

2016 IL App (1st) 143010-U
No. 1-14-3010
March 29, 2016

SECOND DIVISION

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).

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE DEPARTMENT OF)	Appeal from the Circuit Court
TRANSPORTATION OF THE STATE)	Of Cook County.
ILLINOIS, for and on behalf of the)	
People of the State of Illinois,)	
)	Nos. 02 L 050101
Plaintiff-Appellee,)	02 L 50181
)	
v.)	The Honorable
)	Alexander P. White,
MICHAEL HORCHER and BERNADINE)	Judge Presiding.
HORCHER, as Trustees under the)	
Provisions of Trust Agreement dated the)	
23 rd Day of December 1991, known as the)	
Horchner Family Trust No. 1, as to an undivided)	
.5038 interest; and MICHAEL P. HORCHER)	
and PATRICK A. HORCHER, as Trustees)	
Under the provisions of a Trust Agreement)	
Dated the 28 th Day of December 1991, known as))	
Horchner Family Partnership Trust #2, as to an)	
Undivided 0.4962 interest; BANK OF)	
BUFFALO GROVE; HERMAN)	
HEIDERSCHKEIT; NORTHWEST)	
COMMUNITY BANK and UNKNOWN)	
OWNERS, generally,)	
)	
Defendants-Appellants.)	

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Pierce and Justice Hyman concurred in the judgment.

ORDER

¶ 1 *Held:* The State has not shown that documents in its possession qualify as public documents for purposes of an exception to the hearsay rule when the State cannot show that any statute required or authorized it to maintain the documents. The exception to the hearsay rule also does not apply when the State cannot account for several transformations the documents underwent between the time a state employee created them and the time of the transformed document's presentation to the court.

¶ 2 The Department of Transportation of the State of Illinois (Department), by condemnation, acquired title to property owned by Michael Horcher and his family. The dispute between the Department and the Horchers centered on the width of the prescriptive easement the Department owned prior to the condemnation. The circuit court rejected the Horchers' evidence that the easement covered a strip of land less than 20 feet wide, and granted a motion *in limine* barring the Horchers from presenting evidence that the Department owned an easement less than 33 feet in width. The Department chose not to seek a finding of a wider easement. The circuit court granted the Department's motion for summary judgment, requiring the Department to compensate the Horchers for the condemned land based on the court's finding that the Department already owned an easement 33 feet wide across the Horchers' property. The Horchers appeal. We find that the exhibits on which the circuit court relied leave contested issues of material fact concerning the width of the prescriptive easement. Accordingly, we reverse the circuit court's order for summary judgment and remand for further proceedings in accord with this order.

¶ 3

BACKGROUND

¶ 4

In 2002, the Department filed two complaints for condemnation of two parcels of land owned by the Horchers. The Department sought to use the land to make improvements to McHenry Road in Cook County. The circuit court entered an order granting title to the land to the Department. The parties engaged in an extended course of litigation concerning just compensation for the condemned land.

¶ 5

Plats showed that the center line of McHenry Road formed one boundary for the Horchers' properties. The circuit court gave the Department title to a strip of land 55 feet wide, with the center line of McHenry Road as one border of the strip.

¶ 6

The parties agreed that prior to 2002, the Department owned an easement across the Horchers' properties for McHenry Road, and that the Department did not owe the Horchers any further compensation for the land for which it already owned an easement. The parties focused the presentation of evidence on the width of the easement prior to 2002. The Department claimed an easement 50 feet wide, while the Horchers argued that the easement was only 17 feet wide.

¶ 7

In the course of litigation the Department eventually abandoned its theories of statutory dedication or common law dedication of an easement. Instead, it relied on a theory of prescriptive easement. The parties agreed that, as one element of proof of a prescriptive easement, the Department needed to prove that it actually used the land over which it claimed an easement. The parties agreed that the Department actually used the road, the shoulder, and the drainage ditch abutting the road; the Department claimed that it also used a further strip of land.

¶ 8 The Department filed a motion *in limine* to bar the Horchers from presenting evidence that the Department had a prescriptive easement less than 33 feet wide before 2002. In opposition to the motion, Patrick Horcher testified that in 2001 he measured the width of McHenry Road on the Horchers' property. He found that the paved portion of the road measured 11 feet across, the gravel shoulder ranged from about 4 to 5 feet across, and the far edge of the drainage ditch lay about 3 feet beyond the edge of the shoulder, making the easement extend about 18 or 19 feet into the Horchers' property.

¶ 9 In support of the motion *in limine*, the Department presented an exhibit purportedly showing construction plans from 1930 for improvements to McHenry Road. The Department referred to the exhibit as the "full-sized version of the plans." The exhibit includes 16 diagrams purportedly reflecting cross-sections of McHenry Road and surrounding land as the Department expected that land to appear after the construction proposed in 1930. The index to the 1930 plans refers to the page on which the diagrams lie as "Cross-Sections." The first page of the 1930 plans states that for cross-sections, the scale "1 inch = 5 feet" applied.

¶ 10 Jose Rios, a civil engineer who worked for the Department, swore in an affidavit that the Department prepared and maintained the plans in the ordinary course of the Department's business. He said he prepared his own scale for the plans to determine the size of everything shown in the plans. In his affidavit, Rios did not mention the scale shown on the "full-sized version of the plans." Rios did not explain why he needed to create his own scale when the plans included a scale. He used a scale of approximately 1 inch = 10 feet for his interpretation of the cross-sections of McHenry Road.

¶ 11 At a hearing on the motion *in limine*, Rios testified in court that he located the 1930 construction plans in the microfilm section of the Department's Bureau of Maintenance and Acquisitions, which archives the copies of construction plans. Rios did not testify about who microfilmed the plans. He testified that he requested microfiche of the 1930 plans from the Department. He did not testify about who converted the plans from microfilm to microfiche. He said the Department kept the microfiche in a secure room. To explain what the Department meant by referring to the room as secure, the Department's attorney asked whether "anybody [can] walk in and pull the microfiche and then alter what is shown on the microfiche." Rios said, "No."

¶ 12 The Horchers objected to Rios's testimony and affidavit. The court wrote in response, "Recognizing the unsettled nature of this area of evidence, the Court, pursuant to *Smith* [*v. Williams*, 34 Ill. App. 3d 677, 680 (1975)], determines th[at] Jose Rios' affidavit and testimony are not admissible as evidence for the purpose of describing the 1930, 1978 and Current Construction Plans." The court did not clarify which, if any, statements in Rios's affidavit and testimony qualified for admission into evidence. Although the court's written order recounts the Department's argument, including its reliance on Rios's testimony and affidavit, the court made no reference to Rios's testimony and affidavit in its rulings on the motions *in limine*.

¶ 13 The circuit court barred the Horchers from presenting evidence that the Department owned an easement less than 33 feet wide. The court said that the 1930 construction plans showed that the far edge of the drainage ditch, "while it varies along McHenry Road, averages 32.25 feet from the centerline of the road." To reach its conclusion that the far end

of the drainage ditch lay, on average, more than 30 feet from the center line, the circuit court appears to have interpreted each 8 inch diagram as a representation of 80 feet of land. That is, the circuit court appears to have treated the diagrams as having a scale of 1 inch = 10 feet.

¶ 14 Based on the court's conclusion that before 2002 the Department owned an easement at least 33 feet wide, the Department chose not to contest the Horchers' contention that the prescriptive easement did not extend further. After 2002, the Department used a swath of the Horchers' property 55 feet wide, and according to the court, the Department owned an easement at least 33 feet wide before 2002. The circuit court granted the Department's motion to enter a summary judgment requiring the Department to compensate the Horchers for the 2002 taking of a strip of land 22 feet wide. The Horchers now appeal.

¶ 15 ANALYSIS

¶ 16 The Horchers argue that the Department's evidence does not sufficiently establish that prior to 2002 the Department owned a prescriptive easement at least 33 feet wide across the Horchers' property. We review the order for summary judgment *de novo*. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). "Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. [Citation.] Summary judgment is a drastic measure and should only be granted if the movant's right to judgment is clear and free from doubt." *Outboard Marine*, 154 Ill. 2d at 102.

¶ 17 The circuit court relied primarily on the 1930 construction plans in support of its ruling on the motion *in limine*. The Department presented the 1930 construction plans as public records. "Generally, public records may come within an exception to the hearsay rule if

required either by statute or authorized to be maintained by the nature of the office. Such records are evidence of those matters which are properly required to be maintained and recorded therein. This exception to the hearsay rule is based upon assumptions that public officers will perform their duties and are without motive to falsify, and that public inspection to which such records may be subject will disclose inaccuracies." *Lombard Park District v. Chicago Title & Trust Co.*, 105 Ill. App. 2d 371, 378 (1969).

¶ 18 Here, we find no duty to maintain construction plans. The Department cited 605 ILCS 5/6-202.1 (West 2014) in support of its claim that the plans constitute public records. Section 6-202.1 provides that the district clerk for each road district shall "[h]ave the custody of all records, books, and papers of the road district, and he shall duly file all certificates or oaths and other papers required by law to be filed in his office." 605 ILCS 5/6-202.1 (West 2014). Our research uncovered no statute requiring the district clerk to retain construction plans. Moreover, the evidence does not establish that the documents remained under the control of public officers. Rios testified that the Department prepared the construction plans, but he did not explain how those plans underwent conversion to microfilm or microfiche. The conversion process put the plans in the hands of unidentified persons who apparently left no information concerning the factor used to reduce the images to the size of microfiche. Although the Department referred to the enlargements prepared from the microfiche as "full-sized," it has conceded that no one in the Department knows the size of the original plans, and the Department simply enlarged the microfiche images to a convenient size. Rios then prepared a scale, ignoring the scale on the first page of the plans, because that scale pertained only to the original, full-sized plans – and Rios did not know the size of those plans.

¶ 19 When the court struck Rios's affidavit and testimony insofar as Rios "describ[ed] the 1930, 1978 and Current Construction Plans," the court did not clarify whether it found any of Rios's testimony about the plans admissible. Rios said the plans showed the actual construction, but he did not clarify how he knew that. He did not see the construction in 1930. Nothing on the face of the plan shows that anyone compared the plan to the road at any time following the construction.

¶ 20 We find that the 1930 construction plan cannot bear the weight the court placed on it. The circuit court never saw the original plans proposed for the 1930 construction. Those plans went through at least two transformations – once to microfilm or microfiche, and a second time from microfiche to an enlargement different from the size of the original – and the Department presented no evidence as to who performed the first transformation and whether the original documents remained in trustworthy hands until the time of the completion of the first transformation. The Department concedes that the microfilm or microfiche included no information concerning the extent of the reduction, so the Department could not ensure that it enlarged the microfiched images to their original size. The original plans and the later transformations do not appear to qualify as public records, because no statute required the Department to retain the construction plans. See *Lombard Park District*, 105 Ill. App. 2d at 379.

¶ 21 The Department contends that the evidence apart from the 1930 plans supports the circuit court's judgment. In particular, the Department presented a plat from 1930 and construction plans from 1978, and both indicated that the Department had a right of way extending 50 feet from the centerline of McHenry Road across all of the Horchers' property. However, the plat

does not indicate any "adverse, *** open and notorious" use of the right of way, and therefore it alone does not warrant a finding of a prescriptive easement. *Limestone Development Corp. v. Village of Lemont*, 284 Ill. App. 3d 848, 854 (1996). The 1978 construction plan remains only a plan for proposed construction. The Department relies on Rios's testimony about the construction plans – but the circuit court struck Rios's testimony concerning the plans, at least in part, and we find that nothing in the court's order clarifies whether it accepted as admissible the testimony of Rios on which the Department now relies.

¶ 22 We cannot say that the record before us shows that the Department's "right to judgment is clear and free from doubt." *Outboard Marine*, 154 Ill. 2d at 102. Accordingly, we must reverse the circuit court's order granting the Department's motion for summary judgment.

¶ 23 The Horchers also challenge a number of the circuit court's rulings limiting the use of some photographs, excluding other photographs from evidence, and accepting Department policies and other exhibits into evidence. We do not understand the court's reasons for limiting the use of photographs of McHenry Road and the contested strip of land. If a civil engineer can infer from measurements on a diagram the dimensions of other objects shown in the diagram, he should have some means of using the image of McHenry Road as it appears in the photograph and inferring, from the plats that indicate the width of the paved portion of the road, the widths of adjacent strips of land used as shoulder and drainage ditch. The circuit court also has not adequately explained the relevance of the Department's exhibits, including plans that no one compared to the completed road.

¶ 24

CONCLUSION

¶ 25

Because the evidence before the circuit court did not establish that the Department had a clear right to a judgment declaring that, before 2002, it owned a prescriptive easement at least 33 feet wide across the Horchers' property, we reverse the order for summary judgment and remand for further proceedings in accord with this order. On remand, the circuit court should reconsider its rulings on all the exhibits in light of the need for evidence concerning open and notorious use of the land at issue, and in light of the restrictions on the public documents exception to the hearsay rule.

¶ 26

Reversed and remanded with instructions.