# STATE OF MICHIGAN

# COURT OF APPEALS

SANDRA DAY,

Plaintiff-Appellant,

v

LAVERNE J. MOLITOR and DIANE C. MOLITOR,

Defendants-Appellees.

UNPUBLISHED
December 27, 2005

No. 256489
Muskegon Circuit Court
LC No. 03-042622-CH

Before: Whitbeck, C.J., and Bandstra and Markey, JJ.

PER CURIAM.

Plaintiff appeals as of right a bench trial finding of no cause of action on her complaint alleging a prescriptive easement over a portion of defendants' land. We reverse.

The parties here have an adjoining property line that is not in dispute. Plaintiff seeks a prescriptive easement over a small parcel of land known as the "stub parcel," which abuts both properties and is approximately 29 square feet. Plaintiff purchased her property in 1976. The property was and still is surrounded by a chain link fence with a double-wide gate opening onto the stub parcel. Defendants purchased their property in 1977 and mistakenly believed until 2003 that the stub parcel was part of their property. Plaintiff's investigation revealed the true owner in 2002, whom she approached with an offer to purchase; however, the true owner subsequently transferred the parcel to defendants by quit claim deed. After defendants erected a fence blocking plaintiff's access to the stub parcel, she filed suit seeking a prescriptive easement across the parcel.

At trial, plaintiff and her family testified that they used the stub parcel for access to Oak Knoll Drive since 1976. They testified that they used the parcel for yard waste removal, for access to store vehicles, for deliveries, and for home improvement projects. They also testified that from the 1980s until 1995, they used the parcel to store vehicles used in plaintiff's former husband's used car business. Plaintiff testified that they used the parcel for this purpose two to three times a week during the summer. Defendants' non-family witnesses confirmed some use of the parcel for the used car business; however, each of them denied plaintiff's claimed frequency. Although not every one of defendants and their witnesses confirmed each instance of the other uses plaintiff claimed, each confirmed some portion of them. The trial court found no cause of action for plaintiff.

Plaintiff argues that the trial court erred in determining that the non-family witnesses' testimony corroborated defendants' testimony that her use of the parcel was rare, sporadic, and infrequent. Plaintiff challenges three facets of the trial court's findings: first, that the non-family witnesses' testimony was the most credible; second, that she did not use the stub parcel two to three times a week; and finally, that the non-family witnesses' testimony corroborated defendants' testimony that her use was rare, sporadic, and infrequent. A trial court's findings of fact may not be set aside unless clearly erroneous. MCR 2.613(C); *Sands Appliance Svcs, Inc v Wilson*, 463 Mich 231, 238; 615 NW2d 241 (2000). A finding is clearly erroneous where, although there is evidence to support the finding, the reviewing court, on review of the entire record, is left with the definite and firm conviction that a mistake has been made. *Ambs v Kalamazoo Co Rd Comm*, 255 Mich App 637, 652; 662 NW2d 424 (2003). "An appellate court will give deference to 'the trial court's superior ability to judge the credibility of the witnesses who appeared before it.'" *Id*., quoting *Rellinger v Bremmeyr*, 180 Mich App 661, 665; 448 NW2d 49 (1989).

Considering the trial court's superior ability to judge the credibility of the witnesses, its determination that the non-family witnesses' testimony was most credible is not clearly erroneous. Because those witnesses adamantly testified that plaintiff did not use the stub parcel two to three times a week in the summer, that finding is also not clearly erroneous. However, defendants and their witnesses also testified that plaintiff regularly used the parcel to remove yard debris to Oak Knoll Drive, for delivery of various materials for home improvement or landscaping projects, and for access to store various vehicles or other large items in the back yard. This testimony corroborated the bulk of plaintiff's claim of use; we conclude that the trial court's finding that the use was "rare, sporadic, and infrequent" was clearly erroneous.

Therefore, we also conclude that the trial court erred in determining that plaintiff had failed to demonstrate the continuous use necessary to create a prescriptive easement over the stub parcel. Actions to determine an interest in land are equitable in nature, MCL 600.2932; accordingly, the trial court's findings are reviewed de novo. *Gorte v Dep't of Transportation*, 202 Mich App 161, 165; 507 NW2d 797 (1993). A prescriptive easement arises from the use of a servient estate that is open, notorious, adverse, and continuous for 15 years. *Killips v Mannisto*, 244 Mich App 256, 258-259; 624 NW2d 224 (2001). An easement does not displace general possession of the land by its owner, but grants the easement holder qualified possession only to the extent necessary for enjoyment of the rights conferred by the easement. *Schadewald v Brulé*, 225 Mich App 26, 35; 570 NW2d 788 (1997).

Plaintiff's use of the servient estate was open, notorious, and adverse for the prescriptive period. The only question is whether plaintiff's use meets the continuity requirement, as described by our Supreme Court:

> The correct rule as to continuity of user, and what shall constitute such continuity, can be stated only with reference to the nature and character of the right claimed. An omission to use when not needed does not disprove a continuity of use, shown by using it when needed, for it is not required that a person shall use the easement every day for the prescriptive period. It simply means that he shall exercise the right more or less frequently, according to the nature of the use to which its enjoyment may be applied. [*von Meding v Strahl*, 319 Mich 598, 613-614; 30

NW2d 363 (1948), quoting *St Cecelia Society v Universal Car & Service Co*, 213 Mich 569, 577; 182 NW 161 (1921), quoting 9 RCL, Easements, § 34.]

In its opinion, the trial court emphasized the "more or less frequently" phrase in the last sentence of the rule. In so doing, the trial court apparently elevated that factor to such an extent that it failed to consider the "nature of the use" at issue. Plaintiff merely claims a prescriptive easement over the stub parcel for ingress and egress from Oak Knoll Drive to her back yard. The testimony at trial consistently demonstrated that plaintiff used the stub parcel for backyard access for more than 27 years when occasion required, and, by maintaining the gated fence, continuously claimed the right to do so. *St Cecelia*, *supra* at 576. When a user "maintains a consistency of purpose, the prescriptive use continues even if actual physical use ceases, so long as the open or notorious requirement is met." 1 Restatement Property, 3d, § 2.17, p 279 comment *i*.

We reverse.

/s/ William C. Whitbeck
/s/ Richard A. Bandstra
/s/ Jane E. Markey