STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1291

Roger Saba,
Appellant,

vs.

Roger Anderson,
Respondent.

Filed June 28, 2021
Reversed and remanded
Segal, Chief Judge

Becker County District Court
File No. 03-CV-19-1778

James A. Teigland, Fremstad Law Firm, Fargo, North Dakota (for appellant)

Zenas Baer, Zenas Baer Law Office, Hawley, Minnesota (for respondent)

Considered and decided by Larkin, Presiding Judge; Segal, Chief Judge; and Reyes, Judge.

NONPRECEDENTIAL OPINION

SEGAL, Chief Judge

Appellant challenges the grant of summary judgment against him on his claim that he has a prescriptive easement to use respondent's driveway. Because we conclude that appellant has put forward evidence sufficient to demonstrate the existence of genuine issues of material fact, we reverse and remand.

FACTS

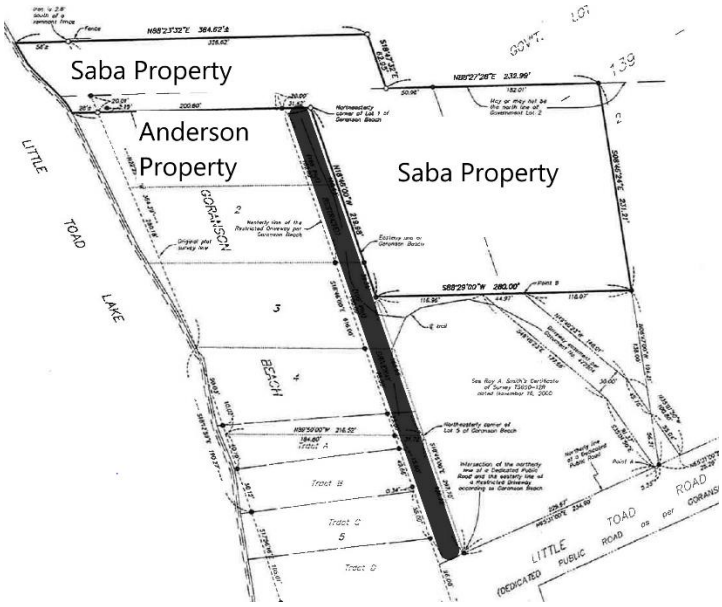
Appellant Roger Saba is the current owner of an irregularly shaped property (the Saba property) in Becker County. The northwestern portion of the Saba property fronts on Little Toad Lake. Saba's parents initially acquired the Saba property in two separate transactions in 1968 and 1969, and members of the Saba family have owned the Saba property since that time. The Saba property contains two cabins that can be accessed from the public roadway on the southern end of the property. Rough terrain and vegetation separate the cabins, making it impossible for vehicles to travel and difficult to walk directly from one cabin to the other.

The Saba property is bordered to the south and west by the Goranson Beach subdivision, which consists of ten lots also fronting on Little Toad Lake. Lots 1-4 of the Goranson Beach subdivision do not abut a public roadway. The Goranson Beach plat therefore provides for a private drive along the eastern edge of lots 1-5 to allow for ingress and egress to those properties.[1] The plat provides, in relevant part, "we hereby establish an easement for the joint use of the owners of Lots Numbered 1, 2, 3, 4 and 5 as shown on the herein plat and marked 'Restricted Driveway.'" The restricted driveway starts where lot 5 abuts the public roadway and continues north through the other lots until it dead ends at the northern property line of lot 1.

Respondent Roger Anderson is the owner of lot 1 of the Goranson Beach subdivision (the Anderson property). He has owned the Anderson property since 1979.

[1] The Saba property borders lots 1-3 of the Goranson Beach subdivision.

The layout of the Anderson and Saba properties and the restricted driveway can be seen on the map below; the restricted driveway is shaded in black.



The restricted driveway does not pass through the Saba property, and the Goranson Beach plat does not provide for the use of the restricted driveway by anyone other than the owners of lots 1-5 of the Goranson Beach subdivision. But according to Saba, the Saba family and their guests have used the restricted driveway to travel between their two cabins and to access the lakefront portion of the property since 1968 because it was "the easiest way" to travel between the cabins and to their lake frontage. Saba claims that between 1968 and 1983 they "used the restricted driveway 1,000+ times every summer." He alleges that they continued to use the driveway every summer between 1983 and 1988, albeit at a reduced level, and that their use increased beginning in 1988, with Saba and his invitees using Anderson's driveway every summer weekend, "in excess of 300 times a summer." They traveled over the driveway on foot and with golf carts, lawn tractors, and cars, including to transport boats to and from the lakefront portion of the Saba property.

In June 2017, Anderson put up a chain to block Saba's access to the restricted driveway. One of Saba's family members removed the chain, but Saba put it back up after Anderson reported the incident to law enforcement. According to Anderson, he confronted Saba's family about their trespass on his driveway four times, one time each in 1979, 1980, and 2005, with the last time in 2017 when Anderson put up the chain. Anderson claims that trespassing by the Saba family on the driveway was an isolated occurrence and that he did not notice any other instances of trespass other than the four times when he confronted the family.

Saba subsequently commenced this action claiming that he has a prescriptive easement to use the restricted driveway. Anderson moved for summary judgment. He argued that Saba failed to bring forward evidence sufficient to create a genuine issue of material fact with respect to the existence of a prescriptive easement, and also failed to join indispensable parties because he did not join the owners of lots 2, 3, 4, and 5 of the Goranson Beach subdivision. The district court granted Anderson's motion for summary judgment on the merits of the prescriptive easement claim.[2] Saba now appeals.

DECISION

Saba argues that the district court erred in granting summary judgment in favor of Anderson because Saba presented sufficient evidence to establish a genuine issue of material fact on each element required to establish a prescriptive easement. "We review a district court's summary judgment decision de novo." *Riverview Muir Doran, LLC v.*

[2] The district court did not rule on the issue of failure to join an indispensable party and that issue is not before us in this appeal.

JADT Dev. Grp., LLC, 790 N.W.2d 167, 170 (Minn. 2010). "In doing so, we determine whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment." *Id.* "[I]f the nonmoving party bears the burden of proof on an issue, that party must present sufficient evidence to permit reasonable persons to draw different conclusions." *Gradjelick v. Hance*, 646 N.W.2d 225, 231 (Minn. 2002). Evidence is viewed in "the light most favorable to the party against whom summary judgment was granted." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002).

A prescriptive easement grants a right of use to the claimant on the property of another. *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999). To establish the existence of a prescriptive easement, the claimant must demonstrate prior use of another's property in a manner that was (1) hostile, (2) actual, (3) open, (4) continuous, and (5) exclusive for a period of at least 15 years. *McCuen v. McCarvel*, 263 N.W.2d 64, 65 (Minn. 1978). Each of the five elements "are equally necessary," and failure to establish all five is fatal to a claim. *Meyers v. Meyers*, 368 N.W.2d 391, 393 (Minn. App. 1985), *review denied* (Minn. July 17, 1985).

While the elements of proof required to establish a prescriptive easement are the same as those necessary to establish adverse possession, the elements are "subject to such differences as are necessarily inherent in the application of the rules in such cases." *Rogers*, 603 N.W.2d at 657 (quotation omitted). Such differences arise from the distinction "between *possessing* the land for adverse possession and *using* the land for a prescriptive easement." *Boldt v. Roth*, 618 N.W.2d 393, 396 (Minn. 2000) (emphasis added).

The district court in granting summary judgment in favor of Anderson concluded that Saba failed to demonstrate evidence sufficient to create a genuine issue of material fact on any of the five elements necessary to establish a prescriptive easement. We thus analyze below the evidence presented by Saba with respect to each element.

A. Open and Actual Use[3]

To establish open and actual use, the claimant must use the land in such a way as to provide the owner with "unequivocal notice." *Skala v. Lindbeck*, 214 N.W. 271, 272 (Minn. 1927). The claimant's use must be sufficient to make it known that the use is adverse. *Romans v. Nadler*, 14 N.W.2d 482, 485 (Minn. 1944). A prescriptive easement cannot be established based on "occasional and sporadic acts for temporary purposes." *Id.* at 485-86.

Here, the district court determined that Saba did not provide sufficient evidence "to support a visible, actual, and open use of the property" and found that Saba's use amounted to nothing more than a "series of casual and sporadic trespasses." Saba argues that the district court erred in this determination because the district court ignored the sworn evidence submitted by Saba in opposition to the motion for summary judgment that Saba, his family, friends, and invitees, "have used the restricted driveway many thousands of times since 1968 to travel to and from the lake shore, to travel between the two cabins, to mow, to move around the Saba property, and to put boats in and out of the water."

[3] Open and actual use are separate elements, but caselaw addresses them together. *See, e.g., Ganje v. Schuler*, 659 N.W.2d 261, 266-67 (Minn. App. 2003).

Anderson's response to this evidence is his assertion that he only noticed use of the restricted driveway on four occasions since 1979.[4]

In concluding that Saba failed to present evidence sufficient to create a genuine issue of material fact on the elements of open and actual use, the district court points to the fact that Saba "does not contend that [he] established any physical structures upon the land or left markings." This requirement, however, applies to the legal prerequisites for establishing a right to obtain title to property through adverse possession and not necessarily to a right of use through a prescriptive easement. *Boldt*, 618 N.W.2d at 396. The absence of a physical structure or visible markings on another's property is not fatal to a claim for a prescriptive easement. For example, in *Block v. Sexton*, this court held that the use of a farm road, with no evidence of markings or other physical alteration of the road, was sufficient to support a finding of open, actual use.[5] 577 N.W.2d 521, 524-25 (Minn. App. 1998). Here, Saba is claiming a prescriptive easement for use of a driveway consistent with its purpose—to use as a pathway for vehicles and foot traffic. In light of this fact and Saba's allegation that the volume of use was significant, the mere absence of a physical structure or visible markings by Saba on the driveway is not determinative.

[4] Anderson also claims that he objected each time he observed the use, an allegation that is disputed by Saba.

[5] In *Block*, just an "occasional" and "sporadic" use of the road was found to be sufficient to support a prescriptive easement when the land involved in the case was rural and undeveloped. *Id.*

The cases relied on by Anderson are distinguishable.[6] For example, in *Romans*, the supreme court held that a claim for a prescriptive easement failed when the claimant used his neighbor's property twice a year to switch out storm windows and screens on the neighbor's side of the claimant's house, and once every six years to paint that side of his house. 14 N.W.2d at 485. In contrast, Saba's evidence here is that he used the restricted driveway many thousands of times since 1968.

The case of *Stanard v. Urban* is inapposite because it dealt with a claim for adverse possession, seeking outright ownership of a portion of a neighbor's property, not a claim for a prescriptive easement seeking only a right of use. 453 N.W.2d 733 (Minn. App. 1990), *review denied* (Minn. June 15, 1990). Moreover, this court expressly cautioned in *Stanard*, even though that case involved adverse possession, that the "decision is not meant to state that, as a matter of law, adverse possession cannot start until one puts up a building or other permanent or semi-permanent structure." *Id.* at 735-36 n.1. Thus, the lack of physical structures and visible markings[7] does not render the alleged usage inadequate as a matter of law to establish open and actual use. By presenting evidence that Saba and his family openly used the restricted driveway to travel on foot and in vehicles, and to transport boats, reasonable persons could draw the conclusion that Saba's use of the driveway was

[6] We also note that none of the cases were resolved on summary judgment.

[7] Saba also argues that the district court erred by considering evidence outside the record. Specifically, he claims that the district court's determination that Saba's use of the Anderson property left no visible markings was based on statements made by Anderson's counsel during oral argument. Because we reverse the district court's determination on other grounds, we need not address this issue.

open and actual. We therefore conclude that the district court erred in its finding that Saba failed to present sufficient evidence, as a matter of law, on the elements of open and actual use.

B. Exclusive Use

The next element in establishing a prescriptive easement is exclusivity. For purposes of a prescriptive easement, exclusivity "does not require a claimant to have excluded use by others." *Oliver v. State ex rel. Comm'r of Transp.*, 760 N.W.2d 912, 918 (Minn. App. 2009), *review granted* (Minn. Apr. 29, 2009), *and appeal dismissed* (Minn. Nov. 16, 2009). "Instead, a use is exclusive when it does not depend on a similar right in others, and is exclusive against the community at large." *Id.* (quotations omitted).

Here, the district court determined that Anderson and the owners of the Goranson Beach lots used the restricted driveway "for the purposes of ingress and egress to their properties and to access the lake." The district court then concluded that Saba failed to establish a showing of exclusive use because his use of the restricted driveway "r[a]n concurrent with the intended purpose of the restricted driveway and was thus indistinguishable from the use of the owners and the public at large." The district court also noted that "it cannot be said that [Saba's] rights did not depend on someone else's rights as [Saba's] usage and enjoyment of the easement was wholly dependent on the intended purpose for the restricted drive as laid out in the plat."

The supreme court has observed, however, that "[i]t is not fatal to the right by prescription that the use may have been participated in by the owner of the servient tenement, or by the owners of adjoining land" and that "[c]ertainly the fact that others,

having occasion, used it, did not prevent the plaintiffs from acquiring the right for themselves." *Merrick v. Schleuder*, 228 N.W.2d 755, 756 (Minn. 1930) (quotations omitted). The fact that Anderson and the other Goranson Beach lot owners used the restricted driveway for the same purpose as Saba therefore does not defeat his claim for a prescriptive easement. Rather, the use must simply be "exclusive against the community at large." *Nordin v. Kuno*, 287 N.W.2d 923, 926 (Minn. 1980); *see also Oliver*, 760 N.W.2d at 918-19 (holding the fact that a haul road was used by the landowner as well as the claimant and adjacent landowners, did not defeat the element of exclusivity; the element of "exclusivity" of use can be established by a showing that the claimant's use "depended on no other person's right to use the road"); *Wheeler v. Newman*, 394 N.W.2d 620, 621-23 (Minn. App. 1986) (affirming that claimant's use of a driveway on a neighbor's land was exclusive even though historically there had been heavy use of the driveway by the public, when the public use was only sporadic in the preceding 15 years).

We therefore conclude that the district court erred in finding that Saba failed to bring forward adequate evidence to establish a genuine issue of material fact on the element of exclusivity. The evidence put forward by Saba reflects that the restricted driveway was only used by the owners of the Goranson Beach lots, Saba, and their respective invitees, and that Saba's claimed use depended on no one else's right to use the driveway. Saba therefore made a sufficient showing on the element of exclusive use to survive a motion for summary judgment.

C. Continuous Use

Continuous use requires that the claimant so use the disputed property as to meet all the other elements of adverse possession for a period of 15 years. *Ganje*, 659 N.W.2d at 268. There is no bright-line test for how much use is required to be continuous use. *Id.* "Instead, the [general] rule . . . is that the [claimant] must be using the property as his or her own, i.e., regularly and matched to the land's intended use." *Id*. Additionally, "the same continuity of use is not required in cases of prescriptive easements as in those of title by adverse possession." *Romans*, 14 N.W.2d at 485. Rather, "the requirement of continuity depends upon the nature and character of the right claimed." *Id.* And a prescriptive easement may be acquired based on seasonal use of the property at issue. *Block*, 577 N.W.2d at 525-26.

The district court determined that Saba failed to make a showing that he had continuously used the restricted driveway for the required 15-year period. The district court noted that Anderson told the Saba family that they were not allowed to use the restricted driveway in 1979 and 1980, and that "[t]hese two incident[s] would have disrupted the running of the statutory period necessary to establish a prescriptive easement and prevented the continuous usage of the drive." We disagree. In making this determination, the district court observed that the Saba family stopped using the restricted driveway at least temporarily after Anderson told them that they were not allowed to use it, but Saba disputes this fact. Because this is a motion for summary judgment, we must view the evidence in the light most favorable to Saba. Saba offered evidence that he and his family used the restricted driveway every summer since 1968 until Anderson put up a

chain blocking Saba's access in 2017—a 49-year period. We therefore conclude that the district court also erred in its finding concerning the element of continuous use.

D. Hostile Use

The fifth and final element requires that the use was "hostile." "A use is hostile in prescriptive easement cases if it is nonpermissive." *Oliver*, 760 N.W.2d at 919. And "[u]se 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*, 577 N.W.2d at 524. Acquiescence in this context 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*, 238 N.W.2d 609, 611 (Minn. 1976) (emphasis omitted) (quotation omitted).

We conclude that, when the evidence is viewed in the light most favorable to Saba, there exists a genuine issue of material fact as to whether Saba's use of the restricted driveway was hostile. The Goranson Beach plat only grants the right to use the restricted driveway to the owners of lots 1-5, and Saba did not otherwise obtain permission to use the restricted driveway. His alleged use was therefore "nonpermissive." *Oliver*, 760 N.W.2d at 919. Moreover, Saba contends that he and his family used the restricted driveway every summer since 1968, numbering in the tens of thousands of uses over the years, and that this was all without permission. Anderson also maintains that he never gave permission for use of the driveway and communicated that to members of the Saba family at least four times over the years.

In sum, we conclude that Saba has presented sufficient evidence to create a genuine issue of material fact on each of the five elements. The district court therefore erred in granting summary judgment in favor of Anderson on Saba's claim for a prescriptive easement, and we reverse and remand for further proceedings.

Reversed and remanded.