STATE OF MICHIGAN

COURT OF APPEALS

STEVEN A. MARKS and SAMCO REALTY CORP.,	UNPUBLISHED March 15, 2018
Plaintiffs/Counter-Defendants-Appellees,	
v	No. 337240 Alpena Circuit Court
BRIAN N. TIMM,	LC No. 15-006868-CH
Defendant/Counter-Plaintiff-Appellant.	

Before: SAWYER, P.J., and BORRELLO and SERVITTO, JJ.

PER CURIAM.

In this property dispute, defendant, Brian N. Timm, appeals as of right the trial court's order following a bench trial, which granted an injunction in favor of plaintiffs, Steven A. Marks and Samco Realty Corp.,[1] enjoining defendant from using a road on plaintiffs' property. For the reasons set forth in this opinion, we affirm.

I. BACKGROUND

This case arises out of a dispute involving a road running through plaintiff's property that defendant used to access his own property. Plaintiff owns property that abuts M-32 and also surrounds property owned by defendant. Plaintiff's property includes a parcel of approximately 100 acres referred to as the "Bilton property." Defendant owns a 40-acre parcel that is located approximately a quarter mile off of M-32, along a winding "two-track" road that runs from M-32, across plaintiff's property, back to defendant's property. Plaintiff testified that he owned all of the property from the starting point of the road in question until it reached defendant's property. The road then continued through a portion of defendant's property to another portion of plaintiff's property. Defendant testified that his property has been in his family for approximately 100 years and that he and his family members have always used this road to

[1] Marks owns Samco Realty Corp. Because the distinction between Marks and the entity of Samco Realty Corp is not pertinent to the issues on appeal, we refer to Marks as "plaintiff."

access the property. Plaintiff began acquiring property in the area in approximately 1985. According to the testimony of both plaintiff and defendant, there was no indication in any of the pertinent deeds of an easement across plaintiff's property being reserved for defendant or anyone else. Furthermore, plaintiff testified that when he acquired the relevant properties, he did not have any notice that anyone had a right to use those properties.

Curt Smith, who began working for plaintiff in 1988 at a local television station owned by plaintiff, apparently had some kind of informal verbal agreement to look after plaintiff's property. Additionally, plaintiff gave Smith permission to hunt on the property. Smith testified that he hunted on the property, which he described as undeveloped, "hunting land" from approximately 1989 to 2004. Plaintiff also described this land as "raw land" and indicated that there was "no camp" on the property. At some point, plaintiff installed a gate near the beginning of the road off of M-32. Plaintiff testified that he did not initially put a lock on this gate. According to Smith, this gate was present when he first went to the property to hunt in the fall of 1989, and there was a lock on the gate to which he was given a key. Smith used the gate and the two-track road to access the property for hunting.

In either 1991 or 1992, defendant met with Smith after Smith had changed the lock on the gate at the beginning of the two-track road. According to Smith, defendant indicated that he and his family had been using the road for many years to access his property and that the new lock was barring his access. Smith testified that defendant told him that he wanted to be able to use the road as he had been doing but did not mention a claim to any kind of legal easement. Defendant testified that that he believed he had a right to use the road and that he never requested permission from anyone to use the road. Smith and defendant agreed to put two locks on the gate: one for defendant and one for Smith and plaintiff. They further agreed that they would continue sharing the road in question to access the properties as they had previously been doing. There were no further discussions on that matter, and defendant testified that he was allowed to keep his lock on the gate until approximately 2014, when plaintiff told him that he was trespassing. Defendant also testified that he never did anything to put plaintiff on notice that defendant claimed an easement across the road.

Plaintiff testified that at some point in 2015, plaintiff walked the road from M-32 to the beginning of defendant's property and discovered that there was a gate there, which he realized was preventing him from accessing the rest of his property. This was the first time plaintiff had walked the road and seen a gate. Plaintiff never hunted, and he had not personally used the road in dispute for any purpose since he had owned the property. As a result of his discovery, plaintiff filed the instant lawsuit.

In his complaint, plaintiff alleged that defendant was trespassing on plaintiff's property by continuing to use the road. Defendant filed a counter claim asserting that he had established an easement by prescription or an easement by necessity.[2]

[2] On appeal, as at trial, defendant only argues that he obtained an easement by prescription, and we therefore do not need to discuss any claim of an easement by necessity.

After a bench trial, the trial court issued a written opinion and order granting an injunction in plaintiff's favor, enjoining defendant from using the road over plaintiff's property. The trial court concluded that defendant had not established a prescriptive easement because defendant "produced no evidence that plaintiffs were provided notice of hostile possession." The trial court further concluded that evidence that defendant made improvements to the road was "insufficient to give plaintiffs notice of a claim of right." This appeal followed.

II. STANDARD OF REVIEW

"We review the trial court's findings of fact in a bench trial for clear error and conduct a review de novo of the court's conclusions of law." *Heeringa v Petroelje*, 279 Mich App 444, 448; 760 NW2d 538 (2008) (quotation marks and citation omitted). "A finding is clearly erroneous where, although there is evidence to support the finding, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been made." *Ambs v Kalamazoo Co Rd Comm*, 255 Mich App 637, 652; 662 NW2d 424 (2003). "An appellate court will give deference to the trial court's superior ability to judge the credibility of the witnesses who appeared before it." *Id*. (quotation marks and citation omitted).

III. ANALYSIS

"An easement represents the right to use another's land for a specified purpose." *Plymouth Canton Community Crier, Inc v Prose*, 242 Mich App 676, 678; 619 NW2d 725 (2000). "An easement by prescription results from use of another's property that is open, notorious, adverse, and continuous for a period of fifteen years," but "[m]ere permissive use of another's property . . . will not create a prescriptive easement." *Id*. at 679. This Court has explained the meaning of the term "adverse" for purposes of obtaining an easement by prescription:

> A use is "adverse" when it would entitle the landowner to a cause of action against the trespasser:
>
> > The term "hostile" as employed in the law of adverse possession is a term of art and does not imply ill will. Nor is the claimant required to make express declarations of adverse intent during the prescriptive period. Adverse or hostile use is use inconsistent with the right of the owner, without permission asked or given, use such as would entitle the owner to a cause of action against the intruder. [*Goodall v Whitefish Hunting Club*, 208 Mich App 642, 646; 528 NW2d 221 (1995) (some quotation marks omitted; citation omitted).]

In other words, "[u]se of another's property qualifies as adverse when made under a claim of right when no right exists." *Plymouth Canton*, 242 Mich App at 681. Our Supreme Court has further stated that "[a]dverse user is defined as such a use of the property as the owner himself would exercise, disregarding the claims of others entirely, asking permission from no one, and

using the property under a claim of right." *Outhwaite v Foote*, 240 Mich 327, 329; 215 NW 331 (1927) (quotation marks and citation omitted).

However, our Supreme Court has held that while mere use may be sufficient to give a landowner notice of an adverse claim of right to an easement over enclosed premises, there is no such presumption when the alleged servient estate at issue is wild and unenclosed land, and in the case of wild lands, the user of a right of way must "bring home to the owner, by word or act, notice of a claim of right before he may obtain title by prescription." *Du Mez v Dykstra*, 257 Mich 449, 451; 241 NW 182 (1932). "The burden is on the party claiming a prescriptive easement to show by satisfactory proof that the use of the . . . property was of such a character and continued for such a length of time that it ripened into a prescriptive easement." *Mulcahy v Verhines*, 276 Mich App 693, 699; 742 NW2d 393 (2007).

Like the trial court, we conclude that our analysis is governed by our Supreme Court's decision in *Du Mez*, 257 Mich 449. In *Du Mez*, defendant accessed his property, on which he had built a summer cottage and barn, by using an old logging road that went across plaintiffs' property. *Id*. at 449-450. Plaintiffs' property was "wild land, unenclosed, covered with second growth timber." *Id*. at 449. Defendant had been told by his grantor when defendant purchased his property that this logging road was the means for accessing his property, although the grantor did not have any interest in the other property that was owned by plaintiffs. *Id*. at 450. On more than one occasion after purchasing his property, defendant made repairs to the road, and plaintiffs contributed to the costs of at least some of these repairs. *Id*. When plaintiffs subsequently had an opportunity to sell their property, defendant claimed a right of way by prescription, and plaintiffs brought the subject action to enjoin defendant's trespass. *Id*. Our Supreme Court noted that although plaintiffs knew for 15 years that the road was being used by defendant, plaintiffs had not been presented with any notice, or facts that would charge them with notice, that defendant's use was "under a claim of right," other than defendant's mere use itself. *Id*. Our Supreme Court further noted as follows:

> Defendant stated that he had never told plaintiffs nor any one else that he claimed a right of way, although, relying on what his grantor told him, he thought he had a right to use the road. The joint repair of the road in 1923 was a neighborly agreement, as both plaintiffs and defendant had use for it, and it is not particularly indicative of anything upon adverse possession. [*Id*.]

The *Du Mez* Court held that there was no prescriptive easement because "[t]he case present[ed] no evidence of hostile or adverse claim of defendant brought to the attention of plaintiffs except the fact of user." *Id*. at 451. In reaching this conclusion, our Supreme Court reasoned as follows:

> One may acquire a right of way by prescription over wild and uninclosed lands. But, while use alone may give notice of adverse claim of inclosed premises, the weight of authority is that it raises no presumption of hostility in the use of wild lands. This distinction is in recognition of the general custom of owners of wild lands to permit the public to pass over them without hindrance. The custom had been particularly general as to logging roads over timber lands until the carelessness of hunters and campers produced such fire hazards that the

> protection of timber required the permission to be circumscribed. The tacit permission to use wild lands is a kindly act which the law does not penalize by permitting a beneficiary of the act to acquire a right in the other's land by way of legal presumption, but it *requires that he bring home to the owner, by word or act, notice of a claim of right before he may obtain title by prescription*. [*Id*. (emphasis added.)]

In this case, there was testimony that the road in question went across plaintiff's property that, much like the analogous parcel in *Du Mez*, was undeveloped, "raw" land, which was used only for hunting. There was also testimony that this road was a "two-track" that was difficult to travel by vehicle and that had originally been a logging road. Although there was testimony that defendant and his family had historically used the road for accessing the property currently owned by defendant, that they believed that they were entitled to do so, and that plaintiff was aware that the road was being used by others, there was also testimony that defendant never gave plaintiff, nor anyone associated with him, notice that defendant's use of the road was pursuant to a claim of right or a claimed easement over the road. Based on our review of the record, the trial courts factual findings were in accord with the above evidence, and as such were not clearly erroneous because we are not left with a definite and firm conviction that a mistake was made. *Ambs*, 255 Mich App at 652.

On the evidence presented to the trial court, defendant only established, at best, that plaintiff had notice of defendant's *mere use* of the road. However, when wild lands are at issue, such use does not give rise to a presumption that the use is adverse or hostile use for purposes of establishing a prescriptive easement. *Du Mez*, 257 Mich at 451. Because of the nature of the property at issue, defendant was required to make clear to plaintiff that defendant's use of the road was under a claim of right to an easement before he could establish a prescriptive easement. *Id*. This is true despite the fact that defendant and his family, like the defendant in *Du Mez*, appears to have used this road for well over 15 years. *Id*. at 450-451. Defendant's assertion that he never asked plaintiff or anybody else for permission to use the road is inconsequential to the disposition in this case because there is a difference between using without asking for permission, which is still just "use," and "bring[ing] home to the owner, by word or act, notice of a claim of right" as is required by our Supreme Court's decision in *Du Mez* before an easement over wild lands can be obtained by prescription. See *id*. at 451. Because there was no notice given to plaintiff in this case that defendant's use of the road was hostile or adverse under a claim of right, the trial court did not err by concluding that defendant had not obtained an easement by prescription and thus could be enjoined from using the road. *Id*. at 451.

We further note that despite defendant's assertion on appeal that he told Smith that defendant's use was under claim of right, the record does not support such a finding. Defendant testified that he told Smith that he was going to put his own lock on the gate and use the road to access his property as his family had for years, and defendant also testified that he spoke to Smith in an attempt to be "neighborly." Defendant believed that what he said to Smith would be communicated to plaintiff and that he never did anything to put plaintiff on notice that defendant claimed an easement over the road. Smith testified that defendant never mentioned any type of

legal easement, and Smith also testified that he and defendant agreed that defendant could add his own lock on the gate and that access to the road would continue for all of them. According to Smith, he informed plaintiff of this arrangement, and plaintiff did not object.[3] Contrary to defendant's contention, there is no record evidence that defendant's actions barred plaintiff, who also had his own lock for the gate, from accessing the road. There is also no evidence that this conversation involved defendant actually making a claim of right to an easement over the road. Moreover, to the extent it is possible to understand the evidence to be conflicting on whether defendant made a claim of right, although we do not understand there to be such a conflict, we nonetheless defer to the trial court's ability to judge witness credibility. *Ambs*, 255 Mich App at 652. The agreement that was reached between the parties that they would continue to share the use of the road as before does not show that defendant was claiming a right to an easement for using the road, even if defendant thought he was entitled to use it. *Du Mez*, 257 Mich at 450. Accordingly, the trial court did not clearly err by finding that defendant had not provided any notice of a claim of right. *Ambs*, 255 Mich App at 652.

Additionally, defendant cannot rely on his maintenance of the road to establish that he provided the required notice of a claim of right. The fact that defendant made improvements to the road is insufficient to establish adverse use. *Du Mez*, 257 Mich at 450. Here, evidence of defendant's improvements to the road is even less compelling to support a claim of adverse use than such evidence was in *Du Mez* because the evidence in the instant case shows that defendant never informed plaintiff of his maintenance. Thus, defendant's actions provided *no notice* of these actions to plaintiff, much less notice of a claim of right to an easement, and cannot be relied on to establish that defendant provided the required notice of a claim of right to an easement over the road by defendant. *Id*. at 451.

Finally, defendant relies on *Widmayer v Leonard*, 422 Mich 280; 373 NW2d 538 (1985), for the proposition that because defendant introduced evidence that the road had been used to access defendant's property for "over 100" years, the burden shifted to plaintiff to show that the use of the road was permissive. However, defendant ignores the legal principle discussed above that because the road in question went over wild, undeveloped land, defendant could not rely on mere use alone to establish adverse use but was instead required to affirmatively provide notice of his claim of right before he could obtain an easement by prescription. *Du Mez*, 257 Mich at 451.

Affirmed. Plaintiffs, having prevailed, may tax costs. MCR 7.219(A).

/s/ David H. Sawyer
/s/ Stephen L. Borrello
/s/ Deborah A. Servitto

[3] We note that there was nothing preventing Smith from acting on plaintiff's behalf, as his agent, regarding the property, even though Smith did not have an ownership interest. See *Link, Petter & Co v Pollie*, 241 Mich 356, 359-360; 217 NW 60 (1928) ("[W]hatever a person may lawfully do, if acting in his own right and on his own behalf, he may lawfully delegate to an agent.").