

NOTICE

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2015 IL App (5th) 140422-U

NO. 5-14-0422

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

ALVIN P. HUELS and MARY M. HUELS,)	Appeal from the
)	Circuit Court of
Plaintiffs-Appellants,)	Clinton County.
)	
v.)	No. 13-CH-33
)	
JAMES E. TIMMERMAN, RUTH M.)	
TIMMERMAN, NEAL TIMMERMAN,)	
and WADE TIMMERMAN,)	Honorable
)	Dennis E. Middendorff,
Defendants-Appellees.)	Judge, presiding.

JUSTICE MOORE delivered the judgment of the court.
Justices Goldenhersh and Stewart concurred in the judgment.

ORDER

¶ 1 *Held:* Judgment in favor of the defendants and against the plaintiffs affirmed, where prescriptive easement was not established because the plaintiffs' use of the subject property was not adverse for the requisite 20 years and circuit court did not abuse its discretion by considering the impeachment of testimony with the plaintiffs' answers to interrogatories.

¶ 2 The plaintiffs, Alvin P. Huels and Mary M. Huels, appeal the July 30, 2014, order of the circuit court of Clinton County that ruled against them and in favor of the defendants, James E. Timmermann, Ruth M. Timmermann, Neal Timmermann, and Wade Timmermann, because the circuit court found the subject property did not fit the

definition of a prescriptive easement due to the use of the property being permissive and not adverse. For the following reasons, we affirm.

¶ 3

FACTS

¶ 4 On May 3, 2013, the plaintiffs filed a complaint for a prescriptive easement, permanent injunction, and a motion for a preliminary injunction. The plaintiffs requested the circuit court to, *inter alia*, issue a preliminary injunction, enjoining the defendants from preventing, restricting, or limiting the plaintiffs' use of a roadway that runs across the defendants' respective properties to farm ground owned by the plaintiffs, and directing the defendants to remove a dirt pile or to allow the plaintiffs to do so in order to restore full access to the roadway until further hearing. The plaintiffs further requested the circuit court to establish a prescriptive easement of reasonable width, taking into consideration the plaintiffs' prior use of the roadway, and to issue a permanent injunction directing the defendants to refrain from preventing, restricting, or limiting the plaintiffs' use of the roadway to access the farm ground. After a hearing on July 24, 2013, the circuit court entered an order on July 30, 2013, denying the plaintiffs' request for a preliminary injunction.

¶ 5 A bench trial was conducted on June 4-5, 2014. We limit our recitation of the testimony to that which is pertinent to the determination of whether the use of the subject roadway was permissive or adverse. Plaintiff Alvin Huels testified that in 1987, he rented a 20-acre tract of real estate (the property) from Glen Liebeg and used the property to farm crops. He explained that the sole means of ingress and egress to and from the property that connects to a public road is a certain roadway that runs over and through the

respective properties of the defendants (the roadway).¹ Alvin recalled using the roadway to access the property with his father, Paul Huels, as early as 1965.

¶ 6 Alvin emphasized that he never asked the defendants or their predecessors in interest for permission to use the roadway. According to Alvin, defendant James Timmermann told him in 1987, "I hear you're renting Liebeg's ground now. *** I'll tell you the same thing I always told your dad, you're not supposed to be going down there." Alvin testified that James told him the same thing "numerous times," but the first time was in 1987. On cross-examination, Alvin admitted that he did not testify to the 1987 conversation with James Timmermann at the July 24, 2013, hearing on the preliminary injunction. Alvin was then presented with a copy of the plaintiffs' answers to interrogatories, which was marked as Defendants' Exhibit 1² and asked whether, in response to question number three of the interrogatories, he disclosed the alleged 1987 conversation. Alvin replied in the negative. His counsel neither objected nor requested to present additional portions of the plaintiffs' answers to the interrogatories to the circuit court.³

¹Additional testimony established that there is another road that was used in the past to access the property from the north, but that road is frequently muddy, making it impossible for farm equipment to pass.

²Defendants' Exhibit 1 was never formally admitted into evidence, but was presented to impeach Alvin's testimony.

³Plaintiffs' counsel conceded at oral argument that he did not object at the trial, nor

¶ 7 Alvin testified that in October 2011, he purchased the property from the Glen Liebeg Trust. He recalled meeting with the owner of the property, Una Liebeg, prior to the purchase, but he denied telling her that the defendants would continue giving him permission to use the roadway. He further denied telling her that the property may not be accessible to other potential buyers due to them not having permission to use the roadway. He admitted to telling her that there was no easement to access the property. Alvin testified that his father, Paul, and defendant James Timmermann were friends and knew each other for approximately 40 years before Paul's death.

¶ 8 Alvin acknowledged that after he purchased the property in 2011, he contacted both Danny Potthast and Bill Timmermann to discuss the possibility of them renting the property. However, he denied telling them that James Timmermann was no longer giving him permission to use the roadway. Alvin indicated that he had taken measures to improve the roadway. He explained that he "wanted to take care of it like my own like I do my house [*sic*]." Alvin noted that "after this dispute surfaced in 2011 and it got settled supposedly, then I went ahead and rocked all the way through there to make sure that it was in perfect shape, but I never heard anything." He added that this was done with the knowledge of defendant Neal Timmermann, who did not attempt to stop him. Alvin stated that he first put gravel on the roadway after he began farming the property in the

did he request to present anything further to the circuit court regarding the answers to the interrogatories. He further conceded that the rules of evidence did not require the circuit judge to *sua sponte* request further information.

late 1980s and did it numerous times thereafter. He added that the defendants also maintained the roadway through the years by applying gravel and replacing two culverts.

¶ 9 Alvin testified that in the spring of 2012, a gate was erected across the roadway on James Timmermann's property, which prevented Alvin from passing through with his farm equipment. Alvin further testified that in the spring of 2013, a dirt pile was placed along the roadway on James Timmermann's property, also hindering Alvin's ability to travel along the roadway with his farm equipment.

¶ 10 The evidence deposition of Una Liebeg was taken on May 14, 2014, and admitted into evidence by the circuit court at the bench trial on June 5, 2014. At the deposition, Una testified that she sold the property to the plaintiffs and the deed was executed on October 6, 2011. Una testified that before she sold the property to the plaintiffs, Alvin told her it would be difficult for her to sell the property to anyone else because they may be unable to obtain permission to use the roadway. She further testified that Alvin informed her that he had permission from the defendants to use the roadway and he believed the defendants would continue giving him such permission. Una added that she had previously learned from her late husband, Glen Liebig, that Alvin and his father, Paul, both had permission to use the roadway to access the property.

¶ 11 Yvonne Coburn testified that she is the daughter of James and Ruth Timmermann and the sister of Neal and Wade Timmermann. Yvonne recalled that James and Paul Huels were good friends. Neal Timmermann and Wade Timmermann both testified that Paul Huels was a close family friend. Neal went hunting and fishing with Paul, and they frequently helped each other. Neal noted that Alvin was also a friend, but they never

spent time together. Wade testified that the access road once stopped at two clubhouses and there was only timber beyond that point, until the late 70s or early 80s when Wade, Alvin, and Paul used chainsaws to clear approximately 100 yards of timber to extend the roadway and promote access to the southeast corner of the property.

¶ 12 James Timmermann testified that he is 79 years old and he was a good friend of Paul Huels before he died. James recalled that Paul started using the roadway in the early 80s. When James saw Paul on the roadway he stopped him and told him he was not allowed to use the roadway. James informed Paul that there were also many hunters using the roadway and he wanted to stop them. Accordingly, James told Paul that he would allow him to use the roadway as much as he wanted if he would help him build a gate there to deter the hunters. The two men built the gate, after which James witnessed Paul regularly using the roadway. He estimated that he and Paul built the gate in 1982 or 1983. James did not recall ever seeing Alvin using the roadway in the 1980s, but he qualified that "I don't know for sure. I worked construction too besides farming."

¶ 13 James testified that he saw Paul using the roadway throughout the 1990s and in 1999 Paul told him that he sold everything to Alvin, who would take over. James denied telling Alvin in 1987 that he knew he was leasing the property at that time. James indicated that in 2011 he saw Alvin using the roadway when he was planting corn. James testified that he approached Alvin and told him to "harvest your crop and don't come back," and Alvin responded, "If you don't like that, I won't come back." James testified that was the only conversation he had with Alvin about the roadway.

¶ 14 The circuit court took the matter under advisement then entered an order on July 30, 2014, in favor of the defendants and against the plaintiffs, finding that a prescriptive easement was not established because the use of the roadway was permissive and not adverse. In issuing its ruling, the circuit court noted the discrepancy between the testimony of Alvin and James regarding whether the alleged 1987 conversation actually occurred. Regarding the inconsistency, the circuit court stated that Alvin's testimony was viewed by the court with suspicion because it contradicted his answer to the interrogatory regarding the alleged conversation. The plaintiffs filed a timely notice of appeal.

¶ 15 ANALYSIS

¶ 16 The plaintiffs raise the following two issues on appeal: (1) whether the circuit court's finding that the use of the roadway was permissive was against the manifest weight of the evidence; and (2) whether the circuit court's finding that Alvin's testimony contradicted his answer to an interrogatory was an abuse of discretion.

¶ 17 I. Use of Roadway

¶ 18 The first issue on appeal is whether the circuit court's finding that the use of the roadway was permissive was against the manifest weight of the evidence. "On review of a bench trial, we will not disturb the trial court's findings of fact unless they are against the manifest weight of the evidence." *Southwest Bank of St. Louis v. Pouloukefalos*, 401 Ill. App. 3d 884, 890 (2010). "A finding is against the manifest weight of the evidence only when an opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary, or not based on the evidence." *Id.* "A trial court's judgment

following a bench trial will be upheld if there is *any* evidence supporting it.' " (Emphasis added.) *Id.* (quoting *Nokomis Quarry Co. v. Dietl*, 333 Ill. App. 3d 480, 484 (2002)).

¶ 19 " 'An easement is a right or privilege in the real estate of another.' " *Chicago Title Land Trust Co. v. JS II, LLC*, 2012 IL App (1st) 063420, ¶ 32 (quoting *McMahon v. Hines*, 298 Ill. App. 3d 231, 235 (1998)). "If an easement is found to exist, the owner of the easement has the right, for a limited purpose, to pass over or use the land of another." *Id.* "[A]n easement by prescription is established by long-term use without consent of the owner of the servient estate." *Id.* "To prove a prescriptive easement, the use of the subject land must be 'adverse, exclusive, under a claim of right, continuous and uninterrupted, with the knowledge of the owner, but without his consent.' " *Id.* (quoting *City of Des Plaines v. Redella*, 365 Ill. App. 3d 68, 75 (2006)). "The elements must coexist for 20 years." *Id.* "It is the claimant's burden to establish the elements for a prescriptive easement 'distinctly and clearly.' " *Id.* (quoting *Bogner v. Villiger*, 343 Ill. App. 3d 264, 269 (2003)). "However, 'the law recognizes rebuttable presumptions with regard to the establishment of adversity' when the other elements have been prove[n] and the origin of the alleged easement is unclear." *Id.* (quoting *Light v. Steward*, 128 Ill. App. 3d 587, 596 (1984)).

¶ 20 Applying these principles to the case at bar, the only element of a prescriptive easement at issue is whether the use of the roadway was adverse for the requisite 20 years. Despite the testimony and argument regarding the rebuttable presumption of adversity when the origin of the alleged easement is unclear, we find ample evidence in the record to support the circuit court's finding that the use was permissive, thereby

overcoming the presumption of adversity and precluding the establishment of a prescriptive easement.

¶ 21 Una Liebeg testified that when she and Alvin discussed her selling the property, he told her that he had permission from the defendants to use the roadway, that he believed the defendants would continue permitting him to use it, and that if anyone else purchased the property they may be unable to obtain such permission. Una also learned from her late husband that both Alvin and his father had permission to use the roadway. Defendant James Timmermann testified that he gave Paul Huels permission to use the roadway in exchange for his help in building a gate. James denied any conversations with Alvin in 1987 regarding his knowledge of Alvin leasing the property. James testified that when he saw Alvin using the roadway in 2011, he told him that he was forbidden from using it, thereby making any further use of the roadway adverse at that point. James added that this was the first and only conversation he ever had with Alvin regarding the use of the roadway.

¶ 22 We are mindful that Alvin's testimony contradicts the above-cited testimony of James Timmermann and Una Liebeg. "Where there is conflicting testimony, the trial judge is in a better position than a court of review to observe the demeanor of the witnesses, judge their credibility, and determine the weight their testimony should receive." *Sohaey v. Van Cura*, 240 Ill. App. 3d 266, 273 (1992). "A reviewing court may not substitute its opinion for that of the trial court, especially where the trial court had the opportunity to observe the witnesses and determine their credibility." *Id.* Our objective on review is to determine if there is any evidence in the record to support the finding of

the circuit court. *Southwest Bank of St. Louis*, 401 Ill. App. 3d at 890. As previously discussed, there is testimony in the record to support the circuit court's decision.

¶ 23 Additional supporting evidence includes the testimony of multiple witnesses that James Timmermann was close friends with Paul Huels, and Neal Timmermann's testimony that he was friends with Alvin. Additionally, Wade Timmermann testified that he, Alvin, and Paul used chainsaws to clear timber and extend the roadway to promote access to the property. Permissive use "may be inferred from the neighborly relationship of the parties or from other circumstances attending the use." *Roller v. Logan Landfill, Inc.*, 16 Ill. App. 3d 1046, 1052 (1974). Here, permissive use of the roadway is inferred by the testimony that Alvin had been friends with the defendants and even obtained assistance from Wade Timmermann to extend the roadway to access the property. For these reasons, we cannot say that the circuit court's decision regarding the use of the roadway being permissive was against the manifest weight of the evidence.

¶ 24 II. Interrogatory Used to Impeach Testimony

¶ 25 The final issue on appeal is whether the circuit court erred by finding that Alvin's testimony contradicted his answers to the interrogatories. When defendants' counsel introduced the plaintiffs' answers to interrogatories to impeach Alvin's testimony, plaintiffs' counsel had the opportunity to object or to request permission to give the circuit court additional information regarding the same. However, as indicated by plaintiffs' counsel at oral argument, he did not do so, thereby waiving the argument on appeal. See *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 536 (1996) (issues not raised in the trial court are deemed waived and may not be raised for the first time on appeal).

¶ 26 However, waiver notwithstanding, this court did grant the plaintiffs' motion to supplement the record on appeal with the plaintiffs' answers to interrogatories. Accordingly, assuming, *arguendo*, that the argument was not waived, we look at the following guidelines to review the issue. "Under our supreme court rules, answers to interrogatories may be used *** to impeach a witness in the same manner as any other inconsistent statement of a party." *Palumbo v. Kuiken*, 201 Ill. App. 3d 785, 790 (1990). "A party may use a witness' prior statement for impeachment as long as the statement is sufficiently inconsistent with the witness' trial testimony and relates to a material matter." *Id.* "The trial court has discretion to determine whether evidence is relevant, and a reviewing court will not disturb a trial court's ruling in the absence of a clear abuse of that discretion." *Id.*

¶ 27 Applied to this case, the plaintiffs' argument fails because a review of the supplemental record reflects that in answering the interrogatories, Alvin did not disclose the alleged 1987 conversation between himself and James Timmermann about which he testified at the trial. Indeed, the answers to the subject question are sufficiently inconsistent with Alvin's testimony at the trial, and the inconsistency relates to the fundamental question of whether Alvin's use of the roadway was adverse for the requisite 20 years. Accordingly, the plaintiffs' answers to interrogatories were properly used to impeach Alvin's testimony and the circuit court did not abuse its discretion by taking that into consideration when issuing its ruling.

¶ 28

CONCLUSION

¶ 29 For the foregoing reasons, we affirm the July 30, 2014, order of the circuit court of Clinton County that found that the plaintiffs failed to establish an easement by prescription.

¶ 30 Affirmed.