

upon which the defendants entered and constructed a permanent boat lift and dock. The plaintiffs requested damages in the amount of \$50,000 and an injunction forbidding the defendants from entering the plaintiffs' premises and constructing or maintaining permanent improvements on the property. On March 1, 2011, the defendants filed, *inter alia*, a counterclaim to quiet title on the property at issue, asserting an affirmative defense of ownership via adverse possession. On June 15, 2012, the defendants filed an additional affirmative defense, claiming the right to the construction and use of the boat lift by virtue of an easement established in 1961 by the plaintiffs' predecessor in title to the defendants' predecessor in title.

¶ 5 A hearing was held on June 28, 2012, at which the following evidence and testimony were adduced. David C. Rankin testified that he is employed as a licensed professional land surveyor. On January 5, 2007, Rankin performed a survey at Lake Hills Subdivision in Shelby County (the subdivision), which is adjacent to Lake Mattoon. The completed survey is depicted in Plaintiffs' Exhibit 1, which was admitted into evidence. Plaintiffs' Exhibit 1 portrays the subdivision, including Lot 6, owned by the plaintiffs, and Lot 7, owned by the defendants. Rankin testified that he performed a subsequent survey on July 15, 2009, of the location of a boat lift situated at the bottom of Lot 6. Plaintiffs' Exhibit 2 representing the same was admitted into evidence. Also admitted into evidence was Plaintiffs' Exhibit 3, a survey conducted by Rankin on July 9, 2010, which depicts a seawall and a new boat lift, which is located closer to the seawall than was the original boat lift in 2009.

¶ 6 Jack Poff testified that he is an independent contractor who constructs steel shore walls, boathouses, and boat docks. Poff installed a section of shore wall for the parties in the summer of 2009, as well as steel frameworks for boathouses and boat lifts for each of them. Poff testified that in his business, he relies on the word of his customers regarding property line locations, and he installs what the customers purchase in the locations they request. Poff

testified that before the construction, he was unaware that the plaintiffs owned the property on which he built the boat lift for the defendants, nor could he recall a conversation with the plaintiffs regarding the same on July 3, 2009. He averred that he became aware of the dispute after the installation.

¶ 7 Poff testified that he removed the existing boat lift from the front of the defendants' property, installed a shore wall behind that location, then constructed a new boat lift by driving a well casing 8 to 12 feet into the bed of the lake, after which he placed a reinforcing rod inside the casing and filled it with concrete. Poff described the boat lift as "pretty permanent" and stated that it was intentionally built to be very difficult to remove.

¶ 8 Kevin Tatham testified that he purchased Lot 6 in 1994. Amos and Liz Motsinger owned Lot 7 at the time. He knew the Motsingers prior to purchasing Lot 6 and he was already familiar with the subdivision because while in college, beginning in 1983, he visited there frequently with a friend. Tatham explained that his property extends into and across the lake to the other side of the cove, and that the defendants' property stops at the water. He attested that Plaintiffs' Exhibit 1 accurately depicts the property lines, as did a similar survey he was given at closing when he purchased Lot 6. Accordingly, Tatham was aware of where the property lines were when the purchase was made. Moreover, Tatham became aware of the boundaries of Lot 7 when Amos Motsinger showed him where they were.

¶ 9 Tatham testified that when he bought Lot 6, there were two temporary, portable boat lifts on the water on his property, one belonging to him and the other belonging to Motsinger. He explained that the portable lifts were made of thin material that could be easily removed. He explained that he removed his lift himself and that defendant Edward Fields removed Motsinger's original lift himself. Tatham testified that he and Amos Motsinger were friends over the years and used each other's boat docks to sit, visit, and fish. Moreover, he and Motsinger, as well as a neighbor across the water to the south, all worked together regularly

to clean and maintain the shoreline.

¶ 10 Tatham testified that the defendants bought Lot 7 from the Motsingers in 1999 and subsequently removed the original temporary boat lift and installed another temporary boat lift in its place. In 2009, the neighborhood undertook an improvement project along the cove. In particular, they all decided to install a steel seawall at the same time and some planned to install permanently stationed boat lifts. Tatham testified that he had multiple conversations with defendant Edward Fields during that time. The first conversation occurred on May 3, 2009, when they met at the defendants' property to discuss the project. At that point in time, Tatham informed Fields that he was welcome to reuse his existing temporary boat lift, but he could not install a permanent structure on Tatham's property. Tatham testified that Fields replied that he might not install a steel seawall and the conversation ended.

¶ 11 Tatham testified that a second conversation occurred on July 3, 2009, between himself, Fields, and contractor Jack Poff at the water's edge right in front of the defendants' existing temporary boat lift. The seawall was located on the property line at the time. Poff wanted to build the new seawall in front of the existing wall, rather than removing the existing one and replacing it with the new one. However, Tatham refused because doing so would have encroached three feet onto his property. Accordingly, Tatham stated that the new wall needed to replace the existing wall on the property line. Tatham testified that they also discussed the defendants' continued use of the existing, temporary boat lift. The plan was for the defendants' existing boat lift to be moved pending the construction of the new seawall and replaced after the seawall was complete. Tatham reiterated that he told the defendant that he did not want a permanent structure built on his property and that they had 10 to 11 conversations regarding the project between April and September 2009.

¶ 12 Tatham testified that shortly after the July 3, 2009, meeting with Edward Fields and

Jack Poff, he retained counsel to prepare a document to protect the ownership of his property. Tatham testified that he and Fields conversed several times about the signing of the document. Tatham went to the lake on the third weekend of August, after returning from an anniversary trip to Scotland with his wife. At that point, the seawall was complete, his lift was in place, and the piers for the defendants' lift were ready. Tatham contacted Fields to remind him to sign the proposed document before further work was done on the lift, but the defendants never signed the original copy. Rather, the document was modified without Tatham's knowledge, signed by both defendants, and returned to Tatham's counsel for the plaintiffs to sign, which they refused to do upon discovery of the modification.

¶ 13 Tatham's next trip to the lake occurred on September 4, 2009, when he discovered that the defendants had installed a permanent boat lift on his property against his wishes. He immediately called Mr. Fields and left a voice mail, then had a face-to-face conversation with both defendants the following day. Tatham testified that when he confronted them, Mrs. Fields replied: "Everyone else has a permanent structure, and we just thought it would look better. And we just really didn't think it mattered." Tatham retorted that it did matter because they were in fact told that they could not put a permanent structure on his property. In response, the defendants handed Tatham a proposed document entitled "Easement," which the plaintiffs refused to sign. The document was admitted into evidence as Plaintiffs' Exhibit 15. Also admitted was Plaintiffs' Exhibit 9, a document entitled "License Agreement," which the defendants had prepared and requested the plaintiffs to sign in mid-September 2009, after the earlier proposed document was rejected. Tatham testified that he and his wife refused to sign the license agreement and subsequently filed the complaint.

¶ 14 Edward Fields testified that he purchased Lot 7 of the subdivision in September 1999. He confirmed that there was an existing boat lift when he bought Lot 7, but his boat was too big for it so he replaced the lift in 2000. According to Fields, he had the property surveyed

and the property lines pinned in 2001, but he did not learn that the plaintiffs owned the property underneath his boat lift until July 3, 2009, when he, Tatham, and contractor Jack Poff met to discuss the replacement of the boat lift and the seawall project. Fields testified that, at that meeting, Tatham informed him that he did not want the new, permanent lift installed, so Fields replied: "That is fine then. We will leave what is there, and I will not even replace my wall." Notwithstanding this previous assertion, Fields conceded that he subsequently had the wall replaced and a permanent boat lift installed. Fields qualified, however, that Tatham verbally acquiesced to the same. In contradiction to his earlier testimony, Fields testified that at the July 3, 2009, meeting, Tatham gave him a verbal authorization to install the permanent structure, but Tatham refused to sign a written authorization.

¶ 15 Defendants' Group 1 and Group 2 Exhibits reflect that an easement was granted via a conveyance in August 1961 by the plaintiffs' predecessors in title, Ray and June Hudson, of a strip of land 12 feet wide running east and west, by 70 feet long running north and south out of the southwest corner of Lot 6, to the defendants' predecessor in title, Mervin Becker. The language of the easement provides as follows:

"It being, the intention hereby to give and grant to the Grantee her[e]in[,] his heirs, Successors [and] Assigns access for boating to the water and if for any reason the water does not touch the above described tract, then access over and across land owned by the Grantors is hereby given for boating rights only. No swim[m]ing rights are given in the premises herein above mentioned[.] Any dock constructed by Grantee on the premises herein granted must be constructed in the Southwest corner thereof[.]"

¶ 16 On August 13, 2012, the circuit court entered a memorandum of opinion, which was subsequently incorporated in a November 30, 2012, order in favor of the plaintiffs on their

complaint for ejectment and injunctive relief. The circuit court rejected the defendants' affirmative defenses of ownership via adverse possession and a right to use the boat lift by virtue of the easement established by the parties' predecessors in title, enjoined the defendants from using the boat lift, and ordered the defendants to remove it within 150 days. The defendants filed a timely notice of appeal. Additional facts will be provided as needed in the analysis of the issues on appeal.

¶ 17

ANALYSIS

¶ 18 The defendants raise the following issues on appeal, which are restated as follows: (1) whether the circuit court erred in finding the defendants failed to establish ownership of the disputed property by virtue of adverse possession, (2) whether the easement created by the parties' predecessors in title authorized the defendants to install the permanent boat lift, (3) whether the defendants are entitled to use the permanent boat lift by virtue of an irrevocable license, and (4) whether the plaintiffs established the elements of ejectment.

¶ 19

1. Adverse Possession

¶ 20 The first issue is whether the circuit court erred in finding the defendants failed to establish ownership of the disputed property by virtue of adverse possession. The standard of review used when a trial court's findings regarding the proof of the elements of adverse possession are being challenged is whether those findings are against the manifest weight of the evidence. *Estate of Welliver v. Alberts*, 278 Ill. App. 3d 1028, 1036 (1996). "A finding is against the manifest weight of the evidence if, when viewing the ruling in the light most favorable to the prevailing party, an opposite conclusion is clearly evident." *Bogner v. Villiger*, 343 Ill. App. 3d 264, 269 (2003). "What is essential to establish title under the *** doctrine of adverse possession [citation] is the concurrent existence of *** five elements *** for 20 years: (1) continuous, (2) hostile or adverse, (3) actual, (4) open, notorious, and exclusive possession of the premises, and (5) under claim of title inconsistent with that of the

true owner." *Martin v. My Farm, Inc.*, 111 Ill. App. 3d 1097, 1102-03 (1983).

¶ 21 In this case, the defendants failed to prove all five elements of adverse possession for the requisite 20 years. Although the defendants contend that they and their predecessors in title fulfilled the requirements of adverse possession since at least 1986, the evidence refutes this claim. Amos Motsinger was the defendants' immediate predecessor in title. As testified, the plaintiffs were friends with Motsinger and used his boat dock regularly before the defendants purchased Lot 7. Moreover, plaintiff Kevin Tatham testified that the cleaning and maintenance of the disputed property was a joint venture between himself, Motsinger, and another neighbor. For these reasons, the defendants' adverse possession claim fails because the possession was not exclusive. Tatham testified further that when he purchased Lot 6, he was aware of the location of the property lines, as was Amos Motsinger. With Tatham's knowledge and acquiescence, Motsinger used a temporary boat lift, which was located on Tatham's Lot 6. Accordingly, the defendants' claim of adverse possession must fail because the possession was not hostile or adverse, nor was it under claim of title inconsistent with that of the true owner. For these reasons, it was not against the manifest weight of the evidence for the circuit court to find the defendants failed to establish ownership by adverse possession.

¶ 22

2. Easement

¶ 23 The second issue on appeal is whether the easement established by the parties' predecessors in title authorized the defendants to install the permanent boat lift. "The interpretation of an easement is a question of law, subject to *de novo* review." *Hahn v. County of Kane*, 2012 IL App (2d) 110060 ¶ 12. We start with an overview of the law of easements. "An easement is a right or privilege in the real estate of another." *McMahon v. Hines*, 298 Ill. App. 3d 231, 235 (1998). "An easement is considered appurtenant when the easement requires a dominant estate and a servient estate." *Id.* "The user of the right of the

easement enjoys what is referred to as a dominant estate over the used land, which is the servient estate." *Id.* at 235-36. In this case, the defendants have a dominant estate and the plaintiffs have a servient estate because the defendants have the right to a portion of Lot 6, which is the plaintiffs' property. "As the owners of the dominant estate, the defendants are entitled to necessary use of the easement." *McMahon*, 298 Ill. App. 3d at 236. "Necessary use is the use that is reasonably necessary for full enjoyment of the premises." *Id.* "A principle of concurrent, rather than exclusive, use underlies the law concerning easements." *Id.* at 239. The dominant estate owner "has the right to maintain the easement, although he cannot, for the sake of his convenience, materially alter the easement so as to place a greater burden on the servient estate or interfere with the use and enjoyment of the servient estate by its owner." *Id.* "Courts have tended to construe strictly the easement agreement so as to permit the greatest possible use of the servient tenement." *Id.* at 236-37.

¶ 24 In this case, the defendants limit their argument to the necessity of a boat dock. In particular, they contend that in order to have the full enjoyment of the premises, a boat dock is necessary. We do not disagree. In fact, the language of the easement itself indicates the anticipation of the construction of a boat dock. The instrument provides as follows: "Any dock constructed by Grantee *on the premises herein granted* must be constructed in the Southwest corner thereof[.]" (Emphasis added.) The easement, which is depicted in Plaintiffs' Exhibits 1, 2, 3, and 3A, is clearly marked as a 12-foot-by-70-foot strip of *land* and does not include any of the plaintiffs' Lot 6 on the water. The language of the instrument makes clear that if the grantees choose to build a dock, they must do so on the southwest corner of the 12-by-70-foot land strip.

¶ 25 Apparently the water sometimes touches the easement and other times does not. Testimony revealed that Lake Mattoon recedes during certain times of the year, a phenomenon the drafter of the easement was aware of, as demonstrated by the following

language: "It being, the intention hereby to give and grant to the Grantee *** access for boating to the water and if for any reason the water does not touch the above described tract, then access over and across land owned by the Grantors is hereby given for boating rights only." We interpret this to mean that when the water recedes away from the easement, permission is granted to the defendants to move across the plaintiffs' land to get to the water for boating purposes. It by no means authorizes the defendants to erect a permanent structure on the plaintiffs' property outside the easement.

¶ 26 Exhibits in the record show, and the defense counsel conceded at oral argument, that the permanent boat lift installed by the defendants is located beyond the 12-by-70-foot easement and, as shown in the plaintiffs' exhibits, is situated on the water on the plaintiffs' Lot 6. This is clearly not authorized by the easement instrument. Any construction allowed by the instrument is restricted to the southwest corner of the 12-by-70-foot land strip and anything done within those parameters is limited to that which is reasonably necessary for full enjoyment of the premises. See *McMahon*, 298 Ill. App. 3d at 236. Here, the defendants clearly exceeded the scope of the easement by installing the permanent boat lift, not on the easement, but on the plaintiffs' property. Accordingly, our *de novo* review of the easement in this case leads us to conclude, as did the circuit court, that the easement did not authorize the defendants to build the permanent boat lift.

¶ 27 *3. Irrevocable License*

¶ 28 The third issue on appeal is whether the defendants are entitled to use the permanent boat lift by virtue of an irrevocable license. The defendants did not raise this affirmative defense in the pleadings, nor did they assert it at the hearing. They first mention it in their written closing argument, which was filed on July 13, 2012. Section 2-613(d) of the Illinois Code of Civil Procedure provides that an affirmative defense, such as a license, "which, if not expressly stated in the pleading, would be likely to take the opposite party by surprise,

must be plainly set forth in the answer or reply." 735 ILCS 5/2-613(d) (West 2012). This was not done in this case. Moreover, "[a] defense not properly pleaded is deemed waived although it may appear to be within the evidence." *M. Loeb Corp. v. Brychek*, 98 Ill. App. 3d 1122, 1125 (1981). Because the affirmative defense of an irrevocable license was not appropriately pleaded here, the defendants have waived their right to assert it on appeal.

¶ 29 Waiver notwithstanding, evidence in the record refutes the defendants' claim of irrevocable license. "A license is not an interest in land, but only a revocable privilege to go upon the land for a specified purpose." *Martin v. See*, 232 Ill. App. 3d 968, 981 (1992). "It is in the nature and definition of a license that it is revocable at the will of the licensor." *Id.* "A verbal license *** may be revoked by express notice, by acts which are entirely inconsistent with the enjoyment of the use, or by appropriating the land in question to any use contrary to its enjoyment by the licensee." *Id.* Courts hold licenses irrevocable when allowing a revocation "would operate as a fraud on the licensee." *Id.*

¶ 30 Here, there is evidence contrary to the claim that a license ever existed to enter the plaintiffs' property and build a permanent structure there. Plaintiff Kevin Tatham testified that he gave the defendants permission to continue using the *temporary* boat lift that was situated on his property, but explicitly informed them that nothing permanent could be constructed on his property. Although Fields testified that Tatham gave him verbal permission to build the permanent boat lift on the plaintiffs' property, the circuit court's statement in its memorandum of opinion regarding Tatham's testimony that no permission was given is tantamount to a finding of credibility that we will not disturb. Because we find evidence in the record to support a finding that no license ever existed to erect the permanent structure on the plaintiffs' property, we need not discuss whether any purported license was irrevocable.

¶ 31

4. Ejectment

¶ 32 The final issue on appeal is whether the plaintiffs established all the elements of ejectment. "A reviewing court will not substitute its judgment for that of the trial court in a bench trial unless the judgment is against the manifest weight of the evidence." *Chicago's Pizza, Inc. v. Chicago's Pizza Franchise Ltd. USA*, 384 Ill. App. 3d 849, 859 (2008). "A judgment is against the manifest weight of the evidence only when an opposite conclusion is apparent or when findings appear to be unreasonable, arbitrary, or not based on evidence." *Judgment Services Corp. v. Sullivan*, 321 Ill. App. 3d 151, 154 (2001).

¶ 33 "In an action in ejectment, [the] plaintiffs must allege (1) that they had possession of the subject premises after obtaining legal title, (2) that [the] defendants subsequently took possession of the premises, and (3) that, at present, the defendants 'unlawfully withhold[] from the plaintiff[s] the possession thereof.'" *Bulatovic v. Dobritchandin*, 252 Ill. App. 3d 122, 128 (1993) (quoting 735 ILCS 5/6-109 (West 1992)). The circuit court found that the plaintiffs met their burden with respect to their ejectment claim, and we find evidence to support that finding. As Kevin Tatham testified, when he purchased the property in 1994 he knew where the boundary lines were and, with his permission, Amos Motsinger kept a temporary boat lift on his property. Tatham testified further that, after he gave the defendants explicit instructions not to install any permanent structure on his property, they ignored those instructions and had the permanent boat lift installed. This extended beyond the defendants' prior permissive use of the plaintiffs' property. Moreover, the defendants refused to remove the permanent boat lift and, as a result, have deprived the plaintiffs of the possession of their own property. Based on these facts, we find it was not against the manifest weight of the evidence for the circuit court to find in favor of the plaintiffs on their ejectment claim.

¶ 34

CONCLUSION

¶ 35 For the foregoing reasons, we affirm the November 30, 2012, order of the circuit court

of Shelby County.

¶ 36 Affirmed.