

STATE OF MICHIGAN
COURT OF APPEALS

LAWRENCE D. FRANSTED and
RUTH S. FRANSTED,

UNPUBLISHED
July 24, 2003

Plaintiffs-Appellants,

v

FRANKLIN J. ROBISON, LINDA ROBISON
and JOHN H. ROBISON,

No. 239204
Isabella Circuit Court
LC No. 01-000428-CH

Defendants-Appellees.

Before: Zahra, P.J., and Talbot and Owens, JJ.

PER CURIAM.

Plaintiffs appeal by right from a judgment holding that plaintiffs had not acquired title to a strip of land by adverse possession, had not acquired a prescriptive easement, and, in any event, were equitably estopped from asserting the claim against defendants. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiffs and defendants own neighboring properties. Plaintiffs have used an old county road south of their border as a dirt covered driveway. An approximate thirty by 610-foot strip lies between the county road right-of-way and the property to the south, including a southwest parcel owned by defendants. Plaintiffs presented testimony showing that they had mowed the strip and planted flowers on it since 1961. Further, they claimed that they had used the strip, without permission, to park vehicles and equipment used in their construction and sand businesses at least since 1961. In 1998 or 1999, defendants decided to develop and sell the property, and asked plaintiffs to remove the equipment. Plaintiffs then expressly asserted that they had a claim of right to the strip. On appeal, plaintiffs are challenging only the determination that they were not entitled to a prescriptive easement.

An easement by prescription arises from a use of the servient estate that is open, notorious, adverse, and continuous for a period of fifteen years. *Goodall v Whitefish Hunting Club*, 208 Mich App 642, 645; 528 NW2d 221 (1995). Adversity in this context means hostile use, or “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 [for trespassing].” *Plymouth Canton Community Crier, Inc v Prose*, 242 Mich App 676, 681; 619 NW2d 725 (2000), quoting *Goodall, supra*, at 646. Plaintiffs first argue that the trial court clearly erred in finding that their use was not adverse and notorious. However, these are two different elements. Regarding

adversity, we conclude that the trial court did err in finding that the use was not hostile. One could clearly sue another for trespassing if massive vehicles and equipment were continuously or even periodically parked on one's property.

The trial court also erred to the extent it found that the use was not continuous since the occupation was not every day for fifteen years. In *Dummer v United States Gypsum Co*, 153 Mich 622, 631; 117 NW 317 (1908), the Court stated:

A continuous use . . . does not necessarily mean a daily, constant and unintermittent use; but it means that the acts constituting the use shall be of such frequency as to give notice to the owner of the land of the right claimed against him. A voluntary cessation of the use for a short time would not constitute an interruption so as to prevent the acquirement of a prescriptive right, unless it appeared that the person enjoying the right has no intention of resuming the right.

See also *St. Cecilia Society v Universal Car & Service Co*, 213 Mich 569, 577; 182 NW 161 (1921). In finding that continuous use required use every day, the trial court relied on *Ennis v Stanley*, 346 Mich 296, 303; 78 NW2d 114 (1956), where the Court found that use of a disputed parcel for farming was not continuous when “[u]nquestionably there were years when no part of the 6-acre tract was worked. The use made thereof . . . was intermittent in character.” While the court held that “[t]here must be such continuity of possession as will furnish a cause of action every day during the whole period required to perfect title by adverse possession,” *Id.* at 301, a cause of action could exist every day even if the property was not being used every day.

However, continuity requires “such frequency as to give notice to the owner of the land of the right claimed against him.” *Dummer, supra*. Here, the trial court tied continuity to the open and notorious requirement, and noted that even though the plaintiffs had used the property for more than fifteen years to park vehicles and equipment, continuity was disrupted since the items were moved from time to time. It also noted that the pictures and testimony did not always clearly indicate whether the vehicles were parked on the right-of-way, the road or the disputed strip since there was nothing to mark where one began and another ended. This is best illustrated by comparing exhibit 3, a photograph of 2 trucks, which was taken in 1964, with a 1982 aerial photograph. The first truck in exhibit 3 is to the right of a telephone pole. Plaintiff testified that this truck was in the right-of-way. However, given the placement of the telephone pole on the aerial photograph, one would surmise that the first truck in exhibit 3 is in the disputed strip. The court's doubt as to the accuracy of the testimony placing the items on the strip as opposed to the right-of-way therefore appears to be well founded. Accordingly, we find no clear error in the court's determination that there was insufficient proof of continuity. See *Killips v Mannisto*, 244 Mich App 256, 258; 624 NW2d 224 (2001).

Affirmed.

/s/ Brian K. Zahra
/s/ Michael J. Talbot
/s/ Donald S. Owens