STATE OF MICHIGAN

COURT OF APPEALS

RICHARD W. JOSEPH and BERNICE C. JOSEPH,

Plaintiffs-Appellants,

v

DANIEL GLOMSKI, WENDY S. GLOMSKI, DANIEL A. FOX, DAWN M. FOX, LANCE D. DAVIS, MARCIA DAVIS, GLENN D. DAVIS, JEAN D. DAVIS, KURT DAVIS, BARBARA L. DAVIS, and RAYMOND TARATUTA,

Defendants-Appellees.

UNPUBLISHED
July 27, 2004

No. 244792
Presque Isle Circuit Court
LC No. 00-002388-CH

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

PER CURIAM.

Plaintiffs appeal as of right a judgment in favor of defendants. This case arose when plaintiffs brought an action to quiet title to two easements running to the south over defendants' land for access to a highway. We reverse in part and remand.

With respect to Easement II, plaintiffs argue that an implied easement was created when defendant Raymond Taratuta conveyed parcel B to plaintiff Richard Joseph. We agree.

Actions to quiet title are equitable; therefore, the trial court's holdings are reviewed de novo, and its findings of fact are reviewed for clear error. *McFerren v B&B Investment Group*, 253 Mich App 517, 522; 655 NW2d 779 (2002). Courts will imply an easement when an owner of land splits the property in a manner that leaves one of the parcels landlocked if access is not granted across the other parcel. *Chapdelaine v Sochocki*, 247 Mich App 167, 172; 635 NW2d 339 (2001). Parties are presumed to have intended that the grantee have access to the conveyed property. *Rannels v Marx*, 357 Mich 453, 456-457; 98 NW2d 583 (1959). "In a conveyance that deprives the owner of access to his property, access rights will be implied unless the parties clearly indicate they intended a contrary result." *Id.* at 173, citing 1 Restatement Property, Servitudes, 3d § 2.15, pp 204, 208-209.

Unless there are restrictive words in the deed, apparent and continuous easements previously used by the grantor will pass to the grantee. *Rannels, supra* at 457, citing *Kamm v*

Bygrave, 356 Mich 189, 196; 96 NW2d 770 (1959). On the other hand, before an easement may be implied, the proponent must show that his property is *visibly* dependent on the other parcel for access. *Siegel v Renkiewicz Estate*, 373 Mich 421, 425; 129 NW2d 876 (1964). Our review of the record indicates that the access route was visible across parcel 3, and plaintiffs showed that parcel B was visibly dependent on parcel 3 for legal access.

Although strict necessity may be required in cases where a quasi-easement does not exist, where a quasi-easement does exist only reasonable necessity must be proven. *Schmidt v Eger*, 94 Mich App 728, 732-733; 289 NW2d 851 (1980). An easement implied from a quasi-easement requires that there be an obvious and apparently permanent servitude over one part of the estate and in favor of the other at severance. *Id.* at 733. Further, *Chapdelaine, supra*, clearly states that only reasonable necessity is required to prove an implied easement:

> Regardless of whether the easement at issue is implied by law or reservation, the party asserting the right to the easement need only show that the easement is reasonably necessary, not strictly necessary, to the enjoyment of the benefited property. [*Chapdelaine, supra* at 173, citing *Schmidt, supra* at 735.]

In the instant case, several witnesses testified that the easement conveyed with the property was inaccessible because it was covered with trees and consisted of swampland. Therefore, Easement II was reasonably necessary to access parcel B. Moreover, defendants provided the court with evidence that they were on record notice with respect to Easement II where the addendum to their purchase agreement noted the easement. Where a purchaser has both record and actual notice that an easement exists, the purchaser is not entitled to block the easement holder's access. *Royce v Duthler*, 209 Mich App 682, 690-691; 531 NW2d 817 (1995). Therefore, the court should have granted Easement II to plaintiffs.

Plaintiffs next argue that they presented sufficient evidence of an easement by prescription with respect to Easement I. We disagree.

An action for easement by prescription is 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 Ass'n v Gerrish Twp*, 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 Community Crier, Inc 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 Lawera*, 330 Mich 436, 440-441; 47 NW2d 679 (1951). When conflicting evidence is presented, it is the trier of fact's duty to determine what evidence to believe. *Farm Bureau Mut*

Ins Co v Combustion Research Corp, 255 Mich App 715, 726; 662 NW2d 439 (2003). Because the court found that plaintiffs had permission to use the easement some of the time, plaintiffs cannot establish an easement by prescription. *Banach, supra* at 440-441.

Plaintiffs next argue that the court should not have determined that res judicata barred their claim to Easement I. We disagree.

Application of res judicata is a question of law that this Court reviews de novo. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 379; 596 NW2d 153 (1999). "[T]he doctrine of res judicata is applicable to a second suit involving the same cause of action as that raised in the first suit . . . ." *Braxton v Litchalk*, 55 Mich App 708, 717; 223 NW2d 316 (1974). The party claiming res judicata must show:

> (1) the first action was decided on the merits; (2) the matter contested in the second action was or could have been resolved in the first; and (3) both actions involved the same parties or their privies. [*Dart v Dart*, 224 Mich App 146, 156; 568 NW2d 353 (1997), aff'd 460 Mich 573; 597 NW2d 82 (1999).]

In the instant case, the previous suit was dismissed with prejudice by stipulation. "A voluntary dismissal with prejudice acts as an adjudication on the merits for res judicata purposes." *Limbach v Oakland Co Bd of Rd Comm'rs*, 226 Mich App 389, 395; 573 NW2d 336 (1997). The previous lawsuit involved a dispute over the ownership and use of Easement I and, thus, involved the same facts and evidence. "If the same facts or evidence would sustain both, the two actions are the same for the purpose of res judicata." *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 11; 672 NW2d 351 (2003). Thus, the two suits involved the same cause of action, even though the first suit sought an injunction while the second suit sought to quiet title. Res judicata bars every claim that could have been raised from the same transaction if reasonable diligence had been exercised. *Dart, supra* at 157.

"A privy includes one who, after rendition of the judgment, has acquired an interest in the subject matter affected by the judgment through one of the parties . . . by purchase." *Peterson Novelties, supra* at 13, citing *Wildfong v Fireman's Fund Ins Co*, 181 Mich App 110, 115; 448 NW2d 722 (1989). Privity also includes "mutual or successive relationships to the same right of property." *Phinisee v Rogers*, 229 Mich App 547, 553; 582 NW2d 852 (1998), citing Black's Law Dictionary (6th ed), p 1199. Therefore, the parties in the instant action were privies to parties of the previous action.

Nevertheless, plaintiffs argue that there was no privity because a predecessor in title to both sets of defendants – Sophie Mikolojeski – was not named in the first lawsuit. The sole case cited by plaintiffs to support their argument indicates that where property is owned as a tenancy by the entirety, each spouse owns the entire interest and neither can convey the interest without consent of the other spouse. *Rogers v Rogers*, 136 Mich App 125, 134; 356 NW2d 288 (1984). However, *Rogers* does not involve a res judicata issue. "An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue." *Peterson, supra* at 14, citing *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).

Reversed in part and remanded. We do not retain jurisdiction.

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