I can make of it, the answer is no, that [STB jurisdiction] doesn't preclude the running of the statute of limitations on a subsequent owner's right to dispossess one claim by adverse possession.

The trial court determined that record title to Parcel B was in the Harpers and that "[t]here can be no doubt that the leases don't purport to change that. There is nothing in the leases that is inconsistent with Mr. Harper having record title." It noted that "the septic and the drain field aren't the kind of open and obvious indices of claim of ownership that a well is" but that the paved asphalt was "a pretty clear indication that somebody [wa]s claiming an interest inconsistent with the railroad at the time," and that although "the railroad might have an interest in having people maintain its property because then it doesn't have to spend the money to do it . . . to pave its property, to park postal vehicles and cars on its property, to have a well on its property, to have these other sewage disposal methods on its property, all to me seems to be inconsistent with any claim that there is a lack of adverse possession." Based on its finding of adverse possession, the trial court quieted title in defendants absolutely, no longer limiting its decision as between the parties to the suit. The Harpers then appealed again to this Court.

The Harpers argue that the trial court erred in quieting title to Parcel B in defendants. We agree. We review the trial court's findings of fact for clear error, and its ultimate decision de novo. *Killips v Mannisto*, 244 Mich App 256, 258; 624 NW2d 224 (2001). "To establish adverse possession, the claimant must show that its possession is actual, visible, open, notorious, exclusive, hostile, under cover of claim or right, and continuous and uninterrupted for the statutory period of fifteen years." *West Michigan Dock & Market Corp v Lakeland Investments*, 210 Mich App 505, 511; 534 NW2d 212 (1995). The party claiming title must prove adverse possession with clear and cogent evidence. See *Killips*, *supra* at 260.

Defendants admit that they had not owned the Post Office Property for a period of 15 years and that, in asserting adverse possession of the adjacent Parcel B, they were relying on the actions of their predecessors in title to the Post Office Property.

Defendants' counsel contended at oral argument that this "tacking" issue was not preserved. This proposition ignores that defendants had the burden to prove all of the elements of adverse possession, including the requisite period of 15 years. Because defendants admitted that their only basis for achieving the 15-year period was through tacking, the issue of tacking is necessarily before this Court in order to determine whether the trial court properly concluded that defendants had acquired title through adverse possession.

> [I]t has long been the rule in Michigan that the statutory period of possession or user necessary for obtaining title by adverse possession or easement by prescription is not fulfilled by tacking successive periods of possession or user enjoyed by different persons in the absence of privity between those persons established by inclusion by reference to the claimed property in the instruments of conveyance or by parol references at time of conveyances. [*Siegel v Renkiewicz Estate*, 373 Mich 421, 425; 129 NW2d 876 (1964).]

Thus, in order to tack their time onto their predecessors' time, defendants must show that Parcel B was included in each conveyance of the Post Office Property during the tacking period. To do so, defendants must show either that Parcel B was included in the instruments of conveyance, or that there was parol evidence that Parcel B was being conveyed at the time of each conveyance.

It is undisputed that Parcel B is not contained in any of the legal descriptions in defendants' chain of title to the Post Office Property. Indeed, it is explicitly excluded because the southern boundary of the Post Office Property is defined as being "on the North right of way line of the C&O Railroad, said right of way being 75 feet, measured at a right angle, from the center line of the C&O Railroad tracks." Because none of the deeds in defendants' chain of title to the Post Office Property include Parcel B, there is no privity of estate, such that there can be no tacking and no adverse possession based on inclusion in the deed.

The Post Office Property lessee's continued use of Parcel B since 1962 does not change this. It is true that tenants can adversely possess property for the benefit of their landlord where the lessee believes the right to occupy passed to him under the lease. See *Capps v Merrifield*, 227 Mich 194, 201; 198 NW 918 (1924). However, in *Siegel*, the Michigan Supreme Court held that even though the same tenant used the disputed property from 1928 until 1960, "neither plaintiff nor any of his predecessors in title enjoyed possession or user of the parcels in question for the necessary 15-year period." *Siegel*, *supra* at 425-426. As is true in this case, *Siegel* involved a property that had been leased to the same tenant for more than the statutory period, but ownership of the leased property had changed. *Id.* at 423. Thus, the United States Postal Service's continued leasing of Parcel B from 1961 until 1994 under identical leases cannot establish privity of estate to constitute continued possession of the property for the 15-year statutory period. Accordingly, defendants can only tack to their predecessors in title if they can establish privity "by parol references at time of the conveyances." *Siegel*, *supra* at 425.

Margaret Lilley's affidavit indicated that representations about the ownership of Parcel B were made at the time she acquired the Post Office Property. Bourquin provided a similar

affidavit that stated that he was "advised by the sellers that the conveyance included the entire property including the parking area, well and septic system." However, Bourquin's affidavit is contrary to his testimony at trial that he "assumed that it was part of the property." Nevertheless, even if we take the two affidavits as evidence of a parol reference, defendants' tacking argument still fails.

Parol reference creates privity between the parties to whom the reference is made. Here, Lilley's affidavit provides privity between VanderLaan Land Company and Margaret Lilley in the 1992 execution of the land contract. Bourquin's affidavit provides privity between defendants and Leslie Ann Lamar and her son in the execution of the 1996 quitclaim deed. But there is no privity shown between either Margaret Lilley and Leslie Ann Lamar and her son in the 1995 assignment of the land contract or between VanderLaan Land Company and Leslie Ann Lamar and her son in the 1996 deed in fulfillment of the 1992 land contract. Thus, defendants failed to show that there was parol evidence that Parcel B was being conveyed at the time of each conveyance in the tacking period.

Because defendants failed to show either inclusion in the deed or parol evidence that Parcel B was being conveyed at the time of each conveyance in the tacking period, defendants could not tack their asserted ownership of Parcel B to that of their predecessors in title. Therefore, because defendants failed to meet the statutory 15-year requirement, defendants have not obtained title to Parcel B through adverse possession. Accordingly, defendants' adverse possession claim must fail, and the trial court erred in quieting title to defendants based on adverse possession.[4]

Although not considered by the trial court, defendants also made a claim for acquiescence. Unlike adverse possession, proof of privity is not required "to employ tacking of holdings to obtain the 15-year minimum under the doctrine of acquiescence." *Siegel*, *supra* at 426. Additionally, a claim of acquiescence for the statutory period does not require that the possession be hostile or without permission, and the evidentiary standard is lessened. *Walters v Snyder*, 239 Mich App 453, 456, 458; 608 NW2d 97 (2000). Thus, a finding of acquiescence merely requires that defendants demonstrate by a preponderance of the evidence that the parties treated a particular boundary line as the property line. See *id.*

The doctrine of acquiescence operates under the principle that a boundary line that has been accepted by the parties should stand. *Id.* at 457-458. There are three forms of

[4] Because we find that defendants cannot establish the requirements for adverse possession, we decline to consider whether railroad rights of way can be subject to adverse possession. We note, however, that in *Modern Handcraft, Inc–Abandonment in Jackson County, MO*, 363 ICC 969, 971-972 (1981), the STB noted that its exclusive jurisdiction over the abandonment of railroad lines had enabled a railroad "to maintain control over the property despite repeated attempts by State agencies to have the property condemned." It would seem that if states may not take title to land under the jurisdiction of the STB by means of condemnation for a public purpose, private individuals cannot take title to such property by means of adverse possession for a private one.

acquiescence: "acquiescence for the statutory period, (2) acquiescence following a dispute and agreement, and (3) acquiescence arising from intention to deed to a marked boundary." *Id.* at 457. Defendants concede that the only form of acquiescence at issue here is acquiescence for the statutory period. As described by this Court in *Kipka v Fountain*, 198 Mich App 435, 438-439; 499 NW2d 363 (1993), this form of acquiescence:

> is concerned with a specific application of the statute of limitations to cases of adjoining property owners who are mistaken about where the line between their property is. Adjoining property owners may treat a boundary line, typically a fence, as the property line. If the boundary line is not the recorded property line, this results in one property owner possessing what is actually the other property owner's land. Regardless of the innocent nature of this mistake, the property owner whose land is being possessed by another would have a cause of action against the other property owner to recover possession of the land. After fifteen years, the period for bringing an action would expire. The result is that the property owner of record would no longer be able to enforce his title, and the other property owner would have title by virtue of his possession of the land.

Although the specific elements necessary to establish such a claim have not been expressly delineated, decisions have generally "merely inquired whether the evidence presented established that the parties *treated* a particular boundary line as the property line." *Walters*, *supra* at 458 (emphasis in original).

Defendants presented no evidence that CSX ever recognized any property line other than that described in two deeds, the first which transferred property from private hands to a railroad, the second of which transferred property from CSX to the Harpers. Thus, there is no evidence that all the parties treated that boundary as the property line; only that defendants or their predecessors did. For the doctrine of acquiescence to apply, all property owners involved must have been mistaken concerning the boundary line. See *Kipka*, *supra* at 438 (stating that acquiescence is applied to cases of "*adjoining property owners* who are mistaken about where the line between their property is") (emphasis added). See also *Sheldon v Michigan Central R Co*, 161 Mich 503, 514-515; 126 NW 1056 (1910) (holding that there was no acquiescence to a boundary at a fence installed within a railroad's right-of-way by the railroad because there was no evidence that the railroad intended the fence to be the boundary line).

Moreover, Bourquin testified at trial that he drew the line for the southerly border of Parcel B "to show and indicate the section of the property that was in question for these proceedings so we could have a clear picture of what the post office was using and had been using since 1953 or thereabouts, when it was built." He recognized that there was testimony that various people had mowed all the way to the tracks, but "only enclosed the area in which there were facilities, underground wells, septic tanks. People were parking—these people were planting flowers there, so that was sufficient to claim hostile possession." The parties and their predecessors could not have agreed to this boundary line or mistakenly believed it to be the boundary because testimony showed that the particular boundary being utilized was created for the proceedings by the defendants themselves. Defendants, having failed to show that the railroad ever considered the boundary to be anything other than it was, failed to prove their claim of acquiescence.

Having determined that defendants do not have title to Parcel B by means of adverse possession or acquiescence, we conclude it is clear that, as between the Harpers and defendants, the Harpers have better title. However, it does not appear that the Harpers's record title entitles them to have Parcel B quieted in them absolutely. CSX's conveyance of Parcel B to the Harpers before receiving approval for abandonment from the STB leaves open the question of whether the CSX actually conveyed its ownership interest to the Harpers.

Under 49 USC 10901(a), "a person other than a rail carrier [may] acquire a railroad line . . . only if the Board issues a certificate authorizing such activity under subsection (c)." Because there had been no certificate of abandonment issued before the railroad's sale of Parcel B to the Harpers, the land was still technically "a railroad line" and could not be acquired without a certificate of authorization.[5] Because the statute limits the railroad's ability to transfer its interest in the railroad line without prior authorization of the STB, it would appear that the railroad may have had no title that it could transfer to the Harpers.

Additionally, even assuming that the Harpers could acquire the land from the railroad before approval of abandonment by the STB, the Harpers still do not have clear title to Parcel B. Section 1(3) of the State Transportation Preservation Act, MCL 474.51 *et seq.*, provides that "[t]he preservation of abandoned railroad rights of way for future rail use and their interim use as public trails is declared to be a public purpose." MCL 474.51(3). In an effort to permit the State to preserve and acquire such abandoned rights of way, MCL 474.58(2) provides in relevant part:

> The rights a railroad company may have in all rights of way approved for abandonment within the state shall not be offered for sale without offering the department, on reasonable terms in the first instance, and the department of natural resources, on reasonable terms in the second instance, the right to purchase those rights. . . .

There has been no evidence that Parcel B was ever offered by the railroad to either the department of transportation or the department of natural resources before being sold to the Harpers. Indeed, the very fact that the railroad sold Parcel B to the Harpers *before* receiving approval for abandonment would imply that this did not occur. The statute does not indicate what happens when property has not been offered for sale to the State as required by the statute, but the railroad again potentially had no interest it could convey to the Harpers, as it was required to give the State what was essentially the right of first refusal. Thus, while the Harpers clearly have record title and, thus, better title than defendants, we do not believe title should be quieted in the Harpers absolutely, because it appears the State may still have an interest in this property.

As for defendants' cross-appeal, because defendants are no longer the prevailing party, they are not entitled to costs pursuant to MCR 2.625.

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[5] Obviously, once an abandonment certificate is issued, the land is no longer a railroad line, and 49 USC 10901 would not apply.

Accordingly, we reverse the trial court's order quieting title absolutely in defendants and order title to Parcel B be quieted in the Harpers without prejudice to parties not involved in the lawsuit. We remand for further proceedings as to the Harpers' trespass claims and request for injunctive relief against defendants. The Harpers' conversion claims remain dismissed pursuant to the law of the case. The Harpers are entitled to costs pursuant to MCR 7.219. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ William C. Whitbeck
/s/ Douglas B. Shapiro