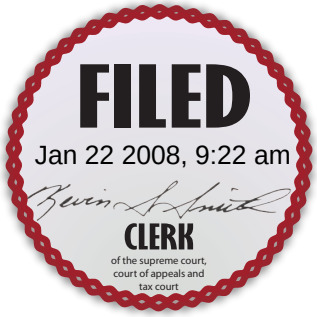

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IN THE
COURT OF APPEALS OF INDIANA

JERRY TERRY, DORMAN HILL, BARRY CLEVENGER, DANIEL WICKLIFFE, and TERRY POWERS,	)	
Appellants-Plaintiffs,	)	
vs.	)	No. 18A04-0705-CV-266
MAX RUDICEL, BARBARA RUDICEL, JAMES SIEFERT, KAREN SIEFERT, RON CHAMBERS, JAWANA CHAMBERS and RENNA ROWAN,	)	
Appellees-Defendants.	)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable John J. Feick, Judge
Cause No. 18C04-0604-PL-7

January 22, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Jerry Terry, Dorman Hill, Barry Clevenger, Daniel Wickliffe, and Terry Powers ("Appellants") appeal from the trial court's judgment that there is an easement over their land held by Dr. Max and Barbara Rudicel, James and Karen Siefert, Ron and Jawana Chambers, and Renna Rowen ("Appellees"). We affirm in part and reverse in part.

FACTS AND PROCEDURAL HISTORY

Appellants live in the Forest Hills Addition on Cherrywood Lane, which borders their properties on the east side.[1] Appellees live to the south of Appellants and do not have direct access to any road from their properties. Appellees' addresses are on Isanogel Road, which borders the northern edge of the northernmost Appellant's property. Abutting the western edge of Appellants' property, there is a twenty-foot easement for ingress and egress. A gravel lane, which Appellees use to access their property, lies partially within that twenty-foot easement; however, it encroaches onto Appellants' property by about five feet. The Appellees do not use the western portion of the twenty-foot easement because of encroachments on that side including vegetation, a swimming pool, and dog kennels.

A deed from 1963 purports to create a public road twenty-five feet in length inside the western edge of the Wickliffes' and Terrys' properties. The portion of the gravel lane that runs along their properties is entirely within the twenty-foot easement and the twenty-five foot area.

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[1] A map is attached for clarity, although it does not show the location of Appellees' property. While the map refers to "Isonagel Road," all the other materials in the record refer to it as "Isanogel Road;" therefore, we will call it Isanogel Road.

The Appellees' properties had all been owned by Dr. Thomas Brown. The Rudicels purchased part of his property in 1972. This parcel was eventually purchased by the Sieferts. In 1975, the Rudicels purchased a home on a different part of the land previously owned by Dr. Brown. Dr. Rudicel believed Dr. Brown had lived off Isanogel Road ten to twelve years prior to 1972. The Rudicels have used the gravel lane several times a day since 1972. Fire trucks and delivery trucks have also used the gravel lane.

The Terrys moved to their home on Cherrywood Lane in 2003. In 2004, they conducted a survey, which indicated the gravel lane encroached on their property. On April 7, 2006, the Appellants filed a suit for damages and a permanent injunction against the Appellees' use of the portion of the gravel lane located on their properties. Appellees raised a prescriptive easement as an affirmative defense. They also filed a counterclaim alleging the existence of a public road and a prescriptive easement.

A bench trial was held on February 8, 2007. The trial court found the Rudicels had lived off Isanogel Road since 1971, Rowan had lived there since 1973, the Sieferts had lived there since June 12, 1986, and the Chamberses had lived there since 2000. All of their properties had previously been owned by Dr. Brown; however, the Appellees did not all purchase directly from him. The trial court found there was a public roadway as described in the 1963 deed; part of the gravel lane was within an express twenty-foot easement; the Appellees had established an easement by necessity and an easement by prescription to the rest of the gravel lane; and Appellees "are owners of the entire length of the gravel lane." (Appellants' App. at 14.)

DISCUSSION AND DECISION

Appellants argue the trial court erred in determining a public road exists, an easement by necessity exists, an easement by prescription exists, and Appellees own the gravel lane. When the trial court enters findings of fact and conclusions of law, we ask whether the evidence supports the findings, and whether the findings support the judgment. *Nodine v. McNerney*, 833 N.E.2d 57, 64 (Ind. Ct. App. 2005), *reh'g granted on other grounds* 835 N.E.2d 1041 (Ind. Ct. App. 2005), *trans. denied* 855 N.E.2d 998 (Ind. 2006). We consider only the evidence most favorable to the judgment along with all reasonable inferences to be drawn from it. *Id*. We will not set aside the judgment unless it is clearly erroneous. *Id*.

1. Effect of the 1963 Deed

Appellants first assert the court erred in finding a 1963 deed created a public road. In 1963, Lela and Carl Bovard conveyed a parcel of land to Philip and Betty Tetrault. That parcel included most of the Terrys' and the Wickliffes' property. The deed states, "A strip of ground twenty-five (25) feet of equal width off the entire West side of the above described tract . . . shall be reserved for a public roadway and hereby is dedicated to the public." (Appellants' App. at 32.) Apparently, that land was never used as a public roadway. In 1965, the Tetraults conveyed the land back to the Bovards. The land subsequently became part of the Forest Hills Addition. The plat of the addition does not show a public road in that location.

Appellees argue the deed effectively created a public road; therefore, Appellants cannot interfere with their use of the portion of the gravel lane located within the area

dedicated to the public. *Poznic v. Porter County Development Corp.*, 779 N.E.2d 1185, 1193 (Ind. Ct. App. 2002), lists four requirements for statutory dedication: platting of the street, acknowledgement by the grantor, proper municipal approval, and recording. Appellees argue municipal approval can be inferred from the recording of the deed, but do not address the remaining requirements of statutory dedication. The elements of statutory dedication are not addressed in the trial court's findings of fact and conclusions of law, nor have we been directed to evidence from which the trial court could have concluded all the elements of statutory dedication were met.

There may be a common law dedication even if a statutory dedication is defective. *Id*. at 1192. The elements of common law dedication are intent of the owner to dedicate and acceptance by the public of the dedication. *North Snow Bay, Inc. v. Hamilton*, 657 N.E.2d 420, 422 (Ind. Ct. App. 1995).

> Evidence of a dedication includes whether the existence of the street is shown by a public plat accompanied with use by the public as a street, whether there is evidence of a parol dedication accompanied by public use, whether there is evidence of the owner selling lots on opposite sides of a strip suitable for a street and the public using the strip as such, or whether there has been a taking by the lawful authority for public use.

Id. at 423. There is no evidence in the record that the public used the twenty-five foot strip or that there was a lawful taking. Therefore, the evidence does not support a finding a public road exists on the Wickliffes' and Terrys' properties.[2]

[2] Appellees also argue Appellants cannot claim this finding was clear error because it was based on an exhibit Appellants introduced at trial. We cannot agree that by offering the 1963 deed into evidence, the Appellants conceded any and every legal conclusion the trial court might draw from it.

2. Easement by Necessity

Next, Appellants argue the trial court erred in finding an easement by necessity. Appellees do not respond to this argument; therefore, Appellants need only establish *prima facie* error. *Ind. Patient's Compensation Fund v. Butcher*, 863 N.E.2d 11, 14 (Ind. Ct. App. 2007). *Prima facie* error is "error that we are able to ascertain 'at first sight, on first appearance, or on the face of it.'" *Id*. (citation omitted).

Appellants argue there was no necessity for an easement on their land when Appellees' land was divided because Appellees had a twenty-foot easement by which they could reach their land.

> An easement of necessity will be implied when "there has been a severance of the unity of ownership of a tract of land in such a way as to leave one part without access to a public road." An easement of necessity may arise, if ever, only at the time that the parcel is divided and only because of inaccessibility then existing. To demonstrate that an easement of necessity should be implied, a plaintiff must establish both unity of title at the time that tracts of land were severed from one another and the necessity of the easement.

Cockrell v. Hawkins, 764 N.E.2d 289, 292-93 (Ind. Ct. App. 2002) (citations omitted).

The trial court found:

> 52. That it is also undisputed that the only access to [Appellees'] real estate is the gravel lane at issue. The [Appellees] have no other means of accessing their property.
>
> 53. That being the only means of ingress and egress, the gravel lane is reasonably necessary for the fair enjoyment of the [Appellees'] real estate.

(Appellants' App. at 13.) The trial court noted the existence of the twenty foot easement, but did not address its impact on the issue of whether Appellees have an easement by necessity. The findings do not address whether there was a necessity "*at the time that the*

parcel is divided and only because of inaccessibility *then existing*." *Cockrell*, 764 N.E.2d at 293 (emphases added). Although the testimony at trial established there are now impediments to using the twenty-foot easement, there was no evidence a necessity existed at the time Appellees' properties were divided. Therefore, Appellants have established *prima facie* error in the finding of an easement by necessity.

3. Easement by Prescription

Appellants next argue the trial court erred in finding an easement by prescription. Our Supreme Court recently reformulated the elements of a prescriptive easement:

> (1) Control – The claimant must exercise a degree of use and control over the parcel that is normal and customary considering the characteristics of the land (reflecting the former elements of "actual," and in some ways "exclusive," possession);
>
> (2) Intent – The claimant must demonstrate intent to claim full ownership of the tract superior to the rights of all others, particularly the legal owner (reflecting the former elements of "claim of right," "exclusive," "hostile," and "adverse");
>
> (3) Notice – The claimant's actions with respect to the land must be sufficient to give actual or constructive notice to the legal owner of the claimant's intent and exclusive control (reflecting the former "visible," "open," "notorious," and in some ways the "hostile," elements); and,
>
> (4) Duration – the claimant must satisfy each of these elements continuously for the required period of time (reflecting the former "continuous" element).

Fraley v. Minger, 829 N.E.2d 476, 486 (Ind. 2005).[3] The duration element requires continuous use for twenty years. *Wilfong v. Cessna Corp.*, 838 N.E.2d 403, 405 (Ind.

[3] Although *Fraley* was a case about adverse possession, our Supreme Court has applied the same analysis to prescriptive easements. *See Wilfong v. Cessna Corp.*, 838 N.E.2d 403, 406 (Ind. 2005) ("This

2005). The party seeking to establish a prescriptive easement must prove each of these elements by clear and convincing evidence. *Id*. at 406.

A. Rudicels[4]

Appellants argue there is no evidence the Rudicels' use of the gravel lane was adverse or hostile. *See id*. (intent and notice elements may not be met if use is permissive rather than adverse and hostile). They claim Appellees "were required to establish that any encroachment on the [Appellants'] property was not by consent." (Appellants' Br. at 9.) To the contrary, the burden was on Appellants to show the use was permissive:

> [U]nexplained use of an easement for 20 years is presumed to be under a claim of right, adverse, and sufficient to establish title by prescription unless that use is contradicted or explained. In other words, a rebuttable presumption that use is adverse arises under those circumstances, and in order to rebut that presumption the owner must explain such use by demonstrating that he merely permitted the claimant to use his land.

Fleck v. Hann, 658 N.E.2d 125, 128 (Ind. Ct. App. 1995) (citations omitted).[5] Appellants do not deny the Rudicels used the gravel lane openly and regularly since 1972. Under the

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reformulation applies as well for establishing prescriptive easements, save for those differences required by the differences between fee interests and easements.").

[4] Appellees argue it is improper to treat each landowner separately. The decisions they cite hold the claimant of a prescriptive easement may tack the use of predecessors in interest; they do not hold landowners with distinct property interests may tack each other's use. We have previously considered separate claims to the same easement separately. *See Downing v. Owens*, 809 N.E.2d 444 (Ind. Ct. App. 2004), *trans. denied* 822 N.E.2d 978 (Ind. 2004). Accordingly, we decline Appellees' invitation to commingle their interests.

[5] This presumption survives our Supreme Court's reformulation of the elements of adverse possession. *Chickamauga Properties, Inc. v. Barnard*, 853 N.E.2d 148, 153 & n.11 (Ind. Ct. App. 2006); *see also Carnahan v. Moriah Property Owners Association, Inc.*, 716 N.E.2d 437, 442 (Ind. 1999) (approving the *Fleck* presumption in the case "of an obvious path or road for ingress and egress").

circumstances, Appellants had the burden of proving the use was permissive. As they failed to do so, we affirm the finding the Rudicels have an easement by prescription.

B. Rowan

Dr. Rudicel testified the gravel lane was the only road into the Appellees property. The record indicates Rowan lived off Isanogel Road for over twenty years. From these facts, it can be implied that she used the gravel lane regularly. As with the Rudicels, Rowan's use created a presumption of adverse use, which Appellants did not rebut. Therefore, we affirm the finding Rowan has an easement by prescription.

C. Sieferts

Appellants claim the finding the Sieferts purchased their home on June 12, 1986, is not supported by the evidence. Assuming for the sake of argument the finding is correct, we note the Sieferts had lived in their home for slightly less than twenty years at the time this action was commenced.[6] Therefore, the Sieferts rely on tacking to establish their claim to a prescriptive easement.

"Continuity of use for the requisite twenty-year period may be established by tacking from the use of predecessors in title." *Downing v. Owens*, 809 N.E.2d 444, 450 (Ind. Ct. App. 2004), *trans. denied* 822 N.E.2d 987 (Ind. 2004). The trial court found the Sieferts purchased the property from Linda and Ronald Pearson, the Pearsons purchased the property from Eddie McKibben in 1978, and McKibben purchased the property from

[6] In *Greene v. Jones*, 490 N.E.2d 776, 777 (Ind. Ct. App. 1986), we held the "period necessary to acquire title by adverse possession is a statute of limitations which runs against the titleholder," and held adverse possession had not been established where the title owner brought suit against the adverse possessor before the period had lapsed.

the Rudicels in 1976. At some point, the land had belonged to Dr. Brown. There is no evidence in the record concerning the Pearsons' or McKibben's use of the gravel drive. Nor can we infer that they used the drive regularly, as the record does not reflect whether they resided on the property when they owned it. As a result, the Sieferts cannot tack any use by the Pearsons and McKibben.

Appellants argue the Sieferts can tack the use of the Rudicels and Rowen. There is no evidence Rowen is a predecessor in interest to the Sieferts. Although the Rudicels are predecessors in interest, their use cannot be tacked to the Sieferts' use because it was interrupted by a period of approximately six years when the property was owned by McKibben and the Pearsons. Nor was there evidence the Rudicels and Dr. Brown used the drive for twenty years to access the Sieferts' property. Therefore, the Sieferts failed to establish continuous use for twenty years, and the court's finding they have a prescriptive easement is not supported by the evidence.

D. Chamberses

The Chamberses' claim fails for the same reason. The Chamberses have lived off Isanogel Road since 2000. They purchased their property from Skip Morrison. The property belonged to Dr. Brown at some point, but the record does not reflect whether Morrison bought from Dr. Brown, or whether there were intervening owners. The record does not reflect whether Morrison or other previous owners resided at the home or used the gravel road continuously for twenty years. Therefore, the trial court's finding the Chamberses have a prescriptive easement is not supported by the evidence.

4. Ownership of the Disputed Property

Appellees argue the trial court erred by finding Appellees "are owners of the entire length of the gravel lane." (Appellants' App. at 14.) The Sieferts and Chamberses have not demonstrated they have an easement over the disputed land, much less ownership of it. Although the Rudicels and Rowan have established a prescriptive easement, there is no indication they ever viewed their interest as anything other than an easement. They did not assert ownership of the disputed land in this lawsuit, nor would their use have put Appellants on notice they intended to claim ownership of the land. Therefore, we reverse the portion of the trial court's judgment stating the Appellees are owners of the entire gravel lane.

CONCLUSION

The trial court's finding the Rudicels and Rowan have a prescriptive easement over the Appellants' property is affirmed. The judgment is reversed in all other aspects.

Affirmed in part and reversed in part.

CRONE, J., and DARDEN, J., concur.