

THE OFTEN MISUNDERSTOOD DOCTRINE OF ADVERSE POSSESSION

A. INTRODUCTION

There is perhaps no legal doctrine more misunderstood by the general public than the doctrine of adverse possession. Contrary to popular belief, this doctrine does not permit me to acquire my neighbor's yard by gradually expanding my lawn mowing efforts each week. The doctrine does, however, provide a means for addressing the situation where a long-recognized occupation line is inconsistent with the legal description. Nevertheless, because of the perception that the doctrine of adverse possession is used only for the benefit of persons who have trespassed upon the property rights of others, over the years various efforts have been made to abolish the doctrine.

An additional concern is that courts have applied the rules of adverse possession inconsistently and thus, the results are unpredictable, even to real estate attorneys who are knowledgeable in the area. The unpredictability in adverse possession cases is due in large part to the fact that courts hearing these cases are looking for a fair result to what is often an emotional dispute. As will be seen, the standards for establishing an adverse possession claim are sufficiently elastic such that courts can apply them in such a manner as to get the

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desired “fair” result. Because of this, there is little continuity in the law. When comparing two cases, it often appears that courts have reached opposite conclusions under almost identical facts.

This article will first summarize the doctrine of adverse possession, and the “flip side” doctrine of acquiescence. The article will then examine several recent adverse possession and acquiescence cases decided by the Michigan Court of Appeals over the last year where these doctrines have been used to solve title problems. Finally, this article will identify the few constantly-cited rules that do exist in this area of the law.

B. DISCUSSION

1. Description of Doctrines

It is often said that an adverse possessor must be in “actual, continued, visible, notorious, distinct and hostile possession of the property involved, under claim of right, for the statutory period of 15 years.” For the most part, what this means is that the true owner of the property must be able to tell that the property is being taken over by a stranger. Properly applied, the doctrine of adverse possession does not permit one to acquire additional land through stealth. Moreover, while there need not be animosity or ill will between the owner and the possessor, the possessor’s use of the property cannot be permissive. It does not matter whether or not the possessor knows that she has no actual legal claim to the property, all that matters is that through her actions, she openly and continuously treats the property as her own for 15 years.

On the other side of the coin is the doctrine of acquiescence. Under this doctrine, if two parties treat a particular line as the common boundary line between their two parcels

for a period of 15 years, the parties will be deemed to have acquiesced in that new boundary.¹

An easement may also be obtained through prescription in the same general way and under the same time frame that title may be acquired by adverse possession. The only difference is that the claimant need only have used someone else's property for a particular purpose for 15 years – rather than have exclusively possessed someone else's property for 15 years. Again, however, the use must be hostile; it cannot be permissive.

When trying to understand these doctrines and to predict how the rules will be applied to particular facts, keep in mind that the standards are very subjective. For example, when, exactly, is the possession of property sufficiently “visible” and “continuous” for an adverse possession claim? Without question, a court's decision on the visibility and continuity of the possession will be affected by its view of the actions of the parties. If the possessor is viewed as a trespasser who is attempting to take unfair

¹ There are two other species of acquiescence. In the first example, if there is a boundary acquiesced in after a dispute, the parties will be deemed to have agreed to that boundary regardless of the length of time that has elapsed since the agreement was recorded. Finally, in the last type of acquiescence, if it can be shown that the parties intended to deed land from a marked boundary, then the parties will be deemed to have acquiesced to that boundary line, even if a different legal description was mistakenly used. Sackett v Atyeo, 217 Mich App 676 (1996).

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advantage of his neighbor's inattentiveness, a court is likely to conclude that the possessor's use of his neighbor's property was not sufficiently visible or continuous. A court is much more likely to find that the possession has been sufficiently visible and continuous, if, for example, it thinks the property owner is seeking to extort money from a neighbor for a relatively small portion of a driveway that has been in place for many years.

2. Recent Examples of the Application of the Doctrines

As an examination of some of the most recent cases will show, often the dispute is between two innocent parties and the application of the doctrine of adverse possession or acquiescence is the most reasonable way to resolve the legitimate property line dispute.

In one recent case, a road had been constructed years ago along what both parties thought was the east-west boundary between two parcels. Amin v King, unpublished opinion of the Michigan Court of Appeals, decided December 9, 2004 (Docket No. 249581). In that case, for over 20 years, the parties believed that the Kings owned all the land north of this road and the Amins owned all the property south of the road. It turned out that the Kings' true property line extended southerly past the road, such that as a matter of record, the Kings owned a narrow strip of land between the Amins' property and road. Noting that this strip of land was almost worthless to the Kings, the court found that the Amins had acquired the disputed strip of land through adverse possession.

In another case, a parent parcel was originally thought to measure 1,164 feet north to south. Riehl v Sherman, unpublished opinion of the Michigan Court of Appeals, decided January 25, 2005, Docket No. 251112. Accordingly, when two parcels were carved out of the parent parcel, each were described as measuring 582 feet north to south. Years later, it was discovered that the parent parcel had been about 125 feet shorter than had been

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thought. Obviously then, at least one of the two parcels carved out from the parent parcel could not be as large as originally thought. Applying the doctrine of acquiescence, the court split the land between the two adjacent property owners on the basis of evidence that both parties had treated a particular tree line as the boundary line between the two parcels for over thirty years.

The case of Sovereign Properties, LLC v Beneteau, unpublished opinion of the Court of Appeals, decided May 31, 2005 (Docket No. 260322) involved two buildings that shared a common wall. A staircase located in Plaintiff's building provided the only means of access to the second floor of both buildings. The staircase itself was 3 feet wide, 2½ feet of which was on Plaintiff's side of the record property line. The Court found first that Defendants had not acquired an interest in the staircase through acquiescence, because there was no evidence that the Defendants or their predecessors had ever believed that they owned a portion of the staircase. Instead, all persons had believed (wrongly) that the entire staircase was on Plaintiff's side of the property line. The Court said that the Defendants had also not acquired any right to use the staircase through adverse possession because there was written evidence and oral testimony that over the years the Defendants had used the staircase with Plaintiff's permission. Thus, Defendants' use of the staircase was not "hostile" to Plaintiff's property rights. The Court concluded that the entire

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staircase belonged to Plaintiff, and that Defendants would simply have to build their own staircase.

In another recent case, back lot owners were able to use the doctrine of adverse possession to acquire the right to maintain a dock. Czeryba v Marzolo, unpublished opinion of the Michigan Court of Appeals, decided November 2, 2004 (Docket No. 230944).

In Czeryba, the Plaintiff back lot owners had a written 20-foot easement and right of way across the Defendant's property for "access to the beach and waters." Plaintiffs had used the easement since 1978. Such use had included the maintenance of a dock and a boat lift within the easement. Defendant had purchased the lakefront lot in 1993 and in 1995, had put up a fence blocking the easement. The trial court found, and the Court of Appeals affirmed, that while the Plaintiffs had no right to maintain a dock and boat lift under the terms of the written easement, they had obtained those rights prescriptively by maintaining a dock and boat lift within the easement for over 15 years:

. . . because Plaintiffs used Defendant's property as if their express easements conveyed riparian rights, Plaintiffs' use of Defendant's property satisfied the hostile or adverse use element necessary to establish a prescriptive easement.

Another case that came down this past year also involved back lot owners who claimed lake access via a prescriptive easement. Moskalik v Hilsinger, unpublished

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opinion of the Michigan Court of Appeals, decided June 21, 2005 (Docket Nos. 251388 and 251389). In Moskalik, the Defendant lakefront owner claimed that Plaintiffs' use could not be deemed to be "hostile," because Plaintiffs had used the strip of land for access to the lake under the mistaken belief that it was public access maintained by the municipality. The Court of Appeals rejected the Defendant's argument, stating that an adverse possession claim is NOT defeated by a showing that the claimant thought he had the legal right to use the property. The Court of Appeals nonetheless overturned the trial court's finding that Plaintiffs had a prescriptive easement because the trial court had not first determined who owned the disputed strip of land. The Court of Appeals stated:

... in order to find that there was a prescriptive easement, the trial court needed to first determine the owner of the fee in question.

C. CONCLUSION

The doctrines of adverse possession and acquiescence are both misunderstood and inconsistently applied. As the above examples illustrate, while from time to time we may all disagree with a particular court's application of the doctrines of adverse possession and acquiescence, most would agree that there certainly are instances where the application of the doctrines led to a fair and reasonable result. It remains true, however, that the standards for applying these doctrines are so subjective that it is almost impossible to

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predict how a particular court will rule on particular facts. A review of the twenty or so adverse possession/acquiescence cases decided over the last year, however, has uncovered several fairly consistently applied rules:

1. The presumption is always in favor of the legal title holder in an adverse possession case: the possessor must prove his case by “clear and cogent” evidence (acquiescence requires only the lesser “preponderance of the evidence” standard). Mesigil v Smith, unpublished opinion of the Michigan Court of Appeals, decided December 28, 2004 (Docket No. 250067).

2. The extent of the visible and uninterrupted activity that will be required may vary depending on the type of property involved – less activity may be required, for example, where the disputed strip of property is part of hunting property or a summer home. McGuire v Smith, unpublished opinion of the Michigan Court of Appeals, decided March 10, 2005 (Docket No. 251041).

3. While it does not matter whether an adverse claimant knew he was claiming land beyond what he actually owned, an admission by a claimant that “all he ever wanted was to possess what he actually owned” is often fatal to an adverse possession claim. Moskalik v Hilsinger, unpublished opinion of the Michigan Court of Appeals, decided June 21, 2005 (Docket Nos. 251388 and 251389).

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4. In order to meet the 15-year requirement, a claimant may “tack on” the possessory periods of predecessors in title only if the disputed strip of land was either mentioned in his deed or discussed orally at the time of the conveyance. Loftis v Hassan, unpublished opinion of the Michigan Court of Appeals, decided on May 19, 2005 (Docket No. 253331).

5. You can acquire an easement or expand your rights under an existing easement through adverse possession. Czeryba v Marzolo, unpublished opinion of the Michigan Court of Appeals, decided November 2, 2004 (Docket No. 230944). While it has been said that you cannot eliminate an easement that burdens your property through the adverse possession doctrine, on occasion this rule has been ignored. Compare, Semon v Chomin, unpublished opinion of the Michigan Court of Appeals, decided April 26, 2005 (Docket No. 253958); Klunzinger v Fitzsimons, unpublished opinion of the Michigan Court of Appeals, decided October 26, 2004 (Docket No. 248673).

6. In an acquiescence case, it is not necessary that we both believe that the marker marks the actual property line. You may think it does; I may know better. What matters is that we both have treated the marker as the actual property line. Winger Concrete Products, Inc. v Mildren, unpublished opinion of the Court of Appeals, decided May 26, 2005 (Docket No. 254511).

7. Hostility, when used in an adverse possession case, requires neither hostile behavior or ill will. For the most part, it just means that the claimant's use of the property was not permissive and was inconsistent with the rights of the true owner. Deutscher v Beuter, unpublished opinion of the Michigan Court of Appeals, decided January 25, 2005 (Docket No. 251903).

8. Finally, and perhaps most importantly, it typically makes little sense to appeal a trial court's decision in an adverse possession case or an acquiescence case. The Court of Appeals almost never overturns a trial court's determination in these types of cases.