STATE OF MICHIGAN

COURT OF APPEALS

SAGINAW VALLEY RANCH,

Plaintiff-Appellee,

v

BONE YARD HUNT CLUB,

Defendant-Appellant.

UNPUBLISHED
September 27, 1996

No. 182877
LC No. 93-001891-CH

Before: MacKenzie, P.J., and Markey and J.M. Batzer,* JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's order permanently enjoining defendant from denying plaintiff access to Bone Yard Road, which was the only access road leading to plaintiff's property, because plaintiff and its predecessors in interest established a prescriptive easement regarding their use of the roadway that crossed defendant's property. We affirm.

Defendant argues that the trial court erred in finding that plaintiff proved all the elements required to establish a prescriptive easement. We disagree. " A prescriptive easement arises from a use of the servient estate that is open, notorious, adverse, and continuous for a period of fifteen years." *Goodall v Whitefish Hunt Club*, 208 Mich App 642, 645; 528 NW2d 221 (1995). Prescription is founded on the existence of a grant which is adverse, as evidenced by the party's use or possession, or is claimed as a right. *Outhwaite v Foote*, 240 Mich 327, 329; 215 NW2d 331 (1927). Plaintiff's and its predecessors' seasonal use of the road since the 1940s to access their property during hunting season is sufficient to establish open, continuous use. See *Dyer v Thurston*, 32 Mich App 341, 344; 188 NW2d 633 (1971). Indeed, when the alleged easement has been used for fifty years, it is unnecessary for plaintiff to establish adverse use; rather, a presumption of adverse use exists and defendant has the burden of producing evidence that the use was merely permissive. See *Widmayer v Leonard*, 422 Mich 280, 290-291; 373 NW2d 538 (1985); *Dyer, supra* at 343.

We believe that the trial court's findings of fact regarding plaintiff's hostile, nonpermissive use of the roadway were not clearly erroneous. MCR 2.613(C). Witnesses for plaintiff, including plaintiff's

* Circuit judge, sitting on the Court of Appeals by assignment.

predecessors and their relatives, testified that they never asked defendant's permission to use the road. Defendant's predecessors' testimony also supported the conclusion that plaintiff's predecessors used Bone Yard Road without condition or permission in order to access their adjoining property. Further, the original gate across the road was placed on the west side of defendant's property leading into plaintiff's property, but the gate was subsequently moved to the east side of defendant's property to keep the public from driving through defendant's property from the immediately adjoining state-owned land. Notably, both plaintiff's predecessors and defendant's predecessors always shared keys to the gate locks. Indeed, the positioning of the gates and the shared access to gate locks supports the conclusion that plaintiff's use of Bone Yard Road for almost fifty years was adverse or hostile use inconsistent with the right of the owner, without permission asked or given, such as would entitle the owner to a cause of action against the intruder. *Mumrow v Riddle*, 67 Mich App 693, 698; 242 NW2d 489 (1976). Contrary to defendant's assertions, the mere fact that plaintiff and its predecessors received a key to the gate does not establish a permissive use in light of the testimony by defendant's predecessors that they believed the road was a public road. See *Widmayer*, *supra*. Thus, defendant's predecessors could have believed that they were required to give plaintiff's predecessors a key. This evidence was insufficient to establish plaintiff's permissive use. *Id*.

We also reject defendant's assertion that defendant's and plaintiff's mutual use of the road precluded plaintiffs from establishing a prescriptive easement. This Court has refused to apply the mutual use rule where a shared driveway was not co-owned by adjoining lot owners or maintained for the joint benefit of both properties. *Cheslek v Gillette*, 66 Mich App 710, 713-715; 239 NW2d 721 (1976). Here, the road was an unimproved two track. Further, we find no evidence that the parties or their predecessors co-owned Bone Yard Road, nor has plaintiff so claimed.[1] Accordingly, upon our review de novo, we believe that the trial court did not err in finding that plaintiff established a prescriptive easement entitling its members to continue using Bone Yard Road, which traverses defendant's property, in order to access plaintiff's property. Cf. *West Michigan Dock & Market Corp v Lakeland Investments*, 210 Mich App 505, 511-512; 534 NW2d 212 (1995).

Defendant also argues that the court erred in estopping it from asserting that plaintiffs had failed to establish its hostile use of the property. We agree but find that the error was harmless. Whether a court can use the doctrine of estoppel as a substitute for a missing element of a prescriptive easement is a question of law that this Court reviews de novo. See, generally, *Deffan v Clare Co Bd of Comm'rs*, 203 Mich App 573, 575; 513 NW2d 192 (1994). Here, the trial court found that,

> when owners of the dominant estate[2] have, in fact, acted to their detriment in reliance upon that acquiescence [by the owners of the servient estate in the unrestricted use of the road], that in such instances the Defendants - - the Defendants, or in this case the ones - - the owners of the servient estate, should be estopped from asserting the absence of hostility.

We agree that the trial court did not decide that the element of hostility was missing, but we disagree that estoppel can be substituted for the elements of a prescriptive easement. Rather, if the use of the road were permissive, then a necessary element of a prescriptive easement, i.e., hostile use, would be

lacking. See *Banach v Lawera*, 330 Mich 436, 440-442; 41 NW2d 679 (1951). Because the trial court correctly found that plaintiff established a prescriptive easement, however, we hold that the court's error was harmless.

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Jane E. Markey
/s/ James M. Batzer

[1] Although plaintiff alleged in Count III of its complaint that the road was public, that count was dismissed on summary disposition and has not been appealed.

[2] Plaintiff seeks to continue using the road on defendant's land, so plaintiff is the owner of the dominant estate. Defendant owns the land upon which the easement is sought and is, therefore, the owner of the servient estate. *Bowen v The Buck and Fur Hunting Club*, 217 Mich App 191, 192-193; 550 NW2d 850 (1996). In *Bowen*, the trial court found that the plaintiffs had a prescriptive easement for the use of a road running over the defendant's property that was the plaintiff's only means of ingress and egress to their property; neither party contested this finding on appeal, however. *Id.*