

STATE OF MICHIGAN
COURT OF APPEALS

CHRISTOPHER C. CREWS,

Plaintiff-Appellee/Cross-appellant,

v

HUGH BROTHERTON, CAROL BROTHERTON,
and ROBERT J. BROTHERTON,

Defendants-Appellants/Cross-
appellees.

UNPUBLISHED

June 23, 2000

No. 216774

Mackinac Circuit Court

LC No. 96-004143-CH

Before: Hood, P.J., and Saad and O'Connell, JJ.

PER CURIAM.

Defendants appeal by leave granted from the trial court's denial of their motion for sanctions pursuant to MCR 2.114 and MCL 600.2951; MSA 27A.2591. Plaintiff cross-appeals from the trial court's order of directed verdict of his claims of prescriptive easement and easement by necessity over property belonging to defendants. We affirm.

On January 10, 1992, plaintiff entered into a land contract agreement with Eugene and Doris Shifter. Pursuant to the agreement, plaintiff purchased eighty acres of vacant land located in Newton Township, County of Mackinac. The land contract agreement provided that the purchase of the property was subject to reservations and "easements affecting the land." During the course of his ownership that commenced in 1978, Shifter accessed the property by using an old railroad bed called the Bryan Grade. However, Shifter testified that while he used the property seasonally for hunting or vacationing purposes, there was an estimated period of three years when his family completely failed to use the subject property. When plaintiff purchased the property from Shifter, the men accessed the property through the Bryan Grade. Shifter addressed the Bryan Grade by stating, "[t]his is how you go through, right here. This is it." Plaintiff began to use his property and utilized the Bryan Grade as the means of access. In October 1995, plaintiff went to access his property by using the Bryan Grade and learned that defendants had blocked it in the summer of 1995. Defendants did not allow plaintiff to remove the obstruction. Plaintiff spoke to other neighboring landowners in an attempt to secure another means of access to his property, but access was denied by those landowners with whom plaintiff was

able to make contact. Thereafter, plaintiff commenced this lawsuit seeking an easement by prescription or an easement by necessity. Plaintiff also alleged that equitable principles precluded defendants' continued blockage of the Bryan Grade. At the conclusion of plaintiff's proofs, the trial court granted defendants' motion for a directed verdict. At a later motion hearing, the trial court denied defendants' motion for sanctions.

Plaintiff first argues that the trial court erred in granting defendants' motion for a directed verdict because plaintiff had established a prima facie case regarding the claim of easement by prescription. We disagree. Our review of a trial court's grant of a directed verdict is de novo. *Farm Credit Services of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 668; 591 NW2d 438 (1998). In evaluating the trial court's decision, we examine the testimony and all legitimate inferences in the light most favorable to the nonmoving party. *Id.* Directed verdicts are appropriate only if no factual question exists upon which reasonable minds could differ. *Meagher v Wayne State University*, 222 Mich App 700, 708; 565 NW2d 401 (1997).

Generally, an easement by prescription arises from use of the servient estate that is open, notorious, adverse, and continuous for a period of fifteen years. *Goodall v Whitefish Hunting Club*, 208 Mich App 642, 645; 528 NW2d 221 (1995). In the present case, the property owned by the parties consists of vacant lands. In the case of wild and uninclosed lands, the plaintiff may not rely on utilization or passage over the property to establish notice of hostile use. *Du Mez v Dykstra*, 257 Mich 449, 451; 241 NW 182 (1932). Rather, the plaintiff must, by word or act, give notice to the owner of a claim of right before he may obtain title by prescription. *Id.* Review of the evidence presented at trial reveals that plaintiff and his predecessor in interest did not discuss with defendants their use or the nature of their use. Accordingly, plaintiff failed to satisfy the elements to establish a claim of easement by prescription.¹

Plaintiff next argues that the trial court erred in granting a directed verdict of his claim of easement by necessity. We disagree. As an initial matter, we note that plaintiff failed to present any evidence regarding the circumstances surrounding the split of property in the area. The plaintiff bears the burden of proving, by a preponderance of the evidence, easement by necessity or implied easement. *Schmidt v Eger*, 94 Mich App 728, 732; 289 NW2d 851 (1980). Because it does not appear that plaintiff's land was landlocked as a result of a split from defendants' property, plaintiff is not entitled to an easement by necessity. See *Schadewald v Brule*, 225 Mich App 26, 41 n 4; 570 NW2d 788 (1997). Even assuming that plaintiff had satisfied this requirement, the creation of an implied easement arises through the severance of a single possessory interest as an inference of the intention of the parties. *Koller v Jorgensen*, 76 Mich App 623, 628; 257 NW2d 192 (1977). Next, the plaintiff must establish notice to the defendant, continuity, and necessity. *Id.* In the present case, plaintiff failed to delineate the history of the severance of property in the area and failed to demonstrate continuity. Accordingly, the trial court's grant of a directed verdict was proper.²

On cross-appeal, defendants argue that the trial court erred in denying their motion for sanctions, claiming that plaintiff's allegations were frivolous. MCL 600.2591; MSA 27A.2591. Our review of a trial court's findings is for clear error. *Schroeder v Terra Energy, Ltd*, 223 Mich App 176, 195; 565 NW2d 887 (1997). A claim is frivolous when the party's legal position is devoid of

arguable legal merit. *Id.* There is no record support for defendants' contention that the trial court's oral failure to address each of plaintiff's three claims in detail implies that the trial court found two of the three claims to be frivolous. In fact, the trial court's complete denial of defendants' motion for sanctions in a written order *evidences* the contrary. Furthermore, we note that plaintiff's failure to meet his burden of proof does not mean that his claims were frivolous, particularly where plaintiff requests an equitable relief in the alternative based on prior use of the property.³

Affirmed.

/s/ Harold Hood

/s/ Henry William Saad

/s/ Peter D. O'Connell

¹ We also note that plaintiff failed to establish continuous use for a fifteen year period because Shifter acknowledged that he did not visit the property for an estimated three year period. This use cannot be deemed seasonal because Shifter testified that a complete absence of use occurred for that period. Furthermore, plaintiff's attempt to introduce use by other neighboring landowners was denied by the trial court. Plaintiff has not appealed that evidentiary ruling and did not preserve the issue for appellate review by offer of proof. MRE 103(a)(2).

² Plaintiff also argues that the trial court erred in holding that a state tax sale extinguished easement rights. Although this issue was orally raised by plaintiff in opposition to defendant's motion for directed verdict, the trial court did not reach a determination regarding this issue. Therefore, it is not preserved for appeal. *Miller v Inglis*, 223 Mich App 159, 168; 567 NW2d 253 (1997). Review of the record reveals that the trial court noted that evidence regarding the tax sale had not been placed in evidence at trial and any reference to a tax sale appeared in the narrative portion of defendants' motion for summary disposition. Although the issue presents a question of law, the necessary facts are not presented for our review, and we cannot address it. *Id.*

³ We also note that defendants had the opportunity to challenge plaintiff's ability to meet his proofs prior to trial. However, defendants' motion for summary disposition did not comply with the twenty-one day hearing requirement of MCR 2.116(G)(1)(a)(i), and the trial court did not rule on the motion prior to trial, but rather, entertained defendants' motion for directed verdict at the close of plaintiff's proofs.