





After numerous continuances, the cause ultimately proceeded to a bench trial where the following evidence was adduced.

¶4 Kevin Grammar testified that he was Union County's highway superintendent and had reviewed various maps and plats of the lands at issue. Grammar stated that although it was connected to a public road to the south, "the road in question [was] not indicated in [Union County's] records as being a public road." He acknowledged, however, that the roadway was depicted in an 1876 Illinois atlas and was thus "generally considered" a public road at that time. Grammar further acknowledged that the road was also depicted in a 1908 plat map of Union County and in a property survey that was recorded with the county in 1914.

¶5 Myron Albers testified that since 1988, he and his wife, Lori, have lived in Alto Pass in a house located on their property north of the plaintiffs' property and the Pirtle property. Albers testified that he inherited his land from his parents in two separate conveyances, and he identified the two accompanying warranty deeds that he recorded in Union County.

Indicating that the omission was the result of his attorney's oversight, Albers acknowledged that neither of the deeds contained "any reference to a roadway or right-of-way across [the plaintiffs'] property."

¶ 6 Albers also identified a 1914 quitclaim deed by which the then-owners of the plaintiffs' property and the Pirtle property had, for \$35, conveyed to the then-owner of his property a two-rod (33-foot) strip of land running north and south and centered on the east-west dividing line of their properties "for road purposes only." Identifying additional deeds constituting the chain of title for his property since 1911, Albers acknowledged that the metes and bounds of the land that had been conveyed in 1914 "for road purposes only" had not been specifically described in a deed since 1935. Identifying the warranty deed that his parents obtained when they bought the land, however, Albers noted that the deed referenced "all appurtenant rights in a road easement running south to a public road on the line between [the plaintiffs' property and the Pirtle property]."

¶ 7 Albers stated that his father had died in 1995 and that in 2004, his mother had executed a quitclaim deed purportedly conveying to him her appurtenant rights in the easement. Albers indicated that neither he nor his father had ever sought permission to use the roadway, because they had "the right-of-way to use that road." Albers further indicated that on its north end, the road veered slightly from its north-south path to bypass a ravine. He explained, however, that he had been using the road since his parents purchased the Albers property in 1969 and that the existing path of the roadway had always been the same.

¶ 8 Albers noted that various improvements to the road had been made over the years and that its passableness by car had "varied over time." Albers testified that he had personally worked on the road "numerous times" and that his father had also "worked on it a great deal." Albers testified that after the plaintiffs purchased their property, he and Mr. Pingleton had discussed the roadway in question, and Pingleton had advised that he had "searched the

records" and had found no mention of it.

¶ 9 Daryn Pingleton testified that he and his wife reside in Florida and that in May 2002, they bought their property in Alto Pass from Abe Norton. Pingleton testified that during his presale visits to the land, he was never told that there was "any alleged roadway on the west side." Before purchasing the land, however, he heard that one might exist. Pingleton indicated that when he subsequently expressed his concerns about the road to a local abstractor and an employee at the county road commissioner's office, he was led to believe that he "had no reason to worry." Pingleton stated that after purchasing the property, he had spoken with Norton, and Norton had said that Albers was "crazy" for claiming rights to an easement across the land. Pingleton further stated that he and Albers had subsequently discussed the alleged easement but had been unable to come to an agreement on the matter.

¶ 10 Pingleton testified that when he had later inspected the location of the alleged roadway, "[i]t was so overgrown," it was impassable. He acknowledged, however, that an "indentation" of a road had nevertheless been visible. Pingleton further acknowledged that he had not researched the Albers property's chain of title before he and his wife purchased their land and that the deed that they received from Norton included the following provision:

"SAID PARCEL BEING SUBJECT TO THE RIGHT-OF-WAY OF AN OLD COUNTY ROAD ALONG THE WEST SIDE, AND ANY OTHER RIGHTS-OF-WAY AND EASEMENTS, RECORDED OR OTHERWISE."

Pingleton indicated that he filed his complaint seeking a declaratory judgment after Albers commenced clearing the disputed roadway with a bulldozer.

¶ 11 Jerry Pirtle testified that his grandfather had purchased the Pirtle property in 1908, that his parents had moved there in 1946, and that he presently owned most of the land. Pirtle indicated that having lived on the family property for many years, he knew many of the families who had previously owned or lived on the Albers property and was familiar with the

"roadway in dispute." Pirtle further indicated that the road had "always" been there and had historically been the only way to get to and from the Albers property and the public road to the south. Pirtle testified that after Albers' parents bought the property, Albers' father had improved the roadway with a bulldozer. Pirtle explained that northern parts of the Pirtle property were difficult to access without the roadway and that Norton had used the road when farming the "back fields" of the plaintiffs' property.

¶ 12 Pirtle stated that recent improvements that had been made to the road included the addition of new rock and the installation of a culvert. Pirtle testified that when he sold the southern part of his land in 2001, his right to use the road to access the northern part had been "listed in the deed as an easement." Pirtle acknowledged that he had not walked the entire length of the roadway in several years and had not driven the entire length since the 1960s. He also indicated that he had cleared fallen trees from a section of the road in the late 1990s and that additional trees might have fallen on the road in recent years. Pirtle testified that the road had always been located and equally divided along the east-west dividing line running north and south along his property and the plaintiffs' property.

¶ 13 Mitchell Garrett, president and CEO of Shawnee Surveying and Consulting, testified that he was a licensed land surveyor, and his firm had surveyed the properties at issue at the request of their respective owners. Referencing a 1908 plat map of Union County and an 1876 Illinois atlas, Garrett testified that the depicted location of the disputed roadway was consistent with that of a road that was identified during a survey done for Pirtle in 2001, a survey done for Norton in 2002, and a survey done for Albers in 2004. Garrett indicated that the Pirtle and Norton surveys specifically referred to the road as a right-of-way to which the properties were subject. Garrett further indicated that the road meandered to the east before entering the Albers property.

¶ 14 Billy Abernathy, a land surveyor for Shawnee Surveying and Consulting, testified that

he observed the roadway at issue while surveying property in the area. Abernathy stated that what he had seen was an "old roadbed" with "road banks on either side of it." Abernathy also noted that signs of four-wheeler traffic had been present, and "[i]t was obvious that [the road] had been traveled in the past." Abernathy indicated that although the road had not been entirely passable by car, it could have been restored to "automobile-traffic use" with a "couple of passes with a small bulldozer." Abernathy further indicated that the roadway had been referenced or depicted in surveys, deeds, and maps since 1876.

¶ 15 Dennis Pender testified that he had purchased the southernmost portion of the Pirtle property in 2001 and was familiar with the disputed roadway that ran along the eastern border of his land. Pender stated that he had grown up in Alto Pass and had first used the road while working as a farmhand for Albers' parents as a teenager. In the fall of 2001, Pender used Albers' bulldozer to improve portions of the road and to access the Albers property. Pender indicated that in the spring of 2002, the road was generally not passable by automobile, and loggers who had been working near the road had piled treetops and hollow logs onto portions of it. Pender testified that Albers had subsequently cleared the road of the treetops and logs and had later added rock to the road. Pender stated that the Alberses had always used the roadway to access their property and that there had never been any prior disputes regarding their right to do so. Pender testified that Norton knew that the road was an established right-of-way.

¶ 16 Bill Vandergraph testified that he lived on the Albers property during the 1950s after his parents purchased the land in 1954. Vandergraph further testified that the disputed roadway was the only access to the property, that his family had always assumed that they had "the right to use that roadway," and that his father had maintained the road with gravel and dirt while living there. Vandergraph believed that his father had also altered the northernmost section of road to bypass an area that "had a lot of water problems." The

northernmost section thus meandered "a little bit" from its original location, but the road was otherwise a "straight shot" to the Albers property. Vandergraph testified that in the late 1990s, he had seen that portions of the road had been "neglected" and were "grown up" with small trees and brush.

¶ 17 Norman Lindsey testified that he lived in Alto Pass near the lands at issue and was familiar with the roadway in question. Lindsey stated that when he had observed portions of the road in the 1970s and 1990s, they were consistently grown up with brush and saplings. Lindsey testified that four-wheeler tracks had nevertheless been present on the road in the 1990s and that sometime between 2000 and 2002, someone had worked on the road with a bulldozer. Additionally, someone had subsequently added new rock to the road. Lindsey indicated that despite the roadway's variable condition, because its banks had always been visible, "city folks might not recognize [it] as a road," but "country folks would."

¶ 18 Via evidence deposition, Norton testified that property to the east of the lands at issue had been in his family since the 1840s and that in the 1940s, his parents had purchased the property that he sold to the plaintiffs in 2002. Norton testified that the disputed roadway had "been there long before [his] time." Norton indicated that while the road ran along "a straight line north and south," it veered slightly "at the very north end where it enter[ed] the Albers property." Norton further indicated that for as long as he could remember, the roadway had always been the only access to the Albers property, and his family and the Pirtles had also used the road. Norton testified that before the plaintiffs had purchased their land from him, he had told Pingleton about the roadway, and it was later referenced in the plaintiffs' deed to the property. Norton stated that when he had last observed the road, it would have been passable with a four-wheeler or tractor.

¶ 19 In the fall of 2010, the parties submitted written closing arguments, and in January 2011, the circuit court entered judgment declaring that by virtue of the aforementioned 1914

quitclaim deed, Albers owned a nonexclusive easement appurtenant to the disputed roadway, with the exception of a two-rod "gap" resulting from a 1902 conveyance of a two-rod strip of land bisecting the eastern half of the road. The court further declared that with respect to the entire roadway, Albers had proven the elements necessary to establish a prescriptive easement over the plaintiffs' land. Following the circuit court's denial of the plaintiffs' motion to reconsider judgment, the plaintiffs filed a timely notice of appeal.

¶ 20

#### DISCUSSION

¶ 21 The plaintiffs contend that the circuit court erred in its determination that Albers had valid easements with respect to the roadway at issue. We disagree.

¶ 22 "An easement is a right or privilege in the real estate of another." *McMahon v. Hines*, 298 Ill. App. 3d 231, 235 (1998). "Easements are interests in land and can be created only by grant, by implication, or by prescription." *Seiber v. Lee*, 158 Ill. App. 3d 361, 367-68 (1987). Where the relevant facts are not in dispute, a circuit court's rulings on easements are subject to *de novo* review as questions of law. *Ellis v. McClung*, 291 Ill. App. 3d 448, 455 (1997).

¶ 23

#### Easement by Grant

¶ 24 "To acquire an easement by grant, no particular words are necessary, but the words that are used must clearly show an intention by the grantor to confer an easement, and such terms must be definite, certain, and unequivocal." *McMahon*, 298 Ill. App. 3d at 236. "Such intent is ascertained from the words of the instrument and the circumstances contemporaneous to the transaction, including the state of the thing conveyed and the objective to be obtained." *Id.*

¶ 25 "An easement qualifies as appurtenant when the user of the right enjoys a dominant estate over the used land, which is considered the servient estate." *Matanky Realty Group, Inc. v. Katris*, 367 Ill. App. 3d 839, 842 (2006). "An easement appurtenant is 'created to

benefit another tract of land, the use of easement being incident to the ownership of that other tract.'" *Kankakee County Board of Review v. Property Tax Appeal Board*, 226 Ill. 2d 36, 53 (2007) (quoting Black's Law Dictionary 549 (8th ed. 2004)). An easement appurtenant may burden more than one servient estate, and common ownership of the servient estates is not necessary. See *Quinlan v. Stouffe*, 355 Ill. App. 3d 830, 840 (2005). "[A]n easement appurtenant continues until the easement is either terminated or abandoned" (*Schnuck Markets, Inc. v. Soffer*, 213 Ill. App. 3d 957, 974 (1991)), and "[t]o constitute an abandonment of such an easement there must be, in addition to \*\*\* non-use, circumstances showing that it was the intention of the dominant owner to abandon the use of the easement." *Flower v. Valentine*, 135 Ill. App. 3d 1034, 1039 (1985). "An easement appurtenant runs with the land and may be transferred." *Kankakee County Board of Review*, 226 Ill. 2d at 53; see also *Smith v. Jack Nicklaus Development Corp. of Illinois*, 225 Ill. App. 3d 384, 391 (1992) (noting that "an easement, once created and recorded, runs with the land and is a burden or benefit for all successors in the chain of title").

¶ 26 Here, the evidence presented for the circuit court's consideration established that through a 1914 quitclaim deed, the then-owners of the plaintiffs' property and the Pirtle property had, for \$35, conveyed to the then-owner of the Albers property a two-rod strip of land running north and south and centered on the east-west dividing line of their properties "for road purposes only." The evidence before the court further established that the conveyed strip marks the location of the disputed roadway and that the road has historically been used as the only access to and from the Albers property. Additionally, the roadway has repeatedly been referenced or recorded as an easement or right-of-way in various deeds and surveys since 1914, and there was no evidence that any prior owner of the Albers property had ever demonstrated an intent to abandon the use of the road. Given the road's historic use and the limiting language contained in the quitclaim deed, the circuit court rightfully concluded that

the 1914 conveyance evinced an intent to grant an easement appurtenant with respect to the roadway and that the easement is still valid. See *Magnolia Petroleum Co. v. West*, 374 Ill. 516, 524 (1940). The phrase "for road purposes only" clearly granted a specific right, thus limiting the 1914 conveyance to an easement consistent with the road's traditional function. See *Urbaitis v. Commonwealth Edison*, 143 Ill. 2d 458, 468 (1991). Accordingly, as it is undisputed that a 1902 conveyance of a strip of land bisecting the eastern half of the road resulted in a two-rod "gap" in the 1914 conveyance, the circuit court properly determined that Albers owned a nonexclusive easement appurtenant to the disputed roadway, with the exception of the gap.

¶ 27 Easement by Prescription

¶ 28 "It is well established that in order to require an easement by prescription, a claimant must establish that the use of the land was adverse, exclusive, continuous and uninterrupted, and under a claim of right for a period of at least 20 years." *Seiber*, 158 Ill. App. 3d at 368. "[A]ll elements must be distinctly and clearly proved," and "[t]he burden of proving a prescriptive right is on the party alleging such right." *Bogner v. Villiger*, 343 Ill. App. 3d 264, 269 (2003).

¶ 29 "[S]uccessive periods of adverse, continuous and uninterrupted use may be tacked together to compose the required period of prescription if there has been privity between the users." *Roller v. Logan Landfill, Inc.*, 16 Ill. App. 3d 1046, 1053 (1974). "The requisite of privity exists when the latter user has succeeded to the interest of the earlier user by *inter vivos* conveyance, by descent, by devise, or by involuntary conveyance." *Wehde v. Regional Transportation Authority*, 237 Ill. App. 3d 664, 677 (1992). "To establish exclusivity, it is not necessary to show that only the claimant has made use of the way because exclusive use means that the claimant's right to use the [land] does not depend upon a like right in others." *Light v. Steward*, 128 Ill. App. 3d 587, 594 (1984).

¶ 30 "To meet the requirements of adverse use, the use must be with the knowledge and acquiescence of the owner but without his permission." *Light*, 128 Ill. App. 3d at 595. The requirement that the use of land be "adverse" does not implicate "ill will" and is satisfied by proof of an "assertion of ownership incompatible with that of the true owner and all others." *Joiner v. Janssen*, 85 Ill. 2d 74, 81 (1981). "Using and controlling property as owner is the ordinary mode of asserting a claim of title inconsistent with that of the true owner" (*Peters v. Greenmount Cemetery Ass'n*, 259 Ill. App. 3d 566, 570 (1994)), and because "actions alone can adequately convey the intent to claim title adversely to all the world, including the titleholder," no deeds or "title documents are even required to support a party's claim of ownership" (*Tapley v. Peterson*, 141 Ill. App. 3d 401, 404 (1986)). "Such improvements or acts of dominion over the land as will indicate to persons residing in the immediate neighborhood who has the exclusive management and control of the land are sufficient to constitute possession." *Augustus v. Lydig*, 353 Ill. 215, 222 (1933).

¶ 31 "Where the property has been used in an open, uninterrupted, continuous and exclusive manner for the required period, adversity will be presumed and the burden of proof shifts to the party denying the prescriptive easement to rebut the presumption." *Bogner*, 343 Ill. App. 3d at 270.

"In the absence of evidence tending to show that such long-continued use of the way may be referred to a license or other special indulgence, which is either revocable or terminable, the conclusion is, that it has grown out of a grant by the owner of the land, and has been exercised under a title thus derived. The law favors this conclusion, because it will not presume any man's act to be illegal. It is also reasonable to suppose that the owner of the land would not have acquiesced in such enjoyment for so long a period, when it was his interest to have interrupted it, unless he felt conscious that the party enjoying it had a right and a title to it that could not be

defeated." *Rush v. Collins*, 366 Ill. 307, 315 (1937).

¶ 32 Here, the plaintiffs do not challenge the circuit court's determination that the disputed roadway has been used in an open, uninterrupted, continuous, and exclusive manner "for more than 50 years." Noting that there was "evidence of a neighborly relationship" between the various owners of the properties in question, however, the plaintiffs contend that the court erred in finding that the use of the road has been adverse.

¶ 33 "Where the evidence shows that a use is merely permissive from the owner, the use is not adverse and furnishes no basis upon which a right of way by prescription can rest." *Light*, 128 Ill. App. 3d at 595; see also *Deboe v. Flick*, 172 Ill. App. 3d 673, 676 (1988) (holding that where the defendants' "immediate predecessor in title" testified that he "gave direct permission" to the plaintiffs to use his driveway, the plaintiffs' claim of prescriptive rights necessarily failed); *Klobucar v. Stancik*, 138 Ill. App. 3d 342, 344 (1985) (holding that where the undisputed evidence established that the plaintiff and her predecessors in title had used the defendant's driveway with permission or by license, "the circuit court properly granted [the] defendant's motion for summary judgment as to [the] plaintiff's claim of a prescriptive easement"). While "evidence of a neighborly relationship may give rise to a rebuttable presumption of permissive use," there must be sufficient evidence in the record to support such a presumption. *Healy v. Roberts*, 109 Ill. App. 3d 577, 581 (1982).

¶ 34 Here, the evidence before the circuit court suggested that the various owners of the properties at issue have historically been neighborly, but nothing suggested that any of the prior owners of the Albers property had ever sought or were granted permission to use the disputed roadway. The evidence rather established that the roadway at issue has been in use since at least 1876 and that since 1914, the various owners of the Albers property have continuously used the roadway under the claim of right conveyed by the 1914 quitclaim deed. The evidence further established that for more than 50 years, the owners of the Albers

property have, without permission, improved and maintained the roadway as their own. Under the circumstances, none of the evidence presented for the circuit court's consideration supported a presumption of permissive use, and the court properly determined that the use of the road has historically been adverse. See *Schultz v. Kant*, 148 Ill. App. 3d 565, 572 (1986) (holding that evidence that the relationship between the parties was "friendly and cooperative" did not "establish permission by [the] defendant to [the] plaintiffs to use the roadway for their own purposes due to their neighborly relationship" and that even assuming otherwise, "there was sufficient evidence of adverse use to overcome the presumption").

¶ 35 Referencing the evidence "regarding the northern deviation" of the road from its originally defined path, the plaintiffs lastly argue that the circuit court erred in finding the existence of a prescriptive easement because the exact boundaries of the disputed roadway were not sufficiently defined at trial. At the outset, we find that the plaintiffs have waived this contention, because they raise it for the first time on appeal. See *In re Marriage of Kerman*, 253 Ill. App. 3d 492, 502 (1993). Waiver aside, however, the argument is without merit.

¶ 36 When proving that one's possession of property was adverse, "where there is no deed or color of title[,] the claimant has the added burden of establishing by clear and convincing proof the location of the boundaries to which he claims." *Schwartz v. Piper*, 4 Ill. 2d 488, 493 (1954); see also *Tapley*, 141 Ill. App. 3d at 405. Here, as previously noted, the strip of land conveyed and described "for road purposes only" by the 1914 quitclaim deed marks the location of the disputed roadway, and the roadway was further depicted and described in a 1914 property survey that was also recorded with the county. The location of the roadway was similarly described in later deeds to the Albers property, and the road has historically been characterized and recorded as a two-rod strip of land running north and south and centered on the east-west dividing line of the plaintiffs' property and the Pirtle property. We

recognize that there was evidence before the circuit court that since 1914, a section of the roadway's original path has deviated slightly to veer around a ravine on the north end, but the evidence still supported the court's conclusion that despite that deviation, the "actual location of the roadway has been in the same place since at least as long ago as 1954." Because the boundaries of the roadway have previously been established and recorded and because the northern deviation has long been ascertainable and "confined to a definite and specific line of way" (*Thorworth v. Scheets*, 269 Ill. 573, 582 (1915)), there was no need to further establish the road's boundaries for prescriptive-easement purposes. We lastly note that at oral arguments, the plaintiffs withdrew their brief's request that "if a prescriptive easement is found to exist, \*\*\* this cause be remanded for clarification as to the location, size, and scope of the prescribed easement."

¶ 37

#### CONCLUSION

¶ 38 The circuit court rightfully determined that the defendants have a nonexclusive easement appurtenant to the disputed roadway, with the exception of the aforementioned two-rod gap, and that they further proved the elements necessary to establish a prescriptive easement over the plaintiffs' land with respect to the entire road. Accordingly, the judgment of the circuit court is hereby affirmed.

¶ 39 Affirmed.