STATE OF MICHIGAN

COURT OF APPEALS

PATRICIA JOHNSTON and BARBARA WIGHTMAN, Plaintiffs-Appellees, v LOUIS PETE JAZDZYK, Defendant-Appellant, and JAMES C. WIGHTMAN, Defendant.	UNPUBLISHED October 16, 2018 No. 341527 Cheboygan Circuit Court LC No. 17-008629-CH

Before: MURPHY, P.J., and SAWYER and SWARTZLE, JJ.

PER CURIAM.

Defendant Louis Pete Jazdzyk appeals by right the trial court's judgment granting an easement to plaintiffs[1] over portions of the southwest corner of defendant's 39-acre parcel. We reverse.

[1] Plaintiffs, Patricia Johnston and Barbara Wightman, and defendant James Wightman are siblings and co-owners of the parcel adjacent to the Jazdzyk property. James Wightman refused to sign documents to allow for a sale of this property; plaintiff Patricia Johnston therefore named him as a defendant and asked the court to appoint her as a receiver for him. After entry of its judgment in favor of plaintiffs, the trial court entered a default judgment against James Wightman and appointed plaintiff Patricia Johnston as a receiver for him. "Plaintiff" as used in the singular in this opinion refers to Patricia Johnston, who actively participated in the litigation. "Defendant" as used in the singular in this opinion refers to Louis Jazdzyk.

I. BACKGROUND

Defendant and plaintiff own property adjacent to each other. Plaintiff's property sits south of defendant's property, and portions of plaintiff's northern boundary line are adjacent to portions of defendant's southern boundary line. To the west of each parcel sits 190 acres of state land controlled by the Michigan Department of Natural Resources (DNR). Rondo Road borders the northern portion of defendant's property, but no official road borders plaintiff's property. Plaintiff and her family accessed their parcel via a two-track trail that began at Rondo Road, ran across defendant's southwest corner of his property, and ended on plaintiff's property. Multiple witnesses testified that there was no other way to access plaintiff's property other than the two-track. This dispute centers on whether plaintiff and her family hold an easement, express or prescriptive, to traverse over defendant's southwest property via this two-track.

In 1949, plaintiff's parents purchased their property from the Petersons on land contract and then received the deed in 1952. Plaintiff and her siblings, James Wightman and Barbara K. Wightman, later received this property from their parents after both of the parents passed away. Defendant purchased his property in 1983 on land contract and subsequently received the full deed. In 1984, defendant purchased another parcel of property, located on the Sturgeon River, which was surrounded by state land, not connected to his other parcel, and was not subject to dispute in this case. On this property was a cabin located by the Sturgeon River banks. Both plaintiff's and defendant's respective properties were quite heavily wooded.

Plaintiff, her parents, and plaintiff's siblings utilized their property regularly over the decades. To access their property, they utilized the two-track that ran across defendant's property. Defendant testified that he gave James Wightman permission over the years to use the two-track to check in on the property; however, defendant testified that he never gave plaintiff or the other members of her family permission. In the early 2000s, defendant placed a gate across the two-track, but he gave Wightman a key and continued to grant him permission. Finally, in 2016, after finding evidence of strangers and damage on his property, defendant placed another lock on the gate and refused to give Wightman another key. This suit followed.

II. ANALYSIS

Defendant argues that the trial court erred by granting an express easement and, in the alternative, a prescriptive easement. We agree.

A. STANDARD OF REVIEW

"This Court reviews de novo a trial court's holdings in equitable actions" and reviews "findings of fact for clear error." *Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 117; 662 NW2d 387 (2003). Clear error exists when, although there is evidence supporting the trial court's decision, the reviewing court "is left with the definite and firm conviction that a mistake has been committed." *In re Cornet*, 422 Mich 274, 278; 373 NW2d 536 (1985) (quotation marks and citation omitted).

B. EXPRESS EASEMENT

"An easement is an interest in land that is subject to the statute of frauds." *Forge v Smith*, 458 Mich 198, 205; 580 NW2d 876 (1998). "In order to create an express easement, there must be language in the writing manifesting a clear intent to create a servitude." *Id*. "Any ambiguities are resolved in favor of use of the land free of easements." *Id*.

In the conveyance of plaintiff's property from the Petersons to plaintiff's parents, the deed stated that it was subject to the easement recorded within Liber 119, p 632:

> The grantors herein do hereby grant a right of ingress and egress to and from the above descriptions herein above described, which said right of ingress and egress, was heretofore included in an execution to a deed executed by the grantors hereinto the State of Michigan, and which said deed is recorded in Liber 119, page 632 and in which said deed the right of ingress and egress to and from County highway on the north of said section is reserved to grantors.

This referenced a deed from Peterson to the DNR, recorded at Liber 119 p 632, which contained the following language:

> EXCEPT the site of the Cottage on the east bank of the Sturgeon River . . . also included in this Exception the right of ingress and egress over a suitable and unobstructed right-of-way from said site to the County Highway on the north section line of said section twenty five.

In reviewing other deeds in the record, it appears that during the 1940s defendant's property had been dealt back and forth between the Petersons and an individual named E. E. Styles. In 1947, the Petersons conveyed defendant's property to Styles without Styles subsequently conveying the property back to them. Styles then conveyed this property to the Hill family in May 1949. Therefore, in 1952, when the Petersons conveyed plaintiff's property to plaintiff's parents, the Petersons did not own defendant's property anymore.

"A warranty deed conveys the entire bundle of rights to the property from the grantor to the grantee . . . ." *Eastbrook Homes, Inc v Treasury Dep't*, 296 Mich App 336, 348; 820 NW2d 242 (2012). The Petersons did not hold an interest in defendant's property at the time of the 1952 conveyance to plaintiff's parents because the Hill family owned it. From our review of the record, it does not appear that the Hill family was a party to the conveyance between the Petersons and plaintiff's parents. Therefore, the Petersons could not convey an express easement to plaintiff's parents over the property that later became defendant's, because the Petersons had no legal right to do so. Only the Hill family, as the owners, could have granted such an easement. The Petersons could only convey the bundle of property rights they held. See *Eastbrook*, 296 Mich App at 348.

The trial court found that the Petersons originally owned both defendant's and plaintiff's properties but subsequently deeded defendant's property to two individuals, Chapin and Bonbright, in 1941. The trial court examined this deed and found evidence of an express easement reserved over defendant's property. The trial court appears to have held that this

easement then transferred with the land when subsequently purchased by defendant. However, Chapin and Bonbright subsequently conveyed their interests *back* to the Petersons in 1944. One cannot possess an easement on one's own land, because the "union of dominant and servient estates in the same owners extinguishes prior easements." *von Meding v Strahl*, 319 Mich 598, 605-606; 30 NW2d 363 (1948) (quotation marks and citation omitted). Therefore, assuming there was an easement created when the Petersons conveyed the parcel to Chapin and Bonbright, this was extinguished when it was conveyed back to the Petersons. No easement could have transferred with the land to defendant.

We hold that the trial court erred by concluding that plaintiffs had an express easement over defendant's property.

C. PRESCRIPTIVE EASEMENT

"An easement by prescription results from use of another's property that is open, notorious, adverse, and continuous for a period of fifteen years." *Mulcahy v Verhines*, 276 Mich App 693, 699; 742 NW2d 393 (2007) (quotation marks and citation omitted). The elements of a prescriptive easement are similar to that of adverse possession, with the exception of the exclusivity requirement. *Matthews v Natural Resources Dep't*, 288 Mich App 23, 37; 792 NW2d 40 (2010). Adversity or hostility does not require ill will or intent, but, rather, a lack of permission or infringement upon another's property rights. *Plymouth Canton Community Crier, Inc v Prose*, 242 Mich App 676, 681; 619 NW2d 725 (2000). "Use of another's property qualifies as adverse when made under a claim of right when no right exists." *Id*. Permissive use of another's property will not result in a prescriptive easement. *Banach v Lawera*, 330 Mich 436, 440-441; 47 NW2d 679 (1951). "The burden is on the party claiming a prescriptive easement to show by satisfactory proof that the use of the defendant's property was of such a character and continued for such a length of time that it ripened into a prescriptive easement." *Mulcahy*, 276 Mich App at 699.

However, for "wild and unenclosed land," there is a heightened standard for the adversity requirement. There is no concrete definition for land that is "wild and unenclosed." However, land that was "wild land, uninclosed [sic], covered with second growth timber, and ha[d] old logging roads on it" was held to be wild and unenclosed. *Du Mez v Dykstra*, 257 Mich 449, 449-451; 241 NW 182 (1932). A heightened standard exists to create a prescriptive easement over wild and unenclosed land. As explained in *Du Mez*:

> One may acquire a right of way by prescription over wild and uninclosed [sic] lands. But, while *use alone may give notice of adverse claim of inclosed* [sic] *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*. at 451 (emphasis added).]

In this case, we conclude that the record supports the proposition that defendant's property was wild and unenclosed. It appears that the property located on the Sturgeon River was where defendant and his wife stayed during visits; it does not appear that they ever stayed on the other property. While the Sturgeon River property had a cabin on it, it appears that the other parcel contained no structure to reside in. It also appears that the property, which was heavily wooded, very rural, raw, and undeveloped, was used exclusively for hunting, fishing, and taking nature walks. Additionally, there was an old logging road that ran from Rondo Road and through the acreage parcel. In fact, a logger cut some trees on defendant's land in 2004. Defendant and his wife did not live on the properties. While the river property contained a cabin that defendant and his wife inhabited during visits, the two properties were separate and purchased at separate periods of time by defendant. Conflating the two would be improper, given that each piece of real property is considered unique. See *In re Smith Trust*, 480 Mich 19, 20-21; 745 NW2d 754 (2008).

Applying the heightened standard for adversity applicable to wild and unenclosed land, plaintiff's claim for a prescriptive easement must fail. In such cases, mere use alone will not suffice. *Du Mez*, 257 Mich at 451. While there was testimony to show that plaintiff and her family used the two-track, there was no evidence to show that plaintiff or her family had brought "home to the [defendant], by word or act, *notice of a claim of right* before he may obtain title by prescription." See *id*. (emphasis added). In fact, plaintiff testified that during her first visit to the property, she was unaware of who even owned the two-track. There was no evidence to show or suggest that plaintiff's parents subsequently placed defendant on notice of a claim of use. There was no evidence establishing that plaintiff or her family "told [defendant] nor any one [sic] else that [they] claimed a right of way . . . ." See *id*. at 450. While mere usage would ordinarily be enough to satisfy the adversity requirement, see *Plymouth Canton Community Crier, Inc*, 242 Mich App at 681, the heightened standards for wild and unenclosed land require more.

We hold that the trial court erred by concluding that plaintiffs had a prescriptive easement over defendant's property.

Reversed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Brock A. Swartzle