STATE OF MICHIGAN

COURT OF APPEALS

GLEN TOLKSDORF, MIRANDA TOLKSDORF, DAVID PENDELL, RICHARD PENDELL, KAREN PENDELL, JOHN LUCZAK, MARCY LUCZAK, RICHARD DEISLER, PATRICIA DEISLER, DENNIS HILL, NANCY HILL, TERRENCE TORMOEN and LYNN TORMOEN,

Plaintiffs-Appellants,

v

JOHN T. GRIFFITH, GERALD DAHLGREN, JANE C. GRIFFITH, NORTH WOODS CONSERVANCY, JOHN T. FOLEY, PAUL MICHAEL FOLEY II and MICHELE FOLEY SHEPARD,

Defendants-Appellees.

UNPUBLISHED
June 15, 1999

No. 209240
Keweenaw Circuit Court
LC No. 95-000304 CZ

Before: Whitbeck, P.J., and Markman and O'Connell, JJ.

PER CURIAM.

This litigation stems from plaintiffs' claim that they are entitled to use and improve roadways that traverse defendants' property by virtue of an easement, prescriptive or actual. Plaintiffs also claim that they are entitled to invoke Michigan's "private roads" statute, MCL 229.1 *et seq*.; MSA 9.281 *et seq*., requiring the township supervisor to impanel a jury to determine whether roadway construction on the land in question is a "necessity." Plaintiffs appeal as of right the trial court's ruling that plaintiffs had not proved the existence of a prescriptive easement over defendants' property, and that the "private roads" statute did not apply to this case. We agree that plaintiffs' proofs are insufficient to support a finding that a prescriptive easement had been established, but remand for issuance of a writ of mandamus compelling the supervisor to impanel a jury under the "private roads" act.

The trial court, in our judgment, properly held that plaintiffs failed to establish the existence of a prescriptive easement.

> To establish adverse possession, the claimant must show that its possession is actual, visible, open, notorious, exclusive, hostile, under cover or claim of right, and continuous and uninterrupted for the statutory period of fifteen years. *Thomas v Rex A Wilcox Trust*, 185 Mich App 733, 736-737; 463 NW2d 190 (1990), lv den 437 Mich 936. An easement by prescription requires similar elements, except exclusivity. *St Cecelia Society v Universal Car & Service Co*, 213 Mich 569, 576; 182 NW 161 (1921). [*West Michigan Dock & Market Corp v Lakeland Investments*, 210 Mich App 505, 511; 534 NW2d 212 (1995).]

After evaluating the proofs, the trial court stated:

> In order to establish the existence of a prescriptive easement the party seeking the finding of such an easement must demonstrate by a preponderance of the evidence that he and/or his predecessors in title with respect to the land benefited used the way over which the prescriptive easement is sought to be declared openly, notoriously, adversely, under claim of right and continuously for a period of at least fifteen years, a principle which is so well established by statutory and case law that no citation is necessary. Although plaintiffs demonstrated through numerous maps and aerial photographs admitted as exhibits that trails did, indeed, exist across [the disputed area], perhaps as early as 1938, it is not the existence of a trail which establishes a prescriptive easement but rather the open, notorious, adverse, under claim of right, and continuous use thereof for fifteen years or more which establishes the prescriptive easement. The proofs offered by plaintiffs at trial, although expansive, simply did not prove the issues upon which they had the burden by a preponderance of the evidence.

Citing MCR 2.517(A)(2), which requires a trial court to make findings of fact after a bench trial, plaintiffs criticize the trial court for failing to make sufficient factual findings regarding the issue whether plaintiffs were entitled to an easement over defendants' property. Findings of fact made by the trial court are subject to review under the clearly erroneous standard. *In re Cornet*, 422 Mich 274, 277-278; 373 NW2d 536 (1985).

Here, the trial court's failure to reference facts regarding whether plaintiffs' use of the road was open, notorious, adverse, and under claim of right for a continuous fifteen-year period was a direct function of plaintiffs' failure themselves to present factual evidence on these issues. As the court observed, plaintiffs proved only that the two forks in the road existed for over fifteen years. On every other element necessary to establish a prescriptive easement, there was a complete failure of proof.

First, plaintiffs failed to establish that they or their predecessors in interest actually used the road for fifteen years continuously. They averred only that the road had always been used by the public. Indeed, no evidence was presented regarding who owned plaintiffs' land for the statutory period or, more importantly, who actually possessed plaintiffs' land and made use of the road for the statutory period.

Second, plaintiffs failed to establish that their (or their predecessors') use of the land was open and notorious.

> It is considered impossible, or at least difficult, to specify the particular acts which, under every condition, will constitute open and visible possession of land, and the character of the land and the use to which it is adopted largely controls. It has been variously stated, in general terms, that it is necessary and sufficient that there be: Notice of possession of that open and visible character which from its nature is calculated to apprise the world that the land is occupied and who the occupant is; such an appropriation of the land . . . as to apprise, or convey visible notice to, the community or neighborhood in which it is situated that it is in [the claimant's] . . . use and enjoyment; acts of ownership of such character as openly and publicly to indicate an assumed control or use which is consistent with the character of the premises in question; such acts as would ordinarily be performed by the true owner in appropriating the land . . . to his own use; . . . physical facts which openly evince and give notice of an intent to hold the land in hostile dominion, or external and public signs or indications of the possession and intention to possess.
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> While it is not required that the occupation be such as to inform a passing stranger that some one is asserting title, possession is not sufficiently open and obvious when neither the original owner nor a stranger passing over the land can see any indication of possession. [2 CJS, Adverse Possession, § 50, pp 714-15.]

In this case, all of the witnesses who testified at trial indicated that the road appeared to be open to the public, that the public in general used the road to access the lake and the river, and that at various times the road appeared to be in disrepair. Never did any witness testify that either plaintiffs or their predecessors had evinced an intent to control the road. Although plaintiff Glen Tolksdorf testified that he smoothed over a portion of the road, this appears to have been done during the past decade. Further, defendant John Griffith testified that, as soon as he saw that someone had smoothed over a portion of the road, he erected a fence to protect his interest in his land. The theory behind adverse possession and prescription is that the true owners forfeit their title by their own neglect in failing to assert their rights against a hostile assertion of authority. 2 CJS, Adverse Possession, § 2, at 646; § 3, at 647.

Third, plaintiffs failed to produce any evidence to show that their use of the road was adverse to defendants' interests.

> In the law of adverse possession, "adverse" is synonymous with "hostile," . . . and the term means having opposing interests, having interests for the preservation of which opposition is essential. . . . A possession is hostile where it is with intent to dispossess the owner, and it has been said that to be hostile the possession must be with intent to claim and hold the land against the true owner and the whole world. [2 CJS, Adverse Possession, § 60, at 734.]

As the trial court noted, plaintiffs simply failed to offer proof that their possession was adverse; they did not show that their use of the road was in any way inconsistent with, or to the exclusion of, the owners of defendants' property. Indeed, this Court has specifically opined that mutual use of property with the property owner's permission is not sufficient to establish adverse possession. *Banach v Lawera*, 330 Mich 436, 440-41; 47 NW2d 679 (1951).

Plaintiffs contend also that the trial court "failed to recognize the issue of the presumption of a lost grant." That presumption was discussed by this Court in *Dyer v Thurston*, 32 Mich App 341; 188 NW2d 633 (1971). In *Dyer*, the plaintiff, who was the party burdened by an easement, claimed that the defendant was not entitled to an easement across the plaintiff's property because no such easement was referenced in the parties' deeds. *Id*. at 343-44. Under these circumstances, this Court stated that "[a] conclusive presumption arises that the right originated in a grant when the use has continued for many years . . . and no proof of whether the claimed prescriptive easement originated in written or oral form is available." *Id*. The *Dyer* Court concluded that the party burdened by the alleged easement had the burden of showing that the use was merely permissive.

However, this presumption of 'lost grant' is inapposite in this case for several reasons. First, the *Dyer* presumption assumes the continued use of the land by the proponents of the easement for many years. In this case there has been no such showing. Second, the issue in this case is not whether plaintiffs were ever granted an easement in a written document but whether plaintiffs' use of the road was continuous, adverse, open, and notorious for fifteen years. Third, plaintiffs raise this issue on appeal as though a finding in their favor on this issue would necessitate reversal of the trial court's decision. However, the issue of a presumed 'lost grant' deals only with the element of claim of right, and not with the open, notorious, adverse and continuous elements of adverse possession or prescription.

We also note that the evidence adduced at trial indicates that plaintiffs seek to install utility lines, considerably expand the road in controversy, pave the road, and use the road to service a new residential subdivision. Michigan courts have held that an easement may not be expanded or modified such that it would increase the burden on the burdened property. *Dobie v Morrison*, 227 Mich App 536, 541; 575 NW2d 817 (1998); *Douglas v Jordan*, 232 Mich 283, 287; 205 NW 52 (1925). Thus, even if the lower court had found that plaintiffs acquired an easement by prescription, plaintiffs would still be forbidden to expand the road to accommodate a new and more onerous use.

For these reasons, we conclude that the trial court properly determined that plaintiffs failed to establish the existence of a prescriptive easement.

However, the trial court erred by failing to issue a writ of mandamus instructing the town supervisor to impanel a jury to decide whether a private road should be opened over defendants' property. The trial court's conclusion that the supervisor was entitled to determine the issue of necessity, or otherwise exercise discretion, before impaneling a jury was clearly erroneous. *Schroeder v Detroit*, 221 Mich App 364, 366; 561 NW2d 497 (1997).

The "private roads" act, MCL 229.1 *et seq.*; MSA 9.281 *et seq*., establishes a procedure for an individual to ask a township supervisor for permission to have a private road laid across another's property. MCL 229.1; MSA 9.281. Upon application, the township supervisor is required to convene a jury to determine whether the private road is necessary, MCL 229.2; MSA 9.284, and if so, to determine the amount due the burdened landowner as compensation for the private taking. MCL 229.4; MSA 9.284. The act states that, if the applicant succeeds, he must pay the township supervisor the amount determined by the jury, and the supervisor must in turn convey the money to the burdened party. MCL 229.5; MSA 9.285.

The constitutional validity of the "private roads" act has been hotly contested, but a special panel of this Court recently resolved this issue in favor of the constitutionality of the act. *McKeighan v Grass Lake Twp Supervisor*, ___ Mich App ___; ___ NW2d ___ (1999) (Docket No. 195437, issued 2/19/99). As in this case, the *McKeighan* Court was faced with the question whether a trial court had properly denied the plaintiffs' request to issue a writ of mandamus. *Id*., slip op, at 8. This Court stated:

> In light of our determination that the private roads act is constitutional, we must determine whether the trial court erred in denying plaintiffs' request for mandamus. . . . Issuance of a writ of mandamus is proper where "(1) the plaintiff has a clear legal right to performance of the specific duty sought to be compelled, (2) the defendant has the clear legal duty to perform such act, and (3) the act is ministerial, involving no exercise of discretion or judgment." *Tuscola Co Abstract Co, Inc v Tuscola Co Register of Deeds*, 206 Mich App 508, 510-511; 522 NW2d 686 (1994). Mandamus is appropriate only when there is no other remedy, legal or equitable, that might achieve the same result. *Id*. at 510.
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> We agree with plaintiffs that defendant has a clear legal duty pursuant to the private roads act to convene a jury and commence proceedings to determine the necessity of the proposed road. Although a right to a private road is not guaranteed, the act does require a *jury* determination as to the threshold issue of necessity and just compensation. [*Id*. (emphasis in original).]

The *McKeighan* Court then held that the trial court abused its discretion by failing to issue the writ. Thus, this Court has made it clear that the issue of necessity is to be submitted to a jury and is not to be determined by any party other than the jury.

In the instant case, the trial court held that because defendants had offered to continue to allow plaintiffs to use the road for recreational purposes, no new roadway was necessary under the private roads act. The trial court stated in this regard:

> Clearly, where necessity is a question a township supervisor does not have discretion under [the act] on the question of whether or not to call a jury. Under the circumstances here presented, however, where it is clear that plaintiffs do have access

> to their lands . . . their lands are not inaccessible and consequently, township supervisor Dahlgren was not in error when he declined their request to call a jury under [the act].

In light of this Court's holding in *McKeighan*, the trial court's holding in this case was clear error. Because necessity was in question, the supervisor lacked the discretion not to call a jury.[1] Therefore, the trial court's decision is reversed and the case is remanded for issuance of a writ of mandamus. *Michigan Waste Systems, Inc v Dep't of Natural Resources*, 157 Mich App 746, 760; 403 NW2d 608 (1987).[2]

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Stephen J. Markman
/s/ Peter D. O'Connell

[1] Even the vacated opinion in *McKeighan*, 229 Mich App 801, 810; 587 NW2d 505 (1988), although concluding that the "private roads" act should be held unconstitutional, recognized that, if constitutional, "the act leaves no room for denial of the application."

[2] Judges Markman and O'Connell, while recognizing the binding force of *McKeighan*, nevertheless state their disagreement with the majority's decision in that case and believe that the dissenting opinion in *McKeighan* and the vacated opinion in *McKeighan*, 229 Mich App 801; 587 NW2d 505 (1998) are better reasoned in their conclusions that the "private roads" act is unconstitutional. However, because the binding opinion in *McKeighan* is the product of a conflict panel convened under MCR 7.215(H), they do not believe that conflict panel procedures are properly invoked to reverse this opinion, reached only three months earlier. Rather, any relief must now come from the Supreme Court-- or, of course, from the jury convened under the Act. Further, they note that the binding opinion in *McKeighan* is now on appeal to the Supreme Court. Judge Whitbeck reaffirms his approval of *McKeighan*, an opinion in which he was a member of the Court majority.