STATE OF MICHIGAN

COURT OF APPEALS

MARY K. DOWNES,

Plaintiff-Appellee,

v

RONALD B. MILLER, RAOUL ANN MILLER, JAMES L. REED, and PENI A. REED,

Defendants,

and

ROBERT L. DEJONG and MARY JO DEJONG,

Defendants-Appellants.

UNPUBLISHED
March 25, 2008

No. 274859
Allegan Circuit Court
LC No. 01-029793-CH

AFTER REMAND

Before: Fitzgerald, P.J., and Smolenski and Beckering, JJ

PER CURIAM.

In this action to quiet title to a portion of a walkway adjacent to plaintiff's property, defendants appeal as of right the trial court's November 13, 2006, judgment in favor of plaintiff. We reverse.

In August 2001, plaintiff's predecessors in interest[1] moved to quiet title to a 100-foot stretch of a four-foot walkway immediately to the south of their property in the Lakeside Addition of Macatawa Park. Plaintiffs claimed they owned the four-foot walkway by adverse possession. Defendants' property bordered the eastern 40 feet of the walkway. Following a one-day bench trial, the trial court found that plaintiff's predecessors in interest adversely possessed a 20-foot section of the four-foot walkway where their house, deck, and steps encroached into the walkway. This Court affirmed the trial court's finding, but noted that the plat dedication of the Lakeside Addition granted defendants an easement in the walkway. Thus, we remanded for a

[1] David and Sara Schreur were the original plaintiffs to this action. Mary K. Downes was substituted as plaintiff on order of this Court. *Schreur v Miller*, unpublished order of the Court of Appeals, entered June 14, 2007 (Docket No. 274859).

determination whether plaintiff's predecessors in interest adversely possessed the easement as well as the servient estate. *Schreur v DeJong*, unpublished opinion per curiam of the Court of Appeals, issued October 27, 2005 (Docket No. 254361).[2] On remand, the trial court held that plaintiff's predecessors in interest adversely possessed the easement. According to the trial court, plaintiff's predecessors in interest used the walkway as an extension of the house and the improvements made to the walkway significantly blocked passage of the walkway.

We review a trial court's factual findings resulting from a bench trial for clear error and its conclusions of law de novo. *Ligon v Detroit*, 276 Mich App 120, 124; 739 NW2d 900 (2007). A factual finding is clearly erroneous when, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake was made. *Harbor Park Market v Gronda*, 277 Mich App 126, 130; 743 NW2d 585 (2007).

"A claim of adverse possession requires clear and cogent proof that possession has been actual, visible, open, notorious, continuous, and uninterrupted for the statutory period of fifteen years." *Kipka v Fountain*, 198 Mich App 435, 439; 499 NW2d 363 (1993).[3]

> "[C]lear and cogent evidence" is more than a preponderance of evidence, approaching the level of proof beyond a reasonable doubt. That is to say, the standard is much like "clear and convincing evidence." . . . Thus, in an adverse possession case, for a party to establish possession by "clear and cogent evidence," the evidence must clearly establish the fact of possession and there must be little doubt left in the mind of the trier of fact as to the proper resolution of the issue. Thus, where there is any reasonable dispute, in light of the evidence, over the question of possession, the party has failed to meet his burden of proof. [*McQueen v Black*, 168 Mich App 641, 645 n 2; 425 NW2d 203 (1988).]

"[U]se of an easement by the owner of the servient estate will not ripen into adverse possession unless such use is inconsistent with the easement." *Nicholls v Healy*, 37 Mich App 348, 349; 194 NW2d 727 (1971). This is because the owner of the servient estate has "an undoubted right to make any use of the premises not inconsistent with the easement." *Id.* (quotation omitted). In *Nicholls*, the owner of the servient estate planted two rows of trees along the length of the easement and erected a privy and a bathhouse on the easement. In addition, a fence with gate access stood across one end of the easement. We held that, because none of these uses seriously blocked passage of the easement, the owners of the servient estate did not adversely possess the easement. *Id.* at 350.

In the present case, no clear and cogent evidence was presented to the trial court establishing that the any improvements to or encroachments on the four-foot walkway seriously

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[2] We also remanded for consideration of an issue irrelevant to the current appeal.

[3] Because the current porch and deck to plaintiff's house was built in 1990, and the complaint to quiet title was filed in 2001, plaintiff cannot adversely possess the 20-foot section of the walkway based on the current location of the porch and deck.

blocked passage of the easement prior to the construction of the current porch and deck in 1990. *Id.*; *McQueen, supra*. First, the one-foot encroachment of the southeast side of plaintiff's house did not seriously block use of the easement for walking and accessing the lake. Three feet of the walkway remained unobstructed, allowing any person to stay on the walkway while passing the southeast corner of the house. Although evidence was presented that a snow fence and seawall crossed the walkway, no evidence was presented that the snow fence or the seawall were in such a location so as to obstruct the use of the portion of the walkway in question. Furthermore, even if the walkway was obstructed by the snow fence or seawall, no evidence was presented as to the continuous obstruction of the walkway for the requisite fifteen years. Likewise, evidence that sand was poured, cement rip rap was laid, and beach grass was planted is irrelevant as there is no proof offered that these improvements inhibited the use of the walkway. Although shrubs were planted on the section of the walkway at issue in this case, no evidence was presented as to the number of the shrubs or the density of the shrubs, much less that they seriously blocked passage of the easement. Additionally, while a side porch extended almost to the far side of the walkway at one point in time, the side porch was a second story porch. It can be inferred that a person could walk underneath the porch. Because a person could walk underneath the porch, the porch did not seriously block passage of the easement. The record also contains no clear indication of the specific location of wooden walkways near plaintiff's house, preventing us from reaching any conclusion regarding whether, and how much, the wooden walkways encroached into the four-foot walkway. Moreover, we note that wooden walkways would not interfere with the right of easement holders to use the easement. Rather, they would enhance the use of the easement.

Because no clear and cogent proof was presented that any improvements to or encroachments on the four-foot walkway seriously blocked passage of the easement for the necessary period of time, we are left with a definite and firm conviction that a mistake was made when the trial court concluded that plaintiff adversely possessed defendants' easement. *Harbor Park, supra*.

Reversed.

/s/ E. Thomas Fitzgerald
/s/ Michael R. Smolenski
/s/ Jane M. Beckering