[Cite as *McDowell v. Zachowicz,* 2011-Ohio-3626.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

DAVID L. MCDOWELL, TRUSTEE, et al.,	:	**O P I N I O N**
Plaintiffs-Appellees,	:	**CASE NO. 2010-A-0033**
- vs -	:	
WENDY ZACHOWICZ,	:	
Defendant-Appellant.	:	

Civil Appeal from the Ashtabula County Court of Common Pleas, Case No. 2009 CV 1019.

Judgment: Affirmed.

Nicholas A. Iarocci, The Iarocci Law Firm, L.L.C., 213 Washington Street, Conneaut, OH 44030 (For Plaintiffs-Appellees).

Jon D. Axelrod, Axelrod Law Office, 31809 Vine Street, Willowick, OH 44095 (For Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} This is an appeal from the judgment entry issued by the Ashtabula County Court of Common Pleas, in which the trial court granted appellees, David McDowell, et al. ("McDowells"), a prescriptive easement for driveway purposes, burdening appellant, Wendy Zachowicz's, property. The trial court also permanently enjoined Ms. Zachowicz from taking any action that interferes with the use of the driveway. The McDowells'

claims for relief for trespass and dimunition in value and for an award of punitive damages and attorney fees were resolved in Ms. Zachowicz's favor.

{¶2} Ms. Zachowicz appeals the trial court's findings of a prescriptive easement in the McDowells' favor, arguing that the elements of adversity and continuity did not exist. We find that the McDowells presented competent and credible evidence of both elements and therefore affirm the decision of the trial court. The McDowells initially cross-appealed the trial court's refusal to grant punitive damages and attorney fees. They voluntarily dismissed the cross-appeal, however, just prior to oral arguments. For the foregoing reasons, we affirm the decision of the trial court.

{¶3} **Statement of Facts and Procedural History**

{¶4} This case pertains to a strip of land situated between 221 Liberty Street ("221 Liberty") and 227 Liberty Street ("227 Liberty"), in Conneaut, Ohio. The McDowells own 221 Liberty, while Ms. Zachowicz owns 227 Liberty. 221 Liberty has been in the McDowell family since before 1885 and is currently titled to David L. McDowell and Susan P. McDowell, Trustees. 221 Liberty was previously owned by Amy McDowell, David's mother, until her death in 1998.

{¶5} Ms. Zachowicz purchased 227 Liberty in June of 2009. The two properties are located next to one another on the south side of Liberty Street. A strip of land ("disputed driveway"), fashioned as a driveway, exists to the west of 221 Liberty and to the east of 227 Liberty. Evidence adduced at trial demonstrates that this strip of land has been used as a shared driveway since at least 1972. A survey submitted into evidence indicates that the disputed driveway is located along the boundary line between the two properties. In addition to the disputed driveway, 227 Liberty also has a

driveway to its west, shared by the property at 233 Liberty Street. No other access point exists for 221 Liberty.

{¶6} Objecting to its shared use, Ms. Zachowicz constructed a flower bed across the disputed driveway from east to west for the purpose of blocking access. The McDowells commenced an action in the Ashtabula County Court of Common Pleas to establish, as a matter of record, that an easement existed along the disputed driveway, for the benefit of 221 Liberty and to the detriment of 227 Liberty. The McDowells also sought punitive damages and attorney fees based on claims of frivolous and intentional acts "intended to purposefully cause * * * financial harm."

{¶7} The trial court granted a preliminary injunction enjoining Ms. Zachowicz from interfering with the use of the disputed driveway by the McDowells and their agents. The Friday before the bench trial, the McDowells' attorney filed a "Motion to Bifurcate Attorney Fees and Costs Issue." During trial and at the conclusion of the direct examination of Mr. McDowell, his counsel attempted to introduce an attorney fees invoice. Counsel for Ms. Zachowicz objected on the basis of a failure to comply with a local rule of court requiring submission of attorney fees itemizations seven days prior to trial. The trial court refused to hear any evidence on the issue of attorney fees, citing not only the failure to comply with the local rule, but, the more substantive basis that it had heard no evidence warranting an award of fees. The McDowells put on one additional witness, offered exhibits, rested, and asked the court to "reconsider" its ruling on attorney fees through consideration of arguments to be made in the parties' written closing arguments. There were no proffers of evidence regarding attorney fees.

{¶8} After trial and review of the written closing arguments, the trial court granted a prescriptive easement to the McDowells and permanently enjoined Ms. Zachowicz from blocking access to the disputed driveway. The trial court, however, denied the McDowells punitive damages and attorney fees. Specifically, the trial court found that the McDowells "failed to establish any damages, compensatory or punitive, or any basis for an award of attorney fees." Ms. Zachowicz filed a timely notice of appeal followed by the McDowell's timely filed notice of cross-appeal, which was voluntarily dismissed just prior to oral arguments. Ms. Zachowicz raises two assignments of error:

{¶9} "[1.] The trial court erred, to the prejudice of the defendant-appellant, by finding that the use of the common driveway has been continuous.

{¶10} "[2.] The trial court erred to the prejudice of the defendant-appellant, by finding that there was absolutely no evidence in this case that the establishment and use of the common driveway was with permission."

{¶11} **Standard of Review**

{¶12} A court of appeals, in reviewing a trial court's judgment, will give considerable deference to a trial court's findings of fact. "Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, at syllabus. Deference is extended to the trial court's determination because "the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony."

Seasons Coal Co. v. Cleveland (1984), 10 Ohio St.3d 77, 80. Thus, "an appellate court should not substitute its judgment for that of the trial court when there exists * * * competent and credible evidence supporting the findings of fact and conclusions of law rendered by the trial judge." Id.

{¶13} **Continuous Use**

{¶14} In her first assignment of error, Ms. Zachowicz argues that the trial court erred to her prejudice when it found that the McDowells' use of the disputed driveway was continuous. Continuity of use is one of the four required elements of a successful prescriptive easement claim. Ms. Zachowicz asserts that the McDowells failed to demonstrate by clear and convincing evidence that their use of the disputed driveway was continuous for the statutorily required period and that the court erred in finding otherwise.

{¶15} Establishment of a prescriptive easement requires demonstration of five distinct elements by clear and convincing evidence. *J.F. Gioia, Inc. v. Cardinal Am. Corp.* (1985), 23 Ohio App.3d 33. To prevail, a party asserting a prescriptive easement must show that their use of the property is: (1) open, (2) notorious, (3) adverse, (4) continuous, and (5) for a period lasting 21 or more years. Id. at 37; *McGinnis, Inc. v. S. Point Barge Co., Inc.* (Mar. 16, 1994), 4th Dist. No. 93CA19, 1994 Ohio App. LEXIS 1159. The burden of establishing the existence of an easement rests with the party claiming the right of use. *McInnish v. Sibit* (1953), 114 Ohio App. 490, 493. Here, no dispute exists as to three of the five elements; Ms. Zachowicz challenges the continuity and adversity elements only.

{¶16} Upon review, the trial court found that the McDowells presented some competent and credible evidence as to the continuity element. At the preliminary injunction hearing, attorneys for both parties stipulated to the fact that until 1998, when Amy McDowell passed away, the house at 221 Liberty was owned and occupied by various generations of the McDowell family. Counsel further stipulated that until 1998, the disputed driveway was in fact used as a shared driveway by the various owners of 221 Liberty and 227 Liberty. This leaves only the period from 1998 to 2009, when Ms. Zachowicz objected to the use of the disputed driveway, for which to account.

{¶17} We note, however, that such a stipulation establishes continuity for a period far greater than the statutory time requirement of 21 years. David McDowell testified that a residence was first constructed on 221 Liberty by his great-grandfather around 1885. Bert Drennan, the previous owner of 227 Liberty, testified that his parents purchased the property in 1972, with title to the property transferring to him upon his father's death. Mr. Drennan stated that, despite never having lived at 227 Liberty, he had personal knowledge as to the manner in which the disputed driveway was used. Mr. Drennan testified that "[i]t has always been used for access by both our side and McDowell[s'] side."

{¶18} Sally Richards, the McDowells' neighbor and general attorney, also testified as to the historical use of the disputed driveway. At the preliminary injunction hearing, Ms. Richards stated that "based on my observations and actual personal use of it, it's always been a shared driveway. I would use it when I would be visiting Amy at 221 Liberty Street. I also parked my vehicle behind that property using that same driveway as access when David asked me to do so."

{¶19} Based on the evidence adduced, the trial court could have determined that continuity of use of the disputed driveway by 221 Liberty existed for at least 26 years and quite possibly as long as 113 years. Either number exceeds the required 21 years for establishment of a prescriptive easement.

{¶20} The trial court could also have found that continuity of use has extended beyond 1998 to the present day. In 1998, upon the death of David McDowell's mother, title to 221 Liberty passed to David McDowell. At the same time, 221 Liberty became unoccupied due to the McDowells' primary residence in Wisconsin. David McDowell testified that despite primarily residing out of state, he and his wife "frequent the residence every year. * * * And we had typically come down twice, three times, four times on a few occasions and visited and stayed." The length of time the McDowells' stay at 221 Liberty varies, but has lasted up to two weeks on some occasions.

{¶21} Additionally, evidence was presented at both the preliminary injunction hearing and the trial that while the McDowells are away from 221 Liberty, their agents enter on to and make use of the property. David McDowell stated at the preliminary injunction that "we have a gentleman that cuts the grass, his mower and he has used the driveway up until recently to take his mower back there. I have a maintenance person that does many things on the property. He has used the driveway as well." Mr. McDowell reiterated this testimony at trial when he said, "I've got several different handymen that do various kinds of work; roofing, guttering, cleaning gutters, painting, spackling. So there is a number of different people that use the driveway." When asked at whose direction they use the disputed driveway, Mr. McDowell definitively stated, "[a]t mine."

{¶22} Sally Richards supported Mr. McDowell's testimony, by stating at the preliminary hearing that she had personal knowledge of the lawn maintenance person and the contractor's use of the disputed driveway.

{¶23} Continuity does not require activity on the disputed land to occur at the same sustained level throughout the statutory period. Rather, an analysis of continuity rests, not on the frequency, but, on the nature of the activity. *Keish v. Russell* (February 17, 1995), 4th Dist. No. 94CA1618, 1995 Ohio App. Lexis 737. This court has held that failure to be physically present on the property throughout the calendar year does not defeat the continuous use element. *King v. Hazen*, 11th Dist. No. 2005-A-0031, 2006-Ohio-4823, ¶62.

{¶24} The McDowells presented more than adequate testimony as to the manner in which the disputed driveway had been used over the statutory period. The disputed driveway was used as just that, a driveway, for ingress to and egress from 221 Liberty. The nature of the McDowells' usage did not change in 1998, merely the frequency, and thus continuity existed.

{¶25} Having considered the evidence presented to the trial court regarding the continuity element, this court is satisfied that some competent and credible evidence of the disputed driveway's continuous use by the residents and agents of 221 Liberty has been adduced. Therefore, this court will not disturb the judgment of the trial court. The first assignment of error is without merit.

{¶26} **Adversity**

{¶27} In her second assignment of error, Ms. Zachowicz argues that despite the McDowells' prima facie showing of adversity, the trial court erred in its finding that no

evidence rebutting adversity was presented. Ms. Zachowicz does not appear to be challenging the evidence adduced by the McDowells at trial regarding adversity, but instead challenges the court's disregard of evidence she purports to have presented rebutting such a claim. Adversity, just like continuity, is a required element of prescriptive easement.

{¶28} An individual uses land adversely when he does so without permission from the true owner and in a manner inconsistent with the true owner's rights. *Cadwallader v. Scovanner*, 178 Ohio App.3d 26, 2008-Ohio-4166, ¶57, citing *Kimball v. Anderson* (1932), 125 Ohio St. 241. Use of a right-of-way over another's property to access one's own land constitutes adverse use. *Pavey v. Vance* (1897), 56 Ohio St. 162, paragraph one of syllabus. If the use of another's property is by permission or accommodation of the owner, however, then adversity does not exist. *Hindall v. Martinez* (1990), 69 Ohio App.3d 580, 584; *McGinnis*, supra. While the party asserting adversity bears the burden of establishing a prima facie case of adverse use, a true owner bears the burden of rebuttal by preponderance of the evidence. *Gulas v. Tirone,* 184 Ohio App.3d 143, 2009-Ohio-5076, ¶23, citing *Goldberger v. Bexley Properties* (1983), 5 Ohio St.3d 82, 84; *Pavey*, supra; *Martin v. Sheehy* (1986), 33 Ohio App.3d 332, 334.

{¶29} In the instant case, the McDowells presented sufficient evidence to establish a prima facie case for adversity. "A party claiming a prescriptive easement satisfies its burden by demonstrating a use which is inconsistent with the title owner's rights and not subordinate or subservient thereto." *Gerstenslager v. Lloyd* (Feb. 15, 1995), 9th Dist. No. 16814, 1995 Ohio App. LEXIS 704, *5. Mr. McDowell, Ms.

Richards, and Mr. Drennan all testified that residents, guests, and agents of 221 Liberty used the disputed driveway as the primary mode of ingress to and egress from the property. A prima facie showing of adversity is thus established. The burden then switched to Ms. Zachowicz to present persuasive rebuttal evidence regarding adversity.

{¶30} The evidence presented to the trial court did not persuasively rebut the McDowells' establishment of adversity. In her brief, Ms. Zachowicz argues that the testimony of both Mr. Drennan and David McDowell indicated that the McDowells' use of the disputed driveway was by way of permission or neighborly accommodation. In reviewing the record for such evidence, this court is unable to find any persuasive testimony regarding permissive use. In fact, the testimony of Mr. Drennan and Mr. McDowell was inapposite to Ms. Zachowicz's contention.

{¶31} At the preliminary injuction hearing, Mr. Drennan simply stated that "there was no problem with any anybody using either of driveways." He had never had a conversation about the shared driveway and assumed it had been that way forever. At trial, Mr. McDowell testified that neither he nor anyone else owning or occupying 221 Liberty had asked for or obtained permission from the owners of 227 Liberty to use the disputed driveway. Although Mr. McDowell stated that he did not believe he was using the disputed driveway against the wishes of the owners of 227 Liberty, no evidence was adduced at trial to demonstrate outright permission. Therefore, Ms. Zachowicz did not meet her burden of proof on the issue of permissive use and the McDowells' prima facie case of adversity stands. This court is satisfied with the trial court's review of the evidence and will not disturb the judgment as to adversity. The second assignment of error is without merit.

{¶32} **Cross Appeal**

{¶33} The McDowells raised one assignment of error in their cross appeal: "Did the trial court err in refusing to permit McDowell to produce any evidence at trial on the issue of punitive damages based on its determination that McDowell failed to comply with Local Rule 26 of the Ashtabula County Common Pleas Court, and its findings at trial that insufficient evidence existed to justify an award of punitive damages?"

{¶34} Just prior to the start of oral arguments, the McDowells moved to dismiss their cross appeal and the motion was so granted. Therefore, we will not consider the McDowells' assignment of error on its merits.

{¶35} The judgment of the Ashtabula County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.