STATE OF MICHIGAN

COURT OF APPEALS

ROBERT W. SMITH, CELINE M. SMITH, CASEY D. SMITH, DENISE SMITH, ROBERT W. SMITH, JR., and VIVIAN SMITH,

Plaintiffs-Appellees,

and

8-80 HUNT CLUB,

Plaintiff-Appellee/Cross-Appellant,

v

WILLIAM J. COLEMAN and B C SPORTSMAN CLUB INC,

Defendants-Appellants/Cross-Appellees.

UNPUBLISHED
June 24, 2004

No. 243768
Roscommon Circuit Court
LC No. 00-722151-CH

Before: Whitbeck, C.J., and Griffin and Borrello, JJ.

PER CURIAM.

Defendants appeal as of right a judgment granting plaintiffs a prescriptive easement across defendants' property. Plaintiff 8-80 Hunt Club cross-appeals the portion of the judgment that denied its claim of an implied easement by necessity. We affirm.

Defendants first argue that the trial court impermissibly shifted to them the burden of proof. We disagree.

Actions to quiet title are equitable in nature. *Killips v Mannisto*, 244 Mich App 256, 258; 624 NW2d 224 (2001). In equitable actions, a trial court's holdings are reviewed de novo, while its findings of fact are reviewed for clear error. *Higgins Lake Property Owners v Gerrish Twp*, (*After Remand*), 255 Mich App 83, 117; 662 NW2d 387 (2003). An easement is the right to use another's land for a specified purpose. *Slatterly v Madiol*, 257 Mich App 242, 260; 668 NW2d 154 (2003). A prescriptive easement is created by using another's land in a manner that is open, notorious, adverse, and continuous for fifteen years. *Plymouth Canton Crier v Prose*, 242 Mich App 676, 679; 619 NW2d 725 (2000). A party claiming a prescriptive easement may prove that the use was adverse by showing that the property was used without seeking or receiving

permission in a manner that would create a cause of action for trespass, nuisance, or interference. *Id.* at 681, citing *Mumrow v Riddle*, 67 Mich App 693, 698; 242 NW2d 489 (1976). Where a landowner has given permission, a prescriptive easement cannot be established. *Banach v Lowera*, 330 Mich 436, 440-441; 47 NW2d 679 (1951). In this case, the trial court, after indicating that the party claiming an easement generally has the burden of proving the elements, stated:

> However, where a party shows that the claimed easement has been used for a number of years in excess of the prescriptive period, a presumption of a grant arises and the burden shifts to the owner of the servient estate to show that use was permissive, as opposed to hostile or adverse. *Reed v Soltys*, 106 Mich App 341, 346[; 308 NW2d 201] (1981).

In *Widmayer v Leonard*, 422 Mich 280, 291; 373 NW2d 538 (1985), our Supreme Court held that reversal of the trial court's decision was an error because MRE 301 permits "'*the burden of going forward with the evidence*'" to pass between parties, "'not *the burden of proof.*'" *Id.* at 291, quoting MRE 301 (emphasis added). The burden of proof has two aspects – the burden of persuasion, which remains with the plaintiff, and the burden of producing evidence, which may shift between the parties several times during trial. *Id*. at 290.

Nevertheless, the trial court in the instant case did not specifically state that the *burden of proof* shifted – only the burden to show that the use was permissive. According to our Supreme Court in *Widmayer*, *supra* at 290, the burden to show that the use was permissive does shift:

> The burden of proving a prescriptive easement remained throughout trial with plaintiffs. Once plaintiffs presented evidence that they had used the disputed land for over fifty years, the burden of producing evidence shifted to defendants to establish that plaintiffs' use was permissive. *Id.*

It is clear from the record that the court considered the parties' conflicting evidence and found plaintiffs' evidence more credible. Because we are not left with a definite and firm conviction that a mistake was made, we conclude that there was no clear error. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

Defendants next argue that the trial court's failure to grant its request for a jury trial was an abuse of discretion because even if the court could remain impartial where several plaintiffs were local attorneys, one was a sitting probate judge, and one was a retired county official, an inference of partiality was likely. Although defendants moved for disqualification and for a jury trial, there does not appear to be a definitive ruling on either motion. But the trial court did assure defendants on the record that he was not social with any of the plaintiffs and could remain impartial, and it is clear that a bench trial was conducted. Thus, we can infer that the trial court denied both motions.

The decision whether to grant a jury trial where there is no right to one – as there was not here – is reviewed for an abuse of discretion. See *Old Kent Bank v Kal Kustom Enterprises*, 255 Mich App 524, 532; 660 NW2d 384 (2003). Here, where the trial court assured the parties that it

could conduct a bench trial without partiality and where there is no indication of prejudice in the record, we cannot conclude that the trial court abused its discretion.

Defendants next argue that the Smiths' attorney should have been disqualified because an appearance of impropriety existed and that they were not required to show an actual conflict of interest. We disagree.

The trial court here questioned whether it had jurisdiction over this issue. This Court reviews de novo whether a trial court has subject-matter jurisdiction. *Davis v Dep't of Corrections*, 251 Mich App 372, 374; 651 NW2d 486 (2002). It is the judiciary's prerogative to regulate judicial proceedings. *Attorney General v Michigan Public Service Comm*, 243 Mich App 487, 491; 625 NW2d 16 (2000). And a judge is responsible for the professional conduct of his court officers. *Id.* at 492. Before a trial court's failure to disqualify opposing counsel because of a conflict of interest will be reversed, there must be a demonstration of actual prejudice. *In re Osborne (After Remand)*, 237 Mich App 597, 603, 610-611; 603 NW2d 824 (1999). Because defendant failed to demonstrate actual prejudice, the court's failure to disqualify the Smiths' attorney does not require reversal.

Finally, plaintiff 8-80 Hunt Club argues on cross-appeal that it sufficiently established an implied easement by necessity and that the court erred when it determined otherwise. We disagree.

In a bench trial, a court's holdings are reviewed de novo, while its findings of fact are reviewed for clear error. *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001). An easement by necessity may be implied by law where a landowner splits property so that one parcel is landlocked unless access is gained across the other parcel. *Chapdelaine, supra* at 172, citing *Schmidt v Eger*, 94 Mich App 728, 732; 289 NW2d 851 (1980). Where premises are accessible by other means, a landowner is not entitled to access over land he does not own. *Dimoff v Laboroff*, 296 Mich 325, 329; 296 NW 275 (1941). The court's grant of the prescriptive easement destroyed the necessity of the implied easement. An easement by necessity ceases to exist when the necessity for it ceases. *Waubun Beach Ass'n v Wilson*, 274 Mich 598, 615; 265 NW 474 (1936). As long as the forty-acre parcel was the only legal means of accessing the property, the easement by necessity continued. But once 8-80 Hunt Club was granted another means of accessing the property, the necessity no longer existed, and its easement by necessity ceased to exist.

Affirmed.

/s/ William C. Whitbeck
/s/ Richard Allen Griffin
/s/ Stephen L. Borrello