

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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MAHER FAMILY TRUST, PEGGY BLAKELY,  
Trustee,

UNPUBLISHED  
October 6, 2000

Plaintiff-Appellant,

v

No. 218682  
Jackson Circuit Court  
LC No. 97-080526-CH

DANNY L. KAHN and MARY J. COTE,

Defendants-Appellees.

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Before: Kelly, P.J., and Whitbeck and Collins, JJ.

PER CURIAM.

Plaintiff Maher Family Trust appeals as of right from a judgment entered in favor of defendants Danny L. Kahn and Mary J. Cote after a bench trial. We affirm.

This case concerns a dispute over a driveway that runs from a main road east to west across defendants' property, which was formerly known as the Hull farm. Trial testimony shows that the driveway passes within approximately fifteen to thirty feet of defendants' house, runs between defendants' outhouses, enters defendants' hayfields and approaches a forty-acre parcel of property owned by plaintiff, and then makes a u-turn back toward defendants' home about twenty to thirty feet from plaintiff's property. William Maher testified that the forty-acre parcel of land had been in his family for over 100 years, and that he deeded the land to the family trust in 1993 or 1994. Several witnesses, including Maher, testified that because of wetlands surrounding part of the forty-acre parcel, the only way to access that parcel by automobile is the driveway located on defendants' property, and that Maher and various friends and relatives had used the driveway for over seventy years. Kahn testified that he purchased the farm previously owned by the Hulls in 1985. He further testified that while he initially allowed Maher and his friends and family to use the driveway, he withdrew permission when the use became excessive. Plaintiff claimed a prescriptive easement, while defendants asserted that the use was merely permissive. The trial court agreed with defendants and found that plaintiff did not have a prescriptive easement.

Plaintiff contends that the trial court erred in several respects. However, the broad question before this Court is whether the trial court erred when it found that plaintiff had not established a prescriptive easement. We find that it did not.

We review de novo a trial court's determination of equitable issues. *Cipri v Bellingham Frozen Foods, Inc.*, 235 Mich App 1, 9; 596 NW2d 620 (1999). However, we review the findings of fact supporting the court's determination for clear error. *Id.* A finding is clearly erroneous when, although there is evidence to support it, this Court is left with the definite and firm conviction that a mistake has been made. *Id.*

A prescriptive easement is founded on the supposition of a grant. *Reed v Soltys*, 106 Mich App 341, 346; 308 NW2d 201 (1981). It arises from the open, notorious, continuous and adverse use across the land of another for a period of 15 years. *Id.* Continuous use does not mean constant use. *Dyer v Thurston*, 32 Mich App 341, 344; 188 NW2d 633 (1971). The use is considered open and notorious if it is discoverable by the owner. *Menter v First Baptist Church*, 159 Mich 21, 25; 123 NW 585 (1909). A use is adverse if it is hostile to the title of the property owner. *Waubun Beach Ass'n v Wilson*, 274 Mich 598, 608; 265 NW 474 (1936). Further,

[t]he 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. [*Mumrow v Riddle*, 67 Mich App 693, 698; 242 NW2d 489 (1976).]

Plaintiff contends that it is entitled to a presumption of prescriptive use, and that the trial court erred because it did not give plaintiff the benefit of the presumption by shifting the burden of proving permissive use to defendants. The burden of proving the existence of an easement by prescription is upon the party claiming the easement. *Stewart v Hunt*, 303 Mich 161, 163; 5 NW2d 737 (1942). However, when a party shows that the alleged easement has been used for fifty years, a presumption of a grant arises and the burden shifts to the owner of the servient estate to show that use was permissive. *Reed, supra*; *Widmayer v Leonard*, 422 Mich 280, 290; 373 NW2d 538 (1985). The presumption does not, however, relieve a plaintiff from the burden of proving a prescriptive easement:

[A] presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast. [*Widmayer, supra* at 291, quoting MRE 301.]

Although a defendant may present evidence to rebut the presumption of a grant, a permissible inference remains that may be sufficient to satisfy the trier of fact. *Widmayer, supra* at 290-291.

Here, Maher testified that he and other family members and friends had used the driveway to access the forty acres for approximately seventy years, and several other witnesses substantiated Maher's testimony that the driveway had been used for this extensive period of time. Thus, plaintiff was entitled to the presumption. Although the trial court did not expressly state that it applied the presumption, the court in its opinion recognized the existence of the presumption and the shifting of the burden of going forward with evidence, and it detailed the evidence that showed the presumption had been rebutted. The court noted that Maher testified he did not know if his grandfather ever was given permission to use defendants' driveway. However, Kahn testified that Maher would ask Kahn, almost yearly, for permission to use the driveway to access his property, and that until recently, he granted permission every year. The trial court reasoned that Maher would not have asked permission of Kahn to cross his property if he really believed he had the right to do so, i.e., if he had been using the driveway under a claim of right. See *Mumrow, supra* at 697. Thus, the court concluded, defendants had presented evidence sufficient to show that plaintiff's use of the driveway had been by permission of defendants and their predecessors in title. We find no clear error in this conclusion. Moreover, once the court determined that plaintiff's use of the driveway was permissive, the presumption was rebutted. *Widmayer, supra* at 290.

Plaintiff further argues that, even if defendants rebutted the presumption, the trial court erred in finding that plaintiff did not establish a prescriptive easement. Although the trial court was free to conclude that the inference remaining after defendants successfully rebutted the presumption was strong enough to find that plaintiff had established a prescriptive easement, *id.* at 290-291, the court did not do so. Instead, the trial court found the testimony of Kahn to be persuasive, despite Maher's contradictory testimony that he never requested permission to use the driveway, and concluded that plaintiff's use of the driveway was permissive. This Court defers to the ability of the trial court to judge the credibility of the witnesses. *Fletcher v Fletcher*, 229 Mich App 19, 24; 581 NW2d 11 (1998). Thus, we hold that the trial court did not err when it found that plaintiff had not established a prescriptive easement.

Finally, plaintiff argues that the trial court failed to make sufficient findings concerning the application of the presumption, the success of defendants in rebutting the presumption, and the reasoning behind its decision. "A trial court sitting without a jury must make specific findings of fact, state its conclusions of law separately, and direct entry of the appropriate judgment." *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 176; 530 NW2d 772 (1995). "Findings of fact regarding matters contested at a bench trial are sufficient if they are 'brief, definite, and pertinent,' and it appears that the trial court was aware of the issues in the case and correctly applied the law, and where appellate review would not be facilitated by requiring further explanation." *Id.*, quoting MCR 2.517(A)(2).

Here, the trial court spent an extensive amount of time summarizing the testimony and reiterating the law on prescriptive easements, and its opinion detailed the specific reason for rejecting plaintiff's claim of a prescriptive easement. Therefore, we find no support for plaintiff's argument that the trial court failed to make specific findings of fact.

Affirmed.

/s/ Michael J. Kelly  
/s/ William C. Whitbeck  
/s/ Jeffrey G. Collins