2018 IL App (2d) 180282-U
No. 2-18-0282
Order filed December 13, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

JEFFREY CRITTENDEN, JULIANN M. CRITTENDEN, ROBERT REIMER, JUDITH REIMER, SUSAN M. STILLINGER, JAMES BIEWER, and LINDA BIEWER,	)	Appeal from the Circuit Court of Kane County.
Plaintiffs-Appellees,	)	
v.	)	No. 15-CH-1252
CHRISTOPHER CLARK,	)	Honorable David R. Akemann,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Presiding Justice Birkett and Justice Hutchinson concurred in the judgment.

ORDER

¶ 1 *Held*: A permanent injunction was affirmed where (1) the matter was not barred by principles of *res judicata*, (2) the trial court's findings were not against the manifest weight of the evidence, and (3) the order did not constitute an abuse of discretion.

¶ 2 Plaintiffs—Jeffrey and Juliann M. Crittenden, Robert and Judith Reimer, James and Linda Biewer, and Susan M. Stillinger—each own properties in Elgin, Illinois. Defendant, Christopher Clark, is their neighbor. The deeds to plaintiffs' respective properties contain easements over defendant's property for purposes of ingress and egress. A portion of the area

that is the subject of those easements contains a long gravel drive connecting plaintiffs' properties with Highland Avenue. The Crittendens originally sued defendant in 2008, complaining that he was interfering with their use and enjoyment of their easement. That action was dismissed for want of prosecution several months after it was filed. In 2015, the Crittendens, joined by some of their neighbors, filed the present action against defendant, again alleging that he was interfering with their respective easements. The court denied defendant's motion to dismiss the 2015 action as *res judicata*. Following a bench trial, the court entered a permanent injunction in favor of plaintiffs. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 A. The 2008 Action

¶ 5 On June 18, 2008, the Crittendens filed a complaint against defendant in the circuit court of Kane County. That action was docketed as No. 08-MR-436. The Crittendens alleged as follows. They were the beneficiaries of a perpetual easement over a portion of defendant's land. The origin of that easement was a 1951 deed between the parties' predecessors in interest. The Crittendens disagreed with defendant regarding the exact location of the easement and the use and maintenance of the easement. For the past 50 years, a gravel driveway had been part of the easement. With time, trees grew over the area and prohibited access by vehicles taller than 10 feet. When the Crittendens offered to remove those trees, defendant threatened to call the authorities. On June 10, 2008, defendant's wife indeed called the authorities when the Crittendens filled potholes. There had been numerous other arguments related to the maintenance and use of the easement area, and defendant even threatened to move the driveway.

¶ 6 The Crittendens prayed for a declaratory judgment as follows:

"(1) That the Easement identified herein is in full force and effect; (2) That the easement

> entitles the Plaintiff [*sic*] to reasonable maintenance of the easement area at Plaintiffs' expense, which maintenance may include the removal of two trees currently impeding vehicular traffic upon the easement; (3) That the easement provides full use and enjoyment of the easement area; (4) That a Staked Survey of the Easement Area be made and that the parties be ordered not to remove said stakes after their installation; (5) That the Defendant be ordered not to interfere in anyway [*sic*] with Plaintiffs' full use and enjoyment of the easement area; [and] (6) That Defendant be ordered not to re-route the driveway, plant vegetation, or take any other action that reduces or diminishes the useable area of the easement parcel."

¶ 7 On July 18, 2008, defendant filed his answer to the complaint. On October 7, 2008, the case was dismissed for want of prosecution.

¶ 8 B. The 2015 Action

¶ 9 On October 28, 2015, the Crittendens and some of their neighbors filed a new lawsuit against defendant in the circuit court of Kane County. That action was docketed as No. 15-CH-1252. Plaintiffs alleged as follows. They each had a permanent easement over defendant's property for purposes of ingress and egress to their residences and businesses. (Although there were multiple easements involved, plaintiffs referred to these easements collectively as the "Permanent Easement.") The easement was improved with a gravel driveway, and trees and bushes encroached on part of the easement over the years. Whenever they attempted to maintain or improve the easement by removing trees and shrubs or fixing holes, defendant interfered with their rights by making threats and calling the authorities. In count I of the complaint, plaintiffs sought a declaratory judgment that they had an "exclusive right to reasonable maintenance of the Permanent Easement at their expense to preserve their ingress and egress without unreasonable

interference from Defendant."

¶ 10 In count II, plaintiffs first incorporated the factual allegations of count I. Plaintiffs added allegations about defendant placing signs and metal stakes within the easement area in the past several months. According to plaintiffs, the distance between those structures did not allow plaintiffs free and safe ingress and egress across the easement. Additionally, it was impossible for fire, emergency, and waste removal vehicles to properly access their properties. Plaintiffs thus requested an injunction "prohibiting Defendant, and anyone claiming by, through, or under Defendant[,] from interfering with the full rights of ingress and egress over the Permanent Easement, including a mandatory injunction ordering Defendant to remove the existing impediments to such access." Plaintiffs also requested attorney fees in this count.

¶ 11 In count III, plaintiffs incorporated the factual allegations of the other two counts. They sought damages for trespass to property arising out of the placement of impediments within the easement area.

¶ 12 A few weeks after they filed their complaint, plaintiffs petitioned for a temporary restraining order and injunctive relief. On November 24, 2015, the court entered an order temporarily restraining defendant from placing obstructions or from further interfering with plaintiffs' ingress and egress. On December 4, the court extended the temporary restraining order and directed defendant to remove the existing obstructions in the event that any public safety authority so required.

¶ 13 Defendant moved to dismiss the complaint as *res judicata* pursuant to section 2-619(a)(4) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(4) (West 2016)). On February 19, 2016, the court denied that motion.

¶ 14 On May 13, 2016, plaintiffs filed an amended complaint. They removed one of the

original party plaintiffs, Jacqueline Payne, who passed away during the pendency of the action. Plaintiffs added allegations detailing defendant's and his wife's interference with their use of the easement between June 2008 and March 2016. Examples of such interference included contacting the authorities on multiple occasions, parking their cars in a manner that prevented other cars from entering the drive, and thwarting plaintiffs' efforts to fix potholes, remove trash, and trim trees. Plaintiffs also alleged that in 2015, the fire department responded to two separate fires and encountered difficulties fitting emergency vehicles between the signs and posts that defendant placed in the easement area.

¶ 15 The matter proceeded to a bench trial on multiple dates between June and September 2016. The trial was limited to plaintiffs' request for a permanent injunction. The parties introduced conflicting evidence on many issues, including the historical dimensions, maintenance, and use of the subject gravel drive.

¶ 16 On November 7, 2016, the court found that defendant unreasonably restricted plaintiffs' use of the easement[1] in the following respects: (1) "impair[ing] or prohibit[ing] the right of the Plaintiffs to maintain said portion of the easement used as a roadway or from walking on the same and purporting to impose a speed limit and weight limit for vehicles using the easement"; and (2) "obstruct[ing] the Plaintiffs [*sic*] easement by the planting of bushes and the placement of metal stakes covered in plastic on the easement thereby reducing the actual amount of the easement to use by Plaintiffs as well as public vehicles such as fire equipment from using the easement to access the Plaintiffs [*sic*] property." The court found that defendant's conduct caused plaintiffs irreparable harm for which they did not have an adequate remedy at law.

[1] The court followed the parties' lead and referred to the multiple easements in the singular form.

Accordingly, the court enjoined defendant, or anyone acting by or through him, from interfering with plaintiffs' full rights of ingress and egress. Specifically:

> "(a) Plaintiffs may maintain and improve that portion of the easement as a gravel drive with a width of 20' and a height of 13[.]5' of the easement areas[.] In the north south portion the [*sic*] goes past the Defendant's residence and the Biwer [*sic*] property, the 20' shall be the western 20'
>
> (b) Defendant shall be prohibited from inserting any object that would restrict or impede the use of the drive portion of the easement by the Plaintiffs for vehicular or pedestrian movement
>
> (c) Defendant shall be given the opportunity to remove any object that he placed or caused to be placed in the road portion of the easement that is above the surface of the drive on or before[ ] November 30, 2016, after which, the Plaintiffs may remove or caused [*sic*] to be removed any such object."

¶ 17 On November 28, 2016, defendant filed an emergency motion to clarify and stay enforcement of the judgment pending an appeal. Ruling on this motion on December 5, 2016, the court (1) corrected a minor typographical error in the November 7 judgment; (2) stayed until January 31, 2017, plaintiffs' right to remove the lilac bushes that defendant planted in the easement area; and (3) merged the temporary restraining order with the November 7 judgment.

¶ 18 In December 2016, defendant filed a notice of appeal from three orders: (1) the February 19, 2016, order denying his motion to dismiss; (2) the November 7, 2016, order granting plaintiffs a permanent injunction; and (3) the December 5, 2016, order that was entered in response to defendant's emergency motion to clarify and stay enforcement of the permanent

injunction. On January 13, 2017, a motion panel of this court stayed the November 7 and December 5, 2016, orders until further order of court.

¶ 19 On December 11, 2017, we dismissed defendant's original appeal for lack of jurisdiction, given that counts I and III of the amended complaint remained pending in the trial court. See *Crittenden v. Clark*, No. 2-16-1052 (2017) (unpublished summary order under Supreme Court Rule 23(c)). After the release of our decision, upon defendant's motion, the trial court made findings in accordance with Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016), which allowed defendant to immediately appeal the permanent injunction. Defendant thereafter filed a timely notice of appeal. As in his original notice of appeal, defendant purported to challenge the orders of February 19, November 7, and December 5, 2016.

¶ 20 II. ANALYSIS

¶ 21 A. *Res Judicata*

¶ 22 Although the parties do not address the issue, we note that a litigant generally may not appeal the denial of a motion to dismiss if the matter subsequently proceeded to trial. See *In re Marriage of Sorokin*, 2017 IL App (2d) 160885, ¶ 22 ("On an appeal, it is not proper to raise the denial of a section 2-619 motion to dismiss, as the result of the denial merged with the final judgment from which the appeal was taken."). The exception is "when the issues presented in the prior motion are questions of law, rather than fact, and those questions of law were not presented to the court again at trial." *In re Parentage of G.E.M.*, 382 Ill. App. 3d 1102, 1114 (2008). Here, defendant renewed his *res judicata* arguments at trial, to no avail. For example, he raised the issue in his opening argument, his closing argument, and in his objections to the admission of evidence. Furthermore, the court's February 19, 2016, order denying defendant's motion to dismiss related to plaintiffs' original complaint in this action. Plaintiffs subsequently

amended their complaint. Under these circumstances, the February 19 ruling merged into the court's final orders following the trial and defendant may not directly appeal that particular ruling. Fortunately for defendant, however, he also appealed the court's final orders following the trial. We will thus consider his *res judicata* arguments as part of his broader challenge to the propriety of the permanent injunction.

¶ 23 Under the doctrine of *res judicata*, where a court of competent jurisdiction enters a final judgment on the merits, such judgment will bar any subsequent action between the parties or their privies involving the same cause of action. *Richter v. Prairie Farms Dairy, Inc.*, 2016 IL 119518, ¶ 21. The doctrine precludes relitigation of matters that were actually decided, or which could have been decided, in the prior action. *Richter*, 2016 IL 119518, ¶ 21. The doctrine promotes judicial economy by avoiding repetitive litigation and protecting defendants from "the harassment of relitigating essentially the same claim." *Richter*, 2016 IL 119518, ¶ 21. "Three requirements must be satisfied for *res judicata* to apply: (1) a final judgment on the merits has been rendered by a court of competent jurisdiction; (2) an identity of cause of action exists; and (3) the parties or their privies are identical in both actions." *Hudson v. City of Chicago*, 228 Ill. 2d 462, 467 (2008). The party who invokes the doctrine bears the burden of demonstrating its applicability. *Cload v. West*, 328 Ill. App. 3d 946, 950 (2002). We review *de novo* the legal question of whether a claim is barred by the doctrine of *res judicata*. *Sterling v. Rockford Mass Transit District*, 336 Ill. App. 3d 840, 846 (2003).

¶ 24 We first consider whether there was a final judgment on the merits in the Crittendens' 2008 action, which was dismissed for want of prosecution in October 2008. Illinois Supreme Court Rule 273 (eff. Jan. 1, 1967) provides that, "[u]nless the order of dismissal or a statute of this State otherwise specifies, an involuntary dismissal of an action, other than a dismissal for

lack of jurisdiction, for improper venue, or for failure to join an indispensable party, operates as an adjudication upon the merits." In light of this rule, an order dismissing a cause for want of prosecution becomes a final and appealable order upon the expiration of the period for refiling specified in section 13-217 of the Code (735 ILCS 5/13-217 (West 1994)).[2] *S.C. Vaughan Oil Co. v. Caldwell, Troutt & Alexander*, 181 Ill. 2d 489, 491 (1998). Section 13-217 allows a plaintiff to commence a new action "within one year *or within the remaining period of limitation, whichever is greater*, after *** the action is dismissed for want of prosecution." (Emphasis added.) 735 ILCS 5/13-217 (West 1994).

¶ 25 In his opening brief, defendant argues that the October 2008 dismissal for want of prosecution became a final judgment on the merits one year after it was entered; he does not specifically address whether the remaining period of limitation had expired by the time plaintiffs filed the 2015 action. Nor do plaintiffs explore that issue in their appellee's brief, apart from asserting in conclusory fashion that their action was not time-barred. In his reply brief, defendant proposes that there was no specific statute of limitations that applied to the cause of action that was at issue in the 2008 complaint. Therefore, he argues, the matter was governed by the five-year statute of limitations set forth in section 13-205 of the Code (735 ILCS 5/13-205 (West 2016)), which applies to "all civil actions not otherwise provided for." In accordance with that reasoning, defendant asserts that, for purposes of section 13-217 of the Code, the time for refiling the action that was dismissed for want of prosecution expired in 2013, at the latest.

¶ 26 We disagree that the Crittendens' claim for declaratory judgment in the 2008 action was subject to a five-year statute of limitations. As plaintiffs correctly argued before the trial court,

[2] As Public Act 89-7 was held to be unconstitutional, the pre-1995 version of section 13-217 is currently in effect. *Richter*, 2016 IL 119518, ¶ 44, n. 1.

there is generally a 40-year statute of limitations on actions to recover or establish an interest in or a claim to real estate. 735 ILCS 5/13-118 (West 2016). In *Harris Trust & Savings Bank v. Chicago Title & Trust Co.*, 84 Ill. App. 3d 280, 287 (1980), we determined that the 40-year statute of limitations applied where a plaintiff requested an injunction and a declaratory judgment to preserve its interests in an easement for ingress and egress. Accordingly, defendant has failed to demonstrate that the refiling period under section 13-217 expired so as to render the 2008 dismissal for want of prosecution a final judgment on the merits.

¶ 27 Defendant has also failed to demonstrate an identity of the cause of action. Our supreme court has adopted a "transactional analysis" whereby "separate claims will be considered the same cause of action for purposes of *res judicata* if they arise from a single group of operative facts, regardless of whether they assert different theories of relief." *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 311 (1998). To be sure, the 2008 and 2015 actions involved very similar issues. In their present lawsuit, however, plaintiffs have included allegations that defendant interfered with their easement rights in numerous ways between June 2008 and March 2016. The Crittendens could not have complained of those particular violations of their legal rights (or their neighbors' legal rights) when they filed the action in June 2008, as those violations had not yet occurred. See *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 338 (1996) ("A cause of action is defined by the facts which give a plaintiff a right to relief."); *Best Coin-Op, Inc. v. Paul F. Ilg Supply Co.*, 189 Ill. App. 3d 638, 650 (1989) (the doctrine of *res judicata* should apply "only to facts and conditions as they existed when the judgment was entered"). Under these circumstances, the two actions did not arise out of a single group of operative facts.

¶ 28 Nor are we prepared to say that the Crittendens, who were the lone complainants in the 2008 action, were in privity with the remaining plaintiffs who joined them in the 2015 action.

"A nonparty may be bound under privity if his interests are so closely aligned to those of a party that the party is the virtual representative of the nonparty." *Yorulmazoglu v. Lake Forest Hospital*, 359 Ill. App. 3d 554, 559 (2005). "Privity is said to exist between 'parties who adequately represent the same legal interests.' " *People ex rel. Burris v. Progressive Land Developers, Inc.*, 151 Ill. 2d 285, 296 (1992) (quoting *Hartke v. Chicago Board of Election Commissioners*, 651 F. Supp. 86, 90 (N.D. Ill. 1986)). When considering the adequacy of the representation in a prior action, our supreme court has focused on whether the same legal position was "vigorously urge[d]" in the prior action, such as through extensive briefing and argument by competent counsel. *Burris*, 151 Ill. 2d at 297. The Crittendens did not vigorously urge their neighbors' legal position in the 2008 action. To the contrary, the Crittendens allowed the case to be dismissed for want of prosecution before the substance of their grievance was ever litigated.

¶ 29 Even if all of the elements of *res judicata* were met, we would decline to apply the doctrine here for two reasons. One of the exceptions to the rule prohibiting plaintiffs from splitting their claims is where "the case involves a continuing or recurrent wrong." *Rein*, 172 Ill. 2d at 341; see also *Holmon v. Village of Alorton*, 2016 IL App (5th) 150404, ¶ 21. According to the trial testimony, defendant interfered with plaintiffs' rights under the easements long after the 2008 action was dismissed for want of prosecution. This case thus involves a continuing or recurrent wrong. Furthermore, we remain mindful that "equity dictates that the doctrine of *res judicata* will not be applied technically so as to create inequitable and unjust results." *Best Coin-Op, Inc.*, 189 Ill. App. 3d at 650. The litigants here are neighbors who have had a rather acrimonious relationship for at least a decade. At various times, they have sought assistance from the police and from the courts. It would be a disservice to the parties, as well as to any

property owners who might be affected by these easements in the future, to leave them in the dark as to their legal rights and obligations.

¶ 30 For all of these reasons, the doctrine of *res judicata* does not bar plaintiffs' 2015 action.

¶ 31 B. Permanent Injunction

¶ 32 Defendant also argues that the court erroneously granted a permanent injunction in favor of plaintiffs. He says that the court should have simply "affirm[ed] the existence of the Subject Easement as platted"—which he claims is a 10-12 foot gravel drive—rather than allowing plaintiffs to improve the easements with a wider drive. According to defendant, the court improperly allowed the expansion of the drive into ComEd's utility easement and authorized the removal of lilacs from what defendant says was the "unused eastern portion" of the easements. Defendant thus maintains that the court materially altered the easements, placed a greater burden on his servient estate, interfered with his use and enjoyment of the land, and exposed him to liability to ComEd. Defendant further argues that plaintiffs failed to demonstrate their right to injunctive relief, as they suffered no irreparable harm and the equities did not favor their position. Plaintiffs respond by citing trial evidence supporting the court's finding that defendant unreasonably interfered with their rights under the easements.

¶ 33 "An easement is a right or privilege in the real estate of another." *McMahon v. Hines*, 298 Ill. App. 3d 231, 235 (1998). Plaintiffs, as the owners of the dominant estates, are entitled to the "necessary use of the easement[s]," which means such use as is "reasonably necessary for full enjoyment of the premises." *McMahon*, 298 Ill. App. 3d at 236. Plaintiffs have the right to maintain their easements. *McMahon*, 298 Ill. App. 3d at 239. They may not, however, for the mere sake of convenience "materially alter the easement[s] 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."

McMahon, 298 Ill. App. 3d at 239. Defendant, as the owner of the servient estate, likewise may use his property for any purpose that is consistent with plaintiffs' enjoyment of the easements, provided that such use does not materially interfere with or obstruct the use of the land as a right of way. *McMahon*, 298 Ill. App. 3d at 239. The reasonableness of the use of an easement presents a question of fact that depends on the circumstances of the case. See *McMahon*, 298 Ill. App. 3d at 239-40. We review an order granting injunctive relief for an abuse of discretion. *Brandhorst v. Johnson*, 2014 IL App (4th) 130923, ¶ 94. A court abuses its discretion where no reasonable person would adopt its view. *Brandhorst*, 2014 IL App (4th) 130923, ¶ 94.

¶ 34 The court's factual findings were not against the manifest weight of the evidence, and the order allowing the permanent injunction was not an abuse of discretion. Defendant insists that plaintiffs are entitled only to use the 10-12 foot wide drive that presently exists. That position is untenable, as the evidence showed (and defendant admits) that the easement area is about twice that width. "The rule obtaining in this State is that the owner of a right of way for ingress and egress has the right to use the full width of the area or strip having definite boundaries, unhampered by obstructions placed thereon." *Schaefer v. Burnstine*, 13 Ill. 2d 464, 469 (1958); see also *McMahon*, 298 Ill. App. 3d at 236.

¶ 35 Furthermore, the case depended in large part on the credibility of the witnesses. The parties presented contradictory evidence on numerous points, the most significant of which was the historic width of the drive. Plaintiffs claimed that the drive was approximately 20 feet wide for many years but that it narrowed beginning in the mid-2000s due to defendant's actions and inactions. Defendant denied those allegations. The evidence was also conflicting as to who maintained the drive prior to the mid-2000s, whether the condition of the drive deteriorated over time, and whether emergency vehicles could safely access plaintiffs' properties.

¶ 36 Plaintiffs introduced evidence that defendant and his wife restricted their use and enjoyment of the easements in numerous ways, including (1) preventing plaintiffs from maintaining the drive, (2) placing delineators and signs along the drive that made it impossible for two cars to use it at the same time, and (3) planting lilacs within the easement area. Instead of altering the parties' rights and obligations with respect to the easements, it is apparent that the court merely intended to allow plaintiffs to restore the drive to something approximating what it believed were the dimensions prior to the mid-2000s. It seems that the court also had safety concerns in mind. Specifically, the court allowed plaintiffs to improve the existing drive to a width of 20 feet and a clearance height of 13 ½ feet. Those measurements corresponded with a fire chief's testimony about the requirements for this drive as a fire apparatus access road. It was the role of the trial court to resolve the conflicts in the evidence, and we are not at liberty to second guess the court's findings of fact or credibility assessments. See *Chicago Title Land Trust Co. v. JS II, LLC*, 2012 IL App (1st) 063420, ¶ 31. For the same reasons, we will not disturb the court's balancing of the equities or its finding that plaintiffs would suffer irreparable harm in the absence of a permanent injunction.

¶ 37 Defendant fears that he will encounter problems with ComEd if the width of the drive is changed. The evidence showed, however, that plaintiffs' easements for ingress and egress predated ComEd's utility easement. Moreover, ComEd provided a letter detailing its clearance requirements in relation to expanding the drive. Apart from his own speculation, defendant introduced no evidence demonstrating that restoring the road to its historic condition would violate ComEd's requirements.

¶ 38 The evidence supported the court's conclusion that defendant unreasonably interfered with plaintiffs' use of their easements. The court thus did not abuse its discretion in granting a

permanent injunction. For the same reasons, the court did not err in its ruling with respect to defendant's emergency motion to clarify and stay the judgment. Defendant does not identify any error in that order apart from raising the arguments that we have already rejected.

¶ 39 III. CONCLUSION

¶ 40 For the reasons stated, we affirm the judgment of the circuit court of Kane County.

¶ 41 Affirmed.