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ARKANSAS COURT OF APPEALS

DIVISION I
No. CA11-663

JIMMIE H. BAKER APPELLANT V. SCHERRIE L. BOLIN ET AL. APPELLEES	**Opinion Delivered** February 15, 2012 APPEAL FROM THE MADISON COUNTY CIRCUIT COURT, [NO. CV-2010-81-2] HONORABLE MARY ANN GUNN, JUDGE AFFIRMED

JOHN MAUZY PITTMAN, Judge

The parties in this case are adjoining landowners. Each held a forty-acre tract on a forested mountainside. The land is undeveloped and is used by the parties primarily for hunting. A roadway traversing both tracts of land had been used by appellees to access their property. After appellant obstructed the roadway, appellees sued seeking a declaration that they had a prescriptive easement over the roadway crossing appellant's land. After viewing the property and conducting a hearing, the trial judge entered an order finding a prescriptive easement in favor of appellees and enjoining appellant from obstructing appellees' use of the easement by fences, gates, or otherwise. On appeal, appellant argues that the trial court erred in finding adverse use sufficient to establish a prescriptive easement and in finding that the topography of the land precluded rerouting the road. We affirm.

We review equity cases de novo on the record, but we will not reverse a finding of fact by the trial court unless it is clearly erroneous. *Bobo v. Jones*, 364 Ark. 564, 222 S.W.3d 197

(2006). Disputed facts and determinations of witness credibility are within the province of the fact-finder. In reviewing a trial court's findings, we give due deference to that court's superior position to determine the credibility of the witnesses and the weight to be accorded to their testimony. *Carson v. Drew County*, 354 Ark. 621, 128 S.W.3d 423 (2003). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *Owners Association of Foxcroft Woods v. Foxglen*, 346 Ark. 354, 57 S.W.3d 187 (2001).

A person not in fee possession of the land may obtain a prescriptive easement by operation of law in a manner similar to adverse possession, *Cook v. Ratliff*, 104 Ark. App. 335, 292 S.W.3d 839 (2009), and the statutory period of seven years for adverse possession applies to prescriptive easements. *Id.* The principle has been stated as follows:

> Where there is usage of a passageway over land, whether it began by permission or otherwise, if that usage continues openly for seven years after the landowner has actual knowledge that the usage is adverse to his interest or where the usage continues for seven years after the facts and circumstances of the prior usage are such that the landowner would be presumed to know the usage was adverse, then such usage ripens into an absolute right.

Fullenwider v. Kitchens, 223 Ark. 442, 446, 266 S.W.2d 281, 283 (1954). The determination of whether a use is adverse or permissive is a fact question, and former decisions are rarely controlling on this factual issue. *Carson v. Drew County*, *supra*.

The use of wild, unenclosed, and unimproved land is presumed to be permissive until the persons using the land for passage, by their open and notorious conduct, demonstrate to the owner that they are claiming a right of passage. *Bridwell v. Arkansas Power & Light Co.*,

191 Ark. 227, 85 S.W.2d 712 (1935). Generally speaking, mere permissive use cannot ripen into an adverse claim without some overt act in addition to, or in connection with, the use that would make it clear to the owner of the property that an adverse use and claim are being exerted. *Carson v. Drew County*, *supra*. An exception to this rule has been recognized, however, by which the long duration and circumstances of the use are themselves sufficient to establish that the original restriction in the nature of a permissive use in favor of particular persons was abandoned through the long lapse of time. We discussed this exception in *Baysinger v. Biggers*, 100 Ark. App. 109, 265 S.W.3d 144 (2007):

> Time alone will not suffice to transform permissive use into legal title. *McGill v. Miller*, 172 Ark. 390, 288 S.W. 932 (1926). There must be some circumstance in addition to length of use to show that the use was adverse, and it was appellee's burden to show that such circumstances existed. Several cases have found evidence of use by the general public to constitute such a circumstance. In *McGill*, this was found on the basis of the nature of the alleyway, which was marked by "the fences and a barn along the south side, which constituted an invitation to the public to use it as an alley." *Id.* at 393– 94, 288 S.W. at 934. Here, the way in question was over forested lands and was described as an old timber road. Easements were found to exist on such a road in *Kimmer v. Nelson*, 218 Ark. 332, 236 S.W.2d 427 (1951), and in *Fullenwider v. Kitchens*, 223 Ark. 442, 266 S.W.2d 281 (1954). In *Kimmer*, however, there was evidence that the roadway had been in general public use to such an extent to support an inference that "those who utilized the way believed they had a right to do so, and their actions were open, notorious, and adverse." 218 Ark. at 335, 236 S.W.2d at 428. Likewise, in *Fullenwider*, there was extensive evidence of use by the general public based on the testimony of a half-dozen witnesses who testified as to their own use of the road and that of the general public dating back to the days of travel by wagon and buggy.

Id. at 112, 265 S.W.3d at 146.

There was extensive evidence at trial to show that the road over appellant's land had been used by many generations of the appellees' family to access their property. The trial court found that the case involved the descendants of Jesse Combs and a parcel of land that

had been in the Combs family since the nineteenth century. Charles Combs testified that he has used that road to access the property since 1934, when he helped his father care for the hundreds of wild hogs that were kept on the property until 1969. There was also evidence that there were, during the 1940s, four houses beyond appellees' property that were accessed by the same road. Furthermore, there was evidence of use by the general public in the town of Combs to access Forestry Service land. Finally, although it is uncontroverted that appellant placed a locked, chain gate across the roadway at some point following his acquisition of the property, the testimony regarding the circumstances of the placement of the gate was in direct conflict. Appellant testified that he placed the gate first, then later granted appellees permission to enter the gate and provided them a key with which to do so. Appellees presented evidence to show that appellant asked permission before placing the gate, which appellees granted. The trial court was better placed to resolve such issues of credibility, and, on our de novo review of the record, we cannot say that the trial court erred in finding that appellees met their burden of proving that the presumption of permissive use had been rebutted and establishing an adverse claim.

Appellant also asserts that the trial court erred in finding, on the basis of its view of the property, that the topography of the land precluded rerouting of the road, arguing that the issue of easement by necessity was not tried because the parties had agreed to a motion in limine precluding introduction of evidence relating to the theory of easement by necessity. We do not reach this issue. The due-process argument now advanced by appellant is not properly before us because it was not presented to the trial judge when she made her finding

regarding topography from the bench at the conclusion of the trial. *See Doss v. Miller*, 2010 Ark. App. 95. Even constitutional arguments must be raised below and cannot be advanced for the first time on appeal. *Id*. Even if the issue were properly before us, we think that appellant failed to demonstrate that he was prejudiced by this finding in light of the trial court's detailed discussion of the evidence supporting its finding of adverse use. *See Weisenbach v. Kirk*, 104 Ark. App. 245, 290 S.W.3d 614 (2009).

Affirmed.

ROBBINS and GLOVER, JJ., agree.

Donner Law Firm, by: *Donald C. Donner*, for appellant.

Davis, Clark, Butt, Carithers & Taylor, PLC, by: *Constance G. Clark* and *William Jackson Butt II*, for appellees.