S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

HENRY LEE and MIRJANA KREMONIC-LEE, Plaintiffs-Appellees, v GERALD E. BURTON, Defendant-Appellant.	UNPUBLISHED January 27, 2004 No. 243153 Oakland Circuit Court LC No. 99-017805-CH

Before: Fort Hood, P.J., and Bandstra and Meter, JJ.

PER CURIAM.

In this quiet title action, defendant appeals as of right from the trial court's judgment in favor of plaintiffs. Defendant contends that the trial court erred in failing to find that plaintiffs' express easement was abandoned, or alternatively, that the easement was extinguished by adverse possession by defendant. We affirm.

An action to quiet title is equitable in nature. *Killips v Mannisto,* 244 Mich App 256, 258; 624 NW2d 224 (2001). This Court reviews the trial court's findings of fact for clear error, and its conclusions of law de novo. *Id*. Clear error occurs when the reviewing court is left with a firm and definite conviction that a mistake has been made. *Massey v Mandell,* 462 Mich 375, 379; 614 NW2d 70 (2000).

Defendant alleges that the trial court erred in relying upon the language in *Crew's Die Casting Corp v Davidow,* 369 Mich 541, 543; 120 NW2d 238 (1963), which required either fraud or adverse possession in order to find abandonment of an express easement. He argues that this standard is too high, and that the standard should be:

> To prove abandonment, both an intent to relinquish the property and external acts putting that intention into effect must be shown. Nonuse, by itself, is insufficient to show abandonment. Rather, nonuse must be accompanied by some act showing a clear intent to abandon. [*Ludington & Northern Railway v Epworth Assembly*, 188 Mich App 25, 33; 468 NW2d 884 (1991) (Citations omitted).]

We need not decide here which is the applicable standard because defendant does not even meet the one he contends is proper.

Defendant's reliance upon *Jones v Van Bochove*, 103 Mich 98; 61 NW 342 (1894), and *Bricault v Cavanaugh*, 261 Mich 70; 245 NW 573 (1932), do not support his position. In *Jones*, an easement was granted to the Portland Cement Company in a deed which stated as follows: "The right of way for a railroad, running from the marl bed of said cement company to their works, on the west side of the Kalamazoo river …." *Id.* at 100. Years later, the state of the property was as follows: "The evidence is uncontradicted that the railroad was taken up, the rails and ties removed, the fences taken away, and the bridge across the river torn down. The acts of abandonment seem to have been complete, and … all these acts were done for the purpose and with a view to abandon the right of way." *Id.* at 100-101. Our Supreme Court concluded that the intent to abandon coupled with the destruction of the object for which the easement was created, *id*. at 101, resulted in abandonment, stating: "Mere non-user [sic] may not amount to an abandonment, but non-user [sic] with so clear an intent to abandon as here shown amounts to an absolute abandonment.…" *Id.* at 101-102.

In *Bricault*, our Supreme Court interpreted the language of an easement to find an express easement for a joint driveway. However, the Court also determined that the construction of the home of one of the parties covering the entire portion of the lot reserved for the easement was sufficient evidence of abandonment of the easement. The Court observed as follows: "The testimony shows that their dwelling house occupies the entire portion of their lot reserved for the easement." *Bricault supra* at 73. The Court went on to conclude, "We think this obstruction, which prevents enjoyment of the easement by either party amounts to an extinguishment or at least shows an abandonment by the plaintiffs." *Id*. Thus, in *Jones, supra*, and *Bricault, supra*, the clear intent to abandon was coupled with acts that destroyed the objective for which the easement was created.

In the case at bar, similar evidence of a clear intent to abandon is lacking. Plaintiffs' predecessors built an eight-foot-high chain link fence over the easement area to keep some dogs and children away, and built an alternate driveway making the easement much less necessary. However, plaintiffs' predecessors testified that they never intended to give up the easement, and never expressed an intent to give up the easement. When the property was exchanged among plaintiffs' predecessors, the deeds evidencing the property transfers continued to provide for the original easement. Moreover, the testimony indicates that shortly after plaintiffs purchased the property, they began to have the fence torn down and were planning home improvements by accessing the easement. There was no indication that the erection of the fence, that could readily be removed, destroyed the objective for which the easement was created. *Jones, supra*. Further, plaintiff Kremonic-Lee testified that she specifically inquired about the validity of the easement in discussions with the real estate agent and the seller before she purchased the property. On the contrary, defendant testified that he was unaware of the existence of the easement despite a provision in his property transfer deed stating that it was taken "subject to easement and building usage restrictions of record."

Thus, we conclude that neither plaintiffs nor their predecessors in interest ever expressed the intent to abandon the express easement. Moreover, we conclude that the building of the chain link fence and an alternate access driveway are insufficient to demonstrate a "clear intent" to abandon an express easement.

Defendant also alleges that he acquired the easement via adverse possession. To establish adverse possession, defendant must demonstrate that his possession was actual, visible,

open, notorious, exclusive, hostile, under cover of claim or right, and continuous and uninterrupted for the statutory period of fifteen years. *West Michigan Dock & Market Corp v Lakeland Investments*, 210 Mich App 505, 511; 534 NW2d 212 (1995). The doctrine of adverse possession is strictly construed, and 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). Defendant's argument on appeal is directed only at the requirement of hostility.

"In Michigan use of an easement by the owner of the servient estate will not ripen into adverse possession unless such use is inconsistent with the easement." *Nicholls v Healy*, 37 Mich App 348, 349; 194 NW2d 727 (1971). In *Nicholls*, the *servient* estate installed a fence with a gate, two rows of trees, and a bathhouse on the easement property. Nonetheless, this Court found that there was no adverse possession because none of these uses "seriously blocked passage" on the easement. *Id*. at 350. Therefore, this Court concluded that "the record here fails to establish acts evidencing hostile prevention of the plaintiffs' rights of passage." *Id.*

In the case at bar, defendant parked cars and the other vehicles blocking the easement, and put trashcans in the way of the easement. Applying the holding of *Nicholls* to this case, the trial court properly concluded that defendant's actions "occasionally interfered with the easement." This fails to meet the standard for hostility.

Defendant also relies upon the fence, which was installed by the *dominant estate* by plaintiffs' predecessor in interest as evidence of defendant's adverse possession. However, the act of *plaintiff's* predecessor in interest of erecting a fence, cannot be construed as a *hostile* act by *defendant*. We agree with the trial court and plaintiff in concluding such acts by plaintiff are not evidence of hostile action by defendant. Defendant failed to establish its adverse possession of the easement by "clear and positive proof." *Strong, supra*.

Defendant also argues that plaintiff should be estopped from owning the easement because plaintiffs predecessor in interest "allowed" defendant to purchase the property.[1] However, defendant has failed to properly argue this issue and has effectively abandoned it on appeal. *Yee v Shiawassee County Bd of Comm'rs,* 251 Mich App 379, 406; 651 NW2d 756 (2002).

Affirmed.

/s/ Karen M. Fort Hood
/s/ Richard A. Bandstra
/s/ Patrick M. Meter

[1] Defendant testified at trial that he had not taken legal action against the title insurance company with regard to the basis of this litigation.