STATE OF MICHIGAN

COURT OF APPEALS

ATTORNEY GENERAL and
DEPARTMENT OF NATURAL RESOURCES,

Plaintiffs-Appellees,

v

WILLIAM N. FAUNT and SHARYN L. FAUNT,

Defendants-Appellants.

UNPUBLISHED
February 25, 2000

No. 211769
Mackinac Circuit Court
LC No. 96-004037-CH

Before: Wilder, P.J., and Bandstra and Cavanagh, JJ.

PER CURIAM.

Defendants appeal as of right from an order granting a permanent injunction preventing them from blocking public access to that portion of the "Strickler Truck Trail" crossing their property in Henderson Township, Mackinac County. We affirm.

I

In 1992, defendants purchased the property described as "The Southwest Quarter of the Northwest Quarter (SW1/4-NW1/4), the entire Southwest Quarter (SW1/4) and the West Half of the Southeast Quarter (W1/2-SE1/4) of Section Nine (9), Township Forty-three (43) North, Range Eight (8) West." A single-lane, dirt road known as the Strickler Truck Trail crossed a portion of this property. During the summer of 1994, defendants learned that unknown persons using the Strickler Truck Trail had been trespassing, littering, and camping on their property. In response, they placed cables across the trail where it intersected their east and west property boundaries.

In spite of requests by the Department of Natural Resources (DNR) Area Forest Manager, defendants refused to remove the cables, and plaintiffs subsequently filed this suit. At trial, plaintiffs presented evidence that the Strickler Truck Trail had been in existence at least since the 1930s, when local residents remember seeing the Civilian Conservation Corps (CCC) improving the trail. Two residents claimed that they had used the trail personally for more than sixty years and had neither asked permission nor had ever seen the trail blocked. They assumed that the trail crossed state-owned land because it was maintained by the state.

Additional testimony and exhibits were offered showing that the trail was maintained by the state from the 1930s until the mid 1980s, when maintenance funding was cut. At that time, the DNR continued to maintain the trail on an emergency basis, but turned over regular maintenance to the companies using the trail to remove lumber from the area until the DNR resumed maintenance in 1995.

Defendants' property included a forty-acre parcel identified as the SW ¼ of the SW ¼ of Section 9 ("Parcel A"[1]). This parcel was owned by the State of Michigan prior to 1963, when it was transferred to Kimberly-Clark Corporation. Kimberly-Clark transferred it to Champion International Corporation in 1982, and the latter corporation sold it to defendants in 1992. The east boundary of Parcel A is contiguous to defendants' "Parcel B," identified as the SE ¼ of the SW ¼ of Section 9. Defendants' "Parcel C," the SW ¼ of the SE ¼ of Section 9, is contiguous to the east boundary of Parcel B. Thus, the three forty-acre parcels form a rectangular parcel beginning with Parcel A on the west and ending with Parcel C on the east, with Parcel B directly between the two. The Strickler Truck Trail crosses all three parcels.

Kimberly-Clark acquired Parcels B and C sometime before 1958, and in 1958, a road easement was granted and recorded in favor of the State of Michigan over the Strickler Truck Trail where it crossed these two parcels. At that time, Parcel A was owned by the State of Michigan, making it unnecessary to create an easement. In 1982, Parcels B and C were transferred to Champion International Corporation, and were subsequently sold to defendants in 1992, along with several other parcels of land. This claim of appeal involves, essentially, whether plaintiffs have an easement[2] over the portion of the Strickler Truck Trail that crosses Parcel A, the SW ¼ of the SW ¼ of Section 9.

II

Defendants first claim that the lower court erred in finding that plaintiffs had acquired an easement by prescription over Parcel A. We disagree. This Court reviews questions of law de novo. *In re Lafayette Towers*, 200 Mich App 269, 273; 503 NW2d 740 (1993). Findings of fact are reviewed for clear error. MCR 2.613(C).

A prescriptive easement results from action or inaction leading to a presumption that the true owners, by their acquiescence, have granted the interest adversely held, *Marr v Hemenny*, 297 Mich 311, 314; 297 NW 504 (1941), and such an easement may be acquired by using land for a fifteen-year period, in a similar manner as land acquired through adverse possession, *Dummer v United States Gypsum Co*, 153 Mich 622, 633; 117 NW 317 (1908); MCL 600.5801; MSA 27A.5801. The use must be adverse, under claim of right, continuous, open, notorious, peaceable, and with the actual or presumed knowledge or acquiescence of the true owner – essentially the same elements as adverse possession, with the exception of exclusivity. *Marr, supra*; *St Cecelia Society v Universal Car & Service Co*, 213 Mich 569, 576-577; 182 NW 161 (1921).

Defendants' first challenge to the alleged prescriptive easement is that plaintiffs failed to give notice, either to defendants or their predecessors, of an adverse claim of right. A person's use is "adverse" when it would entitle the landowner to a cause of action against the trespasser:

> The term "hostile" as employed in the law of adverse possession is a term of art and does not imply ill will. Nor is the claimant required to make express declarations of adverse intent during the prescriptive period. Adverse or hostile use is use 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. See *Rose v Fuller*, 21 Mich App 172; 175 NW2d 344 (1970); also, 25 AmJur2d, Easements and Licenses, § 51, pp 460-461. [*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).]

With respect to a claim of right, defendants' possession must have been "so open, visible, and notorious as to raise the presumption of notice to the world that the right of the true owner is invaded intentionally." *Burns v Foster*, 348 Mich 8, 15; 81 NW2d 386 (1957) (emphasis deleted). The Strickler Truck Trail appeared on maps as early as 1937. After the sale of Parcel A, the state continued to maintain the trail until the mid 1980s. Based on the public's open and continued use of the trail and plaintiffs' ongoing maintenance and signs, plaintiffs' use of the trail meets the definition of an adverse claim of right.

Defendants next claim that members of the public may not acquire a prescriptive easement over land registered under the Commercial Forest Act (CFA), MCL 320.301 *et seq*.; MSA 13.221 *et seq*.[3] In making this argument, defendants rely on *Goodall, supra*. In *Goodall, supra* at 643-644, the plaintiffs claimed the right to use various roads and trails throughout the defendants' property, contending that they had used the roads from 1966 through 1990 or 1991 – considerably longer than fifteen years. The land had been registered in 1972 under the CFA, an act forbidding "the owner of commercial forestland from denying the general public the privilege of hunting or fishing." *Id*. at 644-645. The defendants claimed that the CFA registration changed the plaintiffs' use of the land to a permissive use, and the Court agreed:

> In the present case, plaintiffs' use of defendants' roads was related directly to the CFA's protected activity of hunting and fishing. The CFA clearly was designed to encourage the landowner to allow open access to his property for purposes of hunting and fishing. Permitting prescriptive easements to be created if motor vehicles are used to gain access to such lands would conflict with the spirit and purpose of the act. [*Id*. at 646-647.]

The Court agreed with the defendants' reasoning, that it was "contrary to the intent of the CFA to require landowners to hold their land open for public use, and to then allow loss of a part of their ownership rights as a result of claimed adverse use in excess of fifteen (15) years," particularly where landowners were granted monetary incentives for holding the land open for twenty years or more. *Id*. at 647.

In the instant case, plaintiffs claim a prescriptive easement was established well *before* the land was registered under the CFA. However, an easement may not be created over one's own land. *Dimoff v Laboroff*, 296 Mich 325, 328; 296 NW 275 (1941). Therefore, plaintiffs' use of the road

could not have established a prescriptive easement before 1963. Thus, we must consider the impact of the CFA on plaintiffs' claimed prescriptive easement.

This case is different from that presented in *Goodall*. In *Goodall*, the plaintiffs' use of defendants' road was "related directly to the CFA's protected activity of hunting and fishing." *Id*. at 646. Here, however, the use was not so limited. Rather, the trail was also regularly used for sightseeing, timber sales, forest fire protection, conservation law enforcement, and various recreational pursuits not related to hunting and fishing. Because the public use went well beyond the CFA-protected activities of hunting and fishing, CFA registration did not preclude a prescriptive easement over this road.

Further, in *Goodall*, the Court expressed concern that property owners would be, in effect, penalized for allowing hunting and fishing on their land pursuant to the CFA. *Id*. at 647. The facts in the present case do not raise the same concerns. This is not a case in which Kimberly-Clark or Champion unknowingly gave up an easement over the Strickler Truck Trail by merely registering their property under the CFA program. Rather, plaintiffs are merely attempting to allow the public to continue to use a trail it has been using for over sixty years for many commercial, recreational, and public safety purposes.

Defendants next contend that because their land was "wild, unenclosed recreational land," plaintiffs were required to "give actual notice of the hostility of [their] claim or the use must be so open, notorious, and hostile as to leave no doubt in the mind of the owner that the owners' rights are being invaded in a hostile manner." Defendants explain that, absent the element of hostility, plaintiffs' and the public's use of the trail was permissive, precluding a finding of prescriptive easement. This claim is equivalent to defendants' first claim – that neither they nor their predecessors had notice of an adverse claim of right. Defendants' lack of notice claim has already been addressed. With respect to defendants' claim that use of the trail was permissive, no evidence was offered in support of this theory. No one testified that plaintiffs were ever given *permission* to use the trail. Rather, the evidence showed that plaintiffs always treated their rights in the trail as hostile; that is, in a manner putting defendants and their predecessors on notice that they had a cause of action for trespass if they chose to exercise it. See *Goodall, supra* at 646.

Defendants finally contend that the government may not acquire an easement by prescription, but they have presented no authority to support this theory. To the contrary, in *M&D, Inc v McConkey*, 226 Mich App 801; 573 NW2d 281 (1997), vacated 226 Mich App 801 (1997), adopted in relevant part 231 Mich App 22, 35; 585 NW2d 33 (1998), this Court upheld the trial court's conclusion that the Michigan Department of Transportation had acquired a prescriptive easement in a drain over the plaintiffs' property. *Id*. at 814. Similarly, in *Toth v Waterford Twp*, 87 Mich App 173, 178; 274 NW2d 7 (1978), this Court found that the Oakland County Road Commission had acquired a prescriptive easement in a drain located on the plaintiffs' property. Thus, defendants' argument that the state may not acquire a prescriptive easement is without merit.

III

Defendants' second claim is that the trial court erred in finding that plaintiffs had acquired an implied easement over Parcel A. We disagree. Three things must be demonstrated in order to establish an implied easement:

> (1) that during the unity of title an apparently permanent and obvious servitude was imposed on one part of an estate in favor of another, (2) continuity, and (3) that the easement is reasonably necessary for the fair enjoyment of the property it benefits. [*Schmidt v Eger*, 94 Mich App 728, 731; 289 NW2d 851 (1980).]

Implied easements may be established in one of two ways, strict necessity or quasi-easement. *Id.* at 732-733. Defendants first claim that plaintiffs have failed to show unity of title, and that because the easement was not continuous, a showing of strict necessity was required but not established.

At the time the state conveyed title to Parcel A to Kimberly-Clark, it owned not only Parcel A, but much of the property contiguous to Parcel A and contiguous to Parcels B and C. In Michigan, an implied easement may arise where two or more tracts of property are created from what was once a single tract, and the use of one portion of the property, the servient parcel, benefited another portion, the dominant parcel, during unity of title. *Id.* at 733. Defendants claim that unity of title was not present because plaintiffs did not own Parcels B and C at the time they conveyed Parcel A to Kimberly-Clark. However, defendants have provided no authority for their contention that the severed parcels must be contiguous at the location of the easement, even though this might normally be the case. Plaintiffs have shown: (1) that they owned a large tract of land, that is, Parcel A and much of the surrounding land; (2) that they severed this tract of land and conveyed a portion of it; and (3) that, at the time it remained a large tract, the Strickler Truck Trail at Parcel A benefited other parts of plaintiffs' larger parcel of land.

Defendants also claim that use of the Strickler Truck Trail was not "continuous," and therefore, required a showing of strict necessity. Our Supreme Court has said an easement is "continuous" when it "may be enjoyed without any act upon the part of the party claiming it." *Waubun Beach Ass'n v Wilson*, 274 Mich 598, 606; 265 NW 474 (1936). The Court has stated specifically that "[a] way is a discontinuous easement." *Bubser v Ranguette*, 269 Mich 388, 392; 257 NW 845 (1934). However, even though these cases have not been expressly overruled, later decisions have recognized implied easements in cases involving driveways, *Rannels v Marx*, 357 Mich 453; 98 NW2d 583 (1959), vehicular ingress and egress, *Kamm v Bygrave*, 356 Mich 189; 96 NW2d 770 (1959), rights of way, *Myers v Spencer*, 318 Mich 155; 27 NW2d 672 (1947), and lakeshore access, *Koller v Jorgensen*, 76 Mich App 623; 257 NW2d 192 (1977). Because an implied easement requires continuity, and the Courts in these cases found that an implied easement existed, this suggests that "continuous" in this context has evolved to mean "without a break in regular usage." 1 Cameron, Michigan Real Property Law (2d ed), Easements, § 6.9, p 201. In light of these later cases, we conclude that the continuity element has been satisfied in this case as well.

The lower court in the present case found that the necessity element had been satisfied, noting that if it were to deny the easement, it would extinguish, for all practical purposes, the state's recorded easements over Parcels B and C. The court's conclusion that the trail was

reasonably necessary for the enjoyment of the remaining land was supported by the evidence, and was, therefore, not clear error.

We affirm.

/s/ Kurtis T. Wilder
/s/ Richard A. Bandstra
/s/ Mark J. Cavanagh

[1] "Parcel A," "Parcel B," and "Parcel C" are labels provided by this Court for ease of reference and carry no significance apart from this opinion.

[2] We note that any argument regarding an express easement that could possibly be derived from the various documents in this case was waived by plaintiffs at oral argument.

[3] Repealed and replaced by MCL 324.51101 *et seq*.; MSA 13A.51101 *et seq*. (1994 PA 451, § 90104; 1995 PA 57, § 1).