

STATE OF MICHIGAN
COURT OF APPEALS

HAROLD ROSS and WANDA ROSS,

Plaintiffs/Counter-Defendants-
Appellees/Cross-Appellants,

v

DALE W. WELLS and SHIRLEY A. WELLS,

Defendants/Counter-Plaintiffs-
Appellants/Cross-Appellees.

UNPUBLISHED

July 18, 2006

No. 259368

Roscommon Circuit Court

LC No. 03-724209-CH

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

PER CURIAM.

Defendants appeal as of right from the trial court's order granting judgment in favor of plaintiffs following a bench trial in this case concerning the parties' rights under an easement. Plaintiffs cross-appeal from that portion of the judgment ordering that if trees impede defendants' use of the easement for launching boats, defendants may remove them. We affirm.

This dispute centers on four contiguous parcels of property, identified as A, B, C, and D. Parcel D abuts Higgins Lake to the west while parcel A abuts a county road to the east. Parcels B and C lie between parcels A and D. A twenty-foot-wide common easement traverses the south end of all four parcels, leading from the county road to the lakeshore. Plaintiffs own parcels B, C, and D, while defendants own parcel A. The easement gives defendants the express right to access the lake and plaintiffs the express right to access their property from the road. For many years, defendants used the portion of the easement near the water for purposes other than access. On appeal, they assert that the trial court erred in concluding that they had not obtained a prescriptive easement giving rise to littoral rights. We disagree. This Court reviews a trial court's holding in an equitable action de novo. *Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 117; 662 NW2d 387 (2003). However, a trial court's findings of fact are reviewed for clear error. *Id.*

An easement by prescription is established by the use of another's property openly, notoriously, adversely, and continuously for a period of fifteen years. *Higgins Lake Prop Owners Ass'n, supra* at 118. An adverse use is one that is inconsistent with the right of the owner, without permission, and that would establish a cause of action against the intruder. *Plymouth Canton Community Crier, Inc v Prose*, 242 Mich App 676, 681; 619 NW2d 725 (2000). When the use of disputed property is mutual, the use is not adverse, and it does not ripen

into a prescriptive easement. *Worden v Assiff*, 317 Mich 436, 439-440; 27 NW2d 46 (1947). The mutual use doctrine applies when the disputed property is owned half and half by the adjoining lots or when it has been “maintained for the joint benefit of both properties.” *Cheslek v Gillette*, 66 Mich App 710, 714-715; 239 NW2d 721 (1976). Here, each of the parties owned a portion of the land that the express easement passed over, and the easement had been maintained for the joint benefit of the parties.

Nevertheless, under *Plymouth Canton Community Crier, Inc, supra*, the mutual use doctrine would not apply if defendants’ use of the easement for purposes beyond access was under the mistaken belief that the express easement entitled them to participate in those activities. See also *Cook v Grand River Hydroelectric Power Co, Inc*, 131 Mich App 821, 826; 346 NW2d 881 (1984) (concluding that “if a claimant has obtained a conveyance of an easement which is ineffective, his use of the subservient estate, made on the assumption that the conveyance was legally effective, is adverse and not made in subordination to the owner of the burdened estate”).

There was no direct testimony concerning the parties’ beliefs regarding the extent of their rights under the original easement, although there was testimony that defendants never asked for nor were given permission to engage in the disputed activities. However, *Plymouth Canton Community Crier, Inc, supra* at 683-684, suggests that the absence of evidence concerning an express grant or denial of permission is an insufficient basis on which to conclude that defendants satisfied their burden of showing prescriptive use. Dale Wells did testify that the original grantor of the property gave him a dock to use when he bought the property. Nonetheless, the gift could have indicated either permission or belief concerning the extent of the easement and, thus, was ambiguous. Because evidence of adverse use must be clear, we conclude that the trial court did not clearly err by concluding defendants failed to satisfy their burden of showing prescriptive use. *Cheslek, supra* at 714.

At the outset of the trial, the court indicated it was interested in whether there were any obstructions in the easement, including trees, that would impede defendants’ use of the easement for launching boats and other watercraft. After hearing testimony and visiting the property, the court ruled that if any trees impeded defendants’ use of the easement for launching boats, defendants were permitted to remove them. Plaintiffs cross-appeal this portion of the court’s ruling. In their statement of questions presented, plaintiffs frame the issue as a jurisdictional matter. However, they fail to make a jurisdictional argument or cite any jurisdictional authority to support their claim of error. Accordingly, the claim is not properly presented. *People v Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993). Moreover, plaintiffs’ argument, which cites a court rule concerning the requirements for specific pleadings, addresses an issue neither raised before nor decided by the trial court. Hence, this issue was not properly preserved. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999).

Nevertheless, we find the court had ancillary jurisdiction to ensure that both parties could use the easement without impediment. *WPW Acquisition Co v City of Troy (On Remand)*, 254 Mich App 6, 9; 656 NW2d 881 (2002). Furthermore, to the extent plaintiffs claim lack of notice, we note that plaintiffs not only placed impediments to the use of the easement in issue, but cited several cases in their trial brief for the proposition that defendants had the right to use the easement to carry watercraft to water and the right of access or passage. Therefore, we find plaintiffs had sufficient notice.

Affirmed.

/s/ Michael J. Talbot

/s/ Donald S. Owens

/s/ Christopher M. Murray