DA 19-0345

IN THE SUPREME COURT OF THE STATE OF MONTANA

2020 MT 26

BARRETT, INC., a Wyoming Corporation,

Plaintiff and Appellant,

v.

CITY OF RED LODGE, AND RED LODGE SCHOOL DISTRICT NO. 1,

Defendant and Appellee,

v.

COLLABORATIVE DESIGN ARCHITECTS, INC.,

Respondent and Third-Party Defendant.

APPEAL FROM: District Court of the Twenty-Second Judicial District,
In and For the County of Carbon, Cause No. DV 17-54
Honorable Matthew J. Wald, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

William A. D'Alton, D'Alton Law Firm P.C., Billings, Montana

For Appellees:

Jon T. Dyre, Crowley Fleck PLLP, Billings, Montana
(for Collaborative Design Architects, Inc.)

Jeff A Weldon, Felt, Martin, Frazier & Weldon, P.C., Billings, Montana (for Red Lodge School District No. 1)

Rebecca Narmore, City Attorney for Red Lodge, Missoula, Montana
(for City of Red Lodge)

Submitted on Briefs: December 11, 2019

Decided: February 4, 2020

Filed:

Clerk

Justice Jim Rice delivered the Opinion of the Court.

¶1 Barrett, Inc. (Barrett) appeals from the entry of summary judgment in favor of Collaborative Design Architects, Inc. (CDA), by the Sixteenth Judicial District Court, Carbon County, declaring a prescriptive easement had been acquired over Barrett's property for the Red Lodge High School's secondary access route. The sole issue presented on appeal is whether the District Court erred by concluding the City of Red Lodge and the Red Lodge School District established a prescriptive easement, and granting summary judgment. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 In 1902, the City of Red Lodge (City or Red Lodge) abandoned its right of way on Chambers Avenue north of the intersection of Chambers Avenue and 5th Street. The property that had been subject to the right of way was added to parcels lying on the east and west sides of the right of way, by dividing down the centerline. At all times pertinent to this case, Barrett owned lots to the west of the abandoned Chambers Avenue right-of-way, and Red Lodge owned the parcel to the east. In 2004, Red Lodge School District #1 (School District) leased the City's parcel to build a new high school. One of the specifications of the conditional use permit issued by the City to the School District for construction of the high school was that the school would have two access roads.

¶3 CDA was the architect on the school construction project. CDA was instructed to extend Chambers Avenue north from the intersection with 5th Street, and to curve the road toward the northeast to connect the secondary access road with the school. Construction

of the school began in 2007, and the access road was completed in 2008, when traffic use began.

¶4 In September 2016, Barrett hired Red Lodge Surveying to survey its property, which revealed that the access road encroached upon the Barrett lots by approximately 5 feet for an approximate length of 130 feet. Barrett took the position that, until this survey was completed, it had no actual notice of the encroachment upon its property.[1] On May 26, 2017, Barrett initiated this action against Red Lodge and the School District, alleging inverse condemnation, negligence, and state constitutional violations. Red Lodge filed a third party complaint that brought CDA into the litigation, alleging, *inter alia*, that CDA was "negligent in the design and building of the access road across [Barrett's] property."

¶5 Following discovery, CDA moved for summary judgment, contending "the City of Red Lodge [] and/or the Red Lodge School District [] has acquired a prescriptive easement across Barrett's property." The District Court granted the motion. Barrett appeals.

STANDARD OF REVIEW

¶6 "We review appeals from summary judgment rulings de novo. We apply the same summary judgment evaluation, based on Rule 56, M.R.Civ.P., as the district court." *Taylor v. Mont. Power Co.*, 2002 MT 247, ¶ 9, 312 Mont. 134, 58 P.3d 162 (internal citations

[1] Discovery produced factual assertions that Patrick Barrett, an agent of Barrett, Inc., met with Forrest Sanderson, the City's then Development Director, at the site to discuss the road situation in "probably 2011" or "maybe" 2012, according to Mr. Barrett's deposition. Barrett, Inc., in answer to interrogatory questions, stated these individuals discussed the access problem to the lots caused by the road, and considered "alternative routes to the property, such as using a vacated alleyway." The District Court decided the case based upon constructive, not actual, notice, and did not address these factual assertions.

omitted). "The movant must demonstrate that no genuine issues of material fact exist. Once this has been accomplished, the burden then shifts to the non-moving party to prove, by more than mere denial and speculation, that a genuine issue does exist. Having determined that genuine issues of fact do not exist, the court must then determine whether the moving party is entitled to judgment as a matter of law." *Taylor*, ¶ 9. Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." M. R. Civ. P. 56(c)(3). "Where the material facts are undisputed, we 'must simply identify the applicable law, apply it to the uncontroverted facts, and determine who prevails.'" *Walker v. Phillips*, 2018 MT 237, ¶ 9, 393 Mont. 46, 427 P.3d 92 (quoting *Yorlum Props. Ltd. v. Lincoln County*, 2013 MT 298, ¶ 12, 372 Mont. 159, 311 P.3d 748). "'[W]hether a party is entitled to judgment on the facts is a conclusion of law, which this Court reviews to determine whether it is correct.'" *Walker*, ¶ 9 (quoting *Yorlum Props*., ¶ 12).

DISCUSSION

¶7 *Did the District Court err by concluding the City of Red Lodge and the Red Lodge School District established a prescriptive easement, and by granting summary judgment?*

¶8 As a preliminary matter, Barrett argues the District Court erred by failing to identify any standard of proof when it determined the existence of a prescriptive easement, citing *Wareing v. Schreckendgust*, 280 Mont. 196, 930 P.2d 37 (1996), in which the Court stated that "a prescriptive easement claimant must prove each element of the prescriptive easement claim by clear and convincing evidence." 280 Mont at 206, 930 P.2d at 43.

However, *Wareing* involved a trial on the merits, not entry of summary judgment. On summary judgment, trial courts do not apply a standard of proof or issue findings of fact "because, at the summary judgment stage, the parties are not arguing over what happened or presenting conflicting evidence; they merely need to know which of them, under the uncontested facts, is entitled to prevail under the applicable law. In such a case, the district court judge need not weigh evidence, choose one disputed fact over another, or assess credibility of the witnesses. He or she must identify the applicable law, apply it to the uncontroverted facts, and determine who wins the case." *Corp. Air v. Edwards Jet Ctr. Mont. Inc*., 2008 MT 283, ¶ 28, 345 Mont. 336, 190 P.3d 1111 (internal quotations omitted). Thus, the District Court did not err by failing to apply a clear and convincing burden of proof to CDA's summary judgment motion.

¶9 "To establish an easement by prescription, the party claiming an easement 'must show open, notorious, exclusive, adverse, continuous and uninterrupted use of the easement claimed for the full statutory period.'" *Pub. Lands Access Ass'n v. Boone & Crockett Club Found*., 259 Mont. 279, 283, 856 P.2d 525, 527 (1993); quoting *Keebler v. Harding*, 247 Mont. 518, 521, 807 P.2d 1354, 1356 (1991). The statutory period is five years. Section 23-2-322, MCA. "All elements must be proved in a case such as this because 'one who has legal title should not be forced to give up what is rightfully his without the opportunity to know that his title is in jeopardy and that he can fight for it.'" *Pub. Lands Access Ass'n*, 259 Mont. at 283, 856 P.2d at 527; quoting *Downing v. Grover*, 237 Mont. 172, 175, 772 P.2d 850, 852 (1989).

¶10 The only disputed element here is whether the encroachment was open and notorious. "Open and notorious use is a distinct and positive assertion of a right hostile to the rights of the owner and brought to the attention of the owner. Such use gives the owner of the servient estate actual knowledge of the hostile claim, or is of such character as to raise a presumption of notice because it is so obvious the owner could not be deceived." *Combs-Demaio Living Trust v. Kilby Butte Colony, Inc.*, 2005 MT 71, ¶ 14, 326 Mont. 324, 109 P.3d 252 (citations omitted). There are no disputes of fact regarding when the road was built or when Barrett performed the survey. However, Barrett argues summary judgment was improper because an issue of material fact exists about whether Barrett had notice of the encroachment on its property. Barrett argues it did not have actual notice until it surveyed the property in 2016.

¶11 However, the District Court concluded that the circumstances surrounding the access road were sufficient to put Barrett on constructive notice of the encroachment, reasoning:

> The road exists on the border of the two properties where possible encroachment would have been obvious; the road was improved with construction equipment; and then the road has been continually travelled since, and has been encroaching on Barrett's property for years. The very nature of the use is sufficient to put Barrett on constructive notice of the encroachment.

In so concluding, the District Court held that *Slauson v. Bertelsen Family Tr.*, 2006 MT 314, 335 Mont. 43, 151 P.3d 866, was controlling.

¶12 In *Slauson*, the plaintiff acquired real property with the knowledge that it was, at least in part, being used by a neighboring landowner for access to a commercial building

and for parking. *Slauson*, ¶ 7. Plaintiff brought action for encroachment and damages, and Defendant landowner argued he had acquired a prescriptive easement upon the property. *Slauson*, ¶ 8. The District Court, after trial, held in favor of the Defendant, and we affirmed, concluding the Defendant "was not required to notify [Plaintiff] that his use of the pie-shaped property was adverse. [Defendant's] acts alone, which were inconsistent with [Plaintiff's] title, were sufficient to constitute notice." *Slauson*, ¶ 18. Similar to the facts in *Slauson*, the road crossing the border of Barrett's property in this case was a visible encroachment. The road was constructed and then continually used between 2008 and 2016.

¶13 Barrett relies on *Zavarelli v. Might*, 230 Mont. 288, 749 P.2d 524 (1988), where a brother and sister owned adjacent properties after a life estate was divided between them in 1966. In 1983, the sister had survey work done that revealed an underground septic system servicing the brother's property was partially located on her property. *Zavarelli*, 230 Mont. at 290, 749 P.2d at 526. The District Court held, after trial, that the brother had obtained a prescriptive easement for the septic system on the sister's property. This Court reversed, holding, *inter alia*, that the District Court's finding that the trespass only became known in 1983 had "negate[d] that the claim of easement by [brother] was 'open . . . notorious, hostile, adverse. . . .'" *Zavarelli*, 230 Mont. at 292, 749 P.2d at 527.

¶14 We agree with the District Court's analysis that this case is distinguishable from *Zavarelli.* Assuming the survey completed in 2016 provided the first actual notice to Barrett, nonetheless, the access road was, by its nature, obviously visible and not

undetectable to the untrained observer. "The circumstances of the possession must be sufficient to put a prudent person upon inquiry." *Zavarelli*, 230 Mont. at 292, 749 P.2d at 527, and the circumstances here did so. *See Taylor*, ¶ 14 ("[A] prudent property owner engaging in even a casual inspection of his property would have discovered the transformers."); *Albert v. Hastetter*, 2002 MT 123, ¶ 22, 310 Mont. 82, 48 P.3d 749 ("Even a cursory view of his property would have alerted Dr. Hastetter to regular use of this well-defined route leading to Albert's pasture"); *Riddock v. Helena*, 212 Mont. 390, 397, 687 P.2d 1386, 1389 (1984) ("The City openly and visibly constructed the water supply line across the Ranch Company's land outside the easement granted to the City. The intended location of the pipeline was staked out for all to see."). Although Barrett may not have had actual notice of the encroachment until 2016, the road and its use was of "such character as to raise a presumption of notice." *Combs-Demaio Living Trust*, ¶ 14.

¶15 "While the legal import of these facts may be in dispute, the facts themselves are not." *Precision Theatrical Effects, Inc. v. United Banks, N.A.*, 2006 MT 236, ¶ 32, 333 Mont. 505, 143 P.3d 442. The District Court did not err by determining the "open and notorious" element was satisfied, and thus, summary judgment was appropriate. CDA was entitled to judgment as a matter of law upon establishing all of the elements of a prescriptive easement, demonstrating the City and the School District obtained a prescriptive easement for the access road over Barrett's property.

¶16 Affirmed.

/S/ JIM RICE

We concur:

/S/ LAURIE McKINNON
/S/ BETH BAKER
/S/ INGRID GUSTAFSON
/S/ DIRK M. SANDEFUR