Cite as 2023 Ark. App. 421

ARKANSAS COURT OF APPEALS

DIVISION III
No. CV-21-222

CAMP NINE CO., INC.	APPELLANT	Opinion Delivered September 27, 2023 APPEAL FROM THE DESHA COUNTY CIRCUIT COURT [NO. 21ACV-20-56]
V.		
FIREHUNT, INC.	APPELLEE	HONORABLE ROBERT BYNUM GIBSON, JR., JUDGE
		AFFIRMED

MIKE MURPHY, Judge

Appellant Camp Nine Company appeals the order of the Desha County Circuit Court finding that appellee Firehunt is entitled to an easement across Camp Nine's land under the legal theories of prescription, necessity, and implication. On appeal, Camp Nine challenges the circuit court's findings and analyses regarding the statute of limitations and the applicability of any of the cited easement doctrines to these facts.[1] Oral argument on this case was held, and counsel for both parties provided excellent discussion helpful to this decision. We affirm.

The land at issue is located in Desha County. Both parties' land, which together totals several hundred acres, was originally owned by Robert Brown. Some sections of it were

[1]Camp Nine also briefed an argument concerning tacking but conceded the point at oral argument.

farmed, while other sections were better suited for hunting, conservation, and timber. Through the entire parcel owned by Brown also runs Boggy Bayou. There is also a road, which is the subject of this litigation.

In 1966, Brown conveyed part of his land to Camp Nine by general warranty deed and retained the remainder until 2014. The road at issue was on the land that was part of that 1996 sale to Camp Nine. Until Brown sold the remainder of this parcel in 2014, Brown used the road crossing Camp Nine's property to access his retained property west of the bayou. Brown testified that he used this road without any permission from Camp Nine in order to access his remaining property west of Boggy Bayou, and it was never an issue. Around 2019, in connection with this litigation, Brown declined to sign an affidavit that said his use of the road was permissive. The road was maintained such that it is visible in aerial photos taken over several decades.

In 2014, Brown conveyed his remaining property to Price Services, Inc. In 2017, Price Services, Inc., conveyed that same parcel to Firehunt.[2] A public road abuts the northern edge of Firehunt's parcel, but the bayou bifurcates Firehunt's land such that the western portion of the parcel is geographically separated from the eastern portion.

Testimony at trial explained that the bayou has a crude weir built across it made from broken concrete and rebar. The weir backs up the bayou, allowing water to be pumped to hunting areas or used for irrigation. Eighty to ninety percent of the time, the weir is not

[2]Price Services and Firehunt are both wholly owned subsidiaries of The Price Companies, Inc. In its findings of fact, the circuit court referred to them as sister companies.

overtopped by water. The weir does not serve as a road, but people have used it to cross the bayou both by foot and by ATV. The land owned by Firehunt to the west of the bayou is characterized by the owner as a green tree conservation reservoir, and it is primarily used for hunting. Firehunt and its agents used the road across Camp Nine's land to access that western portion.

On April 15, 2020, Camp Nine Company filed its complaint against Firehunt alleging trespass and seeking a declaratory judgment that there is no easement across Camp Nine's land. Firehunt answered and counterclaimed seeking declaration of easement by necessity, implication, and prescription. Prior to trial, Camp Nine dismissed its complaint, and the parties proceeded on the counterclaim.

After a two-day bench trial in December 2020, the circuit court invited counsel to brief any remaining issues. Of note, Camp Nine briefed a statute-of-limitations issue that was pleaded as an answer but was otherwise undeveloped to that point. On December 17, the court entered a letter into the record including extensive findings of fact and conclusions of law. This was reduced to a judgment on December 21. That judgment provides

> that Firehunt, Inc. has a permanent easement of prescription, necessity, and implication allowing continued use of the subject 400-yard access road across Camp Nine Co., Inc.'s 20 acres . . . to Firehunt, Inc.'s 300-acre reservoir to the west of Boggy Bayou. . . . The Easement entitles Firehunt, Inc., its successors and assigns, to access its property by this Easement and the responsibility to maintain the Easement including pipes, gravel, and any other work or improvement necessary to fully utilize its 330-acre reservoir to the west of Boggy Bayou.

On December 29, Camp Nine moved to amend the findings of fact and conclusions of law, asked the court to make additional findings of fact and conclusions of law, and moved

for a new trial. Despite Camp Nine having amended its answer to the counterclaim in October 2020 to include a defense of statute of limitations as provided in Arkansas Code Annotated sections 18-61-101 and -102 (Repl. 2015), the circuit court, on December 30, entered an order finding that Camp Nine never pleaded the defense, and it would therefore not address it. Camp Nine filed its notice of appeal on January 19, 2021. On appeal, Camp Nine contends that (1) any relief granted in this case was time-barred by the statute of limitations; (2) the circuit court conducted an incorrect analysis when applying easement doctrine to the facts at bar; (3) the court erred in granting an easement by necessity and implied by prior use; (4) the circuit court erred in granting a prescriptive easement; and (5) the prescriptive-easement award is overbroad.

I. *Standard of Review*

This court reviews equity matters de novo on the record but will not reverse a finding of the lower court unless it is clearly erroneous. *See Owners Ass'n of Foxcroft Woods, Inc. v. Foxglen Assocs.*, 346 Ark. 354, 57 S.W.3d 187 (2001). 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. *Id.* at 361, 57 S.W.3d at 192. 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. *Carson v. Cnty. of Drew*, 354 Ark. 621, 128 S.W.3d 423 (2003). Disputed facts and determinations of witness credibility are within the province of the fact-finder. *Id.* at 624–25, 128 S.W.3d at 425.

II. *Statute of Limitation*

Camp Nine leads with the argument that any relief awarded to Firehunt is time-barred by Arkansas Code Annotated sections 18-61-102 and -101. Firehunt, in turn, contends that Camp Nine's statute-of-limitations arguments are unpreserved. Camp Nine, however, pleaded the defense in its answer to the counterclaim, made arguments to the court on the point in its posttrial brief, and again moved for findings of fact and conclusions of law unambiguously requesting that the court address its argument. The court entered an order refusing to address Camp Nine's point,[3] and that order was entered before the deemed-denied date ran and was included in Camp Nine's notice of appeal. It is adequately preserved for our review.

Camp Nine argues that Firehunt's relief sought is time-barred under the statutes of limitation found in Arkansas Code Annotated sections 18-61-101 and -102. In relevant part, section 18-61-101(a)(1) provides that

> [n]o person or his or her heirs shall have, sue, or maintain any action or suit, either in law or equity, for any lands, tenements, or hereditaments after seven (7) years once his or her right to commence, have, or maintain the suit shall have come, fallen, or accrued.

Similarly, Arkansas Code Annotated section 18-61-102(a), provides that

> [a]n entry upon lands or tenements shall not be deemed sufficient or valid as a claim unless an action is commenced thereon within one (1) year after the entry and within seven (7) years from the time when the right to make the entry descended or accrued.

[3]In its order denying the motion, the court mistakenly thought that Camp Nine had not raised the defense in its answer.

Camp Nine would have us read these statutes to mean that if Firehunt's interest stems from Brown's use, then essentially, Brown had seven years from the date his interest in the easement perfected to bring suit to establish the same by declaratory judgment, a date which has long since run.

And while we appreciate Camp Nine's argument, we disagree that it is applicable here. Declaratory relief is dependent on—and not available in the absence of—a justiciable controversy and is intended to supplement, rather than supersede, ordinary causes of action. *Dye v. Diamante*, 2017 Ark. 42, 510 S.W.3d 759. Thus, we look at the underlying causes of action in the complaint to determine if any statute of limitations applies. The pleaded causes of action were to establish an easement by either implication, necessity, or prescription. The above-cited statutes of limitation, however, concern recovery of possession, which is a cause of action against the possessor. As the court explained in *Attaway v. Davis*, 288 Ark. 478, 479, 707 S.W.2d 302, 303 (1986), "the appellee's right to obtain access arises from her status as a landlocked owner and is of a continuing nature."

So if Firehunt was the possessor of the easement, then its cause of action for recovery thereof only began to run when Camp Nine asserted an adverse interest. As explained in *42 Causes of Action 2d 111* (regarding prescriptive easements),

> As a general rule, there is no specific time period within which the holder of a matured right to a prescriptive easement must seek judicial recognition of the easement's existence. . . . Neither is judicial confirmation necessary to the vesting of a prescriptive easement; rather, the easement vests when all the requisite elements…have been satisfied for the necessary period of time[.] A judicial declaration that a prescriptive easement exists merely gives record title to an interest already acquired.

Eric M. Larsson, J.D., *42 Causes of Action 2d 111* § 32, Westlaw (database updated July 2023); *see also Carroll v. Carroll*, 355 S.W.3d 463, 468 (Ky. Ct. App. 2011) (concerning an easement by necessity) ("[G]enerally speaking, a claim for an easement by necessity is not subject to a statute of limitations."). Applying this logic, we hold that the statutes of limitation do not bar the relief sought by Firehunt on these facts.

III. *Easement by Prescription*

Camp Nine challenges the circuit court's finding that Firehunt had established an easement by prescription. For reversal, Camp Nine argues that the circuit court erred in finding that Firehunt had established a prescriptive easement because no evidence supports Brown's use of the road under a claim of right, and no evidence supports that Brown used the road adversely. Camp Nine further contends that even if an easement by prescription does exist, the scope granted was overbroad.

One asserting an easement by prescription must show by a preponderance of the evidence that his or her use has been adverse to the true owner and under a claim of right for the statutory period. *Johnson v. Jones*, 64 Ark. App. 20, 977 S.W.2d 903 (1998). Where there is usage of a passageway over land, whether it be 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, 266 S.W.2d 281 (1954). A prescriptive easement, once attached, is permanent and irrevocable. *Carson*, 354 Ark. at 626–27, 128 S.W.3d at 427.

The facts here are very similar to those in *Jackson v. Downs*, 2022 Ark. App. 17, at 6–7, 639 S.W.3d 416, 420. In *Jackson*, this court held that permissive use may ripen into adverse use when a property owner knew or should have known that someone is using the road under a claim of right. Similar to the case at bar, in *Jackson*, one appellee testified that he had used the road over the appellant's land for over fifty years to get to land that had been in his family since 1895. The land was heavily wooded and primarily used recreationally for hunting, hiking, fishing, and timber production. The other appellee leased the land and used it for hunting. Both appellees used a road across the appellant's land to access property. When the appellant barricaded the road, suit followed. The appellees advanced the theory that they had an easement by prescription, necessity, or implication across the appellant's land to access their property, which was bordered by the appellant's land on three sides.

As here, the appellant advanced that his land was wild, unenclosed, and unimproved, and therefore a presumption that the use was permissive existed. However, use is permissive only until the persons using the land for passage, by their open and notorious conduct in the form of some overt activity, demonstrate to the owner that they are claiming a right of passage. *Jackson*, 2022 Ark. App. 17, at 6, 639 S.W.3d at 420. In *Jackson*, this court held that an easement by prescription existed because the appellant should have known that the appellees' use was adverse given the use and the length of time that passed. Even permissive use can ripen into adverse use when the use continues openly for seven years after the

landowner or his predecessors know the use is adverse or if they, under the circumstances, are presumed to know the use is adverse. *Id.*

Likewise, in *Smith v. Loyd*, 68 Ark. App. 127, 131, 5 S.W.3d 74, 76 (1999), the appellees asserted they had a prescriptive easement across the appellant's property, and the appellant also asserted the appellees' use was permissive. The appellant further contended that the absence of proof that the appellees or their predecessors "performed some other activity besides driving up and down the road" was fatal to their claim of a prescriptive easement. Citing *Kimmer v. Nelson*, 218 Ark. 332, 236 S.W.2d 427 (1951), we held that "use of a road through wild and unimproved land for over thirty years overcame the presumption that use of the land was permissive," and, given that the roadway was "used without complaint by the owner of record for nearly forty years" the permissive-use presumption had been overcome. *Smith*, 68 Ark. App. at 131, 5 S.W.3d at 76.

In the case at bar, the circuit court found that Brown credibly testified that, prior to selling the property to Firehunt, he used the access road for forty-eight years without ever asking for permission from Camp Nine. Later, in connection with litigation, Camp Nine even asked Brown to sign an affidavit stating that Brown's use was permissive—and Brown declined to do so. The circuit court found that Brown credibly disputed Camp Nine's position that his use of the access road was permissive. The determination of whether the use of a roadway is adverse or permissive is a question of fact, and a circuit court's finding with respect to the existence of a prescriptive easement will not be reversed by this court unless it is clearly erroneous. *Smith*, 68 Ark. App. at 130, 5 S.W.3d at 76. Under these facts,

Brown had established an easement by prescription, and because the court found that the easement by prescription began during Brown's ownership, that easement necessarily transferred to subsequent landowners. *Fox v. Alexander*, 2023 Ark. App. 247, at 5, 668 S.W.3d 191, 195 ("When an easement is annexed as an appurtenance to land, whether by express or implied grant or reservation, or by prescription, it passes with a transfer of the land, even though it may not be specifically mentioned in the instrument of transfer."). When Price Services, and then Firehunt, acquired Brown's interests, they continued to use the easement to access and make improvements on that section of the property.

Having reached the conclusion that Firehunt is entitled to an easement by prescription, we need not consider Camp Nine's arguments regarding whether the circuit court erred in its finding of easements by necessity or implication.

Finally, Camp Nine argues that even if there is a prescriptive easement, the court's final ruling was ultimately overbroad. It asserts that "the easement must be limited to non-commercial use of a single pickup truck."

The extent of a prescriptive easement is fixed by the use through which it was created. *Restatement (First) of Property* § 477 (1944). However, the use under which it arises "determines the general outlines rather than the minutest details of the interest." *Id.* cmt. b. When an easement is acquired by prescription, the nature of the use cannot be changed to render it more burdensome to the servient estate than it was during the prescriptive period. *Williams v. Owen*, 247 Ark. 42, 444 S.W.2d 237 (1969). In the case of an easement by prescription, both its creation and extent are ascertained from the adverse use of the property over a long

period of time. *Jordan v. Guinn*, 253 Ark. 315, 485 S.W.2d 715 (1972). A circuit court's findings in this regard will not be reversed unless they are clearly erroneous. *Wallner v. Johnson*, 21 Ark. App. 124, 730 S.W.2d 253 (1987).

Here, the testimony established that Brown used the road to get to and from his property whenever he needed to access it, including for recreation, clearing land, and performing improvements and maintenance. The easement recognized by the court determined the general outline: where the easement is, how large it is, and for what purpose—ingress and egress and maintenance thereof. We hold this was not clearly erroneous, and we affirm.

Affirmed.

THYER, J., agrees.

HARRISON, C.J., concurs.

BRANDON J. HARRISON, Chief Judge, concurring. I concur in the majority's judgment that Firehunt, Inc., has an easement along the route described because, giving the circuit court's findings of fact the required deference, I cannot distinguish these facts from our supreme court's decision to affirm an implied easement in *Black v. Steenwyk*, 333 Ark. 629, 970 S.W.2d 280 (1998). The main difference between the majority's view and mine is the legal theory (or claim) on which our decisions rest.

Implied Easement. The evidence was that Robert Brown, who was friendly with the family that owned Camp Nine, Inc., would visit his (Brown's) woods west of Boggy Bayou occasionally along the disputed access road in a pickup truck. The road was in place in 1966

when Brown sold his 180-acre "bean field" to Camp Nine, and he continued using it to access that western parcel until he sold his adjacent holdings in 2014. That route was not *absolutely* necessary—Brown could reach his land east of Boggy Bayou by a public road, and cross the bayou *somehow* without trespassing. But our supreme court has held that "reasonable necessity," meaning something stronger than "mere convenience," is enough to create an implied easement or easement by necessity when the other requirements are met. *Brandenburg v. Brooks*, 264 Ark. 939, 940, 576 S.W.2d 196, 197 (1979) (affirming easement across grantor's land where the parcel conveyed could not be accessed from the grantee's other land except by tractor). And in *Black*, the court held that it was not clearly erroneous to find that an easement was implied over an existing road to the claimant's property on one side of a river, though the claimant had access to the other side from a county road. Putting *Brandenburg* and *Black* together, I cannot say it was clear error to find that an easement was reasonably necessary to give Firehunt automobile access to its property west of Boggy Bayou, despite the weir.

I would start and stop there, within the existing law from our supreme court. We should be conscious in property cases that the law from our opinions could be applied by future litigants to conduct that has already occurred. The analysis of necessity created by severing a particular parcel at a particular time will be so fact-specific that the ripples in spacetime generated by this case will rarely reach future potential litigants. This is much less likely to be true of our decisions in prescriptive-easement cases. Prescriptive easements "are not favored in the law, since they necessarily work corresponding losses or forfeitures in the

rights of other persons." *Carson v. Cnty. of Drew*, 354 Ark. 621, 626, 128 S.W.3d 423, 426 (2003). What we affirm now, we buy more of in the future. In this vein of thought, I'm concerned that the majority seems to condense into the term "use" the traditional test for the specific kind of use ("open," "adverse," "under claim of right," and so on) that creates an easement if all the elements are met for seven years. In all the cases the majority cites on the "adverse use" point, the presumption that use of "wild, unenclosed, and unimproved land" is permissive was overcome by evidence that included decades of open use *by the general public*. Even in *Jackson v. Downs*, members of the public used the disputed road for decades—and a neighbor openly used the road for some twenty-five years after the landowner had posted and attempted to block it. 2022 Ark. App. 17, 639 S.W.3d 416.

The reality in many easement cases—particularly the "adversity by acquiescence" opinions the majority here relies on—is that oftentimes the parties have litigated under easement theories what might in fact be a road. If no party can demonstrate how the long use of a road began, the public's use is presumed to have begun as of right. *See Robb & Rowley Theaters, Inc. v. Arnold*, 200 Ark. 110, 118, 138 S.W.2d 773, 776 (1940) (recognizing that prescriptive easements arose from theory of a lost grant where use "began at a time when the memory of man runneth not to the contrary and the use . . . was open, notorious and adverse to the owners in the chain of [the landowner's] title"). Here, the memory of man runneth to 1966 and extendeth through 2014, the whole time Brown used the road. So did the testimony. Camp Nine owned the land throughout. There was no evidence of use by anyone other than Camp Nine, Brown, and Brown's personal guests. So the "adversity" question is

the same now as it was in 1966: in the absence of express permission, was an occasional, harmless use of the road by a friendly neighbor, which Camp Nine knew about but did not desire or attempt to prevent, permissive or adverse? I conclude it was permissive.

The facts are more favorable to Camp Nine on that point than in *Gazaway v. Pugh*, 69 Ark. App. 297, 12 S.W.3d 662 (2000). In *Gazaway*, we noted that most witnesses who testified to using a road and river access on unenclosed and unimproved property were acquainted with the family who owned the land, and their use "was not in any way inconsistent with the scope of permission that the [family] at least implicitly extended to them." *Id.* at 302, 12 S.W.3d at 666. What "decisively tip[ped] the balance" toward the easement claimants was one witness's testimony about the "sheer number of hunters and fishermen present[,]" which suggested that "not all of the use was by family or friends." *Id.* at 303, 12 S.W.3d at 666. Here, all the use was by Brown, a friend. And we have held that "length of use accompanied by the fact that there had been no objection" was insufficient to establish the right to a prescriptive easement. *Pop-A-Duck, Inc. v. Gardner*, 2022 Ark. App. 88, at 11, 642 S.W.3d 220, 228. In my view, we should continue to do so.

Our policymaking branches of government should not conclude from the number of easement cases we decide that we think this is an ideal way to determine access rights and property interests. Far from it. The process is often unreliable and inefficient, as this case well illustrates. Four Desha County judges testified in the circuit court about whether, at key points since 1966, Camp Nine Road, which both parties use to access their land, was a Desha County road. Judge Mark McElroy, who was county judge between 1993 and 2013,

testified that it is now. But a successor might disagree; there are no records of what the public roads were before 1958 because a disgruntled county employee burned them all. The list is "in the top of the judge's head." Neither Camp Nine nor Firehunt contends the disputed access road is a public road. (But they wouldn't, would they?)

Firehunt's concession that Camp Nine Road is a county road requires us to assume it is for Camp Nine's easement-by-necessity arguments. But we can't settle the road's status, even for the parties, because they did not join the county. *See* Ark. R. Civ. P. 19(a). In my view, where the pleadings in an easement case raise the possibility that the disputed route might be a public road or require finding that one exists to resolve the issues the parties present, adjudicating the case without joining the parties needed to resolve that issue for everyone is, in layman's terms, a waste of time and resources.

Statutes of Limitation. I agree that our ancient statutes of limitation—which are well-nigh incomprehensible—do not bar this case. Perhaps they will be revised in due course so the issues in a case like this one can't sleep so long before waking. Under existing statutes and caselaw on prescriptive easements, the common-law limits on prescription will give way; and as they do, the burden of adjudicating property rights, which is substantial now, will likely get worse. In my view, we need new, concrete statutory standards for creating—and extinguishing—whatever implied or prescriptive rights the General Assembly chooses to retain (with sensible time limits to claim them or lose them). Finally, while it would clearly be the General Assembly's purview to do so, our property law may well benefit from a statute of repose. Such a statute could remove uncertainties quickly and efficiently when it applies.

Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C., by: *John Keeling Baker* and *Devin R. Bates*, for appellant.

Wright, Lindsey & Jennings LLP, by: *Scott A. Irby*, *Michael A. Thompson*, and *Nathan R. Finch*, for appellee.