

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2011 IL App (3d) 100448-U

Order filed August 22, 2011

---

IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2011

KENNETH R. MILLS and RONALD W. MILLS,	)	Appeal from the Circuit Court
	)	of the 14th Judicial Circuit
	)	Whiteside County, Illinois
Plaintiffs-Appellees,	)	
	)	Appeal No. 3-10-0448
v.	)	Circuit No. 08-CH-104
	)	
DAVID J. VANDERMYDE and	)	
PATRICIA M. VANDERMYDE,	)	Honorable
	)	John L. Hauptman
Defendants-Appellants.	)	Judge, Presiding.

---

JUSTICE LYTTON delivered the judgment of the court.  
Presiding Justice Carter concurred in the judgment.  
Justice Wright dissented.

---

**ORDER**

¶ 1 *Held:* Plaintiffs presented sufficient evidence to establish an easement by prescription where plaintiffs testified that they traveled over lane with farm equipment for over 30 years.

¶ 2 Plaintiffs, Kenneth R. Mills and Ronald W. Mills, filed a complaint against defendants, David J. Vandermyde and Patricia M. Vandermyde, seeking an easement by prescription over a portion of defendants' property. Following a hearing, the trial court granted plaintiffs a 24-foot wide

easement over defendants' property. On appeal, defendants argue that (1) plaintiffs were not entitled to an easement, (2) the easement granted was too broad in scope, and (3) plaintiffs abandoned the easement. We affirm.

¶ 3 Plaintiffs own a parcel of real estate consisting of 40 acres in Whiteside County. The parcel is divided into two separate sections by Rock Creek. The northern portion of the parcel does not have direct access to a road.

¶ 4 Defendants own a parcel of real estate that borders the northeastern portion of plaintiffs' property. Defendants' property is bordered on the west by a parcel owned by Ernie Hook. That parcel abuts Henry Road. When defendants acquired their property, they also acquired a 24-foot easement over the northern portion of Hook's property to Henry Road. Hook also owns a parcel directly west of plaintiffs' property, which borders Henry Road.

¶ 5 In 2008, plaintiffs filed a complaint against defendants, seeking a prescriptive easement. Access to and from Henry Road was sought over "a lane from the Northwest corner of Defendants' property, along and upon the westerly twenty-four feet (24 ft.) of Defendants' property to the northerly boundary of Plaintiffs' property."

¶ 6 The trial court held a hearing in September 2009. At the hearing, Ron Muur testified that he leased and farmed plaintiffs' property from 1996 to 1998. During those years, he accessed the property from Henry Road by traveling across the northern portion of Hook's parcel then over the lane located along the western edge of defendants' property. He traveled that path with his combine, planter and tilling tools. He does not remember trees ever obstructing the lane on defendants' property. Defendants never restricted his access to the lane.

¶ 7 Kenneth Mills testified that his parents acquired plaintiffs' parcel in 1942. At the time, the

parcel consisted of 10 to 12 acres of tillable land, with the remainder timber. When plaintiffs' father farmed the property, there was a bridge that crossed a creek on the property from Henry Road south to Rock Road. The township removed the bridge in the late 1940s or early 1950s.

¶ 8 From 1968 to 1995, Kenneth farmed plaintiffs' property. When he began farming the property, there were shrubs along both sides of the lane along the western portion of defendants' property. There was also a fence located on the west side of the lane. The lane was 20 to 24 feet wide.

¶ 9 In the late 1970s and early 1980s, Kenneth built an eight-foot wide bridge across Rock Creek so that he could have access to the southern portion of his property. That bridge was not wide enough to accommodate all of his farm machinery, including a combine.

¶ 10 Every year that Kenneth farmed plaintiffs' property, he used the lane located on the northern portion of Hook's property and the lane on the western portion of defendants' property to access his property. He never asked permission to use the lane on defendants' property. He used the lane for combines, tractors, planters, tilling tools and his pick-up truck. The lane was always passable by a combine, which is 13 to 15 feet wide. Kenneth recalled that David Vandermyde removed trees next to the lane at some time. Before that, the lane was still passable by a combine.

¶ 11 Defendants never spoke to Kenneth about his use of the lane until 1998, when one of defendants approached him about renting plaintiffs' property. Defendants told him that they would not permit anyone to go across their lane to access plaintiffs' parcel. Plaintiffs agreed to rent their property to defendants from 1999 to 2007.

¶ 12 Kenneth denied ever accessing his property by traveling along a waterway located in the middle of Hook's northern parcel, a path along the southern portion of Hook's northern parcel

property, or a path along the southern portion of Hook's southern parcel. He denied ever accessing his property by using the end rows on defendants' property. Kenneth testified that his father accessed the property from the south by using a bridge over a creek, but that bridge was removed in the 1950s. He testified that he has no access to his property for farm machinery other than over the lane on defendants' property.

¶ 13 Allan Schaver testified that he grew up on the property that is now owned by defendants. Schaver took over the farming of the property in 1983. Both before and after 1983, he recalls Kenneth Mills calling and asking for permission to travel over the end rows of his property with his combine. He always granted permission.

¶ 14 During the 1970s and 1980s, Schaver and his family did not use the lane on the western boundary of their property for anything except to check on a fence located on the east side of the lane. He drove a tractor on the lane when he did that. Schaver never tried to drive a combine over the lane in the 1970s or 1980s but believed that a combine would not fit through because of overgrown trees. David Vandermyde had the trees removed in 1994. He assumed that the lane was passable by a combine after that.

¶ 15 Defendant David Vandermyde testified that he began farming Hook's farm in 1981. From 1981 on, David saw plaintiffs access their property in several different ways, by (1) traveling across the end rows at the south of Hook's southern parcel, (2) traveling across the northern portion of Hook's northern parcel and then the end rows on the eastern portion of Hook's northern parcel, (3) traveling over the bridge installed by Kenneth Mills, (4) using a path across the northern portion of Hook's southern parcel, and (5) traveling along a waterway on Hook's property.

¶ 16 In 1992, defendants purchased their property from the Schavers. When defendants bought

the property, Kenneth asked if he could use the end rows on their property to access his property. Defendants gave him permission to do so. David testified that the lane in question was not passable by a combine until 1994, when he had trees removed from it. David still does not use the lane for farm machinery because "it is too rough to pass and halfway down there is a bad spot." He only drives his pick-up truck on it. He testified that the lane is currently 14 to 15 feet wide.

¶ 17 Patricia Vandermyde testified that she saw Muur access plaintiffs' property by traveling along the waterway located on Hook's northern parcel. She also saw plaintiffs access their property by traversing the end rows on the eastern portion of Hook's northern parcel. When she and her husband purchased their property in 1992, the lane on the western portion of the property was not passable by a combine because it was covered with shrubbery and trees. Since the trees have been removed, a smaller combine could pass through with difficulty.

¶ 18 After the hearing, the court ruled that plaintiffs proved all of the elements of a prescriptive easement, specifically finding that plaintiffs continuously drove a combine and other farm implements over the lane from 1968 to 1999 "notwithstanding the fact that \*\*\* the condition of the lane may have made travel difficult."

¶ 19 I. EXISTENCE OF EASEMENT

¶ 20 Defendants first argue that the trial court erred in granting an easement to plaintiffs because plaintiffs did not prove the requisite elements.

¶ 21 To establish an easement by prescription, a party must prove that the use of the land was (1) open; (2) adverse; (3) continuous and uninterrupted; and (4) under a claim of right for 20 years or more. *Radke v. Independence Tube Corp.*, 301 Ill. App. 3d 713, 715 (1998). The burden of proving a prescriptive easement is on the party alleging it. *Bogner v. Villiger*, 343 Ill. App. 3d 264, 269

(2003). To show adverse use, the use must be with the knowledge and acquiescence of the owner, but without his permission. *Page v. Bloom*, 223 Ill. App. 3d 18, 21 (1991).

¶ 22 Whether a party has established an easement by prescription is a question of fact. *Bogner*, 343 Ill. App. 3d at 269. A reviewing court will not disturb such a finding unless it is against the manifest weight of the evidence. *Id.* A finding is against the manifest weight of the evidence if, when viewing the ruling in the light most favorable to the prevailing party, the opposite conclusion is clearly evident. *Id.* Where there is evidence supporting the trial court's decision, it is not against the manifest weight of the evidence. *Doornbos Heating & Air Conditioning Inc. v. Schlenker*, 403 Ill. App. 3d 468, 485 (2010).

¶ 23 The trial court is in the best position to observe the demeanor of the witnesses and weigh their credibility. See *Rinderer v. Keeven*, 90 Ill. App. 3d 34, 49-50 (1980). It is the trial court's responsibility to draw conclusions regarding the evidence and witness credibility. *Schlenker*, 403 Ill. App. 3d at 485.

¶ 24 Here, the testimony at the hearing was conflicting. Kenneth Mills testified that he openly, adversely and continuously used the lane on the western portion of defendants' property without defendants' permission from 1968 until 1999, when defendants denied him access to it. Plaintiffs' tenant farmer, Ron Muur, supported Kenneth's testimony, indicating that he exclusively used the lane to access plaintiffs' property for the three years he leased it. Both denied using any other route to access the property by combine or other large machinery.

¶ 25 Defendants, on the other hand, testified that plaintiffs used several routes other than the easement to gain access to their property, including routes across Hook's property and the end rows on defendants' property. Defendants and Schaver believed that the easement was impassable by a

combine from the 1980s until the trees were removed in 1994.

¶ 26 Since the testimony was conflicting, it was the trial court's duty to draw conclusions and make credibility determinations. See *Schlenker*, 403 Ill. App. 3d at 485. Plaintiffs' witnesses provided testimony establishing the existence of all of the elements necessary for a prescriptive easement. See *Radke*, 301 Ill. App. 3d at 715. Since evidence supported the trial court's decision, it was not against the manifest weight of the evidence. See *Schlenker*, 403 Ill. App. 3d at 485.

¶ 27 II. SCOPE OF EASEMENT

¶ 28 Next, defendants argue that the trial court erred in granting plaintiffs a 24-foot wide easement because the evidence did not support an easement that wide.

¶ 29 An easement by prescription carries with it the right to do whatever is reasonably necessary for the reasonable use of it for the purpose for which it was acquired. *Page*, 223 Ill. App. 3d at 22. The extent of a prescriptive easement is defined by the prescriptive use that led to the easement's creation. *Limestone Development Corp. v. Village of Lemont*, 284 Ill. App. 3d 848, 855 (1996).

¶ 30 Here, defendants testified that the lane was 14 to 15 feet wide. However, Kenneth testified that the lane has always been 20 to 24 feet wide and large enough for a 4-headed combine to pass through. Muur agreed that a combine could easily travel over the lane. Based on this testimony, the trial court's granting of a 24-foot easement was not against the manifest weight of the evidence. See *Page*, 223 Ill. App. 3d at 22 (trial court declared 40-foot easement for farming where testimony showed that roadway was 40 to 45 feet wide).

¶ 31 III. ABANDONMENT OF EASEMENT

¶ 32 Finally, defendants argue that the trial court should have found that plaintiffs abandoned the easement because it became overgrown and impassable for a number of years.

¶ 33 To constitute an abandonment of an easement there must be nonuse in addition to circumstances showing that it was the intention of the dominant owner to abandon the use of the easement. *Yunkes*, 339 Ill. at 26. Failure to use the easement for the purpose created may become a circumstance to be considered on the question of intent. *Chicago Title & Trust Co. v. Wabash-Randolph Corp.*, 384 Ill. 78, 92 (1943). The party asserting abandonment must prove it by clear and unequivocal evidence. *Brunotte v. De Witt*, 360 Ill. 518, 533 (1935).

¶ 34 Here, defendants presented testimony that the lane was not passable for a number of years and, thus, abandoned by plaintiffs. Plaintiffs refuted that testimony and presented evidence that they passed through the lane every year for over 30 years. Because there was conflicting testimony about plaintiffs' use of the easement, the trial court's conclusion that there was no abandonment was not against the manifest weight of the evidence. See *Brunotte*, 360 Ill. at 533.

¶ 35 The order of the circuit court of Whiteside County is affirmed.

¶ 36 Affirmed.

¶ 37 JUSTICE WRIGHT dissents:

¶ 38 The law regarding prescriptive easements is well established. A court must presume that “an agreement to impress property with a servitude” was made with knowledge of the provisions of the Statute of Frauds, and was therefore intended as a permissive use only and not as an easement. *Petersen v. Corrubia*, 21 Ill. 2d 525, 532 (1961). This presumption in favor of the true owner is rebuttable *only* when the party claiming a prescriptive easement shows that the use of the true owner's land was adverse, exclusive, continuous and uninterrupted, and *under claim of right* for a period of at least 20 years. *Petersen*, 21 Ill. 2d at 531; *Weihl v. Wagner*, 210 Ill. App. 3d 894, 895 (1991). In order to obtain a prescriptive right of way over the land of a true owner, it

is essential that *all* of the elements, necessary to establish such a right, should be clearly and distinctly proven. *Parker v. Rosenberg*, 317 Ill. 511, 518 (1925).

¶ 39 In this case, the court fixed the starting date of the prescriptive period to be 1968 without explaining the basis for this finding. To meet the element of adversity necessary for the prescriptive time frame to begin, a claimant must show the use of the property was with the knowledge and acquiescence of the owner, but without his permission. *Weihl*, 210 Ill. App. 3d at 895-96. If the initial use of the property, or lane in the instant case, was permissive, the previous permissive use, allowed by the Newendykes, could not ripen into a prescriptive right as the trial court in this case concluded. See *Petersen*, 21 Ill. 2d at 531 (citing *Monroe*, 376 Ill. at 256); *Weihl*, 210 Ill. App. 3d at 896. After carefully reviewing the record in this case, it is clear that Mills did not present any proof that he used the lane beginning in 1968 under a claim of *right* that was adverse to the interests of the true owners, the Newendykes.

¶ 40 Based on this record, the trial court erroneously assumed the use in 1968 was adverse and, consequently, ordered the land to be impressed with a servitude for perpetuity. For this reason, I respectfully dissent and conclude the subsequent true owner, Vandemyde, was clearly entitled to assert his privilege of ownership by prohibiting Mills from using the lane after the contract between the men expired in 1998.

¶ 41 Adverse Possession

¶ 42 Adverse possession cannot be created by inference or implication, but the presumptions are all in favor of the true owner and proof as to each element of a prescriptive easement must be strict, clear, positive and unequivocal. *Poulos v. F.H. Hill Co.*, 401 Ill. 204, 212 (1948); *Monroe v. Shrake*, 376 Ill. 253, 256 (1941); *Rush v. Collins*, 366 Ill. 307, 315 (1937). In the trial court's

defense, the case law includes competing presumptions which the parties did not make clear to the court.

¶ 43 First, the case law presumes when there is evidence of a neighborly relationship between the parties permissive use is presumed.. *Weihl*, 210 Ill. App. 3d at 896. In this case, Mills did not attempt to prove his relationship with the Newendykes was anything less than a friendly, cooperative relationship. Based on this record, there is nothing to refute the presumption that the Newendykes permitted Mills to use the lane as a matter of neighborly courtesy and convenience from 1968 to 1992. Here, the court should not have presumed that the use became adverse in 1968 without proof that Mills use of the lane was clearly adverse, exclusive, continuous and uninterrupted, and under a *claim of right* to use the lane from 1968 for the next 20 years. Our supreme court has stated:

"Whether the agreement [to use the land] is to operate as a license or as the basis for a claim of right depends primarily upon the language employed by the parties. If the language is such as to create a license only, the enjoyment under it is to be regarded as permissive and not of right, and no title is acquired under it, however, long continued. If, on the other hand, the language and conduct of the parties purport to give a right to the way and the use is continued under such \*532 claim of right for 20 years, the use is adverse and will ripen into a prescription."

*Petersen*, 21 Ill. 2d at 531-32.

¶ 44 \_\_\_ In this case, Mills did not introduce *any* evidence demonstrating that the language and conduct of the Newendykes and the Mills proved that, beginning in 1968, Mills began asserting his access to the lane was a matter of right, rather than a courtesy extended by his neighbor,

Newendyke.

¶ 45 Mills testified that he had not asked the Newendykes for permission to use the lane, but I conclude that silence does not satisfy proof of adverse use when the parties are cooperative neighbors. Moreover, Mills bears the burden of proof to clearly establish adverse use by something other than implication.

¶ 46 The court overlooked the testimony that established, when Mills and Vandermyde were both together in 1992 at the auction where Vandermyde became the highest bidder on the Newendyke farm, Mills asked Vandermyde if Mills would be permitted to *continue* to use the former Newendyke lane. Mills' 1992 inquiry regarding whether his family could *continue* to use the lane with permission constitutes strong circumstantial evidence that Mills clearly understood any prior use of the lane, while the Newendyke's owned the land, had been permissive and negates any arguable inference of prior adverse use.

¶ 47 Further, at trial, Mills did not challenge or refute the truthfulness of Vandermyde's recollection of the conversation shared by both men on the day Vandermyde purchased the Newendyke farm. According to all accounts, Vandermyde honored his promise and allowed Mills and Mills' tenant, Muur, to use the farm lane from 1992 to 1998. Thus, the use was not adverse for those next six years. However, the permissive use allowed by Vandermyde ended in 1998 when Vandermyde informed Mills that he could no longer continue to use the lane with Vandermyde's permission. Even in 1998, the men did not develop an adverse relationship involving the use of the lane. Instead, rather than defying Vandermyde's clearly-expressed intention to end the permissive use, Mills agreed to rent Parcel 10 to Vandermyde beginning in 1999.

¶ 48 This rental agreement between the parties obviated Mills' desire to personally use the lane for his own combine since Vandermyde was able to reach Parcel 10 by driving across his own fields with large equipment. Although counsel for Mills argues on appeal that the rental terms were disadvantageous to Mills, the men both agreed to continue this contractual arrangement for the next nine years until 2008. From 1999 to 2008, Mills did not use the lane because he rented parcel 10 to Vandermyde. Clearly, Mills had not attempted to use the lane without the true owner's permission for the 15 years beginning in 1992 until 2008.

¶ 49 In spite of a 15 year period of non-adverse use, the court did not address the issue of abandonment of the use.

¶ 50 Continuous Use

¶ 51 In addition, Mills did not show he used the lane continuously for the next 20 years after 1968. Mills testified that Parcel 10 was originally used as pasture in 1968, when his father was able to reach Parcel 10 via a township bridge to check both livestock and fences. The record is not clear as to when that township bridge failed to exist, but Mills admitted that he built his own bridge to access Parcel 10 from his own property in the late '70's or early '80's. Mills explained the bridge he built was large enough to accommodate grain wagons used to haul harvested crops off of Parcel 10, but not larger farm equipment. However, the prescriptive 20 years of continuous use after 1968 had not been met at the time Mills built his own bridge to access Parcel 10 in the early 1980's.

¶ 52 In this case, the court found that Mills' converted Parcel 10 into its present tillable state in the early '80's. This finding was consistent with the testimony of Schaver, who advised the court that he grew up on the Newendyke farm, lived there until he graduated from high school in 1970,

and later returned to help his father farm the Newendyke land in 1983. Schaver recalled Mills asking his family for permission to traverse across their end rows with their combine, not the lane. According to Schaver, permission to use the end rows was allowed. Schaver also testified that the lane itself became overgrown sometime in the late 1970's or early 1980's.

¶ 53 Significantly, the timing of the overgrowth on the lane described by Shaver also coincided with the date the court concluded Parcel 10 became fully tillable, and the date Shaver indicated Mills began using the Newendyke endrows with his combine. Apparently, the plant and tree growth naturally encroached upon the boundaries of the old lane during the 1980's due to simple nonuse.

¶ 54 This nonuse also coincided with the time Mills built his own bridge for access and began using Newendyke's end rows with his own combine to reach Parcel 10 with Schaver's permission. Thus, the finding that Mills continuously used the lane, which was not always wide enough for a combine after 1968, was against the manifest weight of the evidence.

¶ 55 Here, the court further found that, by 1999, "the requisite statutory period had elapsed so that, as long as all of the other elements had been met, this denial of access [by Vandermyle in 1998] would be of no legal effect." This conclusion is not supported by the record because Mills did not prove that his use was continuous, exclusive, and adverse for 20 years preceding 1998.

¶ 56 Having mistakenly overlooked the presumption in favor of permissive use, I respectfully conclude that the trial court's finding that Mills proved all of the elements to establish adverse, exclusive, and continuous use during the prescriptive period, beginning in 1968, was contrary to the manifest weight of the evidence. See *Weihl*, 210 Ill. App. 3d at 896; *Roller*, 16 Ill.App. 3d at 1053-54.

¶ 57 For these reasons, I respectfully dissent.