Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2020-021

JUNE TERM, 2020

Albert Benson & Rebecca Benson v. Joshua J. Lowe*	}	APPEALED FROM:
	}	
	}	Superior Court, Franklin Unit, Civil Division
	}	
	}	DOCKET NO. 377-9-18 Frcv
		Trial Judge: Robert A. Mello

In the above-entitled cause, the Clerk will enter:

Defendant appeals pro se from the trial court's determination that plaintiffs acquired a prescriptive easement for recreational use and access across his property. He argues that the court relied on clearly erroneous findings and misapplied the law. We affirm.

Plaintiffs sued defendant to quiet title to a 608-square-foot, triangular-shaped segment of land with 32 feet of frontage on Lake Champlain in St. Albans Bay. Defendant has record title to the disputed land. Plaintiffs argued that they had adversely possessed this land or, alternatively, that they obtained prescriptive easement rights to it.

Following an evidentiary hearing, the court made the following findings. Plaintiffs own a residence and guest home on a parcel of land in St. Albans. They acquired their property in 2005 from Gary and Linda Larow by warranty deed. Before plaintiffs bought the property, they leased it from the Larows beginning in July 1998. In their warranty deed, plaintiffs' land was described as the same land and premises decreed to certain individuals by a decree of distribution. That decree provided that "[t]he southern boundary of the land borders on St. Albans Bay to low water mark . . . and has lake frontage of ninety (90) feet more or less." (Ellipses in original.)

The Larows used the property as a seasonal residence during the summer months from 1981 until they leased it to plaintiffs in 1989. Each summer, the Larows and their family and guests used the lake for recreational purposes, such as boat access and beach activities. They accessed the lake along a gravel path that ran down the middle of their own property, through two large deciduous trees, to the beach. Each summer, Mr. Larow docked his boat at a temporary dock and boat hoist, which he placed in the water each summer at a spot within what is now the disputed triangular segment of land. Mr. Larow's father, who owned the land before him, did the same. Mr. Larow always believed that he owned eighty to eighty-five feet of beach in front of his property, including the thirty-two feet at issue here.

Defendant lives next door to plaintiffs. His predecessors-in-interest, the Barnes family, maintained a dock on the beach about fifteen feet away from Larows' dock. During the time that the Larows owned the property, the Barnes family did not object to Larows' use of the disputed thirty-two feet of beach area and the Larows did not request or obtain the Barnes's permission to use it.

Plaintiffs docked their boat in the same location as the Larows had. From 1998 onward, they accessed the lake for recreational purposes, at first seasonally and then year-round. They treated the disputed area as their own and put up a "no trespassing" sign to keep out strangers. Between July 1998 and 2016, no one objected to their use of the disputed area. Plaintiffs did not request or receive permission to use the disputed area.

Janice Stapleton was defendant's immediate predecessor-in-interest. She owned the property between February 2004 and February 2017 when she sold it to defendant. She was not called to testify at trial. While defendant submitted an affidavit purportedly signed by Ms. Stapleton after the close of evidence, the court did not consider it because it was not submitted at the evidentiary hearing. Plaintiff Albert Benson testified that Ms. Stapleton kept her canoe on the disputed segment of the beach. He later bought the canoe from her and continued to store it on the beach.

The disputed area is in defendant's backyard where his patio and stairs leading down to the beach are located. In January 2018, defendant purposely blocked the path between the two trees that plaintiffs had been using to access the beach. He did not have plaintiffs' permission to place a chain across the trees, which are located mostly on plaintiffs' property. Plaintiffs own about forty-nine feet of beach just north of the disputed area. Since defendant blocked them from accessing the disputed beach area, they have had to go around the two large deciduous trees and over rocks and walls to access their forty-nine feet of beach.

Based on these findings, the court rejected plaintiffs' adverse possession claim but found in their favor on their prescriptive easement claim. It explained that "[t]o establish a prescriptive easement, [a] plaintiff's use of the land must have been open, notorious, continuous for fifteen years, and hostile or under claim of right." Schonbek v. Chase, 2010 VT 91, ¶ 8, 189 Vt. 79 (quotation omitted). Adverse possession "has the additional requirement that the claimant must maintain exclusive possession of the claimed property during the statutory period." Id. (quotation omitted). With respect to prescriptive easements, the "use need not be, and frequently is not, exclusive." Id. (quotation omitted).

The court found that plaintiffs' use of the property was sufficiently open and notorious and continuous for fifteen years. From July 31, 1998, until January 2018, plaintiffs accessed the lake for recreational purposes. They used the beach, cleared it of debris each spring, installed the temporary dock, drove their boat down the path through the two trees to the dock, and left it there all summer. The dock was in the middle of the thirty-two-foot disputed beach area. In the winter, they drove an ice-fishing shanty to the lake using the same route. They treated the disputed beach area as their own, including putting up "no trespassing" signs to exclude strangers. The court found this evidence sufficient to show that plaintiffs used the property under a claim of right. It considered the use hostile because it was "not based on a consensual privilege given by the owner and recognizing his right to forbid such use, but rather based on a claim of a right to use the way

as a limitation on the ownership of the holder of the underlying fee and without regard to permission." Patch v. Baird, 140 Vt. 60, 64 (1981). The court also noted that plaintiffs' chain-of-title included a decree of distribution that described their property as containing approximately ninety feet of lake frontage. It thus concluded that plaintiffs' actions were taken "under a claim of title, where the claimant has a colorable, but defective, deed, or under a claim of right." First Cong. Church of Enosburg v. Manley, 2008 VT 9, ¶ 13, 183 Vt. 574 (mem.). The court did not find plaintiffs' use of the disputed area to be exclusive, however, which defeated their adverse possession claim.

In reaching its conclusion, the court rejected as not credible defendant's assertion that plaintiffs had been given permission to use the disputed area. It thus stated that the case was governed by "[t]he general rule . . . that open and notorious use will be presumed to be adverse and under a claim of right, unless there is found an exception which rebuts that presumption." Buttolph v. Erikkson, 160 Vt. 618, 618 (1993) (mem.). It reasoned that while Ms. Stapleton and her predecessors-in-interest might have acquiesced in the Larows' and plaintiffs' open and notorious use of the disputed area for fifteen years, acquiescence was not the equivalent of permission. See Laird Props. New Eng. Land Syndicate v. Mad River Corp., 131 Vt. 268, 277 (1973) (holding that "ultimate element in the rise of a title through adverse possession is the acquiescence of the real owner in the exercise of an obvious, adverse, or hostile ownership through the statutory period"). Defendant filed a motion for reconsideration, which the court denied. This appeal followed.*

Defendant first argues that we should adopt a "clear and convincing" standard of proof for prescriptive easement claims. Defendant is correct that we have not yet addressed this question. See Schonbek, 2010 VT 91, ¶ 7 n.2 (finding it unnecessary to reach "defendants' argument that plaintiff must meet a clear-and-convincing evidence standard to establish a prescriptive easement" because "plaintiff failed to meet even a preponderance-of-the-evidence standard"). Defendant fails to show, however, that he raised this argument below. The argument is therefore waived. See Bull v. Pinkham Eng'g Assocs., 170 Vt. 450, 459 (2000) ("Contentions not raised or fairly presented to the trial court are not preserved for appeal.").

Defendant next challenges the court's findings that plaintiffs' use of his land was open, notorious, and hostile. He argues that plaintiffs used the land sporadically and they did not show that they engaged in any recreational activities in the disputed area. He also asserts that plaintiffs' use of the property was not sufficiently open and notorious to put a person of ordinary prudence on notice of a prescriptive easement claim. Defendant contends that plaintiff Albert Benson admitted that he did nothing to exclude others. Defendant also argues that plaintiffs recognized his title to the sixty-five feet of beachfront by referencing the Barnes's deed in their amended complaint.

We review the court's factual findings for clear error and its legal conclusion de novo. See Lysak v. Grull, 174 Vt. 523, 526 (2002) (mem.) (stating this with respect to adverse-possession claim). In reviewing the findings, we consider the evidence "in the light most favorable to the

* Plaintiffs did not file a cross-appeal and, thus, we do not address their assertion that the court should have found that they acquired title by adverse possession.

party prevailing below, disregarding any modifying evidence." Id. (quotation omitted). The findings will stand if they are "supported by any credible evidence." Id.

The court's findings are supported by the evidence here, and they support the court's conclusion regarding the prescriptive easement. As previously stated, "[t]o establish a prescriptive easement, [a] plaintiff's use of the land must have been open, notorious, continuous for fifteen years, and hostile or under claim of right." Schonbek, 2010 VT 91, ¶ 8 (quotation omitted). The "nature and scope of the use of property during the prescriptive time period establishes the general outlines of the easement." Id. ¶ 9 (quotation and alteration omitted). It is true that, "in general, sporadic use cannot fairly be characterized as definite or substantial so as to constitute an open and continuous use and [such use] therefore does not meet the requirements of establishing a prescriptive easement." Id. ¶ 11 (quotation and alterations omitted). The court did not find the use sporadic here, however. It found that the Larows used the lake for recreational purposes, including boat access and beach activities, each summer from 1981 to July 1989, and plaintiffs continued that use thereafter, expanding it to year-round use. These findings are supported by the record. This use is fairly characterized as continuous use. Cf. id. (holding that where trial court explicitly recognized that use in question "may have been sporadic and not in great numbers," such uses "failed to establish a prescriptive easement" (quotation marks omitted)).

The court's determination that the use was open is also supported by the record. Plaintiffs and their predecessors-in-interest drove down the path between the trees to launch their boats and put in their docks. They swam and had campfires on the beach; Mrs. Benson testified that she sat on the beach. This behavior plainly put defendant's predecessors-in-interest on notice. See Deyrup v. Schmitt, 132 Vt. 423, 424 (1974) ("The tenant must unfurl his flag on the land, and keep it flying so that the owner may see, if he will, that an enemy has invaded his dominions and planted his standard of conquest."). These uses are readily distinguishable from the intermittent activities at issue in Deyrup that were deemed insufficient to put the landowner on notice. See id. at 425-27 (upholding trial court's finding that plaintiff had no notice of defendants' brief activities on her land where the dates, extent, and duration of the uses were unspecified, and this supported conclusion that defendants did not acquire title by adverse possession).

We reject defendant's argument that the evidence does not support the conclusion that plaintiffs and their predecessors placed their dock and conducted their recreational activities on the disputed stretch of beach to which defendant holds fee title. Defendant bases this argument on testimony from plaintiff's predecessor-in-interest that he never put his dock on the property of defendant's predecessor-in-interest. Defendant contends that this and other evidence show that plaintiff and plaintiff's predecessors placed the dock and engaged in recreational uses on their own deeded lakefront property, not on defendant's property. Defendant's argument fails to take into account that, as the trial court found, plaintiffs believed they owned the property in question, and they treated it as their own. They testified to this effect, as did their predecessors-in-interest. Plaintiffs' inclusion of the Barnes's deed in their amended complaint does not undermine this testimony. Contrary to defendant's assertion, Mr. Benson did assert a claim of right to property within the disputed beachfront deeded to defendant. Mr. Benson testified that he placed a "no trespassing" sign on the base of one of the two trees for this express purpose. He also testified that he told defendant's friends to leave the disputed area. The court's finding that plaintiffs treated the disputed beach area as their own is supported by the record.

Finally, while this appeal was pending, defendant filed a motion seeking sanctions against plaintiffs. He asserts that plaintiffs altered a quotation from Gary Larow's testimony by replacing the words "our property" with "[disputed] property." The language he refers to appears on page eleven of plaintiffs' brief, and it was offered in support of an argument about adverse possession that we do not address on appeal. The sentence reads: "[Plaintiffs'] Motion in Opposition and Incorporated Motion to Amend Judgment pointed out that the court had based its denial of adverse possession on the basis of Gary Larrow's testimony that Helen Barnes had maintained a dock 'ten or fifteen feet past where [the disputed] property line was.' " Plaintiffs cited to the page of the transcript where this testimony appears, and we find it clear from the use of brackets that they replaced a word. We deny defendant's request for sanctions.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Beth Robinson, Associate Justice

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William D. Cohen, Associate Justice