Not Designated for Publication

ARKANSAS COURT OF APPEALS

DIVISION II
No. CA08-330

BUIL DIGGS and ALICE MAE DIGGS APPELLANTS V. JOYCE DAVIS APPELLEE	**Opinion Delivered** November 5, 2008 APPEAL FROM THE GARLAND COUNTY CIRCUIT COURT, [NO. CV2006-12571] HONORABLE JOHN HOMER WRIGHT, JUDGE AFFIRMED

DAVID M. GLOVER, Judge

Buil Diggs and Alice Diggs appeal from an order dismissing their petition to quiet title to a strip of land that is adjacent to their property and is included within the legal description of property owned by their neighbor, appellee Joyce Davis.[1] Although we agree with appellants that the trial court erred in one part of its ruling, we affirm on the other basis of its decision.

Appellants bought their land in Garland County in the early 1950s. After the Davises purchased their property in 2002, appellants contended that they could use a strip of the Davises' land for access to the back portion of their property. The Davises disagreed, and in 2006, built a fence blocking the path. Appellants filed a complaint to quiet title and for

[1]Mrs. Davis's husband, Gene Davis, died after this case was filed but before it was tried.

ejectment in October 2006, asserting title to the purported driveway by adverse possession. The Davises counterclaimed for trespass.

At trial, Mr. Diggs testified that he, his family, and his guests had used the driveway, which he mowed, for access to the back portion of his property for at least twenty years, since a sewer line and a culvert were constructed and the driveway was moved about five feet to the east; before that, the driveway was entirely on his property. He said that, on four or five occasions, he had moved trailers along the driveway, and that, while he worked on them, he used the driveway five or six times a week. He said that he had also used it for access to his sawmill, his cattle, and his goats. Danny Johnson testified that he had moved mobile homes across the driveway for appellants since the mid-1980s. Jim Smoke stated that he had used it for access to old cars and trucks, on which he worked, in the early 1980s. Paul Mowery said that he had used the driveway since 1976 for access to the area where Mr. Diggs had a sawmill and worked on trailers. Paul Diggs, appellants' son, and Mike Malone and Gene Embry, their sons-in-law, also testified about appellants' use of the property.

Appellee Joyce Davis testified that, when she and her husband bought the property, there was no sign of a road on the disputed strip of land and that, to drive there, one would have to drive over trees that were four or five inches in diameter. She stated that they cleared the area in question over Mr. Diggs's objection that he did not want the back part of his property to be seen. She recounted Mr. Diggs's statements about the property as follows: "For a long time he told us that he owned that property, and when we had it surveyed he said he had an easement, that he had permission to go across that. I don't know who he got his

permission from to use it, I never heard." She also said that, after she and her husband erected the fence, Mr. Diggs had, two or three times a day, repeatedly driven up to it and back.[2] She stated that he had another way to access the back portion of his property and that he had told her that he had moved logs over that path.

Martin Golden, Mrs. Davis's son, testified that, when the Davises bought the property, it was all grown up and there was no road. He said that he and Mr. Davis had bush-hogged the property and covered it with gravel; that he had never seen Mr. Diggs on the property until the Davises had it surveyed; and that, after the survey was begun, Mr. Diggs had driven up to the fence and back on a daily basis.

Naomi Smith testified that she had lived in the neighborhood since the 1940s and had never known there to be a road over the area in dispute. Barbara Shaw stated that she had never seen a road there, even though she had moved into the neighborhood in 1945; lived there until the 1970s; visited her mother there until 1995; and still owned a lot there.

In a letter opinion,[3] the trial court stated:

> [T]his is a[n] action seeking to quiet title in the disputed lands and eject the [Davises]. The [appellants] have failed to meet their burden of proof in that regard. Mr. Diggs argued that they were entitled to a prescriptive easement but this was never pled and I do not feel it is proper to address it at this time. There was no motion to conform the pleadings to the proof and it is improper to do so now. Even if that issue were properly before the court the[re] is a substantial question as to whether or not the [appellants'] use of the property was adverse or permissive.

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[2]The gist of this testimony was that he was creating ruts in the ground to support his position at trial.

[3]The trial court stated that it was granting Mrs. Davis's motion to dismiss, which was made at the conclusion of appellants' case and which was renewed at the end of Mrs. Davis's case and after appellants' rebuttal.

On November 19, 2007, the circuit court entered an order of dismissal on those grounds and dismissed the Davises' counterclaim for trespass. Appellants filed a motion for reconsideration, which the trial court denied. Appellants then pursued this appeal.

Appellants raise the following points on appeal: (1) the trial court erred in dismissing their complaint on the ground that they failed to amend their pleadings to conform to the proof; (2) appellants' use of the roadway was not permissive; (3) appellants proved every element of prescription and adverse possession of the roadway; and (4) the three bases alleged by Mrs. Davis in a motion to dismiss did not support the trial court's decision. We need not address the fourth point on appeal because the trial court did not rule on those issues. A ruling by the trial court is a prerequisite to our review of an issue. *Kralicek v. Chaffey*, 67 Ark. App. 273, 998 S.W.2d 765 (1999).

Appellants' first argument, that the trial court should have considered their evidence supporting their acquisition of a prescriptive easement even though they did not plead a prescriptive easement or move to amend the pleadings, has merit. No one objected at trial to the testimony about the asserted easement. Although pleadings are required so that each party will know the issues to be tried and be prepared to offer his proof, Arkansas Rule of Civil Procedure 15(b) allows for the amendment of the pleadings to conform to the evidence introduced at trial. *Myers v. Yingling*, 372 Ark. 523, __ S.W.3d __ (2008). Permitting the introduction of proof on an issue not raised in the pleadings constitutes an implied consent to trial on that issue. *Neste Polyester, Inc. v. Burnett*, 92 Ark. App. 413, 214 S.W.3d 882 (2005).When issues not raised in the pleadings are tried by the express or implied consent of

the parties, Ark. R. Civ. P. 15(b) requires that the pleadings be treated as amended to conform to the proof. *Word v. Remick*, 75 Ark. App. 390, 58 S.W.3d 422 (2001). Even though the circuit court erred on this issue, we do not reverse, because the evidence supports the court's alternative ground, as explained below.

In their second point, appellants challenge the trial court's finding that there was a substantial question as to whether their use of the property was adverse or permissive. In their third point, appellants argue that they established every element of prescriptive use and adverse possession.

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. *Owners Ass'n of Foxcroft Woods, Inc. v. Foxglen Assocs.*, 346 Ark. 354, 57 S.W.3d 187 (2001). Like adverse possession, prescriptive easements are not favored in the law because they necessarily work corresponding losses or forfeitures in the rights of other persons. *Id.* The person who asserts an easement has the burden of proving its existence and that there has been adverse, not permissive, use of the land in question. *King v. Powell*, 85 Ark. App. 212, 148 S.W.3d 792 (2004). Although Arkansas does not have a statute setting forth the length of time for the ripening of a prescriptive easement, for many years the supreme court has considered the period for acquiring a prescriptive right-of-way as analogous to the statutory seven-year period for the acquiring of title by adverse possession and has held that both require seven years. *Id.* Unlike adverse possession, however, prescriptive use need not be exclusive. *Id.* One asserting an easement by prescription must 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. *Id.* 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. *Id.* Mere permissive use of an easement cannot ripen into an adverse claim without clear action that places the owner on notice. *Owners Ass'n of Foxcroft Woods, Inc. v. Foxglen Assocs.*, *supra.* Some circumstance or act in addition to, or in connection with, the use that indicates that the use was not merely permissive is required to establish a right by prescription. *Id.*

The determination of whether the use of a roadway is adverse or permissive is a question of fact. *King v. Powell, supra.* The standard of review of a circuit court's findings of fact after a bench trial is whether those findings are clearly erroneous. *Greenwood Sch. Dist. v. Leonard*, 102 Ark. App. 324, ___ S.W.3d ___ (2008).

The trial court found that appellants failed to prove adverse use of the disputed strip of land, which was a question of fact for the court to decide. It is apparent that the court credited the testimony of Mrs. Davis and her witnesses more than the testimony of Mr. Diggs and appellants' witnesses. Given the testimony about how overgrown the strip was when the Davises purchased their land; about the absence of any road there until the Davises cleared it; how Mr. Diggs deliberately created tire tracks there after the Davises began their survey; and about Mr. Diggs's statement that he had "permission" to use the area, the trial court did not clearly err in rejecting appellants' claims.

Affirmed.

BIRD and GRIFFEN, JJ., agree.