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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SANDEEP GUPTA,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 07 CH 2932
)	
KATHERINE ERWIN and DIRK E. VANKOUGHNETT,)	Honorable,
)	Sophia Hall,
Defendants-Appellants.)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hall and Karnezis concurred with the judgment.

ORDER

Held: We affirmed the grant of summary judgment in favor of plaintiff on count I of his second-amended complaint for a declaratory judgment that he had the right to vehicular access to an easement for ingress and egress across a nine-foot alley on the eastern boundary of defendants' property. We also affirmed the grant of summary judgment in favor of plaintiff on defendants' counterclaim for trespass.

¶ 1 Plaintiff, Sandeep Gupta, filed a two-count, second-amended complaint against defendants, Katherine Erwin and Dirk E. Vankoughnett. Count I sought a declaration that certain real property of defendants is burdened, and certain real property owned by plaintiff is benefitted, by an easement for ingress and egress. Plaintiff also sought a permanent injunction enjoining defendants from

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interfering with his use and enjoyment of said easement. Count II sought a declaration of an "easement by necessity" over the same property. Defendants brought a counterclaim against plaintiff for trespass. The circuit court granted summary judgment in favor of plaintiff on count I of his second-amended complaint and on defendant's counterclaim and denied defendants' cross-motion for summary judgment. The court expressly stated that as a result of its ruling, it "does not reach the [c]ount II claim of easement by necessity." On appeal, defendants contend the circuit court erred in granting plaintiff's motion for summary judgment on count I of his second-amended complaint and denying defendants' motion for summary judgment thereon because: (1) the alleged easement terminated on its own terms prior to plaintiff's acquisition of his property; (2) the doctrine of merger extinguished the easement; and (3) plaintiff's use of the easement exceeded its scope. Defendants also contend, in the absence of a valid easement, the circuit court erred by granting plaintiff's motion for summary judgment on their counterclaim against plaintiff for trespass and by denying defendants' motion for summary judgment thereon. We affirm.

¶ 2 Defendants are the owners of property at 2243 North Cleveland Avenue, also referred to herein as "Lot 5," one of five contiguous row houses in Chicago's Lincoln Park neighborhood. The five houses run in a north-south direction and front west onto Cleveland Avenue. Defendants' property is the northernmost property. Moving in a southerly direction, the next property is 2241 North Cleveland Avenue (Lot 4), which is owned by plaintiff. The property at 2239 North Cleveland Avenue (Lot 3) is owned by Thomas and Claire Hickey. The property at 2237 North Cleveland Avenue (Lot 2) is owned by Michael Barry. The southernmost property, 2235 North Cleveland Avenue (Lot 1), is owned by Douglas Van Arsdale. The row houses cover the entire

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width of their respective lots and are all connected by party walls.

¶ 3 A public alley runs along the north side of defendants' property (Lot 5). A public street, Grant Place, runs along the south side of Van Arsdale's property (Lot 1). The east side of the properties, which is also the back of the properties, is bordered by another property. A private alleyway runs along the east nine feet of each of the lots.

¶ 4 In 1874, Lots 1 through 5 were owned as a single parcel of land by Miner Porter and Mary A. Porter. In August of 1874, the Porters subdivided the parcel into separate lots through a recording filed with the Cook County Recorder of Deeds. On June 4, 1877, a deed was recorded with the Cook County Recorder of Deeds whereby the Porters transferred Lot 5 to Charles Carpenter. The deed included language reserving the rights of an easement, which established the private alleyway. Specifically, the deed states in pertinent part: "[I]t is hereby agreed that the east nine (9) feet of the above described property shall be reserved as a private alley to be kept open as long as the owners of the four adjoining houses south may require."

¶ 5 On June 26, 1878, through a deed recorded with the Cook County Recorder of Deeds, the Porters transferred Lots 2 through 4 to James Blair. The June 26, 1878, deed specifically excepted the "Nine (9) feet off the rear of said Lots, which is expressly reserved and set apart for an alley."

¶ 6 On June 9, 1882, James and Elysa Blair transferred Lots 2 through 4 back to Miner Porter through a deed recorded with the Cook County Recorder of Deeds. The deed again excepted "the nine (9) feet off the rear of said Lots, which is expressly reserved and set apart for an alley."

¶ 7 Defendants acquired Lot 5 in 1995. Plaintiff acquired Lot 4 in September 2005. At the closing of his purchase of Lot 4, plaintiff learned of the existence of the easement along the east nine

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feet of Lot 5. In September 2008, plaintiff first began using the easement to gain vehicular access from the public alley along the northside of Lot 5 to the rear of Lot 4. When defendants objected to plaintiff's vehicular use of the easement, plaintiff filed a two-count, second-amended complaint.

¶ 8 Count I of plaintiff's second-amended complaint sought "a declaration finding that Lot 4 is benefitted and Lot 5 is burdened by an easement for egress and ingress through, upon and across the nine-foot private alley running in a northerly and southerly direction along the eastern boundary of said Lot 5." Plaintiff also sought to enjoin defendants "from interfering, obstructing or otherwise impeding the use and enjoyment of the nine-foot private alley running in a northerly and southerly direction along the eastern boundary of said Lot 5."

¶ 9 In support, plaintiff cited to the June 4, 1877, deed in which the Porters transferred Lot 5 to Charles Carpenter and which reserved the east nine feet of Lot 5 as a private alley by way of easement for the benefit of Lots 1 through 4. Plaintiff pleaded "[u]pon information and belief, persons dealing with the Porters, their tenants and latter owners of Lots 2 through 4 used the private alley to remove ashes and garbage from the rear of said lots across the rear of the lots to the north (and possibly the south) of their lots." Plaintiff also pleaded "[u]pon information and belief, the Porters, their tenants and latter owners of Lots 1 through 4 used the private alley in receiving provisions, fuel and other items into the rear of their houses on those Lots from across Lot 5, there being no access to Cleveland Avenue except through the front entrances of the houses." Plaintiff alleged the easement remains in existence and "the only way [he] may access the rear of his property by vehicle is from Cleveland Avenue, through the public alley and over the private alley located on Lot 5." Plaintiff further alleged "[t]he City of Chicago [also] makes use of the private alley. On

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garbage pick-up days, [defendant Erwin] does not park a vehicle on the private alley. The City of Chicago sanitation workers back their truck onto the private alley, to collect the [refuse] left by the owners of Lots 2 through 5 outside their fences at the rear of each dwelling."

¶ 10 In count II of his second-amended complaint, plaintiff sought a declaration that an "easement by necessity exists" over the east nine feet of Lot 5 for the benefit of Lot 4 because, otherwise, he would have no legally cognizable way to access the public alley from the rear of his house in case of emergency.

¶ 11 After filing his complaint, plaintiff installed a patio on the rear of Lot 4 that he uses as a parking space. Without defendants' permission, plaintiff altered the east nine feet of Lot 5 to make it more suitable for vehicular use by hiring contractors to remove the existing ground cover and installing gravel. As a result, defendants filed a counterclaim for trespass against plaintiff. In her affidavit, however, defendant Erwin admitted when defendants objected to plaintiff's alteration of the east nine feet of Lot 5, plaintiff "had his contractors mostly restore the property."

¶ 12 Plaintiff filed a motion for summary judgment, arguing "[t]he unequivocal language of the deeds recorded between 1874 and 1882 demonstrate a clear intention to utilize the east nine-feet of each of the Lots, including Lot 5, as a means for ingress and egress, and there is no limitation as to the method of ingress and egress that could be utilized."

¶ 13 Defendants filed a response to plaintiff's summary judgment motion and they filed a cross-motion for summary judgment in their favor on plaintiff's complaint and on their counterclaim for trespass. In their response to plaintiff's summary judgment motion, defendants stated, "[t]he condition of the properties belies any suggestion that there is any easement across the east [nine feet]

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of the properties." Specifically, defendants argued, "[i]t is undisputed" that there are two "very old utility poles" and "two rusted old bollards" within the east nine-foot area of Lots 3 and 5. Defendants also argued, there are "two very large, old trees" in excess of 50 feet high within the east nine-foot area of Lots 2 and 3. In addition, "there is a wall along the eastern side of the [nine-foot] area. This would make it hazardous to drive vehicles, especially larger vehicles across this area due to the risk of damaging the brick walls of the neighboring properties." Defendants also argued, "[j]ust as notable as what is on the properties is what is *not* on the properties. Lots 2 and 3 do not have either a garage or parking pad." Also, "[p]rior to [p]laintiff's acquisition of Lot 4, it did not have a parking pad or garage." Therefore, "[n]othing about these properties suggests that they have ever been used as a driveway or for vehicular access prior to this lawsuit."

¶ 14 Defendants additionally argued, the "uses to which the owners of Lots 1 through 5 have put their properties is further evidence that there is no vehicular easement across the [east nine feet] of the properties." Specifically, "[t]he owner of Lot 1 constructed a garage on the property in approximately 2000 [that] fronts onto Grant Place. Cars cannot access the garage from the north across Lots 2 through 5. *** Therefore, the owner of Lot 1 does not use the [east nine feet] of Lots 2 through 5 for vehicular ingress and egress to Lot 1." Further, "[a]t least for decades, it would have been impossible for the owner of Lot 1 to use the [east nine feet] of Lots 2 through 5 for vehicular access as there is a bollard, a utility pole and large, old trees traversing through the properties." Also, "the owner of Lot 1 stores his City-of-Chicago issued garbage cans on Lot 1 and then moves the garbage cans onto Grant Place on trash pick up days. *** Contrary to [plaintiff's] allegations *** the City of Chicago does not drive its truck across Lots 2 through 5 to collect garbage from Lot

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1."

¶ 15 Defendants argued, the owner of Lot 2 does not require the use of the east nine feet of Lots 3, 4, and 5 to his north as he has "blocked off his property and uses the east [nine feet] of Lot 2 essentially as a yard; it has been landscaped with a tree, shrubbery and has outdoor patio furniture on it." Also, "[t]he owner of Lot 2 stores his City-of-Chicago issued garbage cans on Lot 1 and moves them onto Grant Place to be emptied by the City. The City of Chicago does not drive its truck across Lots 3, 4 and 5 to collect garbage from Lot 2.

¶ 16 Defendants argued, the owners of Lot 3: "do not require use [of] the [east nine feet] of Lots 4 and 5 for vehicular access;" "[t]he City of Chicago does not drive its truck across Lots 4 and 5 to collect garbage from Lot 3;" and "[t]he owners of Lot 3 do not park their car on their property."

¶ 17 Defendants argued, "[t]he owner of Lot 4 prior to Plaintiff did not require use of the [east nine feet] of Lot 5 for vehicular access" and "[i]t is undisputed that at least prior to June 19, 2009, ***. Plaintiff did not keep his City-of-Chicago issued garbage cans on the east [nine feet] of his property." Defendants contended "[t]he City of Chicago does not drive its truck across Lot 5 to collect garbage from Lot 4."

¶ 18 Defendants contended, as the owners of Lots 1, 2, 3, and 4 had not required use of the claimed easement for 133 years, the easement terminated based on the language in the 1877 deed that the easement was only intended to last "as long as the owners of the four adjoining houses south may require."

¶ 19 Defendants further argued automobiles did not exist in 1877, when the alleged easement on their property was created. Therefore, "the grantor could not have intended the language on which

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Plaintiff relies in his lawsuit to require automobile ingress and egress across Defendants' property or any of the other properties." Defendants also asserted, "Plaintiff alleges but offers no evidentiary support that the east [nine feet] of the properties was used [to] 'remove ashes and garbage' from the properties and to 'deliver fuel' to the properties. Even if that were true, such use is no longer required by the owners of the properties because it is undisputed that all waste pick up occurs along Grant Place to the south and in the public alley to the north and the houses are all served by public utilities."

¶ 20 Finally, defendants argued, the doctrine of merger bars plaintiff's claims as a matter of law because Lots 2 through 4, which were originally deeded by M. Porter to James Blair, were subsequently re-conveyed by James Blair to M. Porter. Defendants explained, "[t]he doctrine of merger provides that if at any time the owner in fee of the dominant parcel acquires the fee in the servient parcel not subject to any other outstanding estate, the easement is then extinguished by merger."

¶ 21 In support of their response to plaintiff's summary judgment motion, defendants attached the affidavit of Katherine Erwin, the owner of Lot 5. Defendants also attached their responses to plaintiff's interrogatories, as well as responses to plaintiff's interrogatories from Michael Barry (the owner of Lot 2) and from Douglas Van Arsdale (the owner of Lot 1). The affidavit and responses to plaintiff's interrogatories mirrored defendants' arguments, that the condition and use of Lots 1 through 5 by their owners belied any suggestion of an easement across the east nine feet of the properties.

¶ 22 In response to defendants' arguments, plaintiff filed an affidavit stating he had been unable

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to use the easement from September 23, 2005, to May 2008, because defendants had blocked his access by parking their car in the easement area, but in May 2008, defendants stopped blocking the easement after they received compensation from their title company for overlooking the easement when they purchased their home. Plaintiff also stated there are a bollard, a utility pole and trees along the easement area, "but notwithstanding this it is possible for an automobile to pass through" and he has been able to drive his vehicle along the easement area without causing damage to any of the other Lots. Plaintiff further stated he has witnessed the owners of Lots 1, 2, 3, and 5 "use the easement for their own benefit." Finally, plaintiff stated that, on garbage days, he brings his garbage cans from the rear of his home across the easement area on Lot 5 to the public alley, where it is picked up by the City garbage collectors.

¶ 23 The circuit court granted summary judgment in favor of plaintiff on count I of his second-amended complaint, finding "an express private alley easement on Lot 5 exists for the benefit of Lots 1 through 4 and has not been terminated in any regard. [Plaintiff's] use of the private alley easement by driving his car across it is within the scope of the easement." The court "[did] not reach the Count II claim of easement by necessity." The circuit court also granted plaintiff's motion for summary judgment on defendants' counterclaim for trespass and denied defendants' cross-motion for summary judgment.

¶ 24 Defendants filed this timely appeal.

¶ 25 Summary judgment is appropriate where the pleadings, depositions, and admissions on file, together with any affidavits, when viewed in the light most favorable to the nonmovant, reveal that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of

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law. *State Farm Fire & Casualty Co. v. Martinez*, 384 Ill. App. 3d 494, 497-98 (2008). The circuit court also must consider answers to interrogatories when determining a motion for summary judgment. *Washington v. City of Evanston*, 336 Ill. App. 3d 117, 130-31 (2002). Review is *de novo*. *Martinez*, 384 Ill. App. 3d at 498.

¶ 26 "When a defendant moves for summary judgment, he may meet his initial burden of production either by affirmatively showing that some element of the cause of action must be resolved in his favor or by demonstrating that the plaintiff cannot produce evidence necessary to support the cause of action. [Citation.] In either case, the defendant must produce evidence that would clearly entitle him to judgment as a matter of law. [Citation.] Once the defendant satisfies his initial burden of production, the burden shifts to the plaintiff to present some factual basis that would arguably entitle the plaintiff to a favorable judgment." *Sang Ken Kim v. City of Chicago*, 368 Ill. App. 3d 648, 653-54 (2006).

¶ 27 First, defendants contend the circuit court erred in granting plaintiff's motion for summary judgment on count I of his second-amended complaint and denying their cross-motion for summary judgment because the alleged easement terminated on its own terms prior to plaintiff's acquisition of his property. An easement is a "right or a privilege in the real estate of another." *Beloit Foundry Co. v. Ryan*, 28 Ill. 2d 379, 388 (1963). The tract of land benefitted by the easement is the dominant estate and the land burdened with the easement is the servient estate. *McCann v. R.W. Dunteman Co.*, 242 Ill. App. 3d 246, 254 (1993). An easement may be created by an express grant in the deed of conveyance that determines the extent of the easement. *Bjork v. Draper*, 381 Ill. App. 3d 528, 538 (2008). In construing instruments creating easements, the court ascertains and gives effect to

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the intent of the parties. *Id.* "That intention is ascertained from the words of the instrument and the circumstances contemporaneous to the transaction. [Citation.] Such circumstances include the situation of the parties, the state of the thing conveyed, the object to be obtained, and the practical construction given by the parties by their conduct." *Coomer v. Chicago & North Western Transportation Co.*, 91 Ill. App. 3d 17, 23 (1980). "The same rules that apply to deeds and other written instruments apply to grants of easements" (*Bjork*, 381 Ill. App. 3d at 538); therefore, we give the language of the easement its plain and ordinary meaning and we may employ a dictionary as a source to ascertain the meaning of undefined words. See *e.g.*, *People v. R.J. Reynolds Tobacco Co.*, 2011 IL App (1st), 101736, ¶20 (employing a dictionary to ascertain the meaning of an undefined term in a written instrument). We review the language of an easement *de novo*. *Bjork*, 381 Ill. App. 3d at 538.

¶ 28 The easement at issue was created by the following language in the June 4, 1877, deed that conveyed Lot 5 to Charles Carpenter: "[I]t is hereby agreed that the east nine (9) feet of [Lot 5] shall be reserved as a private alley to be kept open as long as the owners of the four adjoining houses south *may require*." (Emphasis added.) The word "require" was not defined in the deed. Defendants interpret the word "require" as meaning "need." Defendants' interpretation correlates with the modern dictionary definition of the term. See American Heritage College Dictionary 1160 (3d ed. 2000)¹ (defining "require" to mean "[t]o have as a requisite; need.").

¶ 29 Defendants contend their motion for summary judgment should have been granted because

¹We note that the dictionary definition of the word "require" was the same in 1877 as it is today. See the etymology of the word "require." Webster's Third New International Dictionary 1929 (1993).

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they met their initial burden of producing evidence that would clearly entitle them to judgment as a matter of law, specifically, that the easement terminated because plaintiff did not require (need) use thereof; and that plaintiff failed to present a factual basis in response that would arguably entitle him to a favorable judgment.

¶ 30 Specifically, defendants argue, "[t]he undisputed evidence shows that Plaintiff himself does not *require* access across Lot 5 to use his property. Plaintiff concedes that he has owned his property since 2005 but did not attempt to begin using the east nine feet of Defendants' property until 2008. *** Plaintiff did *not* testify that he would be unable to use his home without vehicular access. Plaintiff does not *require* vehicular access to his property; it is only for mere convenience that Plaintiff seeks access across Lot 5. There is no evidence that one must have a parking space on one's property in the City of Chicago in order to be able to use one's property. Consequently, none of the owners of Lots 1 through 4 require vehicular access over Lot 5." (Emphasis in the original.)

¶ 31 Defendants also argue, "[t]he undisputed evidence further showed that the owners of Lot 4 *prior* to Plaintiff did not use Lot 5 for vehicular access and yet by all accounts the prior owners of Lot 4 likewise were able to use Lot 4 for living purposes." (Emphasis in the original.) Defendants further argue, plaintiff failed to present evidence in support of his allegations that access across Lot 5 was required in the 1870's and 1880's to remove ashes and garbage and receive fuel oil deliveries, or that access across Lot 5 is currently required for garbage removal.

¶ 32 In sum, defendants contend, since plaintiff does not need the easement to use Lot 4, the easement terminated on its own terms. In point of fact, though, under defendants' interpretation of the term "require" as meaning "need," the easement never went into effect in the first instance

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because neither plaintiff nor any of the previous owners of Lot 4 ever needed the easement to use Lot 4. There was no easement to terminate because it never came into existence. Defendants' interpretation of the term "require" renders meaningless the language in the deed creating the easement.

¶ 33 We disagree with defendants' interpretation. As discussed, "[t]he same rules that apply to deeds and other written instruments apply to grants of easements." *Bjork*, 381 Ill. App. 3d at 538. It is well settled that a contract must be construed such that none of its terms are rendered meaningless or superfluous. *Salce v. Saracco*, 409 Ill. App. 3d 977, 982 (2011). We have also held that a "fundamental principle of construction is that a deed should not be interpreted, to the extent possible, so that any portion is rendered meaningless or mere surplusage." *Diaz v. Home Federal Savings & Loan Association of Elgin*, 337 Ill. App. 3d 722, 730 (2002). In accordance with these rules of construction, we decline to adopt defendants' interpretation of the term "require," which would render meaningless the language in the 1877 deed creating the easement.

¶ 34 Instead, we interpret the term "require" by its alternate meaning (which was also in use in 1877): "To call for as obligatory or appropriate; demand." American Heritage College Dictionary 1160 (3d ed. 2000). Under this definition, the easement remains open as long as plaintiff demands, regardless of whether or not said easement was "needed."

¶ 35 Defendants argue, though, that the 1877 deed creating the easement provides that the private alley will remain open only as long as the "*owners* of the four adjoining houses south may require." (Emphasis added.) Thus, defendants argue, even if the term "require" is interpreted to mean "demand," the easement terminates unless *all four owners* of Lots 1 through 4 demand that the alley

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remain open. Defendants contend the easement terminated since only plaintiff is demanding that the alley remain open.

¶ 36 We disagree. Defendants are reading the deed as if it stated that the private alley shall be kept open "as long as *all* the owners of the four adjoining houses south may require." (Emphasis added.) However, the deed does not use the word "all" to modify the word "owners"; in fact, the deed is silent as to the number of owners who "may require" that the alley be kept open.

¶ 37 As discussed, when construing an easement, we give consideration to the circumstances at the time of the conveyance as well as to the language used in creating the easement. *Coomer*, 91 Ill. App. 3d at 23. The circumstances of the conveyance indicate that the Porters subdivided their parcel of land in 1874 and deeded Lot 5 to Charles Carpenter in 1877. The language of the 1877 deed created a private alley by way of easement along the east nine feet of Lot 5 which burdened Mr. Carpenter, the owner of Lot 5, and benefitted "the owners of the four adjoining houses south," *i.e.*, the owners of Lots 1 through 4. The private alley easement provided each of the owners of Lots 1 through 4 with vehicular access from the public alley along the northside of Lot 5 to the rear of their properties. From the circumstances of the conveyance and from the language of the 1877 deed, we believe that the private alley easement was intended to benefit each of the four owners of Lots 1 through 4 and, as such, the easement creating the private alley should remain in existence as long as any of the owners of Lots 1 through 4 requires that the private alley be kept open. Since plaintiff requires that the private alley be kept open, the easement has not terminated.

¶ 38 Defendants argue, though, that the private alley easement has terminated because the decades old conditions on the properties show that the owners of the properties do not require an alley way.

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Specifically, defendants point out that there are: "two very old utility poles within the east nine-foot area of Lots 3 and 5,"; "[t]here are two very large, old trees in excess of 50 [feet] high within the east nine-foot area of Lots 2 and 3,"; "[t]here are two old rusted steel and concrete bollards within the east nine-foot area, one on Lot 5 and one on Lot 3,"; and "[t]here is a wall along the eastern side of the nine-foot area making it hazardous to drive vehicles." Defendants also argue, "[j]ust as notable as what is on the properties is what is *not* on the properties. Lots 2 and 3 do not have either a garage or parking pad."

¶ 39 We reject defendants' argument that plaintiff's right to use the private alley easement over Lot 5 has terminated based on the condition of the properties. Plaintiff filed an affidavit stating that, "[t]here are a bollard, a utility pole and trees *** along the easement, but notwithstanding this it is possible for an automobile to pass through." Defendants admit in their appellate brief that plaintiff has "installed a patio on his property which he uses as a parking space" and that he has begun "regularly driving his car across Defendants' property." As plaintiff requires that the private alley remain open, and as he is able to utilize the private alley notwithstanding its "condition," his right to use the easement has not terminated.

¶ 40 Next, defendants contend summary judgment should have been granted in their favor on count I of plaintiff's second-amended complaint because the easement was terminated by the doctrine of merger. "A merger occurs when the dominant (benefitted) estate and the servient (burdened) estates are owned by the same person, thereby extinguishing an easement by virtue of unity of title and possession, given that one has no need of an easement over one's own property. [Citation.] Ownership of both the dominant and servient estates must be identical in duration,

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quality, and all other circumstances of right." *Ellis v. McClung*, 291 Ill. App. 3d 448, 459-60 (1997).

¶ 41 Defendants argue the 1882 deed in which the Blairs reconveyed Lots 2 through 4 back to the Porters, the owners of Lot 1, resulted in a merger that extinguished the alley easement over Lots 2 through 4 that was created in the 1878 deed by the Porters to the Blairs. Plaintiff responds that the 1882 deed did not result in a merger extinguishing the private alley easement over Lot 5, since Lot 5 was not reconveyed to the Porters. We agree with plaintiff. Plaintiff here seeks to use the private alley easement over Lot 5 in order to gain vehicular access to the back of Lot 4. Thus, the dominant estate is Lot 4; while the servient estate is Lot 5. In the absence of any evidence showing ownership of the dominant and servient estates by the same person, the doctrine of merger did not operate to terminate the private alley easement over Lot 5.

¶ 42 Defendants contend the circuit court should have granted summary judgment in their favor on count I of plaintiff's second-amended complaint because plaintiff's use of the private alley easement across Lot 5 for vehicular ingress and egress exceeds the scope of the easement. Defendants argue, when the Porters created the easement in 1877, they could not have contemplated the use of automobiles since automobiles did not exist at that time. Therefore, defendants argue, plaintiff exceeds the scope of the easement when he drives his car across the private alley.

¶ 43 We disagree. The 1877 deed creating the private alley easement stated: "[I]t is hereby agreed that the east nine (9) feet of [Lot 5] shall be reserved as a private alley to be kept open as long as the owners of the four adjoining houses south may require." As correctly noted by the circuit court, "the language of the private alley easement is unlimited as to the use of the easement", *i.e.*, it did not limit the private alley to pedestrian use only, but also contemplated vehicular use of the type then in

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existence (*e.g.*, horse-drawn vehicles.) The question here is whether the easement language may also be construed to contemplate the use of the private alley by the modern day automobile that was not then in existence. We answer that question in the affirmative, as there is no language in the deed limiting the private alley to the specific types of vehicles then in use; rather, the language is open-ended, allowing for any type of vehicle capable of traversing the nine-foot-wide alley.

¶ 44 This case is similar to *Heuer v. Webster*², 187 Ill. App. 273 (1914). In *Heuer*, a deed granted an easement for a common right of way over a strip of land 10 feet wide, one-half of which was located on Heuer's lot and one-half of which was located on Webster's lot. *Id.* at 273-74. The deed stated that the strip of land "shall be and remain an open court for light, air, access and right of way, for the common benefit of the parties hereto, their heirs and assigns, and of the owners of any building or buildings now or which may hereafter be erected on said lots nine (9) and ten (10) or either of them, said strip of ground lying and being one-half thereof on each side of the north line of said south ten (10) feet of said lot nine (9)." *Id.* at 274-75.

¶ 45 In May 1910, Heuer laid a cement driveway on the strip of land which would allow for vehicular passage. *Id.* at 274. Webster disputed Heuer's right to pave the strip as a vehicular driveway without his consent. Webster subsequently tore up the portion of the driveway on his side of the strip. *Id.* at 274. Heuer brought suit to recover damages for Webster's tearing up the driveway. *Id.* at 273. Heuer contended, "the right of way so given is for passage for vehicles as well as pedestrians." *Id.* at 275. Webster contended, "that the deed must be construed in the light of the

²Although *Heuer* is not binding or precedential as it was decided prior to 1935, we may cite it as persuasive authority. See *Reichert v. Court of Claims*, 203 Ill. 2d 257, 262 n.1 (2003) ("appellate court decisions issued prior to 1935 are persuasive authority only.")

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facts existing at the time of its execution from which *** a contrary purpose and intention must be inferred." *Id.*

¶ 46 We noted that the language of the deed made an express grant of a right of way without limitation or reservation as to its character and with no specifications as to any particular manner in which it should be used. *Id.* at 276. We held that "[i]nasmuch as the strip in question is sufficiently wide for the use of ordinary vehicles and teams and there are no words of limitation or restriction in the deed as to the character of its use as a right of way, we see no difficulty *** in construing it to include the right to vehicle as well as foot passage." *Id.* at 277.

¶ 47 As in *Heuer*, the 1877 deed here made an express grant for a private alley easement without reservation or limitation on its use. As the private alley is sufficiently wide (nine feet) for the use of ordinary motor vehicles, plaintiff is allowed the right to drive his automobile thereon.

¶ 48 Our decision here is consistent with out of state cases holding that an easement created before the invention of the automobile can be used for motor vehicle traffic. See *Hodgkins v. Bianchini*, 80 N. E. 2d 464 (Mass. 1948); *Matteodo v. Capaldi*, 138 A. 38 (R.I. 1927). We agree with the following statement by the *Matteodo* court: "[I]t may be said as a matter of law that, when a vehicular right of way has been granted, its use is not limited to such vehicles as are customary at the time of the grant; that mere travel over the way in any vehicle which is an ordinary and customary mode of conveyance is not an increase of the burden upon the servient estate." *Id.* at 39.

¶ 49 Defendants argue, the "lack of any language in the deed as to how the property is to be maintained, at whose cost and the like is further evidence that the claimed easement was never intended to apply to vehicular traffic and that such an increased use of Defendants' property would

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be unreasonable and an abuse of the claimed easement." We disagree. The lack of any language regarding the maintenance of the easement is not fatal thereto, as it is well settled that the owner of the dominant estate has the duty to maintain the easement. *McCann*, 242 Ill. App. 3d at 255.

¶ 50 Defendants also argue plaintiff exceeded the scope of the easement when his "contractors substantially altered Defendants' property without Defendants' prior knowledge or consent by layering it with crushed stone in order to make it useable to Plaintiff." In defendant Erwin's affidavit, though, she admits that when defendants objected to the alterations of their property, plaintiff "had his contractors mostly restore the property." Ms. Erwin's own affidavit belies her argument that plaintiff ultimately exceeded the scope of the easement.

¶ 51 Next, we note that in its order granting plaintiff's motion for summary judgment and denying defendants' cross-motion for summary judgment, the circuit court determined that the evidence raised the issue whether plaintiff abandoned the easement. Abandonment of an easement is an affirmative defense (*USR Corp. v. Ash*, 101 Ill. App. 3 229, 235-36 (1981)), for which defendants bear the burden of proof. See *e.g.*, *Rosenthal v. City of Crystal Lake*, 171 Ill. App. 3d 428, 435 (1988) (defendant bears burden of proof on an affirmative defense). After considering the issue, the circuit court found that defendants failed to present sufficient evidence that plaintiff abandoned the easement.

¶ 52 Defendants contend the circuit court erred in *sua sponte* raising the issue of abandonment of the easement, and that they were prejudiced because by considering the issue, the court shifted the burden of proof to them. Defendants contend, instead of considering whether defendants proved that plaintiff abandoned the easement, the court instead should have considered whether plaintiff

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presented sufficient evidence to meet his initial burden of proving, under the express language of the 1877 deed, that the easement was still required by the owners of Lots 1 through 4.

¶ 53 Defendants' argument is without merit. Review of the record indicates that prior to considering the affirmative defense of abandonment of the easement, the circuit court determined that plaintiff met his initial burden of proving that he required the easement. As discussed above, plaintiff's continued requirement that the easement remain open satisfied the language of the 1877 deed; accordingly, we affirm the circuit court's finding on this issue.

¶ 54 On the merits of whether plaintiff abandoned the easement, we note that "[a]n easement is abandoned 'when nonuse is accompanied by acts which manifest an intention to abandon and which destroy either the object for which the easement was established or the means of its enjoyment.' [Citation.]" *Diaz*, 337 Ill. App. 3d at 731. "With respect to abandonment, the rule is that mere nonuse will not constitute an abandonment of an easement. [Citation.] Rather, the abandonment of an easement requires, in addition to nonuse, circumstances showing an intention of the dominant owner to relinquish his right." *Gacki v. Bartels*, 369 Ill. App. 3d 284, 292 (2006).

¶ 55 In the present case, plaintiff filed an affidavit stating he purchased Lot 4 in September 2005, and that he was unable to initially use the private alley easement over Lot 5 because defendants regularly blocked access thereto by parking their car in the alley. Plaintiff stated that in approximately May 2008, defendants "stopped blocking the easement after they received compensation from their title company for overlooking the easement when their home was purchased." Plaintiff began using the private alley in September 2008. On these facts, which are not disputed by defendants, the circuit court correctly found that defendants "offered no evidence

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of an intent by [plaintiff] to permanently abandon his right to use the easement over Lot 5 to access the rear of his lot by car."

¶ 56 We also note there is no evidence regarding any intent of the prior owners of Lot 4 to abandon the right to use the easement. Thus, there is no evidence of any abandonment of the easement prior to plaintiff's purchase of Lot 4.

¶ 57 Finally, defendants contend the circuit court erred in granting plaintiff's motion for summary judgment on their counterclaim for trespass and denying their motion for summary judgment thereon. "A trespass is the entry onto another's land without permission, invitation, or other right." *Benno v. Central Lake County Joint Action Water Agency*, 242 Ill. App. 3d 306, 313 (1993). Defendants argue, "the undisputed evidence is that Plaintiff has and continues to drive an automobile over [the east nine feet of Lot 5] without their consent." Defendants' counterclaim presupposes that the private alley easement over the east nine feet of Lot 5 is non-existent or terminated. However, as discussed above, the easement remains in effect and it gives plaintiff the right to drive his automobile thereon. Accordingly, the circuit court correctly granted summary judgment in favor of plaintiff on defendants' counterclaim for trespass and denying defendants' motion for summary judgment thereon.

¶ 58 For the foregoing reasons, we affirm the circuit court.

¶ 59 Affirmed.