2013 IL App (2d) 121321-U
Nos. 2-12-1321 & 2-12-1357 cons.
Order filed July 15, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

DAVID J. HUNDRIESER and DANA E. HUNDRIESER, Plaintiffs and Counterdefendants-Appellants, v. JOEL PERRY and LAURA PERRY, Defendants, Counterplaintiffs, and Third-Party Plaintiffs-Appellees (Donald J. Wienen, Sandy K. Wienen, and James Kapela, Third-Party Defendants).	)	Appeal from the Circuit Court of Jo Daviess County. No. 10-CH-57 Honorable William A. Kelly, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Presiding Justice Burke and Justice Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly granted summary judgment for defendants on defendants' counterclaim insofar as it sought to allow them to use their easement on plaintiffs' land as a driveway, as the deed's language providing for a "a 30 foot wide easement for ingress and egress" unambiguously allowed defendants to use the easement for motor vehicles. However, this grant of summary judgment did not resolve whether defendants could pave the easement. Moreover, there were questions of material fact regarding whether the presence of gates on the easement were reasonable. Therefore we affirmed in part, reversed in part, and remanded.

¶ 2 Plaintiffs, David J. and Dana E. Hundrieser, appeal from the trial court's grant of summary judgment in favor of defendants, Joel and Laura Perry, on defendants' counterclaim. The trial court ruled that defendants' easement over plaintiffs' land, described in the deed as "a 30 foot wide easement for ingress and egress," allowed defendants to install a driveway. The trial court later entered an Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010) finding that there was no reason to delay the appeal of its ruling. The trial court imposed a 30-day stay on enforcing the judgment pending appeal, but it subsequently denied plaintiffs' motion to extend the stay. On appeal, plaintiffs argue that the trial court erred in: (1) granting summary judgment for defendants on defendants' counterclaim; and (2) denying plaintiffs' motion for a stay of enforcement of the judgment pending this appeal. We affirm in part, reverse in part, and remand the cause.

¶ 3 I. BACKGROUND

¶ 4 Plaintiffs filed a complaint for injunctive relief against defendants on July 2, 2010. Plaintiffs alleged as follows. Plaintiffs owned property at 1414 S. Snipe Hollow Road in Elizabeth, Illinois, which they described as "Property A." They acquired the property on November 10, 1999, from Paul Hundrieser, plaintiff David Hundrieser's brother. Paul and his wife Cynthia Hundrieser in turn acquired the property from Donald and Sandra Wienen. At that time, the Wienens owned land bordering Property A, namely 45.86 acres directly west of Property A (described as "Property B") and additional land west of Property B ("Property C"). When the Wienens conveyed Property A to Paul and Cynthia Hundrieser, the deed included an "easement for ingress and egress" over Property A. Moreover, Property B was in a "Conservation Reserve Program" in which the Wienens were paid not to farm it, and plaintiffs believed Property B was still in such a program. On October 1, 2001,

the Wienens conveyed Property B to Steven A. Crifase. He conveyed Property B to defendants on February 28, 2010.

¶ 5 Plaintiffs alleged that the location of the easement on their property had been used as pastureland for about 25 years and had never been used for ingress and egress by the owners of Property B since its creation. However, in March 2010, defendants asserted in a letter from their attorney that they had a right to "put in a lane over [plaintiffs'] land and remove or leave open their gates." Defendants further asserted that they would not allow cattle on their easement and that it would be plaintiffs' responsibility to fence at least the north side of the easement.

¶ 6 Plaintiffs alleged that in June 2010, defendants caused trees and a rock to be removed from plaintiffs' property. Further, plaintiffs were informed that defendants had hired a company to construct a road over the easement as soon as possible. Upon information and belief, defendants further intended to remove the gates and install utility lines on the portion of plaintiffs' property subject to the easement. All of these activities were a material alteration of the easement unintended by the parties who created the easement.

¶ 7 Plaintiff sought a temporary restraining order in count I, a preliminary injunction in count II, and a permanent injunction in count III.

¶ 8 Plaintiffs filed an amended complaint on September 24, 2010, which added two counts. These counts alleged as follows. Plaintiffs had been leasing their land to Bill and Paulette Wiley since 2003. Defendants sent e-mails to County personnel falsely claiming that Paulette was conducting personal business during her work hours with the County. Defendant also opened the gate between Property A and the adjacent roadway, allowing the Wileys' cattle onto the road. Defendant further threatened to remove the gate located between their real estate and the easement

and demanded that all gates across the easement be removed. Defendants' conduct threatened to cause the Wileys to breach their lease with plaintiffs or not renew it at the end of the current term. Plaintiffs sought a preliminary injunction (count IV) and a permanent injunction (count V) regarding these activities.

¶ 9 Defendants filed a two-count counterclaim on February 10, 2011, alleging as follows. When the Wienens originally subdivided their property into individual lots, it landlocked Property B in that Property B did not touch upon or have direct access to a road. Therefore, the newly-created lots between Property B and Snipe Hollow Road, which included Property A, were encumbered with easements granting access from Snipe Hollow Road to Property B. The easements provided for "ingress and egress" and defined a specific path across Property A. A portion of the easement was formerly used as a driveway for the house on Property A. Defendants desired to construct a retirement residence on their property. In order to do so, they had to first construct a driveway across the easement to allow access for construction vehicles as well as for their own use after the house was completed. Without a driveway between Snipe Hollow Road and Property B, Property B could not be used as a residential property, which would cause the property value to be markedly diminished, causing defendants irreparable harm.

¶ 10 Defendants alleged that plaintiffs engaged in an intimidation campaign to prevent them from constructing a driveway on the easement. Plaintiffs locked the gates on Property A and stated that defendants must contact them or other neighbors to access the easement. Plaintiff David Hundrieser, a Chicago police officer, frequently carried a firearm in his property, which defendants believed he did, in part, to intimidate them. On August 31, 2010, plaintiffs installed or allowed the installment

of an additional steel barricade in front of the sole gate connecting the two properties, which effectively prevented access to Property B.

¶ 11 Count I of defendants' counterclaim sought to quiet title by either (1) interpreting the easement as a driveway easement and allowing permanent open access to and across the easement; or (2) creating a driveway easement and providing open access to and across the easement. Count II sought a permanent injunction barring plaintiffs from interfering with defendants' use and enjoyment of the easement.

¶ 12 On February 10, 2011, the trial court entered an order allowing defendants to use the easement for ingress and egress while the case was pending. Plaintiffs were required to make reasonable provisions for unlocking all gates for access. Defendants were to secure all gates when leaving and not alter the easement.

¶ 13 On June 20, 2011, defendants filed a two-count, third-party complaint against James Kapela and the Wienens, alleging that the easement crossed over these parties' properties, in addition to Property A. Defendants alleged that quieting title to the easement could not be fully adjudicated without the addition of these third-party defendants. As in their counterclaim against plaintiffs, defendants sought to either interpret the easement as a driveway easement or have a driveway easement created, in addition to obtaining permanent access to and across the easement. Defendants subsequently filed a first amended third-party complaint in which they added a count seeking an easement by necessity on the Wienens' property, Property C (located west of Property B).

¶ 14 On July 13, 2011, plaintiffs filed a motion for summary judgment. We summarize information from the motion, supporting memorandum, and exhibits. Donald Wienen rented the "Goldsworthy" farm for four or five years. Mr. Goldsworthy then passed away, and Mrs.

Goldsworthy sold the land to Donald. Donald was a farmer and wanted to keep the tillable land; he was not interested in the pasture land, the wooded areas, or the buildings. Therefore, he wanted to divide the land. Donald knew Paul and Cynthia Hundrieser and offered to sell them Property A, and they agreed. The January 1990 land contract[1] between the Wienens and Paul and Cynthia Hundrieser included the easement in the property description. Specifically, it described the location of a "30 foot wide easement for ingress and egress." Paul and Cynthia agreed to the creation of the easement.

¶ 15 Donald testified in his deposition as follows. To him, "ingress and egress" meant that a person had an easement or roadway to get to his property. It was not Donald's intent that the easement be used only for agricultural purposes, but rather he expected it to be a road, either crushed gravel or paved. If the easement had been meant solely for agricultural purposes, it would have said "ag." At the time the easement was granted, it had "creek rock" in it. He could not remember whether he put any gravel or creek rock on the easement after 1990. Donald would use the easement weekly during certain seasons to haul manure and occasionally, at most once per year, to make hay. The easement and the area around it were used for pasture land. Donald could also access Property B from Property C.

¶ 16 Donald did not have specific recollections about his conversations with Paul about creating the easement. He did not talk to Paul and Cynthia or plaintiffs about building a road where the easement was located; there was no discussion about what the easement would be used for. "At the time Paul and Cindy thought maybe down the road they would buy it, which didn't happen."

[1]Some portions of the record refer to the transaction occurring in 1996; whether it occurred in 1990 or 1996 does not affect our analysis.

¶ 17 Donald sold Property B to Steven Crifase on October 1, 2001. Crifase could not have accessed Property B without crossing property owned by someone else. When Donald sold two other nearby parcels he owned, Property D and Property E, he built a road or granted the buyers an easement to build a road for access. Crifase sold Property B to defendants on February 28, 2010. Defendants had talked to Donald about building a road across his property (Property C), but it would need to be one-half mile long, and it would not be economical. Also, as "far as [Donald was] concerned," defendants already had an easement on Property A.

¶ 18 An affidavit of Paul Hundrieser attached to the motion for summary judgment stated as follows in relevant part. When he and Cynthia purchased Property A from Donald, Donald wanted an easement in order to more easily move his farm equipment to other properties he owned. When Paul and Cynthia agreed to the easement, their intention was to allow Donald ingress and egress only for farming purposes during the farming season. They did not grant Donald the right to build any kind of road or create a daily residential traffic pattern on their property. Not long after their purchase, Donald put his land into a conservation reserve program and the easement was seldom, if ever, used. For the more than 30 years that Paul lived on Property A, the easement location had always been used as pastureland for cattle, and there was never a road of any kind there.

¶ 19 Plaintiffs further included affidavits from two long-time area residents who discussed their familiarity with Property A and stated that there was never a road on the easement.

¶ 20 An affidavit of plaintiff David Hundrieser stated, in relevant part, the following. In April 2010, defendant Laura Perry told plaintiffs that defendants had originally been told that they owned the land burdened by the easement, but she now understood this was not the case. Plaintiffs said that defendant could fill in deep ruts near the gate to drive over the land. In May or June 2010, plaintiffs

noticed that defendants had mowed the easement, and they did not object. In June 2010, defendants or their agents removed trees and rock from Property A. On July 1, 2010, plaintiff Dana Hundrieser was informed by a company that it had been hired by defendants to construct a road over the easement as soon as possible. At the time defendants purchased their property, it was clearly visible that no road existed on the easement. In August 2010, defendants left the gate open at the location of the easement, and the Wileys' cattle wandered onto Snipe Hollow Road. The same month, defendant threatened to remove the gate. In June 2011, after the order was entered requiring that the easement not be altered, the gate between Property A and Property B was left open, and defendant Laura Perry mowed the easement.

¶ 21 The trial court denied plaintiffs' motion for summary judgment on November 17, 2011, stating as follows:

> "So what I'm looking at today is, is there any dispute with regard to any of the material facts or at least facts to which either of the parties assert would be material, and it's been asserted here by the plaintiffs and touched on by the defendants too that the intent of the parties at the time they entered into this easement for ingress and egress is an important matter that should be addressed in court.
>
> As a result of Mr. Wienen being a party to this and the inconsistencies of his testimony with regard to his deposition where he says, and it makes perfect sense, he thought possibly the Hundrieser's [*sic*] would buy 2 but he wasn't sure if they were going to buy it or not and he wanted to make sure he would be in a position or posture to sell it, and that's what he testifies to, that if he wanted to limit it to ingress and egress for agricultural purposes, it would have been an ag easement. I mean, these are the contentions that he's

> making and later on in his deposition, he may backtrack a little bit, but the fact is, that this is a material fact which is really in dispute so I'm going to deny the Motion for Summary Judgment."

The trial court denied plaintiffs' motion to reconsider on January 26, 2012.

¶ 22 Plaintiffs filed a second amended complaint on May 9, 2012, which added five counts. Count VI alleged a violation of the Wrongful Tree Cutting Act (740 ILCS 185/2 (West 2010)); count VII alleged intentional trespass on June 28, 2010; count VIII alleged intentional trespass on February 10, 2011; counts IX and X alleged negligent trespass on these dates; count XI alleged negligent damage to property; and count XII alleged tortious interference with contract.

¶ 23 On August 28, 2012, defendants filed a motion for summary judgment on their counterclaim. Defendants argued that the easement's language was clear and that the trial court did not need to look beyond the four corners of the deed to construe the language's plain meaning. Defendants argued that the easement granted them unrestricted use for ingress and egress, unrestricted by any gates. Defendants further argued that: they should be permitted to construct a road on the easement, as it would not be an alteration of the easement; a road was necessary to get to property B; and to enjoin the construction of a road would render the grant of the easement meaningless.

¶ 24 On October 16, 2012, the trial court granted defendants' motion for summary judgment on their counterclaim, though it stayed the right to construct a road for 30 days. The trial court stated:

> "Previously when we had a Motion for Summary Judgment the Court did indicate that the intention of the parties could be relevant to the situation and maybe I didn't make myself clear. What I meant was, the original people who established the easement for ingress and egress ***

***

*** Whatever side agreement they had at the time that this express easement for ingress and egress was established could be relevant.

We're not talking about those people anymore and I do believe it's the four corners of the instrument and I believe that it's unambiguous. They have the right to have ingress and egress and take whatever steps are necessary to effectuate that particular goal; to be able to get on the property, which means that they have the right to put in a road that would be commensurate with use 12 months out of the year.

They've got to maintain it. I don't know if it needs drainage pipes or whatever it needs but they have the right to do that and, with regard to the gates, they have a right, under the present law, to have it unobstructed.

* * *

So they're going to have the right to put in a road, and here's what I want you to do. If you have plans to put in some sort of road, let [plaintiffs] know what it is and they can raise an issue if they think it's too broad, too expansive or whatever.

It's my understanding what the plans are, at least now to put in a road that will hold up, probably a gravel road that's wide enough for one lane vehicles back and forth is probably all you need. So you're not putting in eight inches of concrete over 30 feet of the property here and if cattle guards go in, you know, that effectuates the problem with regard to the gates and so forth.

So I'm granting the Motion for Summary Judgment on those terms."

¶ 25 Also on October 16, 2012, plaintiffs filed a third amended complaint adding three counts. Count XIII alleged extinguishment of the easement through adverse possession; count XIV alleged extinguishment through adverse possession of any right to build a road on the easement; and count XV alleged extinguishment of any oral agreement to build a road.

¶ 26 Plaintiffs thereafter requested that the trial court make a Rule 304(a) finding on the trial court's grant of summary judgment on defendants' counterclaim. Plaintiffs also sought to extend the stay pending appeal to preserve the status quo.

¶ 27 On November 7, 2012, the trial court granted plaintiffs' motion for a Rule 304(a) finding. However, it denied their motion for a stay, finding that there was no irreparable harm to plaintiffs from the denial. The trial court orally stated that if plaintiffs were ultimately successful, the property could be restored to its original condition.

¶ 28 On November 20, 2012, plaintiffs timely appealed the grant of summary judgment for defendants pursuant to the Rule 304(a) finding.

¶ 29 On November 21, 2012, plaintiffs filed an emergency motion for rule to show cause why defendants should not be held in contempt for failing to comply with the trial court's ruling requiring them to inform plaintiffs of their plan to put a road over the easement. On November 28, 2012, defendants were ordered to replace all gates and posts that they had removed, within 30 days. They were also ordered not to further modify the easement absent order of the court or agreement of the parties.

¶ 30 On December 5, 2012, plaintiffs timely filed a notice of interlocutory appeal from the portion of the trial court's order denying their motion to continue the stay. This court granted plaintiffs' motion to consolidate the two appeals.

¶ 31 II. ANALYSIS

¶ 32 On appeal, plaintiffs first contest the trial court's grant of summary judgment for defendants on defendants' counterclaim. Summary judgment is appropriate only where the pleadings, depositions, admissions, and affidavits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Lazenby v. Mark's Construction, Inc.*, 236 Ill. 2d 83, 93 (2010). A genuine issue of material fact exists where the material facts are disputed or reasonable people could draw different inferences from undisputed facts. *Mashal v. City of Chicago*, 2012 IL 112341, ¶ 49. We review *de novo* a grant of summary judgment. *Lazenby*, 236 Ill. 2d at 93. Also, the interpretation of an easement is a question of law that we review *de novo*. *Hahn v. County of Kane*, 2012 IL App (2d) 110060, ¶ 12.

¶ 33 At issue is defendants' easement over plaintiffs' land. An easement provides a right or privilege in the use of another's property. *Matanky Realty Group, Inc. v, Katris*, 367 Ill. App. 3d 839, 842 (2006). The land benefitted by the easement is called the dominant estate, and the land burdened by the easement is called the servient estate. *Chicago Title Land Trust Co. v. JS II, LLC*, 2012 IL App (1st) 063420, ¶ 32. Thus, in this case, defendants' property is the dominant estate and plaintiffs' property is the servient estate. The dominant estate's owner has the right, for a limited purpose, to pass over or use the easement on the servient estate. *Id.* While an easement provides rights of use, it does not provide ownership rights or an ownership interest in the servient estate. *Hahn*, 2012 IL App (2d) 110060, ¶ 10. Also, the easement's owner is entitled to full enjoyment of the easement but does not have the right to interfere with the landowner's control and beneficial use

of the land more than is necessary for the reasonable enjoyment of the easement. *Illinois District of American Turners, Inc. v. Rieger*, 329 Ill. App. 3d 1063, 1077 (2002).

¶ 34 Regarding the scope of the easement, where the language of an instrument creating an easement is facially unambiguous, it must be interpreted as a matter of law, without the use of extrinsic evidence. *Hahn*, 2012 IL App (2d) 110060, ¶ 12. Otherwise, the instrument is construed according to the parties' intent, which is ascertained from the instrument's words and the circumstances contemporaneous to the transaction, including the state of the thing conveyed and the objective to be obtained. *Id.* Courts generally construe easement agreements strictly so as to permit the property owner the greatest possible use of the property. *Bjork v. Draper*, 381 Ill. App. 3d 528, 538 (2008).

¶ 35 A. Whether Deed's Language is Ambiguous

¶ 36 For purposes of this appeal, plaintiffs do not contest the existence of an easement for "ingress and egress" over their land but rather challenge the trial court's ruling that the deed's language was unambiguous and allowed for the creation of a driveway. Plaintiffs argue that the words "ingress and egress" simply denote a means of entering or leaving property and nothing more. Plaintiffs maintain that there is nothing inherent in the phrase "ingress and egress" that conveys a clear right to build a paved road or driveway, and that the language at issue did not specify a particular use or purpose for the easement, such as whether it was confined to people on foot, entry or exit by farm machinery, or motor vehicles. Plaintiffs argue that the phrase is ambiguous and that the trial court therefore should have considered extrinsic evidence to ascertain the intent of the original grantors and grantees. Plaintiff cites *Department of Public Works & Buildings v. Chicago Title & Trust Co.*, 408 Ill. 41, 53 (1950), where our supreme court stated: "Ingress and egress are defined as places or

means of entering or leaving property and may mean only the physical ability to perform such acts from the condition of the adjoining terrain." Plaintiffs argue that here, the circumstances surrounding the easement's creation included the "condition of the adjoining terrain."

¶ 37 Plaintiffs state that they have found no Illinois cases addressing whether the phrase "ingress and egress" is ambiguous or permits the construction of a new roadway as a matter of law. Therefore, they cite cases from other states. In *PARC Holdings, Inc. v. Killian*, 785 A.2d 106, 112 (Pa. Super. Ct. 2001), the court found that an easement for "ingress and egress" was ambiguous as to whether it was just limited to pedestrian and vehicle access or also included the right to install utilities. The court stated:

> "We find the wording of the reservation as to its purpose ambiguous, as it generally defines its purpose in terms of providing mere access to the dominant estate by extension of a public road. The language does not specify a limited purpose to the access, such as for the purpose of maintaining a water system or for pedestrian and vehicular travel only. Since we are dealing with the reservation of an easement or right of way in general terms without a specific statement of purpose, case law clearly expresses that the focal point of inquiry is the intention of the parties who created the easement." *Id.*

¶ 38 Plaintiffs also cite *Keller v. Paulos Land Co.*, 161 N.W.2d 569, 572 (Mich. 1968), where the court held that the phrase "ingress and egress" was ambiguous where the described easement was landlocked, it could only be accessed through the grantee's property, and its only logical use was as a parking lot or circular drive.

¶ 39 Defendants argue that the trial court correctly applied the "four corners rule," looking only at the language of the instrument, because the deed's language is unambiguous. Defendants cite a

series of cases in which courts found easement language to be unambiguous. In *Heuer v. Webster*, 187 Ill. App. 273, 275-76 (1914), the court held that a grant of a "right of way" that was sufficiently wide for vehicles unambiguously referred to the right of both vehicle and foot passage.[2] In *Horner v. Keene*, 177 Ill. 390, 401 (1898), our supreme court stated that an easement for use of an alley was for "all the ordinary and usual purposes and uses of an alley" and was not limited to foot passage. In *McCauley v. Harris*, 928 N.E.2d 309, 312 (Ind. Ct. App. 2010), the easement at issue was described as a " '30 foot Ingress-Egress and Utility Easement.' " The parties and the Indiana Appellate Court agreed that the language of the easement was unambiguous. *Id.* at 314.

¶ 40 Defendants argue that *Department of Public Works & Buildings*, 408 Ill. at 53-54, cited by plaintiffs, is distinguishable because in that case there was no finding that the appellants had a right to ingress and egress. Defendants maintain that the language quoted by plaintiffs merely explained that a bare claim of ingress and egress, without a supporting right, did not support an award of just compensation for a taking.

¶ 41 In examining the issue before us, we recognize that there is an apparent contradiction in the trial court's rulings on the motions for summary judgment. The trial court's first ruling denied plaintiffs' motion for summary judgment based on questions regarding the intent of the original parties to the easement agreement; the trial court's second ruling granted defendants' motion for summary judgment based on the deed's plain language. However, these ruling are explained by the parties' focus in arguing their respective motions. Plaintiffs emphasized extrinsic evidence to

[2]We note that appellate court decisions issued before 1935 are not binding but can be considered persuasive authority. *Choate v. Indiana Harbor Belt R.R. Co.*, 2012 IL 112948, ¶ 32 n.4.

support their motion while defendants argued, in supporting their own motion for summary judgment on their counterclaim, that such evidence was irrelevant.

¶ 42 As discussed, where an instrument's language creating an easement is facially unambiguous, we must interpret the language as a matter of law, without considering other evidence of intent. *Hahn*, 2012 IL App (2d) 110060, ¶ 12. That is, where an agreement's language is unambiguous, it "speaks for itself, and the intention with which it was executed must be determined from the language used in the agreement, without resort to extrinsic evidence." *River's Edge Homeowners' Ass'n v. City of Naperville*, 353 Ill. App. 3d 874, 878 (2004). The deed here provides for "a 30 foot wide easement for ingress and egress" across a defined path on Property A, which has the effect of providing access from Snipe Hollow Road to Property B. Without this easement, Property B would be landlocked. We agree with defendants that an easement for "ingress and egress" unambiguously allows for passage of both foot and vehicle traffic.

¶ 43 Although plaintiffs try to frame the phrase "ingress and egress" as ambiguous, such ambiguity has been found in Illinois only in determining whether this phrase allows for the installation of utility lines *in addition to* vehicle traffic. See *Smith v. Heissinger*, 319 Ill. App. 3d 150, 153 (2001) (where a two-part easement was created by two separate documents, with the first document containing no language limiting the easement's purpose and the second document limiting it to ingress and egress, the documents were ambiguous as to whether the easement included the right to place underground utilities); see also *PARC Holdings, Inc.*, 785 A.2d at 112. The other cases plaintiffs cite are also distinguishable. In *Keller* the easement could not even be used for ingress and egress, unlike the situation here. *Keller*, 161 N.W.2d at 572. As defendants point out, the language plaintiffs quote in *Department of Public Works & Buildings* is distinguishable because the court there

was discussing the physical ability to ingress and egress from a property as opposed to a right to ingress and egress through an easement. *Department of Public Works & Buildings*, 408 Ill. at 53-54.

¶ 44 In contrast to plaintiffs' cases, the cases cited by defendants show that Illinois courts have consistently interpreted easements to allow for vehicle traffic in addition to foot traffic. In *Heuer*, the court stated:

> "Inasmuch 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, without resort to the extraneous facts referred to, in construing it to include the right to vehicle as well as foot passage." *Heuer*, 187 Ill. App. at 276-77.

Similarly, in *Horner* our supreme court stated that the deed's language showed an intent "to grant a perpetual right of way *** for all of the ordinary and usual purposes and uses of an alley. The grant did not limit the right of way to foot passage." *Horner*, 177 Ill. at 401. As in the aforementioned cases, it is difficult to argue that an easement that is 30 feet wide was intended to be limited to foot traffic. Though plaintiffs also maintain that the easement was intended for sporadic agricultural use, there is no such limiting language in the deed. See *id.*; *Heuer*, 187 Ill. App. at 276-77. As the plain language of "a 30 foot wide easement for ingress and egress" allows for vehicle passage, the trial court correctly granted summary judgment for defendants on their counterclaim on this issue.

¶ 45 B. Paving of Driveway & Burden on Servient Estate

¶ 46 Plaintiffs next argue that there were questions of fact regarding the reasonableness of the change in the use of the easement as a paved road or driveway. Plaintiffs argue that summary judgment for defendants was therefore inappropriate.

¶ 47 Plaintiffs cite *Triplett v. Beuckman*, 40 Ill. App. 3d 379 (1976), and *Professional Executive Center v. LaSalle National Bank*, 211 Ill. App. 3d 368 (1991). In *Triplett*, the owners of the dominant estate had an easement " 'for roadway purposes' " across a bridge on a lake. *Triplett*, 40 Ill. App. 3d at 380. The bridge needed repair, and the easement owner replaced it with a causeway, which had the effect of limiting the servient owners' recreational use of the lake. *Id.* The appellate court held that while the owners of the dominant estate had a duty to maintain and repair the bridge, they could not make a material alteration to the easement's character if the alteration placed a greater burden upon the servient estate or interfered with the use and enjoyment of the servient estate by its owner. *Id.* at 382. In *Professional Executive Center*, the court relied on this principle in holding that the owner of a septic field easement could not make changes to the system that could damage the foundation of a building on the servient estate or change the contours of the servient estate. *Professional Executive Center*, 211 Ill. App. 3d at 383-84. Plaintiffs argue that pursuant to these cases, the trial court erred in not considering the adverse impact that putting in the road had on plaintiffs' use and enjoyment of their pastureland.

¶ 48 There is a principle of concurrent, rather than exclusive, use of easements. *Roketa v. Hoyer*, 327 Ill. App. 3d 374, 379 (2002). An easement owner is entitled to the necessary use of the easement, which means use that is reasonably necessary for full enjoyment of the premises. *Hahn*, 2012 IL App (2d) 110060, ¶ 10. The easement owner "has a right to make such changes as will permit it to use the easement for the purpose granted." *Professional Executive Center*, 211 Ill. App.

3d at 383. Still, the easement owner may not interfere with the landowner's control and beneficial use of the land more than is necessary for the reasonable enjoyment of the easement. *Illinois District of American Turners, Inc.*, 329 Ill. App. 3d at 1077. "As no precise rule can be stated as to when the use by the owner of the servient or dominant estate is a reasonable use as distinguished from an unreasonable use, it is a question of fact to be determined from the facts and conditions prevailing." *McMahon v. Hines*, 298 Ill. App. 3d 231, 239-40 (1998).

¶ 49 Plaintiffs appear to take the position that because no road was allegedly in place or put in when the easement was first granted, defendants may not now burden their land with a road, or at least there is a question of fact on this issue. However, while we express no opinion on plaintiffs' claims of adverse possession, we note that an easement may not be lost by mere nonuse. *Erday's Clothiers, Inc. v. Spentzos*, 228 Ill. App. 3d 540, 549 (1992). We have already determined that the deed's plain language allows for vehicle traffic on the easement. Therefore, there is no genuine issue of material fact that defendants may drive over the easement, regardless of the impact on plaintiffs' pastureland, as defendants have the right to reasonable enjoyment of their easement. See *Hahn*, 2012 IL App (2d) 110060, ¶ 10. As the court in *Triplett*, one of the cases relied on by plaintiffs, stated, the servient estate's owner's only duty "is to not interfere with the use of the easement for purposes of access by the owner of the dominant tenement ***." *Triplett*, 40 Ill. App. 3d at 381-82. Further, defendants may alter the easement to allow them to use the easement for the purpose granted (see *Professional Executive Center*, 211 Ill. App. 3d at 383), which we have interpreted to include vehicle access. Therefore, at a minimum, this provides for the addition of some sort of dirt or gravel road.

¶ 50 Defendants assert that they have a right to build a paved road on the entire width of their easement. They maintain that without a proper road surface, their residential access would be left to the vagaries of the weather, which is not reasonable enjoyment. Defendants cite *McCauley v. Harris*, 928 N.E.2d 309 (Ind. Ct. App. 2010), where the court held that the defendants' use and enjoyment of a 30-foot wide easement for ingress and egress included the right to construct a paved roadway over all of the easement.

¶ 51 Defendants' counterclaim sought to allow them to construct a "driveway" on the easement but did not specifically refer to a paved roadway. See *McMahon*, 298 Ill. App. 3d at 238 (defining "driveway" as "passageway, travelway, and a way of ingress and egress"). In granting their motion, the trial court stated that defendants had a "right to put in a road" that they could use all 12 months of the year, but it also did not specifically state that defendants had a right to construct a paved driveway or that it could be 30-feet wide. Therefore, the issue of whether the easement can be paved was not directly resolved in the trial court's grant of summary judgment for defendants on their counterclaim.

¶ 52 Moreover, while defendants have the right to drive over the easement, as discussed in plaintiffs' cases, an easement's owner cannot make a material alteration to the easement's character if the alteration would place a greater burden on the servient estate or would interfere with the use and enjoyment of the servient estate. *Hahn*, 2012 IL App (2d) 110060, ¶ 10. When the two parties' interests are irreconcilable, the dominant estate's owner may repair or maintain the easement as necessary to preserve his use but cannot unreasonably interfere with the servient estate owner's use. *Seymour v. Harris Trust & Savings Bank of Chicago*, 264 Ill. App. 3d 583, 596 (1994). "The question of reasonableness is one of fact in the circumstances." *Id.*; see also *McMahon,* 298 Ill. App.

3d at 239-40 (what constitutes reasonable use of an easement is a question of fact to be determined from the circumstances). Accordingly, the reasonableness of the type and size of the road are questions of fact that are inappropriate to determine on summary judgment here, especially when considering the rural nature of the properties. Defendant's reliance on *McCauley* for the right to build a paved driveway is not persuasive, as that case was not at the summary judgment stage. See also *Clark v. Kuhn*, 15 P.3d 37, 40-41 (Or. Ct. App. 2000) (reasonable necessity of a proposed use of an easement is a fact-based inquiry, and the trial court correctly determined that two lane, paved road was not essential for the defendant's ingress and egress to his property).

¶ 53 In sum, the trial court's grant of summary judgment correctly allowed defendants vehicular access to their property, and the trial court also properly did not reach the issue of whether the easement could be paved, as such relief was not directly sought in the motion, and the reasonableness of the type and size of the road are factual questions that can not be determined on summary judgment. On remand, the trial court shall order defendants to submit any proposed plans for the easement, to which plaintiffs may object on the basis of unreasonable interference with the use and enjoyment of their property. The trial court may then hold an evidentiary hearing where it determines whether defendants' proposed road is reasonable under the circumstances.

¶ 54 C. Gates

¶ 55 Plaintiffs also argue that defendants improperly removed long-existing gates across the easement, whereas defendants maintain that the use of the easement should be unimpeded by gates. In granting defendants summary judgment, the trial court stated that defendants had the right to access the easement unobstructed by gates.

¶ 56 Defendants cite *Schaefer v. Burnstine*, 13 Ill. 2d 464 (1958), where our supreme court stated that "[t]he construction and placing of a gate across this right of way does interfere with the reasonable use of a right of way for ingress and egress to residence property in our modern age." *Id.* at 468. However, in making this statement, the court distinguished cases where the infrequent use of the right of way was outweighed by the protection of farm land or where the easement owners had always opened and closed gates, thereby taking the easement with that burden. *Id.* at 468-69. As the court stated in *Nopolous v. McCullough*, 95 Ill. App. 3d 852 (1981), "The installation of gates, posts, and fences by the owner of the servient estate is antagonistic to the right of ingress and egress over the right of way and is improper *unless circumstances exist which make such obstructions reasonable*." (Emphasis added.) *Id.* at 853-54. Donald Wienen testified in his deposition that at least one of the gates at issue was "always there," meaning that its presence predated the easement's creation. See *Flower v. Valentine*, 135 Ill. App. 3d 1034, 1040 (1985) (servient estate's owners did not have to remove bushes on easement to beach because natural obstructions existing when easements are created do not have to be removed; it was also inequitable to require servient estate's owners to remove barbeque that predated easement and that could be walked around when using easement). Further, the evidence showed that this gate was used to keep cows from wandering on to Snipe Hollow Road. On the other hand, defendants plan to use their property as a residence and make frequent use of the easement. Therefore, there is a genuine issue of material fact regarding whether the presence of gates is reasonable, and the trial court erred in ruling on this issue at the summary judgment stage.

¶ 57 D. Motion to Stay

¶ 58 Last, plaintiffs argue that the trial court erred in not granting their motion to extend the stay on constructing a road beyond the 30-day stay the trial court initially imposed. Plaintiffs maintain that shortly after the expiration of the 30-day period, defendants built a driveway on the easement and removed gates in the process. Plaintiffs argue that if we reverse the grant of summary judgment in defendants' favor, defendants should be further ordered to restore the easement to its previous condition.

¶ 59 The trial court stated that, for the time being, defendants could put in a single lane gravel road and that they would be responsible for restoring the property to its prior condition if plaintiffs ultimately prevailed. We have affirmed the trial court's grant of summary judgment for defendants insofar as it allows them to have vehicular access to their property by way of the easement, so at this time[3] plaintiffs are not entitled to have the easement returned to pastureland. As discussed, the reasonableness of the type and size of road are questions of fact that the trial court could not resolve on summary judgment and will have to determine on remand.

¶ 60 Regarding gates, the record reflects that on November 28, 2012, defendants were ordered to replace all gates and posts that they had removed. We have determined that the trial court erred in ruling when granting summary judgment that defendants are entitled to have the easement unobstructed by gates, as there are questions of material fact regarding whether the gates' presence is reasonable under the circumstances. The trial court will also have to make findings on this subject on remand.

¶ 61 III. CONCLUSION

[3]As stated, plaintiffs have alternative claims to the easement, such as adverse possession, that were not resolved at the time of the appeal.

¶ 62 For the reasons stated, we affirm the judgment of the Jo Daviess County circuit court granting summary judgment for defendants on their counterclaim to the extent that it allows defendants vehicular access on the easement. Contrary to defendants' position, the ruling does not include the right to build a paved driveway, as such relief was not directly sought in the counterclaim, and the reasonableness of the road's type and size are questions of fact that could not be decided on summary judgment. We reverse the trial court's grant of summary judgment insofar as it prohibited the presence of gates on the easement, because there are likewise questions of fact about whether gates are reasonable under the circumstances. Finally, we remand the cause for further proceedings consistent with this order.

¶ 63 Affirmed in part and reversed in part; cause remanded.