STATE OF MICHIGAN

COURT OF APPEALS

JAMES R. STACER and ANNETTE M. STACER,

Plaintiff–Appellees,

v

ELWYN DOBSON AND HELEN DOBSON,

Defendant–Appellants.

UNPUBLISHED
December 3, 1996

No. 181316
LC No. 93-12848-CH

Before: McDonald, P.J., and White and P. J. Conlin*, JJ.

PER CURIAM.

Defendants appeal as of right from a September 30, 1994, order of judgment for plaintiffs extinguishing defendants' interests in the disputed property finding plaintiffs had adversely possessed defendants' easement. The disputed property involved a twenty-foot strip of land just south of defendants' property line. Defendants' title contained language granting them an easement over the disputed property for ingress and egress. We reverse and remand for further proceedings consistent with this opinion.

Actions to quiet title are equitable in nature; thus, they are reviewed de novo. *Gorte v Dept of Transportation*, 202 Mich App 161, 171; 507 NW2d 797 (1993). However, the trial court's factual findings will not be reversed unless they are clearly erroneous. *Id*.

Adverse possession requires a showing of clear and cogent proof that possession was actual, visible, open, notorious, exclusive, continuous, hostile and uninterrupted for fifteen years. *Gorte*, *supra*, MCL 600.5801(4); MSA 27A.5801(4). Moreover, a party's ability to adversely possess another party's easement will not ripen into adverse possession unless such use is inconsistent with the easement because the owner of a servient estate has a right to use the easement in any way not inconsistent with the easement. *Nichols v Healy*, 37 Mich App 348; 194 NW2d 727 (1971).

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* Circuit judge, sitting on the Court of Appeals by assignment.

On appeal plaintiffs concede they failed to prove adverse possession of the twenty feet "alley way." Although the evidence presented at trial supported a finding a portion of the alley way was used by plaintiffs and their predecessors for in excess of fifteen years, use of the remainder of the alley way was not shown for the fifteen year period. Moreover, plaintiffs' use was not inconsistent with the easement because defendants could still use plaintiffs' driveway for ingress and egress. We therefore conclude the trial court erred in holding plaintiffs had adversely possessed defendants' easement.

Nonetheless plaintiffs argue the trial court's ruling is supported by the court's findings indicating defendants' predecessors abandoned the easement. To prove abandonment of an easement a plaintiff must prove more than nonuse. The nonuse must be accompanied by some act showing a clear intent to abandon. *L&NR Co v Epworth Assembly*, 188 Mich App 25, 468 NW2d 884 (1991).

Here, although the transcript indicates the trial court made some findings referring to "abandonment" it is unclear whether these findings were made with the above law in mind. Plaintiffs presented their case primarily on the theory of adverse possession. The court's holding and judgment relied on this theory. We do not dispute some of the court's findings may well support a finding of abandonment or termination by cessation of existence of the original purpose of the easement, see *Anderson v Schmidt*, 16 Mich App 633; 168 NW2d 437 (1969); *MacLeod v Hamilton*, 254 Mich 653; 236 NW 912 (1931). However given the record before us we are unable to review the court's findings as they might apply to such theories.

We therefore remand for further findings by the trial court or in the court's discretion the taking of further testimony. We do not retain jurisdiction. Costs to neither party.

/s/ Gary R. McDonald
/s/ Helene N. White
/s/ Patrick J. Conlin