

**IN THE DISTRICT COURT OF CHERRY COUNTY, NEBRASKA**

**LEE M. SIMMONS,**  
Plaintiff,

Case No. CI99-9

vs.

**DECREE**

**MARY KRZYZANOWSKI HAYFORD and  
CLARENCE HAYFORD, wife and  
husband, and JOHN DOE and MARY DOE,  
unknown persons,**  
Defendants.

**DATE OF TRIAL:** September 20, 1999.

**DATE OF DECISION:** September 24, 1999.

**APPEARANCES:**

For plaintiff: James D. Sherretts with plaintiff.

For defendants:

Hayford: Michael V. Smith with defendants.

Unknown: no appearance.

**SUBJECT OF ORDER:** Decision on the merits following trial to the court in equity.

**FINDINGS:** The court finds and concludes that:

1. Plaintiff seeks an injunction to prohibit defendants Hayford from crossing plaintiff's land. Defendants Hayford assert a prescriptive easement for a road across the subject property. At the beginning of trial, the unknown defendants were dismissed, no service having been obtained. Further reference to the "defendants" means the Hayfords.

2. The decree entered by this court in *Hardin Farms, Inc. v. Manley*, Case No. 10149, does not control. The decree was entered by default. The Hayfords were not named as parties defendant or served with process in that case. The purchase agreement signed by the Hayfords would have, at the time of the commencement of the prior case and at the time of entry of default decree, effected an equitable conversion, such that the Manleys then held equitable title to the real estate. However, Mary Hayford clearly retained legal title. As such, she was a necessary party to any litigation affecting the status of a prescriptive easement appurtenant to defendant's real estate. Adjudication of the existence of the easement was unnecessary to resolution of the dispute against the Manleys. Moreover, because of the omission of

a necessary party, the court lacked subject matter jurisdiction in the prior case to adjudicate the existence or nonexistence of a prescriptive easement. Thus, the question becomes whether a prescriptive easement exists across the plaintiff's property, and if so, the nature and extent thereof.

3. The law treats a claim of prescriptive right with disfavor. Such a claim requires that the elements of such adverse user be clearly, convincingly, and satisfactorily established. *Simacek v. York County Rural P.P. Dist.*, 220 Neb. 484, 370 N.W.2d 709 (1985).

4. The principles of law applicable to this case have been frequently stated and are well-known.

a. In order to obtain rights in the real property of another by prescriptive easement, i.e. a private prescriptive easement, a claimant must show that his use was exclusive, adverse, under a claim of right, continuous and uninterrupted, and open and notorious for the full 10-year prescriptive period. *Werner v. Schardt*, 222 Neb. 186, 382 N.W.2d 357 (1986).

b. A use is adverse and under a claim of right if the claimant proves uninterrupted and open use for the necessary period. Once the claimant has established this presumption, it will prevail unless the owner of the land proves by a preponderance of the evidence that the use was by license, agreement, or permission. *Id.*

c. Exclusive, in reference to a prescriptive easement, does not mean that there must be use only by one person but, rather, means that the use cannot be dependent upon a similar right in others. *Id.*

d. The nature and extent or scope of the easement claimed by prescription must be clearly established. *Id.*

e. In establishing a prescriptive easement, a use is continuous and uninterrupted if it is established the easement was used whenever there was any necessity to do so and with such frequency that the owner of the servient estate would have been apprised of the right being claimed. *Breiner v. Holt Cty.*, 7 Neb. App. 132, \_\_\_ N.W.2d \_\_\_ (1998).

f. If a use begins as a permissive one it retains that character until notice that the use is claimed as a matter of right is communicated to the owner of the servient estate. *Simacek v. York County Rural P.P. Dist.*, *supra*.

g. When the claimed use is over unenclosed lands, the presumption is that the use is permissive. *Gerberding v. Schnakenberg*, 216 Neb. 200, 343 N.W.2d 62 (1984). When the claimed right-of-way entails use over a way opened by the landowner for his own purposes, the presumption is that the use is permissive. *Id.*

h. Where adjoining proprietors lay out an alley between their lands, each devoting a part of his land to that way or alley, which is used for the prescriptive period by the respective owners or their successors in title, neither can obstruct or close that part which is on his own land; and in these circumstances the mutual use of the whole of the alleyway is to be considered to be adverse to a separate and exclusive use by either. *Masid v. First State Bank*, 213 Neb. 431, 329 N.W.2d 560 (1983).

i. Abandonment of a prescriptive easement must be pled and proved, the burden of proof being on the party alleging it. *Grint v. Hart*, 216 Neb. 406, 343 N.W.2d 921 (1984).

j. A claimed easement must be viewed from both ends of the prescriptive period. The nature and extent or scope of the user must from the beginning be clearly established. At the end of the period it must appear in retrospect that there has been no material change or variance from the limits or course adopted or established at the beginning. A lesser user prevents a right to an easement and a greater user is of no importance until the full prescriptive period has elapsed from the initiation of the greater use. *Stricker v. Knaub*, 215 Neb. 372, 338 N.W.2d 757 (1983).

k. The law requires that the easement must be clearly definable and precisely measured. *Id.* A bill to establish a right of way and to enjoin encroachments upon it cannot be sustained where it does not furnish the means for declaring exactly what the right is and the precise locality which it occupies with the shape and dimensions thereof. *Wemmer v. Young*, 167 Neb. 495, 93 N.W.2d 837 (1958).

5. Similarly, the law regarding a public prescriptive easement has long been established. Nebraska law recognizes that a highway may be established by prescription when used adversely by the public continuously for a period of 10 years or more. *Sellentin v. Terkildsen*, 216 Neb. 284, 343 N.W.2d 895 (1984); *Lancaster County ex rel. Rosewell v. Graham*, 120 Neb. 785, 235 N.W. 338 (1931); *Leu v. Littell*, 2 Neb. App. 323, 513 N.W.2d 24 (1993). In order to establish the requisite public prescriptive easement, the public must show that the use and enjoyment of the land was exclusive,

adverse, continuous, uninterrupted, open and notorious, and under a claim of right for the full 10-year prescriptive period. *Sellentini, supra*. Furthermore, there must be a use by the general public under a claim of right adverse to the owner of the land of some particular defined line of travel, and the use must be uninterrupted and without substantial change for 10 years or more. *Id.*

6. The evidence persuades the court, by clear, convincing, and satisfactory evidence, that a private prescriptive easement was established by use of the road for the statutory period completed no later than the mid-1970s. However, the use appears to have been solely for the benefit of the Krzyzanowski family and persons using the road for access to the Krzyzanowski land with the permission of the Krzyzanowski family. The evidence fails to persuade the court of the existence of a public prescriptive easement.

7. While Mary Hayford admitted that she believed that consent to use the road existed, the evidence shows that neither she nor her predecessor in title, nor any other member of the Krzyzanowski family requested permission from anyone to use the land. Her opinion regarding the consent that Simmons' predecessors in title might have manifested if asked is irrelevant to the issue of whether a prescriptive right ripened upon the open and notorious use for the continuous time of the statutory period without anyone asking for or giving permission.

8. Mary Hayford holds a private prescriptive easement across the Simmons property appurtenant to the property owned by Hayford for access thereto.

9. Although there may have been some variation in the frequency of the use of the road made by the defendants since they have been keeping horses confined on the defendants' property, the essential character of the scope of the easement has not changed. The defendants hold a prescriptive easement for a trail road and all of the use to date is consistent with a trail road. It is not the function of this court to give an advisory opinion regarding changes in the scope or use of the easement in the future.

10. The plaintiff's petition should be denied. The defendants' counterclaim should be granted to the extent that it claims a private prescriptive easement, but should be dismissed to the extent that it claims a public prescriptive easement.

11. The plaintiff's petition was not frivolous. The defendants' request for attorney fees upon a claim that the petition was frivolous should be denied. There is no other statute or uniform course of

procedure authorizing attorney fees in this case and any other request for attorney fees, express or implied, should be denied.

**ORDER:** IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that:

1. The plaintiff's petition is dismissed with prejudice.
2. The defendants' counterclaim is granted to the extent that the court determines that the defendant Mary Hayford holds a private prescriptive easement across the plaintiff's property in the manner and to the extent set forth below.
3. Except to the extent granted as set forth herein, the defendants' counterclaim is dismissed with prejudice.
4. The court determines that a private prescriptive easement exists over and across part of the West Half of the West Half ( $W\frac{1}{2}W\frac{1}{2}$ ) of Section 7, Township 34, North, Range 25, West of the 6th P.M. in Cherry County, Nebraska, for a roadway which is 18 feet in width and centered upon the midpoint between the two wheel tracks constituting the traveled surface of the trail road, which road is located:
  - a. beginning, on the north and west end of such trail road, at the intersection of such roadway with the county road, at the gate in the west fence of said  $W\frac{1}{2}W\frac{1}{2}$  of Section 7 near the center of the west line thereof; and,
  - b. which thereafter proceeds in an irregular fashion generally southeasterly to a point where such road adjoins the east boundary fence of said  $W\frac{1}{2}W\frac{1}{2}$  of Section 7; and,
  - c. which thereafter proceeds generally southerly along the west side of said east boundary fence of the  $W\frac{1}{2}W\frac{1}{2}$  of Section 7; and,
  - d. which ends, on the south and east end of the trail road, at the intersection of such trail road with the gate between the plaintiffs' property and the property belonging to defendant Mary Hayford's sister on the south line of the said  $W\frac{1}{2}W\frac{1}{2}$  of said Section 7.
5. That such easement, insofar as it pertains to the parties in this case, is appurtenant to the use and enjoyment of the defendant Mary Hayford's real estate described as:

The Eastern one-half ( $E\frac{1}{2}$ ) of the North 200 acres of the Northwest Quarter ( $NW\frac{1}{4}$ ) and the West Half of the Northeast Quarter ( $W\frac{1}{2}NE\frac{1}{4}$ ) of Section 18, Township 34 North, Range 25, West of the 6<sup>th</sup> P.M. in Cherry County, Nebraska.

6. That the defendants' use of the trail road is limited to the nature and character of the use now established, that being for access to the defendant Mary Hayford's property for agricultural and domestic use. The nature of the use established by prescription is recognized to constitute an unimproved "trail" road, evidenced primarily by two wheel-tracks upon the surface of the sandy soil.

7. That the defendants' use of the trail road is subject to the condition of use established by the prescriptive use, that being to keep the gates enclosing the plaintiff's property closed when reasonably necessary to prevent the escape of livestock.

8. The plaintiff and his agents and employees, and all persons claiming under them, or acting under the direction or authority of them, are perpetually enjoined and restrained from interfering with the right of the defendants and their agent, employees, and guests, to use and enjoy the right-of-way provided by the easement recognized and determined by this decree.

9. The general public does not acquire any right to use such trail road pursuant to this decree.

10. Each party shall bear their own respective costs. Any and all requests for attorney fees, express or implied, are denied.

Entered: September 24, 1999.

If checked, the Court Clerk shall:

: Mail a copy of this order to all counsel of record and to any pro se parties.

Done on \_\_\_\_\_, 19\_\_\_\_ by \_\_\_\_\_.

: Note the decision on the trial docket as: 9/24/99 Signed "Decree" entered.

Done on \_\_\_\_\_, 19\_\_\_\_ by \_\_\_\_\_.

Mailed to:

BY THE COURT:

\_\_\_\_\_  
William B. Cassel, District Judge