

Cite as 2022 Ark. App. 522

ARKANSAS COURT OF APPEALS

DIVISION III

No. CV-21-579

Opinion Delivered December 14, 2022

PATSY INMAN AND LLOYD INMAN III

APPELLANTS

V.

WAYMON JEFFERY HORNBECK

APPELLEE

APPEAL FROM THE ARKANSAS COUNTY
CIRCUIT COURT, SOUTHERN DISTRICT
[NO. 01DCV-18-105]

HONORABLE KATHLEEN BELL, JUDGE

AFFIRMED

WAYMOND M. BROWN, Judge

Appellants Patsy Inman and Lloyd Inman III appeal the Arkansas County Circuit Court’s order entered on April 12, 2021, granting appellee Waymon Hornbeck a prescriptive easement across appellants’ property. On appeal, appellants argue that the circuit court erred by (1) granting an easement by prescription to appellee because appellee failed to satisfy the elements of a prescriptive easement by a preponderance of the evidence and (2) denying appellants’ motion to dismiss at the close of appellee’s proof. We find no error and affirm.

Appellee owns real property located in Arkansas County, Arkansas, more particularly described as:

The Northeast Quarter of the Southwest Quarter of Section 17, Township 5 South Range 2 West; The South Half of the Southwest Quarter of Section 17, Township 5 South, Range 2 West and the Northwest Quarter of the Southwest Quarter Section 17, Township 5 South, Range 2 West. [Derrick Tract]

Appellants own real property located in Arkansas County, Arkansas, more particularly described as:

The Southwest Quarter of the Northeast Quarter of Section 20, Township 5 South, Range 2 West and the East $\frac{3}{4}$ of the South Half of the North Half of the Northwest Quarter of Section 20, Township 5 South, Range 2 West. [Inman Tract]

Appellant Patsy Inman inherited the Inman Tract from her parents in 1998. The Inman Tract has primarily been used for farming purposes and is now farmed by appellants' son. Appellee and his brothers (The Hornbeck brothers) acquired the Derrick Tract in 2011 from their father, who purchased the tract some thirty years ago. For the thirty-year period, appellee and his family have primarily utilized the property for hunting. The Derrick Tract lies north of the Inman Tract. Appellee and his family access the Derrick Tract by driving north on Rattlesnake Lane, a county road, until the county road dead ends. Appellee then continues to drive onto a dirt path through the Inman Tract to access the Derrick Tract. Appellee and others refer to this path as the extension of Rattlesnake Lane (the "Extension").

On October 5, 2018, appellee filed a complaint asking the circuit court for an order determining that appellee established a prescriptive right to permanent use of an easement upon and across appellants' lands. He stated that he and his family, without permission of appellants, had accessed the Inman Tract continuously, openly, notoriously, and adverse to the appellants until August 2018, at which time appellants prohibited appellee access. Appellee stated in his complaint that he and his family and friends have used the Inman Tract for the transportation of equipment, campers, and hunters on a regular basis with full knowledge of the appellants and under claim of right for over seven years. He alleged that he has a right to use the extension roadway by reason of prescriptive easement, his rights having arisen by reason of his and his predecessors in title's adverse usage of the roadway since 1980.

After the December 1, 2020 hearing, the circuit court entered a memorandum opinion finding that appellee established sufficient proof of a prescriptive easement upon appellants' property.

A final order was entered on April 12, 2021, granting appellee the following prescriptive easement:

A 20-foot Access Easement for the purpose of Ingress and Egress with the sidelines of said Easement being 10 feet on each side of the centerline of an existing dirt road with said centerline being more particularly described as follows:

Commencing at an existing stack of disk blades for the NW Corner of the SE ¼ of Section 20, T5S-R3W of the Fifth Principal Meridian, Southern District of Arkansas County, Arkansas; thence S00° 42' 01" W along the West line of said SE ¼, 568.9 feet; thence N90° 00' 00" W, 52.9 feet to the centerline of the end of a gravel county road for the point of beginning of the Easement being described; thence along the centerline of said dirt road the following courses:

N01° 58' 55" E, 490.1 Feet; thence N07° 11' 03" E, 40.3 feet; thence N30° 45' 19" E, 29.2 Feet; thence N23° 42' 05" E, 24.3 feet; thence N67° 42' 37" E, 7.7 Feet; thence S79° 27' 33" E, 24.7 feet; thence N77° 17' 53" E, 41.0 Feet; thence N40° 13' 32" E, 18.3 feet; thence N01° 24' 55" E, 16.1 Feet; thence N19° 58' 16" W, 1390.3 feet to set ½ inch rod with ID Cap (PS 993) in the North line of said Section 20 for the end of said Easement, the sidelines of said Easement shall lengthen or shorten to terminate in the North line of said Section 20 and the end of said gravel county road.

The circuit court's order further provided:

The above description shall be modified from a 20-foot Access Easement to that of a 10-foot Access Easement upon the agreement of the parties. However, [appellee] may transport vehicles and equipment to his property or items wider than 10-feet and may occasionally go off the existing roadway if meeting oncoming traffic upon the Access Easement, at all times using reasonable efforts not to cause any additional damage to the Inman Tract.

From that order, appellants appealed.

On appeal, appellants argue that the circuit court erred when it granted appellee a prescriptive easement because appellee failed to satisfy the elements required to establish an absolute right to such an easement by prescription.

This court reviews equity matters de novo on the record and will not reverse a finding of the lower court unless it is clearly erroneous.¹ 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.² In reviewing a circuit 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.³ Disputed facts and determinations of witness credibility are within the province of the fact-finder.⁴

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.⁵ Like adverse possession, prescriptive easements are not favored in the law because "they necessarily work corresponding losses or forfeiture in the rights of other persons."⁶ 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 under a claim of right for the statutory period.⁷ The statutory period of seven years for adverse

¹*Owners Ass'n of Foxcroft Woods, Inc. v. Foxglen Assocs.*, 346 Ark. 354, 57 S.W.3d 187 (2001).

²*Id.*

³*Carson v. Cty. of Drew*, 354 Ark. 621, 128 S.W.3d 423 (2003).

⁴*Id.*

⁵*Carson, supra.*

⁶*Id.* at 625, 128 S.W.3d at 426.

⁷*Id.*

possession applies to prescriptive easements.⁸ A prescriptive easement may be created only by the adverse use of privilege with the knowledge of the person against whom the easement is claimed or by use so open, notorious, and uninterrupted that knowledge will be presumed, and the use must be exercised under a claim of right adverse to the owner and acquiesced in by him.⁹

First, appellants assert that appellee failed to establish that his use was adverse and that appellants were on notice of such adverse use for the statutorily required seven-year period. There is no dispute that since his family purchased the property in the 1980s, appellee and his family have accessed the Derrick Tract by traversing the Inman Tract. Additionally, the parties agree that permission was never sought or given for this use by appellee or his family during the thirty-year period.

Appellant Patsy Inman testified as to the damage done to the Inman Tract as a result of appellee's use. She stated that she had been aware of the damage for "quite some time" estimating the time frame to be five to ten years since she first noticed damage from appellee's use of the field. Appellant stated that, although she had noticed ruts in the field over the years, in 2018, she inquired as to why seeding had not yet been done and was informed that several days were spent "fixing the field." Patsy instructed her son to place a farm implement—a cultivator—at the end of the county maintenance to block access to the extension. She further testified that she then posted a public notice in the newspaper because "something needed to be done." Additionally, appellants altered

⁸*Neyland v. Hunter*, 282 Ark. 323, 668 S.W.2d 530 (1984); *see also* Ark. Code Ann. § 18-11-106 (Repl. 2015); Ark. Code Ann. § 18-61-101 (Repl. 2015).

⁹*Kelley v. Westover*, 56 Ark. App. 56, 938 S.W.2d 235 (1997).

their farming practices to plant crops across the extension and flooded it for duck hunting in an attempt to stop travel across the Inman Tract; however, the traffic continued.

Appellants' son, Lloyd Inman, Jr., farms the Inman Tract. He testified that he has known of appellee's use of the property for the twenty years that he has been farming the land. He testified that despite the damage to the ground and crops, he did not ask appellee to stay off the property.

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; however, where there is the use of a passage over land, whether it began by permission or otherwise, if that usage continues openly for a period of seven years after the landowner has actual knowledge that the usage is adverse to this interest or where the usage continues for seven years after the facts and circumstances or 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.¹⁰

In light of the applicable caselaw and the testimony presented that, for decades, appellants were aware of appellee's usage of the Inman Tract, and the damage resulting from the usage, we cannot say that the circuit court clearly erred in finding that appellee's use was adverse to appellants' interest as landowners and continued for more than the required seven-year period.

Appellants next argue that appellee failed to carry his burden of establishing by a preponderance of the evidence that his use was continuous and uninterrupted for the required statutory period. To acquire an easement by prescription, appellee has the burden of proving continuous use of a definite way for seven years.¹¹

¹⁰*Clark ex rel. Clark v. Eubanks*, 2019 Ark. App. 49, 570 S.W.3d 506.

¹¹*Boullioun v. Constantine*, 186 Ark. 625, 54 S.W.2d 986 (1932).

Appellee testified that for the last thirty years, except the last few years when he moved to northern Arkansas, he used the extension on the Inman Tract to access his land on the Derrick Tract during hunting season and occasionally during the off season, as well. Appellee's son, Seth Hornbeck, testified that he continued to use the extension frequently, as he had for the past twenty-eight years, traversing the Inman Tract approximately eighty to one hundred times a year, including at least fifteen times in the current year. Neighbor, Johnny Lockley, also testified that he still uses the extension across appellants' property as he has since 1979. This evidence is sufficient to establish by a preponderance of the evidence continuous use of the Inman Tract for at least seven years. Although appellee testified that he himself used the extension infrequently for the last five years, his son's continued and frequent use of the extension to reach the Derrick Tract supports a finding that he had not abandoned the route.

As already noted, to acquire an easement by prescription, appellee has the burden of proving continuous use of a definite way for seven years.¹² Appellants argue that here, the "way" is not definite. Appellants assert that the path has shifted significantly over the years, as it has "been under water, it has moved fifty yards, it has moved 100-200 yards, it has moved a quarter mile, it has been in the draw, and it has been on the ridge."

Appellee admitted that in order to accommodate appellants' farming practices and crop rotations, the path of the extension varied in recent years. Jody Hearn, a resident of Rattlesnake Lane, testified that the extension across the Inman Tract used to run north from the end of the road down a draw, but that in the last few years, the trail had been covered by crops. He further stated

¹²*Id.*

that for the current year, the extension was back where it had previously been and lies on a ridge that runs southeast to northwest. Johnny Lockley also testified that the path shifted in the last three years as a result of appellants' farming practices, most significantly since the case began when rice was planted over the extension and the field was flooded.

Appellants contend that because the pathway across the Inman Tract has been various locations and is wide ranging at best, appellee failed to carry his burden to establish a prescriptive easement because there "cannot be an easement everywhere."

We observe that the testimony established that the path had fluctuated only in the last few years, long after the easement had been established. Moreover, we have held that mere temporary absences of a claimant from the land adversely possessed by the claimant or periods of vacancy of such land that evince no intention of abandonment do not interrupt the continuity of the adverse possession, provided the absence or vacancy does not extend over an unreasonable period.¹³ Further, in *Five Forks Hunting Club, LLC v. Nixon Family Partnership*,¹⁴ we held that an easement had been established in the ditch even though it was undisputed that the ditch was not used during times when the road was not flooded.

Last, appellants argue that the circuit court erred in denying their motion to dismiss based on insufficient proof at the close of appellee's case-in-chief. Specifically, appellants contend that, following presentation of his proof, appellee failed to establish that his use was adverse; therefore, it was error to deny appellants' motion to dismiss.

¹³*Anita G, LLC v. Centennial Bank*, 2019 Ark. App. 217, 575 S.W.3d 561.

¹⁴2019 Ark. App. 371, 584 S.W.3d 685.

Appellants argue that, in the court's memorandum opinion, the only evidence the circuit court found to be adverse is the damage caused to the Inman Tract by appellee's use of the extension. Appellants contend that this evidence of damage was brought out in their case-in-chief, not appellee's. Appellants argue that the only witnesses who testified regarding damage to the land were Mrs. Inman and her son, Lloyd Inman, Jr. Appellants maintain that appellee testified that he attempted to respect the property and not cause damage.

After appellee rested, appellants moved to dismiss. The circuit court denied the motion. Appellants acknowledge that they then proceeded with their proof, including witness testimony that appellee's use caused damage to the Inman Tract.

If, after the denial of a request for a directed verdict or a dismissal, a defendant introduces evidence which, together with that introduced by the plaintiff, is legally sufficient to sustain a verdict, he waives his claim of error by the court in refusing to direct a verdict or dismiss at the close of the plaintiff's case.¹⁵

There was sufficient evidence upon which the circuit court could find that appellee openly and continuously used the extension for longer than the statutory period under such circumstances that such use would be presumed to be adverse and against the appellants' interest as the landowners. Accordingly, we affirm the circuit court's order granting a prescriptive easement in favor of appellee.

Affirmed.

HARRISON, C.J., and HIXSON, J., agree.

PPGMR Law, PLLC, by: *R. Scott Morgan* and *M. Christine Dillard*, for appellants.

¹⁵*Bill Fitts Auto Sales, Inc. v. Daniels*, 325 Ark. 51, 922 S.W.2d 718 (1996).

M. Jacobs Law Firm, PLLC, by: *Michelle L. Jacobs*, for appellee.