

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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TIMOTHY ROBERTS,

Plaintiff/Cross Defendant-  
Appellant-Cross Appellee,

and

SHARON K. ROBERTS,

Plaintiff/Cross Defendant-Appellant,

v

PATRICK E. MITCHELL and RHONDA L.  
MITCHELL,

Defendant/Cross Plaintiff-  
Appellee/Cross-Appellant.

UNPUBLISHED

May 9, 2006

No. 259930

Bay Circuit Court

LC No. 03-003335-CH

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Before: Borrello, P.J., and Saad and Wilder, JJ.

PER CURIAM.

In this quiet title action based on a claim of adverse possession, plaintiffs appeal as of right from the trial court's grant of summary disposition to defendants. This dispute involves a strip of land situated between the parties' properties. We reverse and remand.

Plaintiff Timothy Roberts testified that he and his wife, plaintiff Sharon Roberts, have lived in their house at 1021 Michigan Avenue in Bay City since they purchased it in 1977. He indicated that adjacent to their property is another home that was recently purchased by defendants and that has changed ownership three times since plaintiffs acquired their home. According to Sharon, it was "understood" that the dividing line between plaintiffs' property and the property next door was a line drawn between two telephone poles located between the two properties. Plaintiffs based this assumption on other properties in the neighborhood that had their boundaries marked by telephone poles. Additionally, plaintiffs based this assertion on the fact that ten years ago, when Bay City redid the sidewalk in front of their house, they only redid it up to the telephone pole. Plaintiffs also testified that the driveway on the adjacent property curves away in such a way that it seems to avoid crossing the line between the telephone poles.

Plaintiffs testified that on a regular basis each year, based on their understanding that the property line ended at the telephone poles, they maintained the grass and shoveled the snow up to, and sometimes a bit beyond, that line. Timothy claimed he removed the snow from that area out of fear that if the snow piled up too high next to their house, it might leak into the basement. In addition to mowing the grass, Timothy said they also paid to have the lawn fertilized and chemically treated up to that point, moved sod from the front of their yard to a location in the disputed zone and believed they were paying taxes on the disputed portion of the land, though they were never told there were any tax implications based on the location of their property line.

Timothy testified that the issue of where the boundary line was located did not come up until defendants, in the process of planning to tear down their old garage to build a new larger one, had their land surveyed and staked out. The survey lines did not match the line between the telephone poles, but instead was as far as seven feet beyond it. Timothy testified that, upon seeing the survey line, he and Sharon had their own survey done which did not differ significantly from defendants' survey.

Following defendants' tearing down the old garage and preparing to build a new one, plaintiffs sought quiet title to the disputed strip of land based on a theory of adverse possession. The trial court found disputed questions of material facts on all issues raised except for a mistake, which it found fatal to plaintiffs' claims based on *McQueen v Black*, 168 Mich App 641; 425 NW2d 203 (1988):

But the mistake, I think, is fatal. . . . I don't see that. There is no fact question with respect to mistake; and according to the *McQueen v Black* case, it would appear that that is fatal for an adverse possession claim. I don't think it makes any sense to me, but that's what the law is; I have to follow the law. As a matter of fact, if . . . ever a case probably should be appealed, it would be helpful, because I'd like to have a clarification from the Court of Appeals on this. Because it seems to me, in almost every adverse possession claim, it's a mistake. And . . . if that precludes it, which . . . the *McQueen* case indicates, I think we're really precluding almost all adverse possession.

The trial court then granted summary disposition to defendants and this appeal followed. A motion for summary disposition is reviewed de novo on appeal. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion brought under MCR 2.116(C)(10) is granted when, "except for the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." "When deciding a motion for summary disposition under C(10), a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party." *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005). "Review is limited to the evidence that had been presented to the trial court at the time the motion was decided." *Id.*

"Adverse possession requires a showing of clear and cogent proof that possession has been actual, visible, open, notorious, exclusive, continuous, and uninterrupted for the applicable statutory period." *Gorte v Dep't of Transportation*, 202 Mich App 161, 170; 507 NW2d 797 (1993). The statutory period for adverse possession in Michigan is 15 years. MCL 600.5801(4). "The possession must also be hostile to the title of the true owner." *Gorte, supra* at 170.

Hostility is established by use which is “inconsistent with the right of the owner, without permission asked or given [that] would . . . entitle the owner to a cause of action against the intruder.” *Mumrow v Riddle*, 67 Mich App 693, 698; 242 NW2d 489 (1976).

Plaintiffs argue that contrary to the trial court’s conclusion, their mistake as to the true boundary line was not fatal to their case. In *Connelly v Buckingham*, 136 Mich App 462, 468; 357 NW2d 70 (1984), this Court set forth the following two relevant principles regarding boundary lines:

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.]

As we observed in *DeGroot v Barber*, 198 Mich App 48, 52; 497 NW2d 530 (1993), while “at first glance” the two principles set forth above

appear incompatible<sup>[3]</sup> . . . there is a distinction between the two concepts, albeit a subtle one. In our view, the distinction is 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.

Therefore, a claim of adverse possession is not precluded where it is based on the second of these two principles. *Id.* at 53. As *DeGroot* observed, to allow a mistake about the true boundary line to defeat a claim of adverse possession

would be contrary to fundamental justice and public policy to limit the application of the doctrine of adverse possession to those cases where the adverse possessor knew his possession was deliberately wrong, while excluding the adverse possessor whose possession was by mistake. That would serve to reward the thief and punish the innocent, but mistaken, citizen. [*Id.*]

We recognize that this contradicts the holding of *McQueen v Black*, *supra*, the case relied on by the trial court below in the case at hand. To the extent that *DeGroot* and *McQueen* conflict, *DeGroot* controls. MCR 7.215(J).

Plaintiffs claimed they intended to hold to a recognizable, pre-existing boundary line that was demarked by two telephone poles. They also claimed they were mistaken as to the boundary line, as they eventually discovered from multiple surveys of the properties. Under *Connelly* and *DeGroot*, that mistake does not preclude their claim. Their alleged intention to hold to a recognizable boundary line can be considered hostile and therefore can support a claim of adverse possession. *DeGroot*, *supra* at 53. Therefore, because genuine issues of material fact

exist on the issue of hostile possession, the trial court's grant of summary disposition to defendants on this ground was in error.

Defendants argue that the trial court erred in failing to grant them summary disposition on the basis that plaintiffs' use was only permissive, was not exclusive, and was not open. Timothy Roberts's admission that plaintiffs' lawn care and snow removal into the disputed parcel might have been seen as friendly, rather than as a claim of control, is not conclusive on the issue of permissive use. While a fact-finder might make such an inference, it might also reasonably come to the opposite conclusion. Additionally, Sharon Roberts's testimony that a previous owner of defendants' home may have tended a flower garden in the disputed area for as long as she could recall, is not conclusive on the issue of exclusivity given the non-specific nature of the time frame testified to. Finally, plaintiffs' testimony that they never actually communicated their claim of the land up to the telephone-pole line does not, by itself, mean that their claim was not open or otherwise constructively communicated to defendants and their predecessors, given that plaintiffs' claim is based in large part on their maintenance of the strip of land during the various seasons of the year. Therefore, there are genuine issues of material fact on each of these aspects of plaintiffs' claim.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen L. Borrello  
/s/ Henry William Saad  
/s/ Kurtis T. Wilder