

STATE OF MICHIGAN
COURT OF APPEALS

VILLAGE OF OTTER LAKE,

Plaintiff/Counter Defendant-
Appellee,

v

WILLIAM BRIGGS and PEGGY LADD
BRIGGS,

Defendants/Counter Plaintiffs-
Appellants.

UNPUBLISHED

April 10, 2001

No. 220049

Lapeer Circuit Court

LC No. 98-025068-CZ

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

PER CURIAM.

Defendants appeal as of right from the trial court's final judgment granting plaintiff a public prescriptive easement over a nine-foot by eighteen-foot corner of defendants' property at the intersection of two streets. We affirm.

Defendants first argue on appeal that the trial court improperly relied on the highway by user statute, MCL 221.20; MSA 9.21, to create a public prescriptive easement regarding their property because the road at issue was an alley and not a public highway. Defendants never raised this issue below and the trial court never ruled on this issue. An issue raised for the first time on appeal is not preserved for appellate review. *FMB-First Mich Bank v Bailey*, 232 Mich App 711, 718; 591 NW2d 676 (1998); *Auto Club Ins Ass'n v Lozanis*, 215 Mich App 415, 421; 546 NW2d 648 (1996).

Next, defendants argue that plaintiff failed to establish that Sherman Drive met the requirements of the highway by user statute. We disagree. As a question of law, we review the legal requirements for establishing a highway by user de novo. *Cimock v Conklin*, 233 Mich App 79, 84; 592 NW2d 401 (1998). However, we review the trial court's factual findings for clear error. *Id.* A finding is clearly erroneous if the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.*, quoting *Kent Co Rd Comm v Hunting*, 170 Mich App 222, 233; 428 NW2d 353 (1988).

The highway by user statute creates an easement for public use in private property. See *Eyde Bros Development Co v Eaton Co Drain Comm'r*, 427 Mich 271, 282; 398 NW2d 297

(1986). To establish a public right in private property under the highway by user doctrine, the governmental entity claiming such right must prove the following elements: (1) a defined line of travel with definite boundaries, (2) the road was used and worked upon by public authorities, (3) the road was traveled upon by the public for ten, or in some cases eight, consecutive years without interruption, and (4) such travel was in an open, notorious, and exclusive manner. *Beulah Hoagland Appleton Qualified Personal Residence Trust v Emmet Co Rd Comm*, 236 Mich App 546, 554-555; 600 NW2d 698 (1999); *Kent Co Rd Comm*, *supra* at 231.

First, defendants argue that public use for the statutory period was not established because Sherman Drive, including the disputed corner, was used by the residents of Sherman Drive, their guests and business invitees, not by the general public. There was testimony to support the court's finding that the general public used Sherman Drive, including defendants' corner. With regard to the temporal extent of public use, there was testimony to support the court's finding that the public had used the corner since at least 1985. This Court must give deference to the trial court which had the unique opportunity to assess the credibility of the witnesses and resolve disputed testimony. *Schultes Real Estate Co v Curis*, 169 Mich App 378, 385-386; 425 NW2d 559 (1988). Here, the facts do not clearly preponderate in the opposite direction. Given this record, this Court is not left with a definite and firm conviction that a mistake has been made. The trial court's factual finding of public use for the statutory period was not clearly erroneous.

Defendants next argue that the land in question was a trivial piece of property that was not enclosed and, thus, the use was permissive, not open and notorious. Peggy Briggs broadly conceded twice that the public has used the corner since 1985. The court held that the public use and maintenance had been continuous since 1985, thus putting defendants on notice of plaintiff's claim. Therefore, the trial court's factual finding of open and notorious use was not clearly erroneous.

Defendants also claim that the public use was not adverse because, within the statutory period, plaintiff acknowledged defendants' superior right by having the property line surveyed and marked in 1985 and by offering to purchase easement rights in 1997. Defendants' first argument – that Otter Lake surveyed and marked the property line in 1985, thus acknowledging defendants' superior title – is without merit. That event occurred outside the statutory period, namely, more than ten years before the placement of the galvanized poles. Defendants' second argument – that Otter Lake offered to buy an easement over the corner – is not persuasive. That event occurred at a village council meeting that took place over one year after defendants installed the galvanized poles. Therefore, the trial court's factual finding of hostile or adverse use was not clearly erroneous.

Defendants next argue that public use was not continuous and uninterrupted during the statutory period because defendants placed poles along Sherman Drive in an effort to restrict use of their property. This argument is without merit. Public use and maintenance began at the latest in 1985 and the placement of poles took place in the summer of 1996, more than ten years later. The trial court's factual finding of continuous and uninterrupted use was not clearly erroneous.

Finally, defendants claim that the encroachment of Sherman Drive traffic onto the disputed corner occurred as a result of a gradual shifting of traffic patterns over time and, thus, Otter Lake failed to prove a definite and specific line of travel over the corner of defendants'

property. While the evidence did indicate that Sherman Drive traffic gradually shifted over time to encroach onto defendants' land, there was sufficient evidence, including defendants' admissions, that public use and maintenance included the full corner by 1985. Therefore, not only was a defined line of travel established by the evidence, but the evidence also established that the defined line was in existence for the full statutory period. Consequently, the trial court's factual finding of a definite and identifiable route of travel was not clearly erroneous.

Accordingly, the trial court's finding that plaintiff established a prescriptive highway by user over the corner of defendants' lot was not clearly erroneous.

Affirmed.

/s/ Hilda R. Gage
/s/ Mark J. Cavanagh
/s/ Kurtis T. Wilder