STATE OF MICHIGAN

COURT OF APPEALS

ROBERT KNOTTS and SHARON KNOTTS,

Plaintiffs-Appellees,

V

ERNEST J. JONES and MARGARET R. JONES,

Defendants-Appellants.

UNPUBLISHED
July 19, 2002

No. 229867
Barry Circuit Court
LC No. 99-000806-CH

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

PER CURIAM.

In this action to determine interest in land, defendants appeal as of right from a judgment in favor of plaintiffs following a bench trial. The trial court determined that plaintiffs and their predecessors in title had established a prescriptive easement for use of a driveway located between the parties' homes but almost entirely within the boundary of defendants' property. We affirm.

Defendants argue that the trial court erred in finding that a prescriptive easement for use of the driveway had been established. We disagree. Although actions to determine interests in land are equitable in nature and are thus reviewed de novo by this Court, we review the trial court's findings of fact for clear error. *Sackett v Atyeo*, 217 Mich App 676, 680; 552 NW2d 536 (1996). A finding is clearly erroneous when, although there is evidence to support the trial court's decision, we are left with a definite and firm conviction that a mistake has been made. *Meek v Dep't of Transportation*, 240 Mich App 105, 115; 610 NW2d 250 (2000).

A prescriptive easement is based upon the legal fiction of a lost grant, supposed by the law to exist in circumstances where use of the servient estate has been open, notorious, adverse, and continuous for a period of at least fifteen years. See *Dyer v Thurston*, 32 Mich App 341, 343; 188 NW2d 633 (1971). Generally, the burden of proving the elements establishing an easement by prescription rests upon the party claiming the easement. *Stewart v Hunt*, 303 Mich 161, 163; 5 NW2d 737 (1942). However, where a party shows that the claimed easement has been used for a number of years in excess of the prescriptive period, a presumption of a grant arises and the burden shifts to the owner of the servient estate to show that use was permissive, as opposed to hostile or adverse. *Reed v Soltys*, 106 Mich App 341, 346; 308 NW2d 201

(1981);[1] see also *Hopkins v Parker*, 296 Mich 375, 379; 296 NW 294 (1941) (mutual or permissive use of an area will not mature into a prescriptive easement unless the period of mutuality ends and adverse use continues for the statutory period).

The parties stipulated below that the driveway has been in use by plaintiffs and their predecessors in title for at least sixty years, well in excess of the fifteen-year prescriptive period. This extended period of use triggers the presumption of a lost grant and places the burden on defendants to go forward with evidence that the use was permissive. *Reed*, *supra*; *Widmayer v Leonard*, 422 Mich 280, 290; 373 NW2d 538 (1985). Defendants argue that they provided sufficient evidence to rebut the presumption of a grant and show that use of the driveway was permissive. Therefore, defendants argue, plaintiffs have failed in their burden of establishing a prescriptive easement. We disagree.[2]

In support of their argument that plaintiffs use of the driveway was permissive, defendants analogize the factual circumstances of this case to those in *Frandorson Properties v Northwestern Mutual Life Ins Co*, 744 F Supp 154 (WD Mich, 1990), which involved the mutual use of an access route following the border between two commercial properties, but located entirely on the defendant's property. Applying Michigan law, the court in *Frandorson* found that the factual situation presented there evinced a permissive, as opposed to adverse, use:

> [T]he facts that plaintiffs' use of the drive has been in common with other members of the public, has been consistent with defendants' use of the drive, has never been adverse to defendants' interests, and has never been objected to by defendants all stand as convincing evidence that plaintiffs' use was merely permissive. [*Id*. at 159.]

Citing this language, defendants argue that plaintiffs' use of the driveway at issue here was permissive, as it too has been both in common and consistent with that of defendants, and was never objected to by defendants or adverse to their interests. However, although the fact that the driveway has been used commonly and consistently by both parties without objection by defendants may show that defendants acquiesced to the use, it does not establish that such use was "permissive." Permissive use "denotes permission in fact, expressly or by necessary implication," and means more than just acquiescence. 25 Am Jur 2d, Easements and Licenses, § 54. Similar to the case at hand, *Reed*, *supra*, involved the use, for almost fifty years, of a common driveway straddling two neighboring lots. There, this Court found that the presumption of adversity arising from such long-time use had been sufficiently rebutted, where the defendants

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[1] The presumption of grant is founded on the idea that if there had not been a grant, the owner would have put an end to the wrongful use before expiration of the prescriptive period. See 25 Am Jur 2d, Easements and Licenses § 39. The presumption is enforced, not because the courts believe the grant to have been actually made, but because public policy and convenience require that long-standing use not be disturbed. *Id*.

[2] Defendants are correct that, despite the shifting burden of production on this issue, plaintiffs maintain the overall burden of proving the existence of a prescriptive easement. See *Widmayer*, *supra* at 290-291. Contrary to defendants' assertion, however, although a defendant may present evidence to rebut the presumption of a grant, a permissible inference of a grant remains and such inference may be sufficient to satisfy the trier of fact. *Id*.

provided evidence that a prior owner of their property had "used the driveway as needed with mutual permission." *Id*. at 347. Here, however, no evidence was offered to show that such permission was ever given. To the contrary, testimony was offered showing that permission concerning use of the driveway was in fact never sought or offered in any form. Martin Meyers, owner of defendants' property from the 1930's to the 1970's, testified that it was just "automatic" that the owners of both properties used the driveway. Given this testimony, and considering that defendants' bald assertion that the use has not been adverse is insufficient to meet their burden of production on this issue, we find no error in the trial court's conclusion that defendants failed to overcome the presumption of adversity.

Defendants also argue, however, that the parties' mutual use of the driveway is sufficient to rebut the presumption of adversity, see *Hopkins*, *supra*, and that *Frandorson* establishes that a mutual use is demonstrated if the driveway was continually maintained for the uninterrupted use and benefit of both parties. See *Frandorson*, *supra* at 157-158. Here, however, the parties stipulated to the fact that nearly all of the driveway is located on defendants' property. This evidence indicates that although the driveway may have been mutually used, it was never mutually beneficial. Defendants and their predecessors in title have never needed to use the portion of the driveway held by plaintiffs or their predecessors in title in order to access their property or garage. Accordingly, the trial court did not err in finding that plaintiffs had acquired a prescriptive use of the property.[3]

Because we find that the trial court properly concluded that plaintiffs have acquired a prescriptive easement for use of the driveway, there is no need to examine the remaining issue whether plaintiffs had acquired an interest in the driveway through acquiescence.

We affirm.

/s/ Kurtis T. Wilder
/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra

[3] In reaching this conclusion, we note that defendants do not challenge the trial court's finding that plaintiffs' use of the driveway, or that of their predecessors in title, was open and notorious and continued for the necessary period of at least fifteen years. *Dyer*, *supra*.