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2012 IL App (4th) 120116-U

Filed 9/5/12

NO. 4-12-0116

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

RAY JONES and JENNIFER JONES,	)	Appeal from
Plaintiffs-Appellees,	)	Circuit Court of
v.	)	Jersey County
RONALD C. BRAINERD II and WENDY BRAINERD,	)	No. 11CH9
Defendants-Appellants.	)	
	)	Honorable
	)	Charles J. Gramlich,
	)	Judge Presiding.

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PRESIDING JUSTICE TURNER delivered the judgment of the court.  
Justices Steigmann and McCullough concurred in the judgment.

**ORDER**

¶ 1 *Held:* Where defendants' use of plaintiffs' driveway was permissive and not adverse, the trial court did not err in denying defendants' request for a prescriptive easement.

¶ 2 In January 2011, plaintiffs, Ray Jones and Jennifer Jones, filed a complaint for injunctive relief, seeking to enjoin defendants, Ronald C. Brainerd II and Wendy Brainerd, from using plaintiffs' driveway or otherwise interfering in any way with their use of the driveway. In February 2011, defendants filed a counterclaim, claiming they had a prescriptive easement along the driveway. Both parties filed motions for summary judgment, which the trial court denied. In December 2011, the court found in plaintiffs' favor and denied defendants' request for a prescriptive easement.

¶ 3 On appeal, defendants argue the trial court erred in denying their counterclaim for a prescriptive easement on plaintiffs' property. We affirm.

¶ 4

## I. BACKGROUND

¶ 5 In January 2011, plaintiffs filed a complaint for injunctive relief against defendants. Plaintiffs alleged they owned property at 17159 Indian Lake Road in Jerseyville, Illinois, and defendants owned property immediately to the north at 17153 Indian Lake Road. The complaint alleged defendants had interfered with plaintiffs' use of their driveway and obstructed access to their residence. Plaintiffs sought a preliminary and permanent injunction prohibiting defendants from using the driveway or otherwise interfering in any way with plaintiffs' use of the driveway.

¶ 6 In February 2011, defendants filed an answer to the complaint and a counterclaim. In the counterclaim, defendants alleged Fred Widman, president of Delhi Farms, Inc., conveyed two five-acre parcels to himself and his wife in 1972. Also in 1972, the Widmans entered into a contract for deed with Ronald and Linda Brainerd, defendants' predecessors in title, to sell the northern five-acre parcel. In 1972 or 1973, Widman entered into an unrecorded contract for deed with Daniel and Sharon Zenner, plaintiffs' predecessors in title, to sell the southern five-acre parcel. Homes were constructed on each parcel, and Daniel Zenner and Ronald Brainerd constructed an asphalt driveway for the purpose of connecting the residences to Indian Lake Road.

¶ 7 In March 1973, the Brainerds obtained a survey of their parcel, which noted a 30-foot easement over plaintiffs' property in the same location of the constructed driveway. In October 1975, the Brainerds received a warranty deed for the northern five acres but the 30-foot easement was omitted. The counterclaim alleged the Brainerds utilized the driveway to access their residence and constructed a garage located along the southern boundary line between the

parcels. In June 2008, Linda Brainerd executed a quitclaim deed to Ronald Brainerd II.

¶ 8 Defendants claimed the Brainerds had used the driveway to access their home for more than 20 years; the use had been exclusive, visible, open, notorious, and continuous; and they had no other access point to their property, garage, or residence. Defendants believed they had an easement over plaintiffs' property as described in the March 1973 survey. Defendants claimed plaintiffs obtained title to the southern five acres in October 2010 and began to intimidate, harass, and threaten to obstruct defendants' use of the driveway. Defendants sought an order declaring the existence of a permanent prescriptive easement along the driveway in their favor to access Indian Lake Road.

¶ 9 In July 2011, defendants filed a motion for summary judgment and attached several affidavits as exhibits. In her affidavit, Linda Brainerd stated she and her husband knew the driveway was built entirely on the Zenner property, but they believed Daniel Zenner gave them a permanent 30-foot easement to use and travel across the driveway to access their property. Daniel Zenner stated it was his intention that the Ronald Brainerd "and whomever owned his parcel after him would have an easement to cross the driveway for ingress and egress to the Brainerds home and property." Zenner stated "we never put this easement in writing as we considered a handshake good enough." He never gave Mr. Brainerd permission to use the driveway because he intended the Brainerds, "and anyone else who would own the property after them," to have an easement or the right to use the driveway to access their property and home.

¶ 10 In his affidavit, Ronald Brainerd II, stated that "for as long as I can remember my family believed that we had the legal right to use a 30[-]foot wide roadway easement along the driveway." Mark Seets stated he moved onto the Zenner property, now owned by plaintiffs, in

1989. At the time of purchase, Zenner advised him that the driveway was a shared driveway between the property and the Brainerd property. Seets did not learn the driveway was located completely on his property until several years later. Even upon learning that fact, Seets believed the Brainerds still had the right to use the driveway because it was to be shared between the property owners.

¶ 11 In September 2011, plaintiffs filed a motion for summary judgment. Plaintiffs also filed a response to defendants' motion. Plaintiffs claimed defendants failed to show their use of the driveway was hostile to plaintiffs' rights and the rights of plaintiffs' predecessors in interest. Instead, defendants used the driveway with permission and acquiescence of plaintiffs' predecessors in interest. The trial court denied both motions for summary judgment.

¶ 12 In December 2011, the evidentiary deposition of Mark Seets was filed. Therein, Seets testified he purchased the Zenner property in 1987 or 1988. He believed the center of the driveway was the property line. He was told by the real estate agent that the driveway was a "shared driveway." Seets stated "it was just an understanding" that it was a shared driveway and Brainerd never asked about it. Seets never objected to the Brainerds' use of the driveway.

¶ 13 On December 29, 2011, the trial court issued a written order. The court indicated the parties were of the understanding that the evidence introduced at the hearing and Seets' deposition would suffice for a full hearing on the merits and thus a decision could be rendered even though the court "was never formally asked to do that." The court found defendants failed to overcome the presumption of permissive use and denied their request for a prescriptive easement.

¶ 14 In January 2012, defendants filed a motion to reconsider. Defendants argued

Zenner's affidavit established he granted an oral easement for access over the driveway in 1971 and defendants used the driveway under a claim of right for a continuous period in excess of 20 years. Defendants pointed toward Seets' testimony that he did not grant defendants permission to use the roadway because he believed they had a right to use it. Moreover, defendants claimed the alleged license granted by Zenner was revoked when the land was conveyed to Seets, thereby eliminating the permissive use relied on by plaintiffs, and they used the driveway uninterrupted and adversely under a claim of right for a continuous period in excess of 20 years.

¶ 15 Also in January 2012, plaintiffs filed a motion to modify judgment, claiming the trial court did not rule on their petition for an injunction. Plaintiffs asked the court to enter a permanent injunction preventing defendants from continuing to use the driveway.

¶ 16 The trial court denied the motion to reconsider. The court granted plaintiffs' motion to modify and ordered that the permanent injunction be granted. This appeal followed.

¶ 17 II. ANALYSIS

¶ 18 On appeal, defendants argue the trial court erred in denying their counterclaim for a prescriptive easement in plaintiffs' property. We disagree.

¶ 19 In the case *sub judice*, the trial court denied both parties' motions for summary judgment. Thereafter, based on the affidavits and deposition testimony, the court entered an order denying defendants' request for a prescriptive easement. This court has noted that, "if the facts are uncontroverted and the issue is the trial court's application of the law to the facts, a court of review may determine the correctness of the ruling independently of the trial court's judgment by using a *de novo* standard of review." *Quinlan v. Stouffe*, 355 Ill. App. 3d 830, 836, 823 N.E.2d 597, 602 (2005). Accordingly, we will review the court's judgment *de novo*.

¶ 20 Defendants contend the dispositive issue in this case is whether the "handshake easement" between plaintiffs' predecessor in title, Daniel Zenner, and defendants' predecessor in title, Ronald Brainerd, constituted permissive use or served as a basis to establish a legal right in plaintiffs' property. Defendants argue the facts established the elements of a prescriptive easement. Plaintiffs, however, argue defendants' use of the driveway was permissive and not adverse.

"Under Illinois law, an easement obtained by prescription is based on the same principles as title obtained by adverse possession. [Citation.] Thus, to establish an easement by prescription, a claimant must show that the use of the land was: hostile or adverse, exclusive, continuous, uninterrupted, and under a claim of right or title inconsistent with that of the true owner. [Citation.] These elements must have shared a concurrent existence for a period of 20 years. [Citation.] All presumptions are in favor of the titleholder, and the burden of proving a prescriptive right, which must be clearly and unequivocally proved, is on the party alleging such right." *Catholic Bishop of Chicago v. Chicago Title & Trust Co.*, 2011 IL App (1st) 102389, ¶ 14, 954 N.E.2d 797, 799-800.

¶ 21 As to the "hostile or adverse" element, "the claimant must show that the use of the property was with the knowledge and acquiescence of the owner but without his permission." *Sparling v. Fon du Lac Township Road & Bridge Comm'n*, 319 Ill. App. 3d 560, 563, 745 N.E.2d 660, 663 (2001); see also *Page v. Bloom*, 223 Ill. App. 3d 18, 21, 584 N.E.2d 813, 815 (1991)

("To show adverse use, the use must be with the knowledge and acquiescence of the owner, but without his permission").

"If it can be shown that the use has been made pursuant to the permission of the owner of the servient estate, it cannot be classified as being adverse. [Citation.] Such permission may be established by a written or oral license or may be inferred from the surrounding circumstances. [Citation.] Where there is proof of a parol agreement to use a way, the use has been by license rather than adversely or by claim of right and a prescriptive right has not been established." *Light v. Steward*, 128 Ill. App. 3d 587, 591, 470 N.E.2d 1180, 1184 (1984).

See also *Weihl v. Wagner*, 210 Ill. App. 3d 894, 896, 569 N.E.2d 297, 299 (1991) ("Mere permission to use the land can never ripen into a prescriptive right").

¶ 22 In this case, defendants cannot satisfy the "hostile or adverse" element. The evidence indicated Zenner and Brainerd built the driveway, and it was Zenner's intention that defendants' successors in interest use it for egress and ingress onto their property. The evidence showed the landowners had a neighborly agreement for the shared use of the driveway. Thus, the use of the driveway was permissive rather than hostile. See *Roller v. Logan Landfill, Inc.*, 16 Ill. App. 3d 1046, 1052, 307 N.E.2d 424, 429 (1974) (stating "permission may be inferred from the neighborly relationship of the parties or from other circumstances attending the use").

¶ 23 Moreover, defendants cannot establish hostility based on Seets' testimony that he never gave Brainerd permission to use the driveway. His testimony indicated he permitted use of

the driveway by defendants and their predecessors and in no way prohibited their use such that defendants' actions could be taken as hostile or adverse. To show adverse use or hostility, defendants would have to use the driveway in defiance of the true owner, *i.e.*, without his permission. Here, it is clear the use of the driveway was with the owner's blessing. Thus, the use was permissive and not hostile.

¶ 24 To establish the "claim of right" element, defendants would have to show that they and their "predecessors in title acted in a manner indicating a right to use the \*\*\* driveway unrelated to any license or permission for that use from [plaintiffs or their] predecessors in title." *Klobucar v. Stancik*, 138 Ill. App. 3d 342, 344, 485 N.E.2d 1334, 1336 (1985); see also *Deboe v. Flick*, 172 Ill. App. 3d 673, 676, 526 N.E.2d 913, 915 (1988) ("Permissive use negates not only the adversity element of a prescriptive easement claim but also that the usage took place under a claim of right"). Here, as stated, the use of the driveway was with permission. Thus, defendants' usage cannot be said to be under a claim of right. Accordingly, the trial court did not err in denying defendants' request for a prescriptive easement.

¶ 25

### III. CONCLUSION

¶ 26

For the reasons stated, we affirm the trial court's judgment.

¶ 27

Affirmed.