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UNPUBLISHED OPINION. CHECK COURT
RULES BEFORE CITING.

Court of Appeals of Michigan.

Bruce F. WHITMER and Catherine S. Whitmer,
Plaintiff-Appellees,

v.

Corian Wayne JOHNSTON and Robyn Johnston,
Defendant-Appellants.

No. 239953.

Aug. 14, 2003.

Before: JANSEN, P.J., and NEFF and KELLY, JJ.

[UNPUBLISHED]

PER CURIAM.

*1 Defendants appeal as of right an order granting plaintiffs' motion for summary disposition in this real property case involving an easement. We reverse.

I. Basic Facts and Procedure

This case involves adjacent properties referred to as 114 Wompole Drive and 112 Wompole Drive and an easement, created by grant, with the dominant tenement being 114 Wompole Drive and the servient tenement being 112 Wompole Drive.

A. 112 Wompole Drive

On October 28, 1954, Alton Wompole and Anna Wompole conveyed 112 Wompole Drive to Wallace Whitmer and Katherine Whitmer by warranty deed. This deed excepted an easement [FN1] across 112 Wompole Drive for the benefit of

114 Wompole Drive. On October 4, 1995, Wallace Whitmer and Katherine Whitmer conveyed the property to the Katherine C. Whitmer Revocable Living Trust ("the Trust") by quitclaim deed. This deed also excepted an easement across 112 Wompole Drive for the benefit of 114 Wompole Drive. Katherine Whitmer was the original trustee; upon her death, Bruce Whitmer became the trustee. On May 21, 2001, the Trust, with Bruce Whitmer as trustee, conveyed the property to plaintiffs by quitclaim deed. The easement was not mentioned in this deed.

FN1. We note that none of the parties refer to the properties in question or the easement at issue by the precise property descriptions contained in the deeds. The matter would be simpler if there were but one easement, but the deeds include descriptions of more than one easement. Plaintiffs' original complaint does not provide any guidance in this regard because it too fails to refer to the precise property description.

B. 114 Wompole Drive

On September 27, 1941, the Wompoles conveyed 114 Wompole Drive to Frank Strother and Lonna Strother by warranty deed. This deed included an easement across 112 Wompole Drive. Anita Davison testified that in 1955, her first husband purchased the property by land contract. On June 30, 1972, Lonna Strother conveyed 114 Wompole Drive to Davison and her second husband, Glenn Davison, by a warranty deed which included an easement. On March 18, 1987, Davison conveyed the property to Robert Whitmer and Carol Burr by a warranty deed that also included an easement. On May 23, 2001, Robert Whitmer and Carol Burr conveyed 114 Wompole to defendants by warranty deed, but conveyed an easement across 112 Wompole Drive by quitclaim deed. [FN2]

FN2. Even though the parties have not

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referred to the easement at issue by its precise legal description and the warranty deed and the quitclaim deed from Carol Burr and Robert Whitmer to defendants both contain descriptions of more than one easement, Carol Burr testified that the easement at issue was quitclaimed because the title company "was uneasy about insuring the whole property due to the ... correspondence written by ... Bruce Whitmer and his attorneys."

C. Trial Court Proceedings

In August 2001, plaintiffs filed a complaint against defendants alleging adverse possession and abandonment. Specifically, plaintiffs alleged that in 1956, the Whitmers placed boulders to preclude use of the easement, taking the easement by adverse possession from 1956 to 1986. They also alleged that in 1956, Davison abandoned the easement. Plaintiffs requested that the trial court (1) enter a restraining order or preliminary injunction prohibiting defendant from entering 112 Wompole Drive (2) quiet title to 112 Wompole Drive, and (3) extinguish the easement.

During the deposition of Bruce Whitmer, defense counsel initiated questioning regarding the Trust. Specifically, defense counsel asked questions regarding Bruce Whitmer's position as trustee and his transfer, as trustee, of the property from the Trust to himself and his wife. Plaintiffs counsel objected stating the evidence was not relevant, not admissible, and not within the scope of discovery. When defense counsel continued his attempt to elicit responses, plaintiffs' counsel instructed Bruce Whitmer not to answer any questions involving the trust.

*2 Defendants filed a motion to dismiss or for an order to redepose Bruce Whitmer. The trial court denied defendants' motion to redepose plaintiff, but granted defendants leave to file and serve on plaintiffs a list of proposed interrogatories with an explanation of their relevance to the case. Before the questions were submitted, plaintiffs moved for summary disposition pursuant to MCR 2.116(C)(10) arguing that there was no genuine issue of fact as to whether the easement was extinguished by adverse possession and abandonment. The trial court granted the motion.

II. Discovery

Defendants argue that the trial court erred in denying their motion to redepose Bruce Whitmer. We agree. This court reviews a trial court's ruling on a motion to compel discovery for an abuse of discretion. *Linebaugh v. Sheraton Michigan Corp.*, 198 Mich.App 335, 343; 497 NW2d 585 (1993).

Michigan law is strongly committed to open and far-reaching discovery, and generally provides for discovery of any relevant, non-privileged matter. *Ostoin v. Waterford Twp Police*, 189 Mich.App 334, 337; 471 NW2d 666 (1991). MCR 2.301(B)(1) provides:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party, including the existence, description, nature, custody, condition, and location of books, documents or other tangible things and the identity and location of persons having knowledge of a discoverable matter. It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Pertaining to depositions specifically, evidence objected to at a deposition, on grounds other than privilege, shall be taken subject to the objection. MCR 2.306(C)(4). "When a relevancy objection is made at a deposition, the proper procedure is to note the objection on the record, and then take the deponent's answer subject to the objection." *Linebaugh, supra* at 343. At the deposition, plaintiffs' counsel instructed Bruce Whitmer not to answer stating the evidence was not relevant, not admissible, and not within the scope of discovery. However, Bruce Whitmer's answers should have been taken over his counsel's objections. Based on our review of the deposition, the questions were clearly designed to elicit discoverable material.

Furthermore, a motion under MCR 2.116(C)(10) is generally premature if discovery has not closed, unless there is no fair likelihood that further discovery would yield support for the nonmoving party's position. *Townsend v Chase Manhattan Mortgage Corp.*, 254 Mich.App 133, 140; 657 NW2d 741 (2002). At the time the trial court ruled on plaintiffs' motion for summary disposition, it had

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not yet reviewed defendants' proposed questions regarding the trust. Evidence concerning Bruce Whitmer's status as trustee and his authority to transfer 112 Wompole from the Trust to himself and his wife was certainly relevant and important to the resolution of this case. As defendants argue, if the transfer was improper, plaintiffs would not be the rightful owners of 112 Wompole and, as such, would not have standing to bring this case against defendants. Therefore, the trial court erred in granting the motion when discovery was not complete.

III. Summary Disposition

*3 Defendants also argue that the trial court erred in granting summary disposition on plaintiffs' claims of adverse possession and abandonment. We agree. Although our findings above are adequate to resolve this appeal, we address the following issues to conserve judicial resources as the issues may again be raised in the trial court on remand.

A. Standard of Review

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Harrison v. Olde Financial Corp.*, 225 Mich.App 601, 605; 572 NW2d 679 (1997). A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Maiden v. Rozwood*, 461 Mich. 109, 120; 597 NW2d 817 (1999). In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered admissible evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.*

The court is liberal in finding a genuine issue of material fact. *Marlo Beauty v. Farmers Inc.*, 227 Mich.App 309, 320; 575 NW2d 324 (1998). Only where the nonmoving party fails to bring evidence showing that disputed facts exist should the motion be granted. *Quinto v. Cross and Peters Co.*, 451 Mich. 358, 362; 547 NW2d 314 (1996). Only admissible evidence may be considered to determine whether a genuine issue of material fact exists. MCR 2.116(G)(6); *Veenstra v. Washtenaw County Club*, 466 Mich. 155, 163; 645 NW2d 643

(2000).

In deciding a motion for summary disposition brought pursuant to MCR 2.116(C)(10), a trial court may not make findings of fact or weigh credibility. *Nesbit v. American Comm Mut Ins Co.*, 236 Mich.App 215, 225; 600 NW2d 427 (1999); *Johnson v. Wayne Co.*, 213 Mich.App 143, 149; 540 NW2d 66 (1999); *In re Peterson*, 193 Mich.App 257, 261; 483 NW2d 624 (1992). Thus, when the truth of a material factual assertion depends on credibility, a genuine factual issue exists and summary disposition may not be granted. *Metropolitan Life Ins Co v. Reist*, 167 Mich.App 112; 121; 421 NW2d 592 (1988).

B. Adverse Possession

"To establish adverse possession, the claimant must show by clear and cogent proof 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), citing *Thomas v. Rex A Wilcox Trust*, 185 Mich.App 733, 736-737; 463 NW2d 190 (1990). The doctrine of adverse possession is strictly construed, *Strong v Detroit & Mackinac Railway Co.*, 167 Mich.App 562, 568; 423 NW2d 266 (1988), and the plaintiff has the burden of establishing the elements of adverse possession by clear and positive proof, *Burns v. Foster*, 348 Mich. 8, 14; 81 NW2d 386 (1957); *Killips v. Mannisto*, 244 Mich.App 256, 258; 624 NW2d 224 (2001). The true owner must have actual knowledge of the adverse possession, or alternatively, the possession must be so notorious as to raise the presumption to the world that the possessor claims ownership. *Ennis v. Stanley*, 346 Mich. 296, 301; 78 NW2d 114 (1956).

*4 The evidence presented in the lower court created a genuine issue of fact regarding whether plaintiffs adversely possessed the easement. Plaintiffs presented Davison's affidavit and deposition testimony showing that she voluntarily agreed to give up the easement in 1956. "Adverse or hostile use is inconsistent with the right of the owner, without permission asked or given, use such as would entitle the owner to a cause of action against the intruder [for trespassing]." *Plymouth Canton Community Crier, Inc v Prose*, 242

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Mich.App 676, 681; 619 NW2d 725 (2000), quoting *Goodall v. Whitefish Hunting Club*, 208 Mich.App 642, 646; 528 NW2d 221 (1995), quoting *Mumrow v. Riddle*, 67 Mich.App 693, 698; 242 NW2d 489 (1976) (internal citations omitted). The trial court's ruling in this regard states: "Defendants maintain that the placement of the rocks in the easement was by Anita Davidson's [sic] permission. The Court notes, however, that the placement of the rocks was inconsistent with the easement." Regardless whether placing the rocks was inconsistent with the easement, if it was done with permission, it cannot establish adverse possession. Therefore, the trial court erred in granting summary disposition to plaintiffs, pursuant to MCR 2.116(C)(10), on their adverse possession claim.

C. Abandonment

To establish abandonment, there must have been an intent to relinquish the property and external acts which put that intention into effect. *Sparling Plastic Industries, Inc v Sparling*, 229 Mich.App 704, 717-718; 583 NW2d 232 (1998), citing *Ludington & Northern Railway v Epworth Assembly*, 188 Mich.App 25, 33; 468 NW2d 884 (1991). Nonuse alone is insufficient to prove abandonment. *Strong, supra* at 569.

With their motion for summary disposition, plaintiffs submitted Davison's affidavit dated March 21, 2001, wherein she attests that in 1956, she voluntarily closed the easement in question. In her deposition, Davison testified about the easement: "It was-I'd almost call it a two track. It had tire tracks but grass in the middle of it. It was not really a road, it was a- used occasionally, I guess. I don't think I ever used it." In 1956, she proposed to her neighbors regarding the easement: "I just said I would prefer that that was not used. That it was cordoned off from the street." Davison further testified:

Q. And what was your overall intent in closing this off?

A. I wanted a permanent closure.

Q. And did it remain closed during the entire period of time that you lived there?

A. Yes.

However, in the 1987 warranty deed from Davison and her husband, Glenn Davison, to Robert Whitmer and Carol Burr, the legal description of

the property contains descriptions of easements over the neighboring property. As discussed above, the lawsuit was not begun with a precise legal description of the easement at issue. Thus, it is difficult to determine whether one of the easements contained in this warranty deed is the easement at issue. However, based on the conflict between Davison's 2001 testimony/affidavit and the 1987 warranty deed, there is a genuine issue of fact as to whether Davison abandoned the easement in 1956.

*5 There is another factual and legal issue raised by defendants of whether Davison had legal right to abandon the easement in 1956, when she had purchased 112 Wompole Drive by land contract in 1955 and may not have been the legal owner. The lower court record shows that the property was not conveyed to the Davisons until 1972. Additional facts are necessary to determine what type of title, if any, the Davisons held in 1956 when Davison claims to have abandoned the easement. Based on those facts, a legal determination would have to be made as to whether she could abandon the easement.

Defendants raise another issue as to whether Davison could abandon the easement without the consent of her husband. Although defendants do not develop this issue adequately on appeal, it appears that this too amounts to an issue of fact. The 1972 deed is to Davison and her husband, Glenn Davison. In her deposition, Davison stated that in 1955: "I had a first husband and he bought the place without me seeing it." She also stated that, at that time, her last name was Schultz." Thus, if Davison is determined to have had, in 1956, an ownership interest that would allow her to abandon the easement, there is an issue of fact and law as to whether her husband (and which husband) was a joint owner at that time whose consent was also required.

D. Aerial Photograph

The trial court based its ruling, in part, upon an aerial photograph of the properties taken in 1963. The original photograph which was an exhibit in the lower court record has been provided to this Court. The trial court determined: "Subsequent to oral argument on February 6, 2002, Defendants submitted aerial photographs [FN3] of the disputed area that were taken in 1964 [sic.] A review of these photographs shows that there is a tree in the middle of the roadway, and a blockage at one end. It cannot

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be disputed that the roadway would not allow access in 1964." We find the photograph does not clearly show either that the easement was blocked or not blocked. Thus, based on this photograph and the other evidence, there is a genuine issue of fact as to whether the easement was blocked in 1963.

FN3. It appears that the trial court was referring only to one photograph, of which more than one copy may have been provided. Although other photographs are contained in the lower court record, none of the others are aerial photographs taken in 1963. Also, the trial court erroneously states that the photograph was taken in 1964.

E. Gas Line

The trial court also appears to have misunderstood defendants' argument regarding a gas line. Defendants argue that a gas line was installed across the easement in question in 1987 at which time, the Whitmers were aware that an area was being dug and a gas line was being run across the easement. The testimony of Carol Burr was introduced showing that the Whitmers did not object to this activity or to the gas line being placed. Defendants argue that this evidence tends to show that plaintiffs acknowledged the easement at issue and did not object to its use. However, the trial court apparently understood that defendant was arguing that a separate gas line easement existed, and ruled:

Defendants' argument does not establish the existence of a *gas line* easement. It appears that Defendants seek to impose an additional burden on the roadway easement. As noted by Defendants, the owner of an easement cannot impose a new or additional burden on the servient estate ... Plaintiffs have not established that there is a gas line easement.

*6 Based on a review of the record, it appears that defendants' predecessors' 1987 use of the easement at issue without objection from the Whitmers creates a genuine issue of fact as to whether the easement was extinguished by either adverse possession or abandonment or it remains an easement in full force and effect. [FN4]

FN4. As noted above, the claimed period

of adverse possession is 1956 to 1986. While this period does not include 1987, the Whitmers' 1987 actions regarding the easement would provide circumstantial evidence as to whether they had adversely possessed the easement prior to that time.

Reversed and remanded. We do not retain jurisdiction.

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