STATE OF MICHIGAN

COURT OF APPEALS

FARIS BROTHERS REALTY, INC,

Plaintiff-Appellee,

V

JP PARTNERSHIP, GERALD NAJAR, and PETER NAJAR,

Defendants-Appellants.

UNPUBLISHED
November 15, 2005

No. 261644
Genesee Circuit Court
LC No. 02-072818-CH

Before: Hoekstra, P.J., and Gage and Wilder, JJ.

PER CURIAM.

In this real property action, defendants appeal as of right the trial court's order granting summary disposition for plaintiff and declaring a prescriptive easement over defendants' parking lot and driveway. We affirm.

Plaintiff and defendants own adjacent parcels of commercial property. On defendants' parcel there is a parking lot that abuts plaintiff's parcel, but there is no parking available on plaintiff's property. It is uncontested that the shareholders, employees, and customers of plaintiff corporation have been parking in defendants' parking lot for more than forty years. It is further uncontested that no one objected to plaintiff's use of the parking lot until 2002, when the lease of defendants' tenants expired. At that time, defendants approached plaintiffs and requested payment in exchange for the use of the parking lot. Plaintiff brought this action, and the parties filed cross-motions for summary disposition on the basis of stipulated facts. The trial court granted summary disposition for plaintiff, finding no genuine factual dispute and concluding that plaintiff's use had established a prescriptive easement over defendants' parking lot and driveway.

An easement by prescription arises where a party has used another's property in a manner that is open, adverse, and continuous for a period of fifteen years. *Plymouth Canton Community Crier, Inc v Prose,* 242 Mich App 676, 679; 619 NW2d 725 (2000). If the use was permissive, however, a prescriptive easement will not arise. *Banach v Lawera,* 330 Mich 436, 440-441; 47 NW2d 679 (1951). Although the burden of proving a prescriptive easement remains at all times with the party claiming the easement, once that party has presented evidence that he has used the disputed land far in excess of fifteen years, the burden of moving forward with evidence shifts to the land owner to establish that the claimant's use was permissive. *Widmayer v Leonard,* 422 Mich 280, 290; 373 NW2d 538 (1985).

Defendants first contend that the trial court impermissibly shifted the burden of proof to defendants to establish that plaintiff's use was permissive. However, it was uncontested that plaintiff had been using defendants' driveway and parking lot in excess of forty years. A showing of twenty-five years of use certainly shifts the burden. *Haab v Moorman*, 332 Mich 126, 144-145; 50 NW2d 856 (1952). Therefore, because this evidence established over forty years of use, the trial court did not err in finding that defendants had the burden to produce evidence that plaintiff's use was merely permissive. *Widmayer, supra* at 290.

Defendants argue that they presented sufficient evidence to show that plaintiff's use had been permissive because they acquiesced in plaintiff's use of the driveway and parking lot. However, permissive use "denotes permission in fact, expressly or by necessary implication," and means "more than acquiescence." 25 Am Jur 2d, Easements and Licenses in Real Property, § 65. This definition of permissive use stands in contrast to defendants' mere failure to object, which did not constitute permission. *Mumrow v Riddle*, 67 Mich App 693, 697-698; 242 NW2d 489 (1976). Defendants also contend that plaintiff's use was necessarily permissive by virtue of the fact that both parties mutually used the parking lot. While mutual use that is "permissive at inception" cannot ripen into a prescriptive easement, *Hopkins v Parker*, 296 Mich 375, 379; 296 NW 294 (1941), the cases do not support the proposition that mutual, non-permissive use can never ripen into such an easement. Because plaintiff's use was never permissive in the first instance, defendants' reliance on the mutuality rule of *Hopkins* and its progeny is misplaced.

Defendants next argue that the trial court erred by finding no factual dispute that plaintiff's use of the parking lot and driveway was open and visible, and that because defendants were "absentee owners," they had no way to receive notice of plaintiff's use. Such an argument disregards the rationale underlying the open element, which requires a claimant's use to be "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). In essence, this element obviates the need for actual notice, allowing constructive notice through observations of an adverse claimant's visible activities.

Our Supreme Court has noted that "occupation need not be such as to inform a passing stranger that some one is asserting title. If it be such as to notify and warn the owner, should he visit the premises, that a person is in possession under a hostile claim, it is sufficient." *Merritt v Westerman*, 180 Mich 449, 453; 147 NW 483 (1914). Further,

> [i]t is sufficient if the acts of ownership are of such a character as to openly and publicly indicate an assumed control or use such as are consistent with the character of the premises in question. [*Murray v Hudson*, 65 Mich 670, 673; 32 NW 889 (1887).]

Here, the uncontested evidence showed that plaintiff had maintained the parking lot, despite the knowledge that it belonged to defendants, by mowing the grass, cutting weeds, and collecting litter. Such maintenance activity was sufficient to warn defendants, had they visited the premises, that plaintiff was asserting an adverse claim. There was no genuine issue of fact remaining with respect to whether plaintiff's use was sufficiently open and visible.

Defendants also assert that the trial court improperly concluded that there was no factual dispute regarding whether plaintiff's use had been adverse and hostile. A use is hostile and

adverse when it is "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 for trespassing." *Plymouth Canton, supra* at 681. Because defendants were the record owners of the parking lot and driveway, they necessarily could have brought an action in trespass against plaintiff. Thus, plaintiff's use was hostile and adverse. *Id*. Further, defendants' contention that plaintiff's use was consistent with the character of the disputed property is irrelevant. The case law does not require that a claimant use the disputed property in a manner inconsistent with the character of the property itself. Rather, what is important is that the claimant use the disputed property in a manner "inconsistent with the rights of [the] owner." *Killips v Mannisto*, 244 Mich App 256, 259; 624 NW2d 224 (2001).

Defendants' final contention is that plaintiff's use of the parking lot and driveway was too indefinite in scope and geographic area to ripen into an easement by prescription. We disagree. The trial court granted an easement for one row of parking adjacent to plaintiff's parcel and for use of a driveway to access that area. This award was consistent with the evidence that plaintiff's shareholders, employees, and customers commonly used this area for ingress, egress and parking. Defendants' reliance on *Village of Manchester v Blaess*, 258 Mich 652, 654; 242 NW 798 (1932), is misplaced because that case involved the requirements to establish a public highway under the highway by user statute, not the requirements to establish a prescriptive easement. Defendants offer no applicable case law rationale for their contention that the prescriptive easement determined by the trial court fails because it is insufficiently certain and particular, and we will not search for any such authority that will sustain defendants' argument. *Pena v Ingham Co Road Comm'n*, 255 Mich App 299, 316 n 8; 660 NW2d 351 (2003).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Hilda R. Gage
/s/ Kurtis T. Wilder