

NOTICE

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2014 IL App (4th) 131029-U

NO. 4-13-1029

IN THE APPELLATE COURT  
OF ILLINOIS  
FOURTH DISTRICT

**FILED**

December 24, 2014  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

WILLIAM TONELLATO,	)	Appeal from
Plaintiff-Appellant,	)	Circuit Court of
v.	)	Sangamon County
DALLAS MRASAK and ROSE MRASAK,	)	No. 10CH1305
Defendants-Appellees.	)	
	)	Honorable
	)	Leo Zappa,
	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.  
Presiding Justice Pope and Justice Appleton concurred in the judgment.

**ORDER**

¶ 1 *Held:* (1) The trial court's determination that plaintiff failed to establish that he acquired a strip of land on defendants' property by adverse possession was not against the manifest weight of the evidence.

(2) The trial court's determination that plaintiff failed to establish that he acquired a prescriptive easement over a portion of defendants' property was not against the manifest weight of the evidence.

(3) The trial court's denial of plaintiff's request for injunctive relief was not against the manifest weight of the evidence.

¶ 2 Plaintiff, William Tonellato, brought a cause of action against defendants, Dallas and Rose Mrasak, alleging he acquired a strip of land on defendants' property by adverse possession or, in the alternative, acquired a prescriptive easement over defendants' property. Plaintiff also sought injunctive relief that would require defendants to remove dirt and a fence they had

placed on the disputed property. Following a bench trial, the trial court entered judgment against plaintiff and in favor of defendants. Plaintiff appeals. We affirm.

¶ 3

### I. BACKGROUND

¶ 4

Plaintiff and defendants are neighbors who own adjacent properties in Grandview, Illinois. Plaintiff's property and residence (the Tonellato lot) is located at 2345 East Converse Street. Immediately to the east of the Tonellato lot is defendants' property and residence (the Mrasak lot), which is located at 2349 East Converse Street. The Tonellato lot is 40 feet wide and the Mrasak lot is 80 feet wide. The parties' homes are separated by an empty lot that makes up part of the Mrasak lot.

¶ 5

Relevant to these proceedings, Rose Mrasak's parents, Glen and Elsie Clevenger, were originally the owners of both properties. In approximately 1959 or 1960, plaintiff began renting the house on the Tonellato lot from the Clevengers. In 1962, he purchased the Tonellato lot. The Clevenger family lived on the Mrasak lot until 1959, when they moved and began renting the house on the Mrasak lot to various families. In 1969, defendants, who married in 1965, became tenants on the Mrasak lot. On September 24, 2001, they obtained title to the Mrasak lot.

¶ 6

In 2010, a dispute arose between the parties regarding the land on and around their shared property line. On November 9, 2012, plaintiff filed a first amended complaint against defendants. Count I of his complaint alleged he had obtained ownership of portions of defendants' property by adverse possession. Specifically, plaintiff alleged defendants had tilled earth and installed a cyclone fence on portions of the Mrasak lot which, although owned by defendants, had been possessed, used, and maintained by plaintiff for over 20 years. The disputed property included (1) portions of a gravel driveway, which plaintiff alleged had been present

"[s]ince at least 1980 and before," that ran along the eastern side of plaintiff's house to a garage located behind his house; and (2) a strip of land that ran alongside his driveway and to the northern property lines at the back of the Tonellato and Mrasak lots. In count I, plaintiff alternatively alleged he had acquired a prescriptive easement over the disputed property. He asserted as follows:

"[F]or more than 20 years, [p]laintiff has used and claimed an easement to travel several feet across the western portion of [the Mrasak lot] and used and claimed an easement all the way to the north property line. There has been no change in the width or location of the driveway, property to the east of the driveway, or the property to the north used by plaintiff up to the north property line during that period that are part of [the Mrasak lot]."

¶ 7 In count II of his complaint, plaintiff sought injunctive relief. He alleged defendants interfered with his use and enjoyment of his premises by installing a cyclone fence and placing dirt on their property, "which caused a change in water drainage such that the flow of water now goes onto plaintiff's property[,] \*\*\* floods his existing driveway[,] and causes large amounts of standing water." Plaintiff asked the trial court to "[i]ssue a preliminary and permanent injunction, requiring [d]efendants to immediately remove the fence now encroaching upon [p]laintiff's property and the part of [the Mrasak lot] to which [p]laintiff has title by adverse possession or easement."

¶ 8 On November 14, 2012, defendants filed an answer to plaintiff's complaint along with an affirmative defense. In connection with their affirmative defense, defendants alleged the

"placement of dirt on their property was intended to, and ha[d] the effect of, abating the nuisance created by [p]laintiff's disruption of the natural flow of water from his roof and gutter system." They asserted that, historically, water from plaintiff's roof and gutters naturally flowed down his driveway and to the street at the front of his property. However, prior to defendants' placement of dirt on their property, plaintiff created a shallow trough that ran from a downspout on the eastern side of his residence, across his driveway, and to the western edge of the Mrasak lot. Defendants asserted plaintiff's actions altered the natural flow of water so that it pooled and collected onto an area of their property they used to raise fruits and vegetables and interfered with their enjoyment of their property.

¶ 9 On August 12, 2013, the trial court conducted a bench trial in the matter. Prior to trial, the parties stipulated and agreed to certain underlying facts and the admission into evidence of 69 exhibits. The majority of those exhibits were photographs of various portions of the property in dispute taken at various times. Two of the exhibits were surveys of the properties at issue, one obtained by each party, and one exhibit was defendants' fence permit application. The parties submitted a stipulated exhibit list which provided a brief description of each exhibit. An additional exhibit was admitted at trial, containing a typewritten statement by defendants setting forth their position on their need for a fence.

¶ 10 At trial, the trial court heard testimony from plaintiff; Rose Mrasak; and plaintiff's son, David Tonellato. Plaintiff testified that, when he first bought the Tonellato lot, the house on the property measured 24-feet long from south to north. A driveway, which plaintiff stated was possibly made from red shale, was located to the east of the house and extended from the street in front of the house to approximately 10 feet past the north side of plaintiff's house. Plaintiff

identified a photograph taken in 1962 (exhibit No. 26) as showing his house as it looked when he bought it. Plaintiff testified he eventually built onto the north (back) side of his house and, thereafter, his house measured 40 feet from front to back. In approximately 1964, plaintiff built a garage, which he placed 20 feet to the north of the back of his house. He also extended his driveway, using white rock. He identified a photograph (exhibit No. 2), which he testified accurately depicted the north portion of his driveway and garage as they existed in 1980.

¶ 11 Evidence at trial showed that in the summer of 2010, defendants installed a cyclone fence on the Mrasak lot near where it bordered the Tonellato lot. Defendants' permit application (exhibit No. 20) states they sought to install the fence one foot back from the property line as determined by a survey they obtained from Martin Engineering Company in April 2010 (exhibit No. 24). In a typewritten note attached to their application, defendants asserted the distance from the southeast corner of plaintiff's house foundation to the east edge of his gravel driveway was nine feet and four inches, but the distance from plaintiff's house foundation to the property line as placed by Martin Engineering Company was eight feet and two inches. Defendants noted the possibility that plaintiff had obtained approximately 10 additional inches of property by adverse possession or as the result of an easement. They then asserted they would set the cyclone fence back nine feet and four inches from the foundation of plaintiff's house, which they maintained was a one-foot distance from the property line.

¶ 12 In August 2010, plaintiff obtained a survey from Sangamon Valley Surveying & Consulting, P.C. (exhibit No. 25). Plaintiff's survey contained the following findings:

"1) Survey line off from [plaintiff's] garage is 20" +/- 1" to the east.

- 2) Note attached to permit states that 10" additional to the east is acquired thru adverse possession.
- 3) This would make the property line 30" east of the garage.
- 4) Permit states that fence is to be erected one foot off from the property line.
- 5) This would place the fence 42" off to the east of the garage, 20" survey +10" acquired + 12" for fence.
- 6) Current fence location is 28" off from the front of garage.
- 7) Fence location dose [*sic*] not meet the requirements of the permit."

¶ 13           The parties stipulated that in March 2010, prior to defendants' installation of the cyclone fence, Dallas Mrasak used orange spray paint to mark where defendants believed the property line that separated the Tonellato and Mrasak lots was located. The parties agreed that the survey obtained by defendants from Martin Engineering Company found the property line between the Tonellato and Mrasak lots "to be about four inches to the east (*i.e.*, four inches closer to the Mrasak lot) of the line of orange spray paint." The survey obtained by plaintiff from Sangamon Valley Surveying & Consulting, P.C. found the property line "to be about three inches to the west (*i.e.*, three inches closer to the Tonellato residence) of the line of orange spray paint."

¶ 14           At trial, plaintiff recalled having to resurface his driveway over the years but did not know exactly when that occurred. He testified that when he did the resurfacing he did not know where the property line was between his property and the Mrasak lot. Plaintiff made the decision about where to put the new rock based upon where the original driveway was located.

He testified photographs of his driveway taken in 1975 (exhibit Nos. 30 and 31) depicted the location of his "original" driveway as it looked when he first began living on the property. On cross-examination, plaintiff testified he last added gravel to his driveway in approximately 1976. He did not use any barriers or containment devices to ensure that the gravel did not spread beyond the contours of his driveway. Plaintiff did not recall testifying at his November 2011 deposition that such barriers or containment devices were unnecessary because his driveway was contained entirely within the 40-foot wide lot he purchased in 1962.

¶ 15 Plaintiff testified a line of poplar trees had been located to the east of his driveway and identified that line of trees in a photograph (exhibit No. 26). He testified the line of poplar trees were in line with a maple tree at the front of the Mrasak lot. Plaintiff stated he cut down all of the poplar trees in that line. He identified a photograph taken in 1964 (exhibit No. 27) as showing one of the poplar trees and then a photograph taken in 1968 (exhibit No. 28), showing only a tree stump where plaintiff testified a poplar tree had been. On cross-examination, plaintiff testified he obtained permission from Glen Clevenger to cut down the poplar trees.

¶ 16 Plaintiff testified photographs taken in the area of his driveway in 1975 (exhibit Nos. 30 and 31) showed a wire fence located to the east of his driveway. He stated defendants installed the fence but he did not recall when. Plaintiff agreed an undated photograph (exhibit No. 34), which he estimated was taken in the mid-1980s, showed snow piled up against the wire fence. He testified he and his children would typically pile snow in that location when they cleared snow from their driveway. Plaintiff stated a photograph taken in 1980 (exhibit No. 1) showed the maple tree located to the east of his driveway and near the front of the Mrasak lot. He testified the photograph also appeared to show that the wire fence was located to the east of

the maple tree; however, plaintiff could not recall from memory the location of the fence relative to the tree. Plaintiff also stated that the location of the gravel driveway in the 1980 photograph was "close" to the location of the driveway when he moved onto the property.

¶ 17 Plaintiff identified a photograph taken in October 2005 (exhibit No. 35) as showing a small wooden fence extending from behind his garage toward the east. He stated he erected that fence with the help of his father and stopped at the location he did because he "ran out of fence." Plaintiff testified undated photographs showing his gravel driveway and the wooden fence behind his garage (exhibit Nos. 37 and 38) revealed that the rocks in his driveway extended farther east than his wooden fence.

¶ 18 Plaintiff testified that, from the time he moved into his house until defendants installed their cyclone fence in 2010, he never measured the distance from the east edge of his house to "how far out [he] used and maintained the property." He did not know where the property line between his property and defendants' property was actually located. Plaintiff stated that, when he first moved onto the property and for the next 10 to 12 years, he would mow all, or portions of, a vacant lot that was located to the east of his property and which separated his house from defendants' house. When he first moved in, he cleared out brush and weeds that were "next to [his] garage area \*\*\* and to the north." He also hauled in dirt, noting he had to "backfill" approximately six feet from the east of his garage.

¶ 19 Plaintiff stated he additionally planted grass seed on the part of the Mrasak lot that was immediately adjacent to his driveway and garage. He asserted he planted grass off and on from the time he bought his house and for the next 20 years, when "the kids trumped [the grass] out." Plaintiff agreed both parties' children played on the strip of land next to plaintiff's drive-

way, garage, and wooden fence.

¶ 20 Plaintiff testified he buried his dog under a bush on the disputed strip of property and identified the location in a photograph (exhibit No. 19). On cross-examination, he estimated that his dog died in 1960. Further, plaintiff denied telling anyone that he was going to bury his dog on the Mrasak lot.

¶ 21 Plaintiff stated he had recently measured the distance between the southeast corner of the foundation of his house and the maple tree located near the front of the Mrasak lot, noting the distance was "[a]bout 13 feet." Plaintiff stated, "[w]e took the driveway at 8.2, plus five more feet, 13 feet." He testified that, from the time he moved onto the property until defendants installed their cyclone fence, he mowed at least as far east as the distance he measured and the location where defendants' wire fence had been. Plaintiff also stated he mowed to the east of the poplar trees before they were cut down and also probably to the east of the poplar tree stumps once he cut the trees down. He acknowledged that defendants also mowed the grass on the disputed strip of land. However, plaintiff denied that from 1962 until defendants' wire fence was taken down in 1989 either the Clevengers or defendants mowed grass "that would have laid anywhere west of where the wire fence once was." On cross-examination, plaintiff acknowledged he never tried to keep defendants or their daughter off the disputed strip of land, stating, "[w]ell, we didn't own it."

¶ 22 Plaintiff further testified that while living on the Tonellato lot he used the disputed strip of land when getting in and out of his vehicle. He stated the passenger door of a vehicle would extend over the edge of his driveway, and when passengers would exit a vehicle they would walk in the grass area next to his driveway. Sometimes, he drove his car on the grass lo-

cated to the east of his driveway. On cross-examination, plaintiff testified that in the last 20 years, he drove his car outside the contours of his driveway approximately a dozen times.

¶ 23 According to plaintiff, the rocks that formed his gravel driveway sometimes migrated to the east. He and his children would clean the rocks up using a rake. Plaintiff compared pictures of his driveway taken in 1980 (exhibits Nos. 1 and 2) with pictures taken in 2010 (group exhibit No. 16) and stated that the contour of the east edge of his drive appeared "[n]ot much" different in the photographs. Plaintiff denied that over the previous 20 years the shape and contour of his driveway had changed. On cross-examination, he was confronted with his deposition testimony that the shape, location, and contour of the eastern edge of his driveway had changed over the past 20 years. Plaintiff asserted he could not recall the answers he provided at his deposition.

¶ 24 As stated, the parties stipulated that, in March 2010, Dallas Mrasak used orange spray paint to mark the ground on the disputed strip of property and delineate what he believed was the dividing line between the Tonellato lot and the Mrasak lot. At trial, plaintiff noted photographs (exhibit Nos. 40 and 41) showed an orange line painted down a portion of his gravel driveway. On cross-examination, plaintiff acknowledged the surveying company he hired found the property line at issue to be a few inches closer to his house than the orange line painted by defendants. He also testified defendants tilled up a portion of the eastern edge of his driveway. Plaintiff stated in April 2010, he took a picture (exhibit No. 43) of flooding that occurred on the eastern edge of his driveway after defendants tilled up the land. He denied that his driveway ever previously flooded as shown in the picture.

¶ 25 Plaintiff next identified photographs of fence posts (exhibit No. 51) and the com-

pleted cyclone fence (exhibit No. 52) defendants installed on the disputed strip of land. Plaintiff noted the cyclone fence was located west of the maple tree located at the front of the disputed strip of land. He next identified photographs of his car parked in his driveway and next to the cyclone fence (exhibit Nos. 53 and 54). Plaintiff testified that in the pictures, the passenger door of his car could not be opened to allow someone to exit the vehicle. Prior to defendants' installation of the cyclone fence, he did not have that problem.

¶ 26 On cross-examination, plaintiff testified his driveway was approximately 8 feet wide and defendants' cyclone fence was located more than 10 inches from the eastern edge of his driveway. He stated that for approximately the last 20 years he had only one vehicle. Plaintiff acknowledged testifying at his deposition that he typically parked his car in his garage. Further, he acknowledged photographs (exhibit Nos. 18, 66, 67, 68, and 69) showing empty vehicles parked in various locations in his driveway after defendants installed the cyclone fence.

¶ 27 Plaintiff further identified a series of photographs (exhibit Nos. 57, 58, 59, and 60), which he testified showed defendants' hauling dirt onto the Mrasak lot and placing it along the east side of their cyclone fence in September 2010. He then noted photographs from February and April 2011 (exhibit Nos. 61, 62, and 63) and February and April 2013 (exhibit Nos. 64 and 65), which showed standing water in his driveway. Plaintiff testified he did not have problems with standing water before defendants hauled in the dirt and placed it along their fence. He stated the dirt sat higher than his driveway and impeded the flow of water out of his driveway. On cross-examination, plaintiff acknowledged a photograph from 2008 (exhibit No. 15), taken prior to defendants' installation of the cyclone fence or placement of dirt, showed water collecting on the western portion of his driveway.

¶ 28 At trial, plaintiff called Rose Mrasak to testify as an adverse witness. Rose estimated that defendants' wire fence was put up in approximately 1974. According to Rose, the wire fence was placed where it was so that defendants would have ample room to mow around the fence and along the western edge of the Mrasak lot. She asserted that when the fence was erected, defendants had been aware of the location of the property line. Rose estimated the wire fence was up for four years and was removed because defendants downsized their garden. She stated she had previously been in error when she asserted the wire fence was up until 1988 or 1989.

¶ 29 Rose testified defendants erected the cyclone fence to establish a boundary and protect their strawberry patch, which she identified in a photograph (exhibit No. 16). She noted she did not want plaintiff's family "driving any further than they already had been into the strawberries." Rose testified defendants placed the cyclone fence at the location they did because they believed it would be near the property line. Initially, she denied that the cyclone fence sat on an area where plaintiff would drive. She acknowledged answering the same question differently at her deposition. Rose further stated as follows: "The fence is set back 60 inches from the property line. [Plaintiff] drove about 10 inches from the property line \*\*\*." She also identified a typewritten document she prepared (exhibit No. 70), which set forth defendants' position regarding their need for a fence. In the statement, she acknowledged that, given the position of the gravel in plaintiff's driveway, plaintiff had driven 10 inches over the 40-foot property line for several years.

¶ 30 Rose agreed she could not dispute that the location of plaintiff's driveway in 1960 was the same as depicted in photographs from 1980 (exhibit Nos. 1 and 2). However, she as-

serted that in the 33 years since 1980, the eastern edge of plaintiff's driveway had shifted. Rose recalled removing rocks from the westernmost portion of the Mrasak lot and placing them back on plaintiff's driveway. She denied that defendants tilled a portion of plaintiff's driveway in April 2010.

¶ 31 Rose testified defendants obtained a survey showing the property line at issue was eight feet and two inches from the edge of plaintiff's house. She asserted that property line was next to the orange line painted by defendants in March 2010. When asked why defendants did not put their cyclone fence on the orange line, Rose testified, "[w]e shared that 15 inches of property line" and "[b]ecause plaintiff had room for his driveway."

¶ 32 According to Rose, she had been aware prior to the survey that plaintiff's driveway encroached on her property. However, she did not care and never asked plaintiff to move his driveway. Rose testified she never witnessed plaintiff driving outside the contours of his driveway but she did observe his children doing that. She could not recall when she first noticed plaintiff's children driving off the edge of plaintiff's gravel driveway but estimated it had been less than 10 years ago.

¶ 33 Rose identified a photograph (exhibit No. 19), which she asserted accurately depicted the current condition of plaintiff's driveway. In the photograph, she identified plaintiff's house and bushes located in the front of his house. Rose stated that approximately one week prior to trial she measured the distance between the bushes in front of plaintiff's house and the cyclone fence. Her measurements showed a distance of nine feet and five inches. Rose also measured the distance between plaintiff's garage and the cyclone fence to be 26 1/2 inches. Additionally, prior to the installation of defendants' cyclone fence, Rose observed plaintiff's car parked at

his house on a daily basis. Typically, plaintiff would park in front of his garage. After the cyclone fence was installed, Rose observed plaintiff use his driveway and stated he did not appear to have any difficulty.

¶ 34 Rose further testified that, although she did not live on the Mrasak lot between 1959 and 1969, she did visit a garage on the property two to three times per week. During those visits, she observed the tenants who lived on the property mowing the grass on the Mrasak lot all the way up to plaintiff's gravel driveway. Rose testified that, during the time defendants rented the home on the Mrasak lot, her parents would visit and walk in the area of the Mrasak lot adjacent to plaintiff's driveway, garage, and wooden fence. Further, she stated that after defendants moved onto the Mrasak lot, Dallas Mrasak would mow the grass in the area of the Mrasak lot that ran alongside plaintiff's driveway, garage, and wooden fence. Rose noted Dallas would mow up to the rocks on plaintiff's driveway.

¶ 35 Rose testified that in the 1990s and early 2000s, water would pool in the lower areas of plaintiff's driveway where the gravel had settled and had been "compounded down into the dirt." At some point, plaintiff created a "trench" so that the water would no longer flow into his driveway. Rose testified the "trench" started approximately five inches from plaintiff's downspout and went across plaintiff's driveway and into defendants' strawberries.

¶ 36 David Tonellato testified he lived with plaintiff on the Tonellato lot until 1976, when he got married. Growing up, he mowed the yard all the time and stated he "would mow from the driveway wall [*sic*] the way up to the wire fence from front to back." David denied seeing either the Clevengers or their tenants mow west of the location of the wire fence while he was living on the property. He also denied that defendants mowed west of the location of the

wire fence when the fence was in place.

¶ 37 David testified that he took measurements on the property at issue at his father's request. He measured the distance between the eastern side of plaintiff's house and the cyclone fence as being nine feet and six inches. David next measured the distance between the cyclone fence and the eastern side of the maple tree at the front of the Mrasak lot to be around four feet and six inches to six feet. He noted the tree was difficult to measure because of its roots. Adding those measurements, David asserted the total distance between the eastern edge of plaintiff's house and the eastern side of the maple tree was 13 1/2 feet. He estimated the location of where defendants' wire fence had been was another foot over toward the east.

¶ 38 At the request of defendants' counsel, the trial court took judicial notice of an ordinance requiring a minimum width of 8 1/2 feet for parking spaces in Sangamon County. City of Springfield Code of Ordinances § 17.50.040 (1969) (amended February 2009). Plaintiff's counsel questioned the relevance of the ordinance, stating it did not have anything to do with adverse possession. The court noted one of plaintiff's complaints was that he did not have enough room in his driveway and that the ordinance "may become relevant" if the court did not "go the adverse possession" route.

¶ 39 At the conclusion of the evidence, the trial court asked the parties to present proposed orders for it to consider. The court also noted it would "do a spot check of [plaintiff's] driveway" prior to rendering its decision. The record reflects plaintiff's proposed order asked the court to find that for more than a 20-year period, plaintiff adversely "possessed a strip of land 13.5 feet east from the foundation of his house."

¶ 40 On October 23, 2013, the trial court entered its order, finding in favor of defend-

ants as to both counts of plaintiff's complaint. It determined plaintiff failed to present sufficient evidence to prove the necessary elements of either his adverse possession claim or his prescriptive easement claim. With respect to plaintiff's request for injunctive relief, the trial court determined he failed to establish a clearly ascertainable right that was adversely impacted by defendants' cyclone fence. Additionally, relying on Rose Mrasak's testimony that it was plaintiff who initially altered the natural flow of water off his property onto the Mrasak lot, the court declined to enter an injunction requiring defendants to remove top soil they had placed on their property.

¶ 41 This appeal followed.

¶ 42 II. ANALYSIS

¶ 43 On appeal, plaintiff argues the trial court erred by finding in defendants' favor as to both counts of his complaint. Specifically, he contends he presented sufficient evidence to meet the elements of both adverse possession and an easement by prescription. Additionally, plaintiff argues he was entitled to injunctive relief requiring defendants to remove dirt they added to their property so as to restore the natural flow of water. For the reasons that follow, we find the trial court's determinations that plaintiff failed to establish all the necessary elements of either adverse possession or a prescriptive easement were not against the manifest weight of the evidence. The record also fails to reflect the court erred by denying plaintiff's request for injunctive relief.

¶ 44 A. Adverse Possession

¶ 45 To establish title over property by adverse possession, a plaintiff must prove possession of the disputed property for a period of 20 years (735 ILCS 5/13-101 (West 2010)) and

that, during the 20-year period, his possession was "(1) continuous, (2) hostile or adverse, (3) actual, (4) open, notorious, and exclusive \*\*\*, [and] (5) under claim of title inconsistent with that of the true owner." *Joiner v. Janssen*, 85 Ill. 2d 74, 81, 421 N.E.2d 170, 174 (1981); see also *Brandhorst v. Johnson*, 2014 IL App (4th) 130923, ¶ 37, 12 N.E.3d 198. There must be "concurrent existence of the five elements" during the 20-year period. *Joiner*, 85 Ill. 2d at 81, 421 N.E.2d at 174.

¶ 46 "[A]lthough not one of the five elements of possession, [a plaintiff] must also prove 'by clear and convincing evidence the exact location of the boundary line to which they claim[ ].' " *Brandhorst*, 2014 IL App (4th) 130923, ¶ 37, 12 N.E.3d 198 (quoting *Schwartz v. Piper*, 4 Ill. 2d 488, 494, 122 N.E.2d 535, 539 (1954)).

" 'The proof must be such as to establish with reasonable certainty the location of the boundaries of the tract to which the five elements of adverse possession are applied and all of the elements must extend to the tract so claimed. While it is not necessary that the land should be enclosed by a fence, the boundaries must be susceptible of specific and definite location.' " *Joiner*, 85 Ill. 2d at 83, 421 N.E.2d at 175 (quoting *Schwartz*, 4 Ill. 2d at 493, 122 N.E.2d at 538).

¶ 47 In an adverse possession case, "[p]resumptions are in favor of the title owner, and the burden of proof upon the adverse possessor requires that each element be proved by clear and unequivocal evidence." *Joiner*, 85 Ill. 2d at 81, 421 N.E.2d at 174. Strict proof of each element of adverse possession is required to overcome a presumption, which may not be made out by in-

ference or implication. *Mann v. La Salle National Bank*, 205 Ill. App. 3d 304, 309, 562 N.E.2d 1033, 1037 (1990). "Because the supreme court has not explained the meaning of 'clear and unequivocal evidence,' courts have applied the clear and convincing burden of proof in adverse possession cases." *Brandhorst*, 2014 IL App (4th) 130923, ¶ 38, 12 N.E.3d 198. On review, the trial court's findings will not be disturbed unless they are against the manifest weight of the evidence. *Brandhorst*, 2014 IL App (4th) 130923, ¶ 38, 12 N.E.3d 198. " '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 the evidence.' " *Brandhorst*, 2014 IL App (4th) 130923, ¶ 38, 12 N.E.3d 198 (quoting *Lawlor v. North American Corp. of Illinois*, 2012 IL 112530, ¶ 70, 983 N.E.2d 414).

¶ 48 As stated, the trial court determined plaintiff failed to establish all the necessary elements of adverse possession. Initially, it determined plaintiff failed to prove that he "possessed or exercised dominion up to a defined boundary within the Mrasak lot" and, as a result, was "unable to establish which portions of the Mrasak lot, if any, he ha[d] possessed for at least [20] years." We agree.

¶ 49 In his proposed order, plaintiff asked the trial court to find he "possessed a strip of land 13.5 feet east from the foundation of his house." However, on appeal, he argues he "should be awarded a strip of land measuring [14 1/2] feet to the east starting at the east foundation of his home." At trial, plaintiff never expressly asserted during his testimony the precise boundary to which he was claiming possession. Moreover, the evidence presented as to that issue was equivocal and not necessarily supportive of either the distance claimed in his proposed order or the distance asserted on appeal. In particular, plaintiff testified that the distance between the founda-

tion at the eastern side of his house and the maple tree at the front of the Mrasak lot was "about 13 feet." The testimony of plaintiff's son showed the same distance to be between 14 feet to 15 1/2 feet. Plaintiff also testified he mowed at least as far east on the Mrasak lot as the maple tree and the location where defendants' wire fence had once been. However, the distance from the maple tree on the Mrasak lot to the location of the wire fence was never established. Plaintiff's son could only estimate that the fence had been approximately one foot to the east of the maple tree.

¶ 50 Given this evidence, we find plaintiff failed to clearly and convincingly establish the exact location of the boundary line to which he claimed adverse possession. The trial court's finding as to this issue was not against the manifest weight of the evidence. Further, we also find the record contains sufficient evidence to support the court's determination that plaintiff's evidence failed to establish either continuous or exclusive possession of the disputed property. Its decisions as to those issues were also not against the manifest weight of the evidence.

¶ 51 Here, the trial court determined plaintiff failed to establish continuous possession of the disputed property because defendants "regularly exercised dominion over the portion of the Mrasak lot adjacent to Plaintiff's driveway, garage[,] and fence during the last 40 plus years." "[W]here the continuity of adverse possession is interrupted before the elapse of the statutory period, the benefit of the prior adverse possession is lost and the adverse claimant must commence his possession again." *General Iron Industries, Inc. v. A. Finkl & Sons Co.*, 292 Ill. App. 3d 439, 446, 686 N.E.2d 1, 6 (1997). "An interruption in the running of the statutory period for even one day ends it and it must begin anew." *General Iron*, 292 Ill. App. 3d at 446, 686 N.E.2d at 6.

¶ 52 In *Brandhorst*, 2014 IL App (4th) 130923, ¶ 40, 12 N.E.3d 198, this court determined a plaintiff claiming adverse possession sufficiently proved the continuous element of the doctrine by presenting evidence showing the plaintiff and his predecessors used the disputed property for the 20-year time frame and no one but those individuals used or maintained the property at issue. Here, unlike *Brandhorst*, evidence at trial showed defendants routinely used and maintained the disputed portion of their property. Specifically, evidence showed defendants maintained the westernmost portion of the Mrasak lot by removing gravel and mowing the grass. Rose Mrasak's parents walked upon the disputed portion of property and defendants' daughter also played there.

¶ 53 Additionally, "[e]xclusivity \*\*\* demands the adverse possessor deprive the rightful owner of all possession." *Davidson v. Perry*, 386 Ill. App. 3d 821, 825, 898 N.E.2d 785, 789 (2008); see also *Brandhorst*, 2014 IL App (4th) 130923, ¶ 76, 12 N.E.3d 198 ("Adverse possession claimants must prove that the true owner was altogether deprived of *possession* during the 20-year period." (Emphasis in original.)). As discussed, the trial court determined defendants regularly exercised dominion over the disputed property, as evidenced by their use and maintenance of the property. The record also contains evidence of plaintiff's acknowledgment of the rightful owners' possession. In particular, he acknowledged obtaining permission from the owner of the Mrasak lot prior to cutting down trees on the disputed portion of the property. Plaintiff also acknowledged being aware that defendants maintained the property by mowing grass, and he admitted he never attempted to keep defendants' daughter off the disputed strip because he "didn't own it."

¶ 54 Further, to the extent plaintiff claims only the portion of the Mrasak lot upon

which his driveway encroached, we find the evidence also failed to show plaintiff continuously possessed that portion of the disputed property for the requisite 20-year time period. In particular, the record contains evidence to support the trial court's determination that the shape, location, and contour of plaintiff's driveway changed significantly over the years.

¶ 55 Although evidence at trial showed that in 2010, at least a portion of plaintiff's gravel driveway encroached on the Mrasak lot and Rose agreed plaintiff had used an additional 10 inches of the Mrasak lot for several years, the record fails to indicate the extent of any encroachment for a continuous 20-year time period. Evidence indicated plaintiff had previously asserted his driveway had been originally situated completely within the 40-foot wide Tonellato lot and that the shape and contour of his driveway changed over the years. Plaintiff testified his driveway was in essentially the same location in 1980 as it had been when he began living on the property in approximately 1960. In 1976, plaintiff added gravel to his driveway but did not use barriers or containment devices. Additionally, Rose testified that the eastern edge of plaintiff's driveway shifted in the years since 1980. Thus, the record fails to establish by strict proof, and without inference or implication, the length of time or the extent to which plaintiff's driveway encroached on the Mrasak lot.

¶ 56 Here, the record supports the trial court's determination that plaintiff failed to establish all the necessary elements of adverse possession during the statutory 20-year time frame. In particular, plaintiff failed to establish the exact location of his claimed boundary for any 20-year period or that he continuously and exclusively possessed any portion of the Mrasak lot. An opposite conclusion from that reached by the court is not clearly apparent and its decision was not against the manifest weight of the evidence.

¶ 57

## B. Prescriptive Easement

¶ 58 On appeal, plaintiff next argues the evidence was sufficient to show he obtained an easement by prescription over the disputed property. "[G]aining an easement by prescription means merely divesting the true owner of the right to exclude the claimant from using the easement property for a certain limited purpose." *Brandhorst*, 2014 IL App (4th) 130923, ¶ 76, 12 N.E.3d 198. "To establish an easement by prescription, the claimant must prove that the use of the land existed for 20 years and was (1) hostile or adverse, (2) exclusive, (3) continuous and uninterrupted, and (4) under a claim of right inconsistent with that of the true owner." *Brandhorst*, 2014 IL App (4th) 130923, ¶ 68, 12 N.E.3d 198. "The party claiming the easement must prove the elements 'distinctly and clearly.'" *Brandhorst*, 2014 IL App (4th) 130923, ¶ 68, 12 N.E.3d 198. Further, the establishment of a prescriptive easement involves questions of fact and the trial court's findings will be upheld unless they are against the manifest weight of the evidence. *Brandhorst*, 2014 IL App (4th) 130923, ¶ 69, 12 N.E.3d 198.

¶ 59 Here, in rejecting plaintiff's claim of a prescriptive easement, the trial court found "many of the same shortcomings" it found with respect to plaintiff's claim of adverse possession. Initially, we note the court relied on an incorrect rule of law set forth in *Catholic Bishop of Chicago v. Chicago Title & Trust Co.*, 2011 IL App (1st) 102389, 954 N.E.2d 797, to find plaintiff failed to establish that he exclusively possessed the property at issue. In *Catholic Bishop*, 2011 IL App (1st) 102389, ¶ 20, 954 N.E.2d 797, the First District determined that a party claiming an easement by prescription establishes exclusivity by demonstrating that he deprived the rightful owner of the property of all use. However, the supreme court has since overruled that case, finding it was wrongly decided. *Nationwide Financial, LP v. Pobuda*, 2014 IL 116717, ¶ 41.

¶ 60 Unlike in adverse possession cases, a prescriptive easement claimant "need not prove that the true owner was altogether deprived of *use* during the 20-year period." (Emphasis in original.) *Brandhorst*, 2014 IL App (4th) 130923, ¶ 76, 12 N.E.3d 198; see also *Nationwide Financial*, 2014 IL 116717, ¶ 35 ("Although exclusivity is clearly an element of a prescriptive easement claim under Illinois law, it does not require \*\*\* that the claimant prove that the titleholder was altogether deprived of possession and/or use of the property during the 20-year period."). Instead, exclusivity in the context of a prescriptive easement claim "means no more than that [the claimant's] right to [use the property] does not depend upon a like right in others, and it does not mean that the claim is necessarily well founded." *Petersen v. Corrubia*, 21 Ill. 2d 525, 531, 173 N.E.2d 499, 502 (1961); *Nationwide Financial*, 2014 IL 116717, ¶ 34.

¶ 61 Here, plaintiff was not required to prove that he deprived defendants of all use of the disputed property, and the fact that defendants also used and maintained the disputed property does not defeat his claim. However, despite the trial court's incorrect legal analysis, we nevertheless find its ultimate conclusion—that plaintiff failed to establish all the necessary elements of an easement by prescription—is supported by the record and not against the manifest weight of the evidence.

¶ 62 With respect to his prescriptive easement claim, plaintiff argues on appeal that the evidence shows he used portions of the Mrasak lot as part of his gravel driveway and that he and his family also drove onto the grass on the Mrasak lot. However, as noted by the trial court, "[t]o satisfy the continuous use element of a prescriptive easement, 'the user must be confined to a definite and specific line of way.'" *Bogner v. Villiger*, 343 Ill. App. 3d 264, 270, 796 N.E.2d 679, 685 (2003) (quoting *Thorworth v. Scheets*, 269 Ill. 573, 582, 110 N.E. 42, 46 (1915)). As dis-

cussed, evidence in the record supports the trial court's conclusion that the shape, contour, and location of plaintiff's driveway changed over the years. It is unclear from the record which portions of the Mrasak lot plaintiff used for driving or for how long those portions of the Mrasak lot were used. Thus, plaintiff failed to sufficiently identify the portion of the Mrasak lot he claimed was subject to a prescriptive easement or that his use of the land existed for 20 years.

¶ 63 C. Injunctive Relief

¶ 64 Plaintiff argues the trial court erred in denying his request for injunctive relief. "To be entitled to a permanent injunction, the party seeking the injunction must demonstrate (1) a clear and ascertainable right in need of protection, (2) that he or she will suffer irreparable harm if the injunction is not granted, and (3) that no adequate remedy at law exists." *Swigert v. Gillespie*, 2012 IL App (4th) 120043, ¶ 27, 976 N.E.2d 1176. "Generally, we will not overturn a trial court's order with respect to a permanent injunction unless it is against the manifest weight of the evidence." *Swigert*, 2012 IL App (4th) 120043, ¶ 28, 976 N.E.2d 1176.

¶ 65 First, in his amended complaint, plaintiff asked the trial court to issue an injunction requiring defendants to remove their cyclone fence. The trial court determined plaintiff was not entitled to removal of the fence because he failed to prove his claim for either adverse possession or a prescriptive easement. Thus, plaintiff failed to demonstrate a clear and ascertainable right in need of protection. For the reasons discussed, we find no error in the court's determination and it was not against the manifest weight of the evidence.

¶ 66 Second, both on appeal and in his proposed order to the trial court, plaintiff maintained defendants should be required to remove the fill dirt they added to the Mrasak lot. (Plaintiff did not expressly ask the court to order the removal of dirt in his first amended complaint.)

Plaintiff argues defendants' placement of dirt significantly changed the level of the ground, altered the natural flow of water, and caused water to collect and stand in plaintiff's driveway. To support his position on appeal, plaintiff cites this court's decision in *Swigert*, 2012 IL App (4th) 120043, ¶ 32, 976 N.E.2d 1176, which provides as follows:

"Illinois follows a modified version of the 'civil law rule' of surface-water drainage, under which a landowner's right to alter the flow of surface water on his property depends on whether the landowner possesses the higher (dominant) or lower (servient) estate. [Citations.] A dominant landowner may alter or increase the natural flow of water from his property if the advantages to the dominant land sufficiently outweigh the damages to the servient land. [Citations.] By contrast, however, a servient owner may not obstruct the natural flow of surface water from a dominant owner's property."

¶ 67 Here, in denying plaintiff's request for injunctive relief, the trial court relied on Rose's testimony to find that it had been plaintiff and not defendants who had altered the natural flow of water. Rose's testimony showed that water historically flowed down plaintiff's driveway and onto the street in front of his house, not onto the Mrasak lot. However, as plaintiff's driveway settled, water began pooling in the lower areas of the driveway. Rose testified plaintiff attempted to address the pooling of water by digging a trench across his driveway, which diverted water onto the Mrasak lot. The record reflects Rose's testimony was unrebutted and corroborated by photographic evidence, which showed the condition of plaintiff's driveway over the years and

standing water in portions of his driveway in 2008, prior to defendants' placement of dirt on the Mrasak lot.

¶ 68 Based on the evidence presented, we find plaintiff failed to establish that defendants ran afoul of the rules of law set forth in *Swigert*. Evidence at trial failed to show which party was the dominant or servient landowner or that defendants altered a "natural flow of surface water." Again, plaintiff failed to demonstrate a clear and ascertainable right in need of protection, and the trial court's determination that he failed to establish his entitlement to injunctive relief was not against the manifest weight of the evidence.

¶ 69 D. Evidentiary Ruling

¶ 70 On appeal, plaintiff additionally challenges the trial court's consideration of the Sangamon County ordinance of which it took judicial notice. He argues the court improperly relied on the ordinance to determine that plaintiff had sufficient room to park his car between his house and defendants' cyclone fence when the ordinance was not relevant to a determination of either plaintiff's adverse possession claim or his prescriptive easement claim. Plaintiff maintains: "The ordinance has nothing to do with \*\*\* [p]laintiff's actual use of the property. Plaintiff's use of the property is what is important in adverse possession and prescriptive easement cases, not an irrelevant ordinance."

¶ 71 "Evidence is deemed relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." *Lambert v. Coonrod*, 2012 IL App (4th) 110518, ¶ 29, 966 N.E.2d 583 (quoting *Ford v. Grizzle*, 398 Ill. App. 3d 639, 648, 924 N.E.2d 531, 540 (2010)). "It is within the trial court's discretion to decide whether evidence is relevant and admissible, and a

court's determination on that issue will not be reversed absent a clear abuse of discretion." *In re Marriage of Bates*, 212 Ill. 2d 489, 522, 819 N.E.2d 714, 732 (2004).

¶ 72 Here, the trial court's order shows it considered the ordinance at issue only when determining claimant's entitlement to injunctive relief, not when deciding either plaintiff's claim for adverse possession or his claim for a prescriptive easement. Thus, the record refutes plaintiff's contention on appeal. Additionally, we note the court's order reflects it referenced the ordinance when determining whether plaintiff would suffer harm if an injunction was not granted—the second requirement for injunctive relief. However, because we find plaintiff failed to establish even the first requirement for injunctive relief—a clear and ascertainable right in need of protection—any further discussion as to the ordinance's relevance is unnecessary.

¶ 73 III. CONCLUSION

¶ 74 For the reasons stated, we affirm the trial court's judgment.

¶ 75 Affirmed.