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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-910**

Bradley R. McDonald, et al.,
Respondents,

vs.

Alva Christian, et al.,
Appellants.

**Filed January 9, 2012
Affirmed
Bjorkman, Judge**

Carlton County District Court
File No. 09-CV-09-1793

Charles H. Andresen, Andresen & Butterworth, P.A., Duluth, Minnesota (for respondents)

Keith M. Carlson, Keith M. Carlson Law Firm, Clouquet, Minnesota (for appellants)

Considered and decided by Wright, Presiding Judge; Bjorkman, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

BJORKMAN, Judge

Appellants challenge the district court's determination that respondents have a prescriptive easement over portions of appellants' property and contend that they were entitled to a jury trial. We affirm.

FACTS

Respondents Bradley and Peggy McDonald, Mark and Wendy Couch, Clint and Catherine Fritter, Clifford Schill, and Thomas and Bonita Heilman own adjacent undeveloped property in Carlton County. Through various conveyances, respondents possess deeded access to their properties by a perpetual easement over land owned by Paul Fisher. Paul Fisher granted the easement in an agreement that was recorded in 1981. The easement agreement provides legal access over a gravel road referred to as "Mulberry Lane," a ten-foot wide logging road created by Fisher's father in the 1950s. Mulberry Lane provides the only existing access to respondents' properties from nearby County Road 103. Appellants Alva Christian and Muriel Christian own property that abuts the north side of Mulberry Lane.

When Mulberry Lane was originally constructed, it was thought to be located entirely within Fisher's property. But a 2008 survey revealed that it actually follows a slight angle to the north, eventually crossing the property line and traveling across appellants' property for approximately three-eighths of a mile. At the point Mulberry Lane reaches respondents' properties, it lies eight feet into appellants' property. After learning of the survey results, appellants constructed a fence along their property line,

dug up the roadbed, and planted trees to prevent respondents from using the road to access their properties.

In June 2009, respondents commenced this action seeking a prescriptive easement over the portion of Mulberry Lane that runs across appellants' property. Respondents also requested injunctive relief to prevent appellants from further destroying the roadway and further preventing access to their properties. On June 25, the district court granted respondents' request for temporary injunctive relief, and on August 14, the district court issued a stipulated order for a temporary injunction requiring appellants to remove fencing and other obstructions on the roadway and restore it to a "condition reasonably equivalent to that of undisturbed road surfaces on Mulberry Lane." Appellants did not comply with the stipulated order, and the district court issued a contempt order against appellants on December 23.

The district court denied appellants' request for a jury trial. Following a two-day bench trial, the district court determined that respondents have a prescriptive easement over the portion of Mulberry Lane traversing appellants' property. The district court denied appellants' motion for amended findings or a new trial before a jury. This appeal follows.

D E C I S I O N

Appellants argue that the district court erroneously deprived them of their right to a jury trial and that the prescriptive easement determination is grounded in erroneous factual findings and legal error. We address each argument in turn.

I. The district court did not err or abuse its discretion in denying appellants' request for a jury trial.

We apply a de novo standard of review to the question whether a party has a right to a jury trial in a civil case. *Olson v. Synergistic Techs. Bus. Sys., Inc.*, 628 N.W.2d 142, 148 (Minn. 2001). But when there is no right to a jury trial, we review the district court's denial of a jury trial for an abuse of discretion. *Denman v. Gans*, 607 N.W.2d 788, 794 (Minn. App. 2000), *review denied* (Minn. June 27, 2000).

The Minnesota Constitution guarantees a jury trial in all “cases at law,” including actions for the “recovery of . . . real . . . property.” Minn. Const. art 1, § 4; Minn. R. Civ. P. 38.01. But it is well-established that “[n]o right to a jury trial attaches to claims for equitable relief.” *Onvoy, Inc. v. ALLETE, Inc.*, 736 N.W.2d 611, 615 (Minn. 2007). Actions to quiet title and determine adverse claims, such as claims for prescriptive easements, are equitable actions. *Gabler v. Fedoruk*, 756 N.W.2d 725, 730 (Minn. App. 2008). And although a party has a right to a jury trial in an ejectment action where the recovery of real property is sought, there is no such right when the party has not been ousted from his property. *Denman*, 607 N.W.2d at 793.

Appellants challenge our decision in *Denman*, asserting that it is inconsistent with the “historical right to a jury trial” on matters of adverse possession. They rely on *Vill. of Glencoe v. Wadsworth*, 48 Minn. 402, 404, 51 N.W. 377, 378 (1892), and *Stevens v. Velde*, 138 Minn. 59, 61, 163 N.W. 796, 796 (1917), for the proposition that a question of adverse possession is usually one for the jury. We are not persuaded. As we explained in *Denman*:

Although a number of decisions note that “the question of adverse possession is usually one for the jury,” those cases . . . involve circumstances where the court has taken the case away from the jury by directing a verdict or entering judgment notwithstanding the verdict. Thus, those decisions stand only for the proposition that the question of adverse possession is for the fact finder, whether it be the jury or the court.

607 N.W.2d at 793 (citation omitted). Moreover, appellants admit that they have not been ousted from their property and, indeed, an equitable claim for a prescriptive easement would never result in the total ejectment of one party from the land. *See Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999) (explaining that ownership of a prescriptive easement “does not carry with it title or a right of possession in the land itself”). Because respondents’ claims are equitable in nature, the district court did not err in determining that appellants are not entitled to a jury trial as a matter of right. *See Onvoy*, 736 N.W.2d at 615.

Appellants next argue that, even if they had no right to a jury trial, the district court abused its discretion by denying them a jury trial because the district court “may not have been in a position to be fair and impartial.”¹ We disagree. This unsubstantiated conjecture does not establish an abuse of discretion. *See State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (stating that an assignment of error in a brief based on mere assertion and not supported by argument or authority is waived unless

¹ Appellants conflate the fact that the district court issued a contempt order against them with an inability to remain impartial. But “[p]rior adverse rulings . . . cannot constitute bias,” and have no bearing on the district court’s ability to impartially determine the merits of this case. *See Olson v. Olson*, 392 N.W.2d 338, 341 (Minn. App. 1986).

prejudicial error is obvious on mere inspection). On this record, we discern no abuse of discretion by the district court in denying appellants' request for a jury trial.

II. The district court did not clearly err in making its factual determinations or misapply the law.

On appeal, we do not disturb a district court's factual findings unless they are clearly erroneous. *Rogers*, 603 N.W.2d at 656 (citing Minn. R. Civ. P. 52.01). We give due regard to the district court's opportunity to judge the credibility of the witnesses, and we view the record in the light most favorable to the district court's judgment. *Id.* Findings of fact are clearly erroneous only if they are not reasonably supported by the evidence and reviewing courts are "left with the definite and firm conviction that a mistake has been made." *Id.* (citation and quotation omitted). We review de novo the district court's legal conclusions. *Lindquist v. Weber*, 404 N.W.2d 884, 886 (Minn. App. 1987), *review denied* (Minn. June 26, 1987).

To establish an easement by prescription, a party must prove that he or she used the easement for 15 years in a manner that was hostile, actual, open, continuous, and exclusive. *Nordin v. Kuno*, 287 N.W.2d 923, 926 (Minn. 1980). "A use is hostile in prescriptive easement cases if it is nonpermissive." *Oliver v. State ex rel. Comm'r of Transp.*, 760 N.W.2d 912, 919 (Minn. App. 2009), *review dismissed* (Minn. Nov. 16, 2009). "Use of an easement is presumed to be . . . hostile when the easement claimant shows open, visible, continuous, and unmolested use . . . that is inconsistent with the owner's rights, under circumstances from which the owner's acquiescence may be inferred." *Block v. Sexton*, 577 N.W.2d 521, 524 (Minn. App. 1998). In this context,

acquiescence means “passive conduct” by the owner “consisting of failure on his part to assert his paramount rights against the invasion thereof by the adverse user.” *Rice v. Miller*, 306 Minn. 523, 525, 238 N.W.2d 609, 611 (1976) (emphasis omitted). Unless the owner successfully rebuts the presumption, the party seeking the easement prevails. *Block*, 577 N.W.2d at 524. Once a prescriptive easement is established, it passes to subsequent owners of the property. *Id.*

In concluding that respondents have a prescriptive easement over appellants’ property, the district court found that respondents and their predecessors in interest continuously and openly used Mulberry Lane from 1981 until 2008 under the assumption that they were entitled to do so pursuant to the easement agreement; appellants did not interfere with their use of the road; and respondents “never felt they needed, nor were they given permission to travel across Mulberry Lane.”

Appellants first challenge the district court’s factual determination of hostile use, arguing that the use of the roadway was permissive until December 30, 1998, because the prior owner of respondents’ properties, Joseph Casby, had an oral agreement with appellants permitting each owner to cross the other’s land. Appellants also contend that several of the district court’s factual findings are contrary to the evidence in the record. We disagree with both of appellants’ contentions.

First, the record evidence reasonably supports the district court’s findings and conclusions on the permissive-use issue. The evidence establishes that Mulberry Lane has existed in its current location and has been in use by persons other than appellants since at least 1981. Respondents Bradley McDonald, Mark Couch, Thomas Heilman,

and Clint Fritter all testified to their unmolested use of Mulberry Lane to access their respective properties up to the events leading to this action. While there is evidence that appellants had a “good relationship” with Joseph Casby that included an agreement that they could use each other’s property for hunting and other activities, the record does not establish that appellants gave Joseph Casby “permission” to use Mulberry Lane. It is undisputed that Joseph Casby’s deed included an express easement to use the road. And the evidence supports the conclusion that Joseph Casby used Mulberry Lane to access his property because of the easement. Kurt Casby, Joseph Casby’s son, testified that he was not aware of any arrangement or oral agreement under which appellants gave his father permission to use Mulberry Lane. Rather, Kurt Casby’s testimony confirmed that Mulberry Lane was in existence when his family acquired the property, and that “the assumption was always [that] . . . we had an easement.”

Second, appellants’ challenge to five enumerated findings of fact fails as a matter of law. While appellants directly quote the challenged findings, they do not indicate why these findings are contrary to the record evidence or otherwise support their argument that the findings are clearly erroneous. An assignment of error in a brief based on mere assertion and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection. *Modern Recycling*, 558 N.W.2d at 772. Accordingly, appellants’ arguments with respect to the enumerated findings fail.

Appellants’ legal challenge to the district court’s application of the hostile-use presumption is also unavailing. As noted above, the evidence reasonably supports the district court’s findings that respondents and their predecessors in interest used Mulberry

Lane in a manner that was open, visible, continuous, and unmolested for 15 years. Accordingly, the presumption of hostile use applies. *See Block*, 577 N.W.2d at 524 (outlining conditions triggering presumption). And based on our review of the record, we discern no error in the district court's determination that appellants failed to rebut the presumption of adverse and hostile use of Mulberry Lane since 1981. *See id.* (placing burden on landowner to rebut presumption of hostility by showing that use was permissive).

In sum, we conclude that the district court did not clearly err in its factual determinations or commit legal error in determining that respondents have a prescriptive easement over the portion of Mulberry Lane that crosses appellants' property.

Affirmed.