

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

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JAMES A. ANDERSON, PATRICIA A.  
ANDERSON, and APJ PROPERTIES, LLC,

UNPUBLISHED  
January 16, 2007

Plaintiffs/Counter  
Defendants/Third-Party  
Defendants-Appellees,

v

ELDON E. JOHNSON,

Defendant/Counter Plaintiff-  
Appellant,

No. 263972  
Charlevoix Circuit Court  
LC No. 03-198119-CH

and

NORMA CAMP, JOHN H. REIS, EUGENE  
SAENGER, JAMES L. ELLIOTT as Trustee of the  
JAMES L. ELLIOTT Trust, JOYCE DUKE,  
EUGENE N. CHARDOUL, NAN RUTH  
CHARDOUL, ROBERT SILVER, MARILYN  
SILVER,

Third-Party Plaintiffs-Appellants

and

MICHAEL TRESE, and CARON E. TRESE,

Third-Party Plaintiffs.

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Before: Murray, P.J., and Fitzgerald and Owens, JJ.

PER CURIAM.

In this easement dispute, defendant and third-party plaintiffs appeal as of right the order granting judgment in favor of plaintiffs James and Patricia Anderson and APJ Properties, LLC (APJ).<sup>1</sup> We affirm.

This case involves property along the northern shore of Round Lake in Charlevoix. The area involved is bounded by Round Lake on the south, Dixon Avenue on the north, Michigan Avenue on the west, and Burns Street on the east.<sup>2</sup> Plaintiffs James and Patricia Anderson purchased property located at 304 Dixon Avenue in 1997 from the Martin family. This property was later transferred to APJ, which is wholly owned by the Andersons. The Andersons purchased the neighboring property to the west in 2003 from the Jerome family. The Jeromes purchased their property from the Hawley family in 1992. The property to the east of 304 Dixon Avenue is owned by defendant Eldon Johnson and his wife Pamela, who purchased their property from Fred Willis in 1986. The remaining parties to this lawsuit own property situated to the east of the Johnsons.

Many of the homes in this area are on the level of Dixon Avenue, but the lots associated with these homes drop off sharply before flattening out again near the waterfront. It is undisputed that a road now runs from Burns Street across the lower level of the properties involved in this dispute. The road is paved near Burns Street but then becomes a dirt or gravel two-track. It is the use of this two-track for access to the lower level of the parcels now owned by plaintiffs that is disputed. The trial court determined that a prescriptive easement exists over the two-track to provide access to the waterfront portions of plaintiffs' properties.

“An easement by prescription results from use of another’s property that is open, notorious, adverse, and continuous for a period of fifteen years.” *Higgins Lake Prop Owners Ass’n v Gerrish Twp*, 255 Mich App 83, 118; 662 NW2d 387 (2003). Defendant and third-party plaintiffs challenge the trial court’s conclusion that plaintiffs had proven adverse or hostile use and continuous use of the two-track for the prescriptive period. This Court reviews a trial court’s holding in an equitable action de novo. *Id.* at 117. However, “[t]he extent of a party’s rights under an easement is a question of fact,” *Little v Kin*, 249 Mich App 502, 507; 644 NW2d 375 (2002), reviewed for clear error, *Higgins Lake Prop Owner’s, supra* at 117.

The trial court did not clearly err in concluding that the two-track had been continuously used to access plaintiffs’ property for a period in excess of 15 years. When privity of estate exists, “[a] party may ‘tack’ on the possessory periods of predecessors in interest to” realize the fifteen-year period. *Killips v Mannisto*, 244 Mich App 256, 259; 624 NW2d 224 (2001). Plaintiffs received a description of the disputed easement in their deed and have the necessary

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<sup>1</sup> References herein to third-party plaintiffs are not references to Michael and Caron E. Trese, who were dismissed from this appeal pursuant to stipulation. *Anderson v Johnson*, unpublished order of the Court of Appeals, entered October 20, 2006 (Docket No. 263972).

<sup>2</sup> Michigan Avenue was formerly known as Bridge Street and was sometimes referred to by that name in the trial court.

privity to tack the possessory periods of their predecessors in title.<sup>3</sup> Additionally, testimony showed that the two-track was continuously used during the boating season to access the lower portions of the property now owned by plaintiffs at least from 1976 to the present. Specifically, Robert Morgridge testified that he started storing boats off the Martin property in 1976 and continued to do so until shortly before Lucille Martin sold the property in 1997. He testified that he used the two-track from Burns Street to access the Martin family's lower property approximately three to four times a week from May to September. He testified that he would actually park in a clearing that was located partially on the Martin property and partially beyond that property.

Morgridge's testimony concerning continued use of the two-track to service the lower parcels now owned by plaintiffs mirrored the testimony of many others who also testified that they used the two-track to access the lower levels of the Martin and Hawley properties for shorter periods beginning at least as early as the 1960s. While the trial court found that some vegetation grew in the area because of decreased use during 1969 and 1970, it correctly noted that this fact did not preclude a finding of continued use of the two-track to access the Hawley and Martin parcels, where there was testimony of continued use during that time by Paul Martin, John Ochs, and Don Ward. Accordingly, we conclude that the trial court did not clearly err in finding that the two-track from Burns Street was continuously used for a period in excess of 15 years to access the Hawley and Martin parcels.<sup>4</sup>

Thus, the main issue to be resolved is whether the use of the two-track to access the lower parcels now owned by plaintiffs was adverse during this time frame. ““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 . . . .”” *Plymouth Canton Community Crier, Inc v Prose*, 242 Mich App 676, 681; 619 NW2d 725 (2000), quoting *Goodall v Whitefish Hunting Club*, 208 Mich App 642, 646; 528 NW2d 221 (1995), quoting *Mumrow v Riddle*, 67 Mich App 693, 698; 242 NW2d 489 (1976). Certainly, the use of the two-track to access the property now owned by plaintiffs entitled the owners of the properties east of plaintiffs' property to a cause of action against the intruders at the outset of such use. Further, there is no evidence that permission was expressly requested or given until 1986 when the Johnsons purchased their property.

However, the use of the two-track was mutual, in that the two-track was maintained for the joint benefit of and used by all of the waterfront property owners. *Cheslek v Gillette*, 66 Mich App 710, 714-715; 239 NW2d 721 (1976). Mutual use in the absence of evidence

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<sup>3</sup> Although a copy of the deed transferring 304 Dixon Avenue to APJ was not included in the record, privity clearly exists where APJ is wholly owned by the Andersons, who are able to tack the possessory periods of their predecessors in interest.

<sup>4</sup> We note that the evidence supports a finding that two-track was used to access that lower level of the Martin and Hawley properties for a period greater than 15 years before the Johnsons purchased their property in 1986, when defendant allegedly gave the Martins and Hawleys permission to continue using the two-track.

concerning an express grant or denial of permission until 1986 is generally insufficient to establish a prescriptive easement. *Plymouth Canton Community Crier*, *supra* at 684.

Nonetheless, because the two-track has been used for a period significantly in excess of that required to establish a prescriptive easement, defendant and third-party plaintiffs bore the burden of producing evidence that the use of the two-track was permissive before the Johnsons purchased their property. *Reed v Soltys*, 106 Mich App 341, 346; 308 NW2d 201 (1981). This shifting of the burden of production relies on the presumption that when use has continued for a long period of time, the use originated pursuant to a grant.<sup>5</sup>

Here, the two-track would have been used to access the Hawley and Martin parcels for approximately 40 and 44 years respectively before this action was commenced. This period of long use was sufficient to shift the burden of production regarding permission. *Haab v Moorman*, 332 Mich 126, 144; 50 NW2d 856 (1952); *Reed*, *supra* at 346. Defendant and third-party plaintiffs produced evidence that defendant informed the Hawleys and Martins that they could only continue to use the two-track to cross his property with his permission when the Johnsons purchased their property in 1986. Defendant also testified that Robert Martin told him that use of the two-track was on a permissive basis previously, although no evidence corroborating this allegation was presented.

In reviewing the evidence, the trial court concluded that the fact that Elmer Hawley and Robert Martin requested a written easement from defendant did not indicate an acknowledgement that they were using the two-track with permission rather than as of right, but instead indicated that they simply wanted a written easement to prevent the type of litigation that is now before the courts. Thus, the trial court rejected the evidence of permissive use before the Johnsons purchased their property. The trial court went on to conclude that because the use of two-track was more than a mere convenience for plaintiffs and because the long and open usage of the two-track was sufficient to give the neighboring property owners notice that their rights were being invaded, plaintiffs had established their right to a prescriptive easement. We conclude that the evidence does not clearly preponderate against the trial court's findings.

In this case, the evidence of usage of the two-track to access the parcels now owned by plaintiffs for a period many years in excess of that required to establish a prescriptive easement has given rise to circumstances that militate against disturbing usage of the two-track. It appears that access to the lower portion of plaintiffs' parcels by means of a previously recorded easement

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<sup>5</sup> *Dyer v Thurston*, 32 Mich App 341, 343; 188 NW2d 633 (1971). It has been asserted that this shifting of the burden of production on the issue of permission stands in conflict with the mutual use doctrine, see *Frandorson Properties v Northwestern Mut Life Ins Co*, 744 F Supp 154, 158 (WD Mich, 1990), which relies on the fact that permissive use (i.e., licensed use) cannot ripen into a prescriptive easement. However, shifting the burden of proof relies on the presumption of a grant, not a license. *Dyer*, *supra* at 343. Thus, the doctrines do not conflict. In fact, despite the presumption of a lost grant based on the passage of time, the burden remains on the party claiming the easement to show entitlement to it based on prescription, only the burden of production regarding permissive versus non-permissive use is shifted.

to Michigan Avenue has been cut-off by development. Thus, this case is distinguishable from *Frandonson Properties* in which it was held that the presumption of a grant might not be appropriate because the presumption was disconnected from its purpose. *Frandonson Properties, supra* at 158. In fact, the evidence presented here indicates that the two-track was continuously used without permission, asked or granted, to access the Martin property from Burns Street from 1959 to at least 1986, and that the two-track was continuously used without permission asked or granted to access the Hawley property from Burns Street from the early 1960s to at least 1986. Accordingly, the period of long usage in this case has given rise to a presumption of a lost grant, and thus non-permissive use, which undermines the applicability of the mutual use doctrine which relies on a presumption of permissive use. *Id.* at 157. Therefore, the trial court did not clearly err by determining that plaintiffs had met their burden of establishing adverse use for the prescriptive period, and thus their right to a prescriptive easement for access to the lower portions of their parcels along the two-track from Burns Street.

Defendant and third-party plaintiffs also assert that the trial court erred by admitting into evidence two affidavits. One was prepared in 1990 by Thomas Hawley, whose parents Elmer and Esther Hawley had first purchased the lower level of the Hawley property.<sup>6</sup> It describes the Hawley family's usage of the two-track. The other affidavit was prepared in 1997 by Lucille Martin, who purchased the lower level of the Martin property along with her husband in 1959, and details the Martin family's usage of the two-track.<sup>7</sup> "[T]he decision whether to admit or exclude evidence is reviewed for an abuse of discretion." *Elezovic v Ford Motor Co*, 472 Mich 408, 419; 697 NW2d 851 (2005). However "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected." MRE 103(a).

We first note that defendant and third-party plaintiffs have failed to indicate how the allegedly improper admission of the affidavits has affected their substantial rights. "It is not sufficient for a party 'simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.'" *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998) (citation omitted). In any event, we hold that any error in the admission of the affidavits was harmless because, as the trial court specifically concluded, there was sufficient evidence to find that a prescriptive easement exists even if the challenged affidavits are not considered.

Finally, defendant and third-party plaintiffs assert that access to plaintiffs' parcels by means of the two-track from Burns Street should have been limited to seasonal usage. We disagree.

An easement is merely the right to use the land of another for a specified purpose. *Killips, supra* at 258. "An easement does not displace the general possession of land by its owner, but merely grants the holder of the easement qualified possession only to the extent

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<sup>6</sup> Thomas died before this lawsuit was commenced.

<sup>7</sup> Lucille Martin died before this lawsuit was commenced.

necessary for the enjoyment of the rights conferred by the easement.” *Schadewald v Brule*, 225 Mich App 26, 35; 570 NW2d 788 (1997). Thus, a prescriptive easement is generally limited in scope by the manner in which it was acquired and “previous enjoyment.” 25 Am Jur 2d, Easements and Licenses, § 81, p 579. On the other hand, one who holds a prescriptive easement “is allowed to do such acts as are necessary to make effective the enjoyment of the easement, and the scope of the privilege is determined largely by what is reasonable under the circumstances.” *Killips, supra* at 261.

While much of the evidence presented established that the major period of use of the two-track fell between April and October, there was testimony that major maintenance work on the docks would sometimes need to be performed in the off-season and that the two-track was used for access to the docks. Use of the two-track for that purpose does not unreasonably burden the servient estates. Because such use of the access easement appears to be reasonable under the circumstances, the evidence does not clearly preponderate against the trial court’s ruling. *Killips, supra* at 261. Thus, we conclude the trial court did not clearly err by failing to specifically limit the use of the two-track to spring, summer, and fall.

Affirmed.

/s/ Christopher M. Murray  
/s/ E. Thomas Fitzgerald  
/s/ Donald S. Owens