

**ARKANSAS COURT OF APPEALS**

DIVISION IV  
 No. CA 12-523

THE WILLOWS, LLC and THE  
 WILLOWS II, LLC

APPELLANTS

V.

HERBERT B. BOGY, JUANITA L.  
 BOGY, and HERBERT B. BOGY  
 AND JUANITA L. BOGY  
 REVOCABLE TRUST

APPELLEES

**Opinion Delivered** January 30, 2013

APPEAL FROM THE JEFFERSON  
 COUNTY CIRCUIT COURT  
 [NO. CV-2011-641-2]

HONORABLE ROBERT H. WYATT,  
 JR., JUDGE

AFFIRMED

**RHONDA K. WOOD, Judge**

The Willows, LLC, and The Willows II, LLC, (“Hass”)<sup>1</sup> appeal from the Jefferson County Circuit Court’s order granting a prescriptive easement to appellees Herbert and Juanita Bogy, both individually and as trustees of the Bogy Revocable Trust (“Bogy”). Bogy and Hass each own adjoining pieces of farmland; a portion of Bogy’s property has long been accessed by a road that passes through Hass’s property. Herbert Bogy, his sons, and farming tenants have used that access since 1972. In 2008, Hass bought the adjoining property where the road lies, and in October 2011, he blocked Bogy’s access to the road. Bogy filed a complaint, and, after a bench trial, the circuit court entered an order granting

<sup>1</sup> Gary Hass and his wife own The Willows, II.

him a prescriptive easement. Hass appeals and argues that the circuit court erred by ruling that Bogy's use of the road had been adverse. We affirm.

The properties in question are located in Jefferson County; Hass's property is located on the west side and Bogy's property is located on the east side. The southern portion of Bogy's property is bisected, without crossings, by the Union Pacific railroad. Therefore, Bogy is unable to access the southern portion by road. Instead, Bogy and his tenants have long accessed his property from a railroad crossing and road that begins on a highway west of Hass's property and crosses it from west to east.

Herbert Bogy testified that he bought his property in 1972 as an investment and leased it to a farming tenant, Bobby Frizzell, until 1988. According to Bogy, Frizzell used the road to transport farming equipment for use on the southern portion of Bogy's property. Bogy also stated that no one gave him or Frizzell permission to use the road. From 1988 to 2000, Bogy leased the property to another farming tenant, Sam Morgan. Morgan testified that he used the road to access Bogy's property, again without permission, until 1995, when he bought part of the land on which the road lies. Morgan testified that when he bought the property, Herbert Bogy called him and asked for permission to use the access road, which Morgan granted. Bogy, however, denied that he ever asked Morgan for permission. Morgan sold the property to Hass in 2008. After the sale, Herbert Bogy contacted Hass and asked him for permission to use the road, which Hass granted until October 2011, when Bogy's access was blocked.

The circuit court, adopting Bogy's findings of fact and conclusions of law, found that Bogy's use of the road from 1972 until 2011 had been adverse and satisfied the other

elements of a prescriptive easement. Hass argues that the circuit court erred and that Bogy's use of the road had been permissive.

We review equity cases de novo on the record but will not reverse a finding of the trial court unless it is clearly erroneous. *Slaton v. Slaton*, 336 Ark. 211, 983 S.W.2d 951 (1999). A finding is clearly erroneous, when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been committed. *Id.* The following summarizes our law on prescriptive easements:

A prescriptive easement may be gained by one not in fee possession of the land by operation of law in a manner similar to adverse possession. In Arkansas, it is generally required that one asserting an easement by prescription show by a preponderance of the evidence that one's use has been adverse to the true owner and under a claim of right for the statutory period. This court has said that the statutory period of seven years for adverse possession applies to prescriptive easements.

Overt activity on the part of the user is necessary to make it clear to the owner of the property that an adverse use and claim are being exerted. Mere permissive use of an easement cannot ripen into an adverse claim without clear action, which places the owner on notice. Some circumstance or act in addition to, or in connection with, the use which indicates that the use was not merely permissive is required to establish a right by prescription. The determination of whether a use is adverse or permissive is a factual question, and former decisions are rarely controlling on this factual issue. The plaintiff bears the burden of showing by a preponderance of the evidence that there has been adverse, not permissive, use of the land in question

*Roberts v. Jackson*, 2011 Ark. App. 335, 384 S.W.3d 28 (internal citations omitted). Once gained, a prescriptive easement may be abandoned by more than seven years of nonuse.

*King v. Powell*, 85 Ark. App. 212, 148 S.W.3d 792 (2004).

Herbert Bogy testified that, starting in 1972 when he bought the property, his use of the access road had been adverse to the true owner. Bogy and his farming tenants,

Bobby Frizzell and Sam Morgan, used the road to access the Bogy property to transport farm equipment. Also, Herbert Bogy testified that he made improvements to the road by installing a steel pipe. Further, Bogy maintained throughout the trial that he was never given permission to use the road.

On appeal, Hass highlights that Bogy and Morgan gave conflicting testimony on whether Bogy's use of the road had been permissive from 1995 to 2008. The circuit court concluded that Bogy's account, that the use had been adverse rather than permissive, was credible. We give due deference to the superior position of the trial court to determine the credibility of the witnesses and the weight to be accorded their testimony; further, it is within the province of the trier of fact to resolve conflicting testimony. *DC Xpress, LLC v. Briggs*, 2009 Ark. App. 651, 343 S.W.3d 603. The circuit court found that for 39 years Bogy had overtly and adversely used this land for access to the property, which entitled him to an easement by prescription. There were no allegations that Bogy abandoned the easement, and we will not overturn the circuit court's credibility determination on appeal.

Affirmed.

HIXSON and BROWN, JJ., agree.

*Alexander Law Firm*, by: *Hubert W. Alexander*, for appellants.

*Noel F. Bryant*, for appellees.