

STATE OF MICHIGAN
COURT OF APPEALS

GERALD CRAMER and GAIL CRAMER,

Plaintiffs/Counter-Defendants-
Appellees,

UNPUBLISHED
October 13, 2005

v

No. 255153
Alpena Circuit Court
LC No. 01-003156-CH

STATE OF MICHIGAN,

Defendant/Counter-Plaintiff-
Appellant,

and

DETROIT & MACKINAC RAILWAY, a/k/a
MICHIGAN CORPORATION,

Defendant.

Before: O’Connell, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

In an adverse possession case involving an unused rail line across plaintiffs’ property, defendant State of Michigan¹ appeals from a judgment giving plaintiffs the “exclusive right to possession and use of the former D&M Railroad corridor through their property for the period of November 1 through December 5 of every year.” We reverse.

I.

D&M bought the rail corridor containing the portion at issue here, known as the “Hillman Branch” in 1907; trains ran on the line until 1967. In 1954, for an annual fee, D&M let Alpena Power Company put a power line in the corridor. No one testified that the license had ever been

¹ The Detroit & Mackinac Railway Company (D&M) is not participating in this appeal. Therefore, this opinion refers to the State of Michigan as the singular defendant.

revoked. Plaintiffs bought the nearly forty-acre parcel that the corridor traverses from plaintiff Gail Cramer's (Gail) parents in 1971; plaintiffs' deed states "Railroad right-of-way, ALSO EXCEPTED."

Plaintiffs sued to quiet their title to the corridor "either by adverse possession or abandonment."² They alleged that "immediately after" 1972, they "adversely possessed the disputed strip for more than the 15 years necessary to effect their claim of legal ownership" but that defendant, over plaintiffs' objections, "obtained title . . . and started using the disputed strip as a portion of the RAILS TO TRAILS snowmobile trail" in 1998.

At trial, Gerald Cramer (Cramer) testified that he put a deer blind onto the rail corridor soon after buying the surrounding parcel and that he and his family have hunted on the corridor ever since. He testified that, when he acquired his land, the railroad tracks were broken up and the "[b]iggest share of them was all pulled off to the side." Cramer also testified that "we used to mow it" once a year. Cramer first testified that he "didn't do anything to block physical access to that right-of-way," but then recalled that he once "put a wire across it, then I took that down for, I figured someone come through at night with a snowmobile or something and could have got hurt bad, and I didn't want that." Cramer agreed that putting a wire across the right of way for a period of time was "the only thing you ever did to block anybody's physical access to the property." He claimed to have ejected deer hunters from the corridor "a couple times" and posted thirty to thirty-five "no trespassing" signs along it "about this time every year," and that he paid taxes on the corridor. Cramer admitted not having blocked snowmobile access to the rail corridor, noting that "I never said nothing to nobody." Cramer testified that he never altered the railroad berm in any way, but that he built a road up to it in 2000. He also testified that he and his sons hunted turkeys and other small game on the corridor. Cramer further testified that, during deer season, he would hunt every day, but that he could not hunt once the snowmobiles were using the corridor. He further testified that, over the years, he had three deer blinds on the property, the first being a brush blind and the later two being movable blinds. He agreed that he "didn't put a fixed deer blind that was posted or . . . driven into the ground any time before the year 2001." He admitted that he never took any rails or railroad ties from the corridor, or interfered with the D&M employees removing ties, or with power company employees maintaining the power line. Cramer admitted that snowmobiles used the corridor every winter from 1971 through 1988 or later. He agreed that he contributed \$1500 toward a successful adverse possession suit that a pair of neighbors brought against D&M.

The court questioned Cramer about his deer blinds. Cramer claimed that the first blind he erected stayed in place year-round for six or eight years, but admitted that he did not use the blinds from December 20 through March each year. Cramer told the court that he first learned that a snowmobile club planned to use the rail corridor for a snowmobile trail in 1986 or 1987, but that snowmobilers were already using the corridor. Cramer testified that the latter two blinds

² The judgment is silent as to abandonment, but the court commented at the conclusion of the trial that it was not persuaded that the railroad had ever abandoned its interest in the land. Because the issue was not presented on appeal, we only address the adverse possession claim.

were far from the railroad grade. He also admitted that he saw rabbit hunters on the corridor every weekend after December during rabbit season; however, he claimed that he never saw other hunters on the corridor during deer season. Cramer testified that he never ejected the rabbit hunters from the corridor because they were his neighbors. He admitted not having built or repaired a culvert under the railroad grade, and he testified that defendant told him he had permission to cross the corridor.

Gail testified that she hunted for deer with her sons from the blinds on the corridor. She testified that she did not mow the corridor or see her husband or sons mowing it. Referring to the corridor, she also testified that, once the railroad service stopped, “we figured it was ours,” and that plaintiffs treated it as their own. She testified that she was shocked when defendant purchased the property and informed plaintiffs that it was now state property. She agreed that one of the reasons they went to Tawas City was “for you and Mr. Cramer to see what the railroad was going to do with the property.” She claimed she could not understand how a snowmobile trail could be put on the corridor, but she admitted that she never told anyone that plaintiffs owned the corridor.

Plaintiffs’ son Duane also testified that he cut brush in the corridor and “put the deer blinds out and posted it.” He testified that “there’s always been a blind out there” on the corridor and that he hunted from it every day during deer season. Duane said that he asked other hunters to leave the corridor when he was hunting from the blind, but admitted that he never asked any rabbit hunters to leave. Duane admitted seeing D&M employees removing track sometime in the late 1980s, that he did not tell them to leave, and he did not know if they had permission to enter the corridor from anyone in his family. Duane testified that there would be rabbit hunters on the corridor most weekends, including in December. He also admitted that he had no way to know who was on the snowmobiles using the corridor, and that he never put up “no trespassing” signs for snowmobiles.

Larry Marzean of the Alpena Snowmobile Association testified for defendant. Marzean testified that he had ridden a snowmobile on the corridor and that it was never obstructed “by anything, any fences or anything like that” in the 1970s. He testified that he groomed the corridor for use as a snowmobile trail after obtaining a lease from D&M in 1997. Marzean said the association groomed trails three times a week during the season and installed a gate across the corridor in 1998. He also testified that he and “lots of other folks” used the rail corridor for snowmobiling without permission. He stated that, once, after the club leased the corridor from D&M, Cramer told him to leave while he was in front of plaintiffs’ house posting trail signs, although he said that Cramer did not claim ownership of the corridor.

Randy McKenzie, the DNR coordinator for the snowmobile trails program in Alpena, Presque Isle, and Montmorency counties, also testified. McKenzie said he began contacting D&M about using the corridor for a snowmobile trail beginning in 1988. He testified that, after defendant bought the corridor, he went to adjacent landowners, told them about the state’s claim of ownership and that the state planned to put a recreation trail in. McKenzie also testified that plaintiffs “thought that was their land.” He testified that Gerald Cramer “asked me if I had proof that the State owned it.” McKenzie also testified that he observed and removed a deer blind from the railroad grade in the corridor in 1996.

The court admitted de bene esse depositions from two former D&M employees, Paul Beyer and William Bartlett. Bartlett testified that D&M or sister-company employees kept inspecting the corridor to police encroachments after trains stopped running and that the company reacted to encroachments promptly. Bartlett said he walked over the corridor through plaintiffs' property in 1981 and did not see "no trespassing" signs. Bartlett stated that "[d]eer blinds in general would appear at deer season and disappear" along the corridor. He testified that D&M quitclaimed the disputed right-of-way to defendant in 1998, testifying that railroads normally only issued quitclaim deeds because insurers would not write title insurance for railroads. Beyer stated that he inspected the line and posted "no trespassing" signs along it annually. He said he knew of no claims of ownership against D&M property along the line from 1967 to 1983 and that he never saw deer blinds "on or near" the D&M right of way during his inspections. Beyer had no specific memory of plaintiffs' property or encroachments there, but he testified that "if there were any, I probably would have noticed." Beyer also testified that the company maintained fences along its right of way and used signs to alert others to the company's ownership. Beyer stated that he never saw anyone else's "no trespassing" signs along the right of way.

The parties entered four facts into the record by stipulation:

2. That Plaintiffs did not contact the Alpena Power Company concerning the power lines and poles located in the subject right of way between 1971 and present date.

3. That Plaintiffs did not block physical access to the subject right of way from Harrison Road and Kaiser Road between 1971 and 1988.

4. That Plaintiffs did not erect gates, fences, or any other barrier that blocked physical access to the subject right of way between the years 1971 and 1988.

5. That Plaintiffs were aware that persons_[,] who had not obtained their consent to do so, periodically rode snowmobiles for recreational purposes up and down the subject right of way between the years 1971 and 1988.

In its judgment, the court noted that, although D&M stopped servicing the corridor in 1967, "D&M employees continued to inspect the corridor from that time until 1998 when the property was conveyed to the State of Michigan." The court also noted that, "Plaintiffs and one or more of their children have hunted deer during the regular deer rifle season virtually from the time of their living there in 1959 until the present. They erected blinds on it in at least two areas of the railroad property, one of the blinds being right on the railroad easement itself." The court found that, during deer hunting season, plaintiffs' "use of the property during the month of November and first five days of December was exclusive and during that time, they cleared brush, prepared areas for hunting, erected blinds thereon, removed blinds therefrom, and otherwise exercised control over the entire length of the corridor property" and also that they crossed the corridor to get to a portion of their property "at least since the mid-1960's." However, the court found that plaintiffs' use of the property "at times other than the time period set forth above was not continuous and not exclusive" because "the area was used by other small

game hunters and used for many years by snowmobilers without the permission or consent of Plaintiffs.”

The court entered judgment, dismissing defendant’s trespass counterclaim and giving plaintiffs “exclusive right to possession and use of the . . . corridor through their property for the period of November 1 through December 5 of every year” and the right to cross the corridor “at any and all times of the year to gain access to the land owned by them South and West of the corridor.” The court ordered a copy of the judgment to be filed with the local registrar of deeds.

II.

“Although actions to determine interests in land are equitable in nature and are thus reviewed de novo, we review the trial court’s findings of fact for clear error.” *Slatterly v Madiol*, 257 Mich App 242, 248-249; 668 NW2d 154 (2003). Thus, this Court reviews the court’s factual findings for clear error and conducts a de novo review of the trial court’s application of the law.

[W]e conclude that “clear 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).]

III.

Defendant argues that the trial court erred in granting plaintiffs adverse possession of the disputed property for a portion of every year. Defendant first argues that Michigan law does not recognize any such entitlement to property for only a portion of a year. Further, defendant argues that the evidence presented at trial did not support a finding of adverse possession. We agree with both arguments.

“The doctrine of adverse possession is strictly construed. The party alleging title by adverse possession must prove the same by clear and positive proof.” *Strong v Detroit & Mackinac R Co*, 167 Mich App 562, 568; 423 NW2d 266 (1988).

Initially, the court concluded that “Plaintiffs have proven the elements necessary to gain exclusive possession of the corridor” for a specified period each year. However, this contradicts the court’s previous, unqualified conclusion that “the successor to D&M conveyed valid title to the property when the same was conveyed to the State in 1998.” If D&M’s successor conveyed valid title, then the court erred in determining that plaintiffs obtained title through adverse possession:

Michigan courts have followed the general rule that *the expiration of the period of limitation terminates the title of those who slept on their rights and vests title in the party claiming adverse possession. Gardner v Gardner*, 257 Mich 172, 176; 241 NW 179 (1932). Thus, assuming all other elements have been established, one gains title by adverse possession when the period of limitation expires, not when an action regarding the title to the property is brought. [*Gorte v Dep't of Transportation*, 202 Mich App 161, 168-169; 507 NW2d 797 (1993) (emphasis added).]

Defendant's quitclaim deed gave it "all the estate which the grantor could lawfully convey." MCL 565.3. Thus, the meaning of the court's conclusion that defendant received "valid title to the property . . . in 1998" is unclear. If plaintiffs had any interest, it must have vested before 1998, contrary to the court's other conclusion.

Even more fundamentally, the court erred in concluding that "the law allows adverse possession to be gained for limited purposes" when granting plaintiffs an "exclusive right to possession and use" of the corridor for thirty-five days each year. The court appears to have reasoned that a claimant could obtain an interest in the property that was more than an easement but less than a fee:

So I always wondered, can you get adverse possession over only a part; and that's real clear, the case you cited says that. That's why they have sent it back and said tell us what part you think he adversely possessed.

So then the other question is, forget parts; the next question is if you get adverse possession on a seasonal basis, like a cottage, or a hunting camp, hunting land, then can you use it year round or just during the season? I think there is some good law on that that says, yeah, you can do that. You might want to look at that sort of thing.

However, the trial court's view that adverse possession may be obtained on essentially a seasonal basis was erroneous. *Gorte, supra* at 168. "A title acquired by adverse possession is in every respect as good as a title by deeds running back to the government. In fact, it is an actual, absolute, complete, and perfect legal title in fee simple, carrying all the remedies attached thereto." 3 Am Jur 2d § 248, p 286. "A title acquired through adverse possession permits of no condition or limitation sounding in permission or consent. Thus, a condition of reverter may not be imposed on a title acquired by adverse possession." *Id.*

Also, Michigan law does not sanction any form of estate that gives two parties ownership—the exclusive right to possess and use land—on an alternating basis. See MCL 554.43 (enumerating types of estates in real property with no reference to alternating ownership). New forms of interest in land cannot be created as the trial court would do in this case:

[T]he law has classified and defined all the various interests and estates in lands which it recognizes the right of any individual to hold or create, and the definition of each is made from, and the estate known and recognized by the

combination of certain legal incidents, many of which are so essential to the particular species of estate that they cannot, by the parties creating it, be severed from it, as this would be to create a new and mongrel estate unknown to the law, and productive of confusion and uncertainty. [*Mandlebaum v McDonell*, 29 Mich 78, 92 (1874).]

Therefore, the court erred by concluding that it could grant plaintiffs anything other than fee simple ownership of the disputed corridor or an easement by prescription.

Title through adverse possession gives the claimant a fee simple, but an easement is less than a fee. An easement can be obtained through prescription, a form of adverse possession: “To establish adverse possession, the claimant must show that its possession is actual, visible, open, notorious, exclusive, hostile, under cover of claim or right, and *continuous and uninterrupted* for the statutory period of fifteen years. An easement by prescription requires similar elements, except exclusivity.” *West Michigan Dock & Market Corp v Lakeland Investments*, 210 Mich App 505, 511; 534 NW2d 212 (1995) (citations omitted, emphasis added). The possessor of an easement may enter the land of another without taking anything:

See *St Cecelia Society v Universal Car & Service Co*, 213 Mich 569, 576-577; 182 NW 161 (1921), quoting 9 RCL, Easements, § 2 (“ ‘An easement has been defined as a liberty, privilege or advantage in land *without profit*, existing distinct from the ownership of the soil. It is a right which one person has to use the land of another for a specific purpose.’ ”); 28A CJS, Easements, § 2, pp 166-167 (“Generally, an easement is a right that one has to use another's land for a specific purpose that is not inconsistent with the other's ownership interest”); 25 Am Jur 2d, Easements and Licenses, § 71, p 568 (“The rights of any person having an easement in the land of another are measured and defined by the purpose and character of the easement.”). [*Michigan Dep't of Natural Resources v Carmody-Lahti Real Estate, Inc*, 472 Mich 359, 379 n 42; 699 NW2d 272 (2005) (emphasis added).]

The trial court, without naming the interest, appears to have concluded that plaintiffs had obtained a right to hunt on the corridor. But that is an entirely different estate:

The right of hunting on premises is an incorporeal right, growing out of real estate, which, by the common law, was conveyed by grant, inasmuch as livery of seisin could not be made of it. This right has been termed by law writers a grant of a ‘*profit a prendre*.’ A ‘*profit a prendre*’ is some right growing out of the soil. . . . But, whatever inconsistencies appear, it is settled by all the authorities worth heeding that this right may be segregated from the fee of the land and conveyed in gross to one who has no interest and ownership in the fee, and when so conveyed in gross it is assignable and inheritable.

The rule laid down by 12 RCL 689, is as follows:

“Though one person has no natural right to hunt on the premises of another, it is clear that a right to do so may be acquired by a grant from the owner,

or the owner can convey his premises and reserve to himself the hunting and fowling rights thereon. An owner of lands may convey exclusive hunting rights thereon to others, so as to bar himself from hunting on his own premises. He may make a lease of the hunting privileges, giving the lessee the exclusive right to kill game or water fowl on the premises, and at the same time reserve to himself the pasturage rights on the premises. The right to hunt on another's premises is not a mere license, but is an interest in the real estate in the nature of an incorporeal hereditament, and as such it is within the statute of frauds and requires a writing for its creation. Nor is the right of one person to hunt or fowl on premises owned and in the possession of another an easement, for, strictly speaking, an easement implies that the owner thereof shall take no profit from the soil. The right is more properly termed a *profit a prendre*. Unless the grant otherwise determines the rights of the parties, the owner of the hunting privileges may assign his rights to another, but he cannot give a pass or permit to another, so as to allow the latter to exercise hunting privileges on the premises. In the absence of anything to the contrary, in a grant of hunting or fowling privileges, the right to hunt and fowl is limited to the usual and reasonable methods generally used in the vicinity at the time of the execution of the grant, and the grantor is under no obligation to maintain a preserve for the pleasure and sport of the grantee, but the latter must exercise the right in the condition it may be at the time of the grant. Thus, if the owner of land conveys to others the right to hunt water fowl upon the waters thereof, he is not liable for depreciation in the value of such fowling rights from his acts in clearing and draining the land, provided he does so in good faith for the purpose of improving it.”

* * *

“A *profit a prendre* in gross is ordinarily regarded as freely transferable and inheritable. A *profit a prendre* appurtenant passes *prima facie* upon a transfer of the dominant tenement.” Tiffany, Real Property, vol. 2 (2d Ed.) § 382.

* * *

The cases, both in [the] United States and in England, have recognized the doctrine that a profit in gross may be created in fee, without being appurtenant to a dominant estate. [*St. Helen Shooting Club v Mogle*, 234 Mich 60, 65-70; 207 NW 915 (1926) (italics in original; underlining added for emphasis).]

Even assuming that plaintiffs obtained a profit to hunt deer, the judgment fails to state whether that profit is in gross or appurtenant and whether it applies solely to the elderly plaintiffs or whether their sons also obtained similar profits. Further, under *St Helen Shooting Club*, where a landowner grants a profit, the grantor is not obliged to maintain the land so that the profit may be used. *Id.*, 68. Therefore, defendant could build, for example, a year-round rails-to-trails project for hikers and bicycles, uses that are incompatible with hunting.

Further, plaintiffs failed to show that they satisfied the conditions necessary to obtain an interest in the rail corridor by adverse possession. Our Supreme Court discussed adverse

possession and less-than-continuous occupations in *Ennis v Stanley*, 346 Mich 296, 301; 78 NW2d 114 (1956):

McVannel v Pure Oil Co, 262 Mich 518, 525, 526 [247 NW 735 (1933)], after referring to prior decisions involving claims of title by adverse possession, summarized the following general principles:

“a. Constructive possession of land is in the holder of a record title;

“b. A mere claim of title, no matter how long asserted, will not ripen into title;

“c. Occasional or periodical entry upon land does not constitute actual possession;

“d. In order to make good a claim of title by adverse holding, the true owner must have actual knowledge of the hostile claim; or,

“e. The possession must be so open, visible, and notorious as to raise the presumption of notice to the world that the right of the true owner is invaded intentionally, and with the purpose to assert a claim of title adversely to his, so that if the true owner remains in ignorance it is his own fault;

“f. There must be such continuity of possession as will furnish a cause of action for every day during the whole period required to perfect title by adverse possession;

“g. The possession must be more than a possession which will enable a person on the ground of a possessory title to maintain trespass or ejection against a stranger;

“h. Occasional trespasses or acts of ownership do not constitute such continuous possession as will ripen into title by adverse possession, though extending over the statutory period;

“i. Casual hay cutting, amounting to a little more than an annual trespass, is not sufficient to warn the owner of the record title of a claim of adverse possession.”

The parties’ joint stipulation shows that the court erred by concluding that plaintiffs obtained an interest in the land by adverse possession. The court noted that D&M inspections continued until 1998. Therefore, plaintiffs’ possession was not sufficient “to signal to the true owner that a claim of title contrary to his or her own is being asserted.” 3 Am Jur 2d, § 74, p 150. Further, the court’s comments suggest it believed that plaintiffs could obtain a periodic right to possess and use the corridor. But “possession that does not amount to an ouster of the owner of land is not sufficiently exclusive to support adverse possession because, in the absence of ouster, the owner of the legal title constructively possesses the property. Thus, an adverse possessor cannot share the disputed property with the true owner.” 3 Am Jur 2d, § 69, pp 144-

145. “To constitute an ouster of the record owner, it is generally only necessary that the adverse claimant enter and take possession of the lands as if they were the claimant’s own, and *with the intention of holding them to the exclusion of all others.*” *Id.*, § 70, p 145 (emphasis added). “For adverse possession of real property to ripen into title, it is necessary to show that the possession has been *continuous and uninterrupted for the full statutory period.* . . . The moment the possession is broken . . . the law restores the constructive possession of the owner.” *Id.*, § 73, p 148 (emphasis added).

Therefore, we reverse the judgment of adverse possession in favor of plaintiffs.

/s/ Peter D. O’Connell

/s/ David H. Sawyer

/s/ William B. Murphy