STATE OF MICHIGAN

COURT OF APPEALS

CHUCK ALLEN, ILZE ALLEN, CLARK BEEBE, PATRICIA BEEBE, MARK CONNER, PAULA CONNER, MICHAEL DOBACK, JR., DIANNE DOBACK, JERRY IMBODEN, JOHN KHERKHER, CYNTHIA KHERKHER, JIM KOS, KATHY KOS, TONI MCLAUGHLIN, GENE MCLAUGHLIN, DON MOFFET, NOLAND MORROW, BETTY MORROW, BOB OLSON, JIM TILLMAN, SANDRA TILLMAN, ROBERT TURTON, LAVAUGHN TURTON, GARY WEYER, RITA WEYER, KEITH VANDENKIEBOOM, CAROLYN VANDENKIEBOOM, ROBERT ZSCHERING, VIRGINIA ZSCHERING, LAWRENCE PECAR, KATHERINE PECAR, KEITH McAULIFF, ANN McAULIFF, DAVID PAYNE, BONNIE BREDE, BRUCE BREDE, MIKE GILBOE, KRISTI GILBOE, TOM RICHARDSON, MARK BEYER, DAWN BEYER, and BILL EPLING,

Plaintiffs/Counter-Defendants-Appellees,

v

DELLA COHEN,

Defendant/Counter-Plaintiff-Appellant.

UNPUBLISHED
March 20, 2007

No. 266664
Oakland Circuit Court
LC No. 2004-060234-CZ

Before: Markey, P.J., and Murphy and Kelly, JJ.

PER CURIAM.

In this action to quiet title to property, the trial court concluded, following a bench trial, that defendant failed to establish her claims to the disputed property based on adverse possession and acquiescence. Defendant appeals as of right. We reverse the judgment and remand for entry of judgment in favor of defendant.

This lawsuit involves a dispute over property in the Watkins Lake Lakewood Drive Subdivision in Waterford Township. The parties all own property in the subdivision, which contains five parks that are referred to as Park A, B, C, D, and E, respectively. These parks were dedicated to the owners of residential lots in the subdivision, in undivided interests, for the purpose of access to Watkins Lake. Park A abuts defendant's property. In 1979 or 1980, defendant and her husband erected two sheds and installed a sprinkler system on their side of a chain link fence that supposedly ran along the boundary between defendant's property and Park A. In 1983 or 1984, defendant replaced the chain link fence with a wooden split rail fence. A 2002 survey revealed that defendant's fence, sheds, and sprinkler system all encroached on land that was part of Park A. Plaintiffs filed this lawsuit, seeking a declaration that defendant was unlawfully encroaching onto Park A and an order requiring defendant to remove all encroachments. Defendant filed affirmative defenses and a counter-complaint, claiming title to the disputed property by adverse possession or acquiescence.

Following a bench trial, the trial court found that defendant could not establish a claim of acquiescence because she failed to show that all plaintiffs acquiesced in an identifiable lot line. The court additionally concluded that defendant could not establish title to the disputed property by adverse possession because defendant and plaintiffs were "cotenants" with respect to Park A and defendant failed to "pose no trespassing signs or any other makings indicating to others that she intended to claim this property as her own." The court ruled that the boundary line between defendant's property and Park A was that established by the 2002 survey, and it ordered defendant to remove all encroachments from Park A.

Actions to quiet title are equitable and are reviewed de novo on appeal, but the trial court's findings of fact supporting its decision are reviewed for clear error. *AFSCME v Bank One, NA*, 267 Mich App 281, 293; 705 NW2d 355 (2005); *Gorte v Dep't of Transportation*, 202 Mich App 161, 165; 507 NW2d 797 (1993). A factual finding is clearly erroneous if, on all the evidence, this Court is left with a definite and firm conviction that a mistake has been made. *Attorney Gen v Lake States Wood Preserving, Inc*, 199 Mich App 149, 159; 501 NW2d 213 (1993).

We hold that the trial court erred in finding that defendant failed to establish a claim based on adverse possession. In *Wengel v Wengel*, 270 Mich App 86, 91-93; 714 NW2d 371 (2006), this Court explained the general principles of adverse possession:

> The basis for a claim of adverse possession is found in MCL 600.5801, which provides, in pertinent part:
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> "No person may bring or maintain any action for the recovery or possession of any lands or make any entry upon any lands unless, after the claim or right to make the entry first accrued to himself or to someone through whom he claims, he commences the action or makes the entry within the periods of time prescribed by this section."
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> Generally, an action for the recovery or possession of land must be brought within 15 years after it accrues. MCL 600.5801(4); *Kipka v Fountain*, 198 Mich App 435, 438; 499 NW2d 363 (1993). The *Kipka* panel, addressing the principles of adverse possession, stated:

> "A claim of adverse possession requires clear and cogent proof that possession has been actual, visible, open, notorious, exclusive, continuous, and uninterrupted for the statutory period of fifteen years. These are not arbitrary requirements, but the logical consequence of someone claiming by adverse possession having the burden of proving that the statute of limitations has expired. To claim by adverse possession, one must show that the property owner of record has had a cause of action for recovery of the land for more than the statutory period. A cause of action does not accrue until the property owner of record has been disseised of the land. MCL 600.5829. Disseisin occurs when the true owner is deprived of possession or displaced by someone exercising the powers and privileges of ownership. [*Kipka, supra* at 439 (citations omitted).]"
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> Other cases additionally indicate that the possession must be hostile and under cover of a claim of right. The term "hostile" as employed in the law of adverse possession is a term of art and does not imply ill will; rather, hostile use is that which is inconsistent with the right of the owner, without permission asked or given, and which would entitle the owner to a cause of action against the intruder. [Citations and quotations omitted.]

"Claim of right" means that the adverse claimant claims title to the property by openly exercising acts of ownership with the intention of holding the property as his own to the exclusion of all others. *Walker v Bowen*, 333 Mich 13, 21; 52 NW2d 574 (1952). It is not necessary that the party in possession expressly declare his intention to hold the property as his own, nor need his claim be a rightful one. *Id.* That his acts and conduct clearly indicate a claim of ownership is enough. *Id.*

In situations involving cotenants of the property at issue, a claim of adverse possession is more difficult to prove. *Wengel*, *supra* at 96-97. There is a higher burden of proof that relates specifically to proof of hostility and notoriety. *Mackinac Island Dev Co, Ltd v Burton Abstract & Title Co*, 132 Mich App 504, 513; 349 NW2d 191 (1984). As explained in *Wengel*, *supra* at 96-97:

> [A] claim of adverse possession by a tenant against a cotenant, both sharing ownership interests in the property at issue, is not comparable to the usual scenario in which adverse possession arises, because, in the typical case, the person claiming adverse possession is occupying or possessing property to which he or she had no legal right to possess and which is titled in the name of another, making it easier to identify and determine hostile occupation, as compared to a situation in which there exists concurrent ownership.
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> Accordingly, there is a presumption, in the context of a claim of adverse possession, that a tenant who occupies and possesses the premises recognizes and is honoring the rights of any cotenants to similarly possess and occupy the property unless there is evidence of acts or declarations that clearly establish the contrary and that unambiguously provide notice to the cotenants of an effort to displace or exclude them from the premises in violation of their property rights

> such that a cause of action arises. While a tenant in common may acquire title against a cotenant by adverse possession, the proofs may not be made out by inference. [Citations omitted.]

In other words, there must be clearer and more decisive evidence that one cotenant ousted the other. *Dunlop v Twin Beach Park Ass'n, Inc*, 111 Mich App 261, 265; 314 NW2d 578 (1981). In *Dunlop*, this Court explained:

> The reason for this rule is apparent; the possession itself is rightful and does not import adverse possession, as would that of a stranger. To change a permissive use into an adverse one, a claimant must make a distinct and positive assertion of a right hostile to the rights of the owner; this assertion must be brought to the owner's attention. [*Id*. at 266 (citations omitted).]

In this case, the evidence showed that a chain link fence existed on defendant's property in 1974, which ran along what was believed to be the true boundary line between defendant's property and Park A. In 1979 or 1980, defendant erected sheds and a sprinkler system on her side of the fence. The sheds were built on concrete foundations, were immovable, and were kept locked with a visible Guardian alarm sticker on them. They were for the family's sole use, not the use of the subdivision community. Subdivision residents observed defendant's structures and assumed they belonged to her. In 1983 or 1984, defendant directed contractors to replace the chain link fence with a split rail fence, intending that it be installed along the same line. While there was conflicting evidence whether the split rail fence was installed along the same line, it is undisputed that defendant and her family treated the property inside both fences as their exclusive property. Defendant's family added a swing set on the property, placed sand under it, and maintained the sand and the grassy area.

The trial court properly recognized that defendant had a heightened burden to establish adverse possession by clear and decisive evidence of an ouster, inasmuch as defendant and plaintiffs had similar interests in Park A. But the trial court clearly erred in finding that defendant failed to establish a claim of right to the property that she physically possessed, which was inconsistent with and hostile to the rights of plaintiffs, as cotenants.

The element of hostility is established because defendant's use of Park A was inconsistent with the rights of the other cotenants.[1] The undisputed evidence that defendant

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[1] Plaintiffs cite *Warner v Noble*, 286 Mich 654, 660; 282 NW 855 (1938), for the proposition that the element of hostility is lacking because defendant took possession of part of Park A, with the intent to hold to the true property line. But in *DeGroot v Barber*, 198 Mich App 48, 52; 497 NW2d 530 (1993), this Court subtly distinguished *Warner*, finding that adverse possession can be established where a claimant respects a "line believed to be the boundary, but which proves not to be the true line." An example of this would be where a claimant intends to claim to a visible, recognizable boundary, such as a fence, under the mistaken belief that the visible boundary or fence accurately depicted the boundary line. *Id.* Simply being mistaken with regard to the true boundary line does not defeat a claim of adverse possession. *Id*. at 52-53.

erected permanent structures and installed a sprinkler system on the property, for the exclusive use of defendant's family, clearly and decisively established possession and use of the property in a manner inconsistent with the right of access commonly shared by other cotenants. Defendant's activities on the disputed portion of Park A went well beyond the rights or interests conferred on the subdivision lot owners through the dedication, which merely provided an interest "for the purpose of access to Watkins Lake." There is no basis in the evidence for concluding that defendant's actions were intended for the common benefit of the other cotenants or that defendant was recognizing and honoring the property rights of her cotenants. On the contrary, the erection of a fence, shed, and other encroachments on a portion of Park A provided notice to other cotenants of Park A of an intent to exclude them from that portion and would have entitled the other cotenants to a cause of action for this intrusion. Further, it is undisputed that the encroachments were actual, visible, open, and exclusive continuously for at least 15 years, and they were constructed under a claim of right sufficient to be notorious and hostile against the other cotenants. Accordingly, the trial court erred in finding that defendant failed to establish her claim based on adverse possession. Given our ruling regarding adverse possession, it is unnecessary to address the doctrine of acquiescence, which was an alternate theory of ownership proffered by defendant.

Reversed and remanded for entry of judgment in favor of defendant based on adverse possession. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Kirsten Frank Kelly