STATE OF MICHIGAN

COURT OF APPEALS

CONSUMERS ENERGY,

Plaintiff/Counter-Defendant-Appellant,

v

LEO BEARD, MARY D. BOWER, DOROTHY BURCH, HAROLD P. BURCH, JOYCE E. DENNIS, ROGER S. DENNIS, DELORES D. EPPLE, JEANNE H. EPPLE, JOSEPH C. EPPLE, RITA A. EPPLE, WILLIAM T. EPPLE, DALE J. FIKE, DOROTHY I. FIKE, JON GEECK, LEANN GEECK, RONALD L. GEECK, SHARON K. GEECK, TAMMY L. GEECK, WILLIAM M. GEECK, ALTA M. GROSS, DAVID H. GROSS, NATALIE M. GROSS, PAUL E. GROSS, DALE P. HAFER, JANICE M. HAFER, SAM T. HART, IRENE L. HOLP, PHILLIP B. HOLP, EVA JOYCE JENKINS, LARRY M. JENKINS, DOROTHY JOURDAN, EUGENE E. LATTIMER, ILA M. LATTIMER, LUELLA K. LAWLER, PATRICK J. LAWLER, JOHN E. MOGG, KAREN E. MOGG, ESTHER A. MUTERSPAUCH, GARDINER MUTERSPAUGH, JOYCE J. MYERS, ROBERT L. MYERS, BETTY J. PROUT REVOCABLE TRUST, DUANE L. PROUT REVOCABLE TRUST, TAMMY LEIGH PROUT, THOMAS G. PROUT, JOYCE REIHL, RONALD REIHL, DAN RETZLOFF, JEANETTE RETZLOFF, KAREN E. ROBERT, LAWRENCE J. ROBERT, DOROTHY ROBERTSON, RUSSELL G. ROBERTSON, TAD W. ROBERTSON, JOYCE E. ROLSTON, DORIS J. SHAFFER, JAMES M. SHAFFER, PHILOMENE SHOEN, BERNARD J. SPENCE, PATRICIA A. SPENCE, LISA SWINDLEHURST, LUELLA F. SWINDLEHURST LIVING TRUST, LUELLA K. SWINDLEHURST, Trustee of RICHARD

UNPUBLISHED
October 5, 2004

No. 246979
Isabella Circuit Court
LC No. 99-000901-CH

SWINDLEHURST, JOYCE E. TURNER, THELMA M. WALKER and THOMAS F. WALKER, Co-Trustees of THE THOMAS WALKER FAMILY REVOCABLE LIVING TRUST, ROSE LAWLER, GILBERT A. MAXWELL, IRENE E. MAXWELL, Trustee of GEORGE M. MAXWELL AND IRENE E. MAXWELL JOINT REVOCABLE TRUST, JACK L. MCDONALD, ALICE M. METHNER, CLAREND V. METHNER, THOMAS J. WAZNY, LINDA MARIE YAGER, DONALD M. YAGER, MARK A. ZIELINSKI, and MARY E. ZIELINSKI,

Defendants/Counter-Plaintiffs-Appellees,

and

DEPARTMENT OF NATURAL RESOURCES and DEPARTMENT OF ENVIRONMENTAL QUALITY,

Defendants.

Before: Hoekstra, P.J., and Cooper and Kelly, JJ.

PER CURIAM.

Plaintiff Consumers Energy appeals as of right from an order granting defendants, property owners along a former railroad right of way, partial summary disposition pursuant to MCR 2.116(C)(10), and the final order of the trial court in favor of defendants. We affirm in part, reverse in part, and remand to permit the trial court to take evidence regarding defendants' adverse possession of those properties conveyed by thirty-four "Right of Way" deeds.

I. Facts and Procedural History

In 1879, defendants' predecessors-in-interest either granted permission or conveyed title in fee to a railroad company to construct a railway across their properties.[1] In 1936, plaintiff

---

[1] Although the railway and power lines crossed hundreds of parcels of land, only the named defendants continue to challenge plaintiff's presence on the land. The remaining properties were conveyed by thirty-four "Right of Way" deeds, one warranty deed, two quit-claim deeds, and four untitled deeds. Many defendants also challenge plaintiff's presence where their (continued…)

constructed a high-voltage transmission line along fourteen miles of the right of way with the railroad company's permission. By the late 1970s, however, rail service on the line ceased, and the tracks were removed by 1981. Both defendants and plaintiff were eager to clear title to the right of way. The parties entered into a ten-year easement agreement in 1983, under which plaintiff agreed to make annual payments to defendants for the use of the right of way pending litigation to resolve title. However, litigation never commenced and plaintiff purchased a quit-claim deed to the right of way from the railroad company one year after the easement agreement expired.

Following discovery, the trial court granted partial summary disposition in favor of defendants pursuant to MCR 2.116(C)(10). The trial court found that plaintiff was not entitled to quiet title based on thirty-four "Right of Way" deeds, as they merely conveyed an easement. In a subsequent bench trial, the trial court ruled in favor of defendants on all remaining claims.

II. Summary Disposition

Plaintiff contends that the trial court erred in finding that thirty-four "Right of Way" deeds conveyed only an easement, and therefore, improperly granted defendants partial summary disposition of plaintiff's quiet title claim. We agree. We review a trial court's determination regarding a motion for summary disposition de novo.[2] A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim.[3] "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in the light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists."[4] "Summary disposition is appropriate only if there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law."[5] The underlying action to quiet title is equitable and is reviewed de novo. A trial court's underlying factual findings are reviewed for clear error.[6]

In *Quinn v Pere Marquette R Co,*[7] the Michigan Supreme Court held that where a railroad company takes property as a voluntary grant or donation, it may only be used for the purpose designated in the grant and reverts to the donor upon the cessation of that use.[8]

(…continued)

predecessors-in-interest allegedly permitted the construction of the railway without conveying title to the land.

[2] *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001).

[3] *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999).

[4] *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001).

[5] *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001).

[6] *Gorte v Dep't of Transportation*, 202 Mich App 161, 171; 507 NW2d 797 (1993).

[7] *Quinn v Pere Marquette R Co*, 256 Mich 143; 239 NW 376 (1931).

[8] *Id.* at 149.

However, where, as in this case, the railroad company purchases the property, the railroad's interest is determined by the terms of the deed.[9]

The deeds at issue are entitled "Right of Way" deeds.[10] In *Quinn*, the Supreme Court found:

> "Right of way" has two meanings in railroad parlance: the strip of land upon which the track is laid, and the legal right to use such strip. In the latter sense it may mean an easement. But in this State and others the character of the title taken to the strip depends upon the language of the conveyance.
>
> Where the grant is not of the land but is merely of the use or of the right of way, or, in some cases, of the land specifically for a right of way, it is held to convey an easement only.
>
> Where the land itself is conveyed, although for railroad purposes only, without specific designation of a right of way, the conveyance is in fee and not of an easement.
>
> * * *
>
> . . . [A] statement of use is merely a declaration of the purpose of conveyance, without effect to limit the grant. The reasoning is that, as a railroad company may take real estate only for railroad purposes, the declaration that it is to be so used is merely an expression of the intention of the parties that the deed is for lawful purpose.[11]

We find that the title "Right of Way Deed" merely indicates that the deeds are conveying a strip of land upon which the railroad track would be laid.[12] Although the deeds purport to convey the land for railroad purposes only, the deeds do not specifically indicate that the right of

---

[9] *Id.* at 150.

[10] The trial court erroneously distinguished these deeds from the *Quinn* deed based on its title, finding the *Quinn* deed to be entitled "Warranty Deed." Although the copy of the *Quinn* entered into evidence is very difficult to read, it clearly is untitled.

[11] *Quinn*, *supra* at 150-151 (internal citations omitted).

[12] We find the recent unpublished opinion of *Batchelder v Grand Trunk W R Co*, unpublished opinion order per curiam of the Court of Appeals, issued August 16, 2002 (Docket No. 228876), instructive. In that case, a panel of this Court found that the title "Right of Way" was not determinative of the type of conveyance in the deed as this term as two different meanings under *Quinn*. *Id.* at 2. In determining that the landowners intended to convey fee title to the land, the panel relied on the language of the deed itself. *Id.* at 3. The language in that deed was very similar to the current deeds.

way is an easement.[13] The deeds also do not include language indicating that the railroad merely had the use of the land.[14] Accordingly, the deeds conveyed fee title to the railroad company. Furthermore, the deeds do not contain a reverter clause or reservation to the grantors. Therefore, title to the land did not return to defendants upon the cessation of the railroad services.[15]

As the railroad company had fee title to those portions of the right of way conveyed by these deeds, the trial court improperly granted defendants partial summary disposition regarding the thirty-four "Right of Way" deeds. Because plaintiff's claim regarding these particular properties was dismissed before the trial court had the formal opportunity to address whether defendants had taken title by adverse possession, we reverse and remand to permit the trial court to take testimony regarding the adverse possession of those properties conveyed by thirty-four "Right of Way" deeds.[16]

III. Adverse Possession or Prescriptive Easement

Plaintiff contends that the trial court erred in rejecting its adverse possession claim over those properties for which the railroad company never received a deed and in finding that the greatest interest plaintiff could have acquired in those properties was a prescriptive easement. We disagree. Pursuant to MCR 2.613(C), we review findings of fact in a bench trial for clear error and conclusions of law de novo.[17] A factual finding is clearly erroneous if a review of the entire record leaves this Court with a definite and firm conviction that a mistake was made.[18]

To establish adverse possession, the claimant has the burden to show by clear and cogent evidence that his or her possession of the property was actual, visible, open, notorious, exclusive, hostile, under cover of claim or right, and continuous and uninterrupted for the statutory period

---

[13] See *Boyne City v Crain*, 179 Mich App 738, 743-744; 446 NW2d 348 (1989) (finding that a "right of way" meant an easement pursuant to *Quinn* where a deed was entitled "Deed of Right of Way," conveyed land for a "right of way," and specifically granted only an easement).

[14] See *Westman v Kiell*, 183 Mich App 489, 494; 455 NW2d 45 (1990) (emphasis in original) (finding that the clear language in a condemnation order that the railroad company acquired a "right of way *upon* and *across* lands of Henry Salee . . . for the uses and purposes of said Railroad Company" conveyed only an easement).

[15] *Quinn, supra* at 152-153.

[16] It appears that the trial court also found that plaintiff's payments to defendants for the ten-year easement could affect plaintiff's title. Plaintiff failed to address this issue on appeal and it is deemed abandoned. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).

[17] MCR 2.613(C); *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003).

[18] *Id.*, *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

of fifteen years.[19] In considering an adverse possession claim, the evidence must be construed in favor of the record owner of the land.[20] A prescriptive easement, however, "results from use of another's property that is open, notorious, adverse, and continuous for a period of fifteen years."[21] The use must be without permission; however, the use need not be exclusive in the sense that only the claimant has the use of the property.[22] The exclusivity requirement for prescriptive easement means only that one's right to use the easement is not dependent on a like right in others.[23]

Plaintiff presented evidence that the railroad company used the right of way for a hundred years, and that its power lines stood for sixty-three years at the time it filed suit. Plaintiff correctly asserts that, due to the extended period of use, the burden of going forward with evidence then shifted to defendants to establish that plaintiff's use was permissive.[24] Defendants met that burden by introducing a newspaper article from 1879, indicating that local landowners had donated land to the railroad company and paid into a community subscription to fund a portion of the project. Furthermore, the trial court found that the landowners likely consented to the construction of the railway as they used it to ship agricultural products directly from their farms. Defendants also presented evidence that the landowners, and not the railroad companies, had paid the property taxes on the right of way to support its contention that the railroad companies were merely allowed to use the land.[25] Based on the record evidence, the trial court did not clearly err in finding that the landowners permitted the railroad's presence on these properties. Therefore, the railroad company did not acquire title by adverse possession to those properties for which plaintiff never received a deed to sell to plaintiff.

Although the railroad company's use was likely permissive, plaintiff had only the permission of the railroad company, and not the true owners of these parcels, to construct its transmission line. Defendants presented significant evidence that the railroad company's and plaintiff's use of the right of way was never exclusive.[26] Therefore, the trial court properly found, based on the record evidence, that a prescriptive easement was the greatest interest

---

[19] *W Michigan Dock & Market Corp v Lakeland Investments*, 210 Mich App 505, 511; 534 NW2d 212 (1995); *Gorte*, *supra* at 170.

[20] *Rozmarek v Plamondon*, 419 Mich 287, 292; 351 NW2d 558 (1984).

[21] *Plymouth Canton Cmty Crier, Inc v Prose*, 242 Mich App 676, 679; 619 NW2d 725 (2000).

[22] *Id.* at 679-680, quoting *St Cecelia Society v Universal Car & Service Co*, 213 Mich 569, 577-578; 182 NW 161 (1921), citing *W Mich Dock & Market Corp*, *supra* at 511.

[23] *Id.*

[24] *Widmayer v Leonard*, 422 Mich 280, 290; 363 NW2d 538 (1985).

[25] See *Rozmarek*, *supra* at 293 ("The payment of taxes is not conclusive, but is an important element in determination of title by adverse possession.").

[26] Defendants presented evidence that the landowners had continually used the right of way for farming operations and that members of the public used the right of way like a road.

plaintiff *could have* acquired in those properties to which the railroad never received a deed. However, as we will discuss further in section V, any prescriptive easement plaintiff could have acquired in these properties was destroyed when plaintiff recognized defendants' interest in the land.[27]

IV. Reclamation by Landowners

Plaintiff also contends that the trial court erroneously found that the railroad company's fee title conveyed by one warranty deed, two quit-claim deeds, and four untitled deeds was destroyed by defendants' adverse possession of the right of way following the removal of the railroad tracks in 1981. We again disagree.

As we have already noted, the evidence regarding an adverse possession claim must be construed in favor of the record owner of the land—in this instance, plaintiff. Based on the record evidence, the trial court did not err in finding that defendants had adversely possessed these properties conveyed by warranty, quit-claim and untitled deeds and divested plaintiff of its fee title. Defendants presented the testimony of various landowners whose families owned adjoining property for several decades. All of the witnesses testified that they believed they owned the portion of the right of way adjoining their property, and to using the right of way consistent with that belief over the years.[28] As defendants felt they owned the property, they never asked permission to use the right of way. One witness specifically testified to reclaiming the right of way after the tracks were removed in 1981, by cleaning up railroad debris, returning the strip to farmland, and constructing a farm building. Furthermore, plaintiff acted consistent with defendants' ownership in the past by instructing landowners that it was their responsibility to trim trees on the right of way. Plaintiff also admitted that the landowners denied its workers access to the poles and required police enforcement to maintain its lines.

Defendants clearly possessed the strip of land on those properties conveyed by warranty, quit-claim, and untitled deeds for the statutory period under cover of claim or right. Defendants' installation of a phone line on plaintiff's poles is a clear example of an actual, visible and open

---

[27] Plaintiff also claims that the railroad company's oral license to use the right of way automatically terminated when the railroad company conveyed the land by quit-claim deed. However, plaintiff's use since the 1994 conveyance is too recent to establish a prescriptive easement.

To the extent that the trial court opined that any remaining dispute regarding the right of way would be decided in defendants' favor due to their reclamation of the land, this reasoning cannot be used to destroy plaintiff's prescriptive easement on those properties without a conveying document. Defendants' use does not prevent plaintiff's use, so the prescriptive easement would survive.

[28] The landowners grazed livestock, installed drain tiles and farm lanes, installed a "farmers phone line" on plaintiff's poles, stored equipment, ejected trespassers, and crossed the right of way to reach the back portions of their property.

use. Testimony was also presented that their use of the right of way as a pasture was also visible to the railroad company as trains needed to stop and blow their whistles at grazing animals. Defendants' use was hostile and adverse as they actively denied plaintiff access to the right of way to maintain its poles. The continued presence of plaintiff's poles on the right of way does not render defendants' presence non-exclusive. It is beyond imagination that a private individual could remove utility poles carrying 46,000-volt wires. It is clear from the evidence that defendants intended to keep the land for themselves and eject plaintiff.[29]

V. Recognition of the Landowners' Property Interest

Finally, plaintiff argues that the trial court erroneously determined that its payments on the easement agreement between 1983 and 1993 eradicated its claimed prescriptive easement over the entire right of way. As previously noted, however, the entire right of way is not at issue on appeal. The trial court found that plaintiff could not acquire or retain a prescriptive easement over those properties to which title was never conveyed or those properties conveyed in fee by warranty, quit-claim and untitled deeds that defendants had since adversely possessed.

Plaintiff agreed to make annual payments to defendants in exchange for an easement to maintain its power lines for a ten-year period. The final paragraph of the easement agreement noted the parties' recognition of the continued title dispute between the landowners and the railroad company. The agreement also indicated that plaintiff would cease to be liable for annual payments if litigation was determined in its favor, and that defendants would be entitled to double payments if they were found to have title.

In *Whitehall Leather Co v Capek*,[30] this Court found that an adverse possession claim was destroyed when the claimant recognized the record owner's interest.[31] In that case, the plaintiff sought a prescriptive easement over properties it traversed for nearly forty years to access a railroad spur track. However, the plaintiff had a lease agreement for some of these properties since 1895, and had been in negotiations to purchase or lease the remaining properties for nine years.[32] This Court found that "[t]he payment of rent over a period of many years is hardly adverse and hostile[,]" and that the negotiations amounted to an admission that the defendant had title.[33]

---

[29] It appears that the trial court also found that plaintiff's fee interests in the quit-claim and untitled deeds was also destroyed by its payments for the easement. As the trial court properly found that defendants owning these lots had adversely possessed the right of way and plaintiff failed to address the issue in its brief on appeal, we need not review the propriety of this finding.

[30] *Whitehall Leather Co v Capek*, 4 Mich App 52; 143 NW2d 779 (1966).

[31] *Id.* at 55-56.

[32] *Id.* at 54.

[33] *Id.* at 55-56.

Taking into consideration the language in the easement agreement, plaintiff recognized that defendants *might* have an interest in the property when it made annual payments for the presence of its utility poles. However, in light of the maneuvers taken by plaintiff to avoid legally determining the issue, it is clear that plaintiff recognized the significant possibility that defendants owned the land. Plaintiff failed to commence litigation while the agreement was in force and purchased the railroad company's interest in the right of way knowing that the title was not clear. Accordingly, the trial court properly found that plaintiff recognized defendants' interest in the land, and therefore, could not have acquired title by adverse possession or taken a prescriptive easement.

Affirmed in part, reversed in part and remanded to allow the trial court to take testimony regarding the adverse possession of those properties conveyed by "Right of Way" deeds. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Jessica R. Cooper
/s/ Kirsten Frank Kelly