

IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA

**GARRY D. WILSON, SALLY L. WILSON,
and LORRAINE BORER,**

Plaintiffs,

vs.

**LARRY W. SMITH, MICHELE H.
MUELLER, and CHRIS E. HOFFMAN,**

Defendants.

Case No. CI00-117

DECREE

DATE OF TRIAL: February 6, 2002.

DATE OF RENDITION: February 7, 2002.

DATE OF ENTRY: Date of filing by court clerk (§ 25-1301(3)).

APPEARANCES:

For plaintiffs: John P. Heitz with all plaintiffs.

For defendants: W. Bert Lampli with defendant Hoffman and without other defendants.

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

PROCEEDINGS: See journal entry entered on February 7, 2002.

FINDINGS: The court finds and concludes that:

1. The plaintiffs seek a decree determining the existence of a prescriptive easement for a trail road along the west boundary of the defendants' real estate.

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

3. The principles of law generally applicable to prescriptive easement claims 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. Concerning a prescriptive easement, a use is continuous and uninterrupted where 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 Public Power Dist.*, *supra*.

g. Where 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). Where 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.*

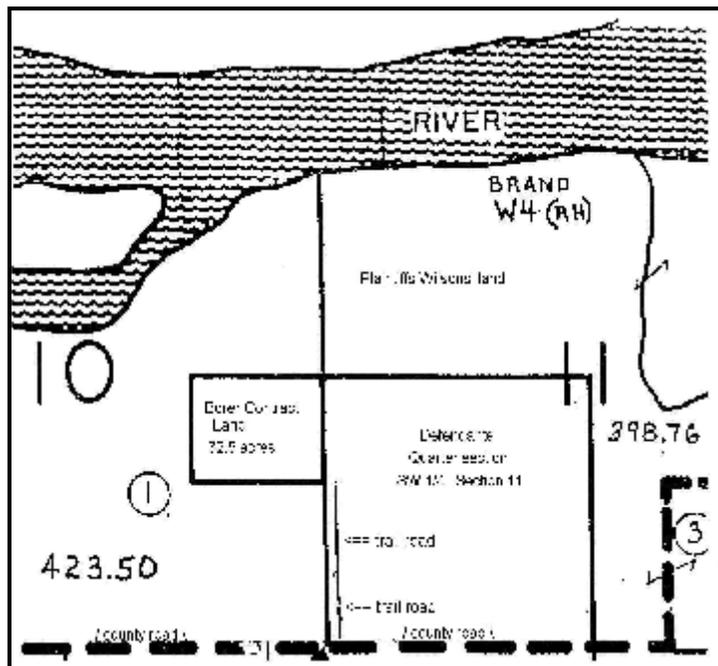
h. Where adjoining proprietors lay out an alley between their lands, each devoting a part of his land to that way or alley, which is used for the prescriptive period by the respective owners or their successors in title, neither can obstruct or close that part which is on his own land; and in those circumstances 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 921 (1983).

i. 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 use prevents a right to an easement and a greater use if 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).

j. 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).

4. The diagram shows the general relationship of the properties involved. The controversy surrounds a trail road from the southwest corner of the defendants' property to a 32½ acre tract adjoining the defendants' land on the north portion of their west boundary.

5. The plaintiffs Wilson (the Wilsons) originally owned the Southwest Quarter (SW¼) of Section 11, as well as the surrounding property in Section 11 and the adjoining 32½ acre tract in Section 10. In 1985, the Wilsons conveyed the SW¼ of Section 11 to the O'Neill Production Credit Association. The Wilsons retained the property to the north and east and the 32½ acre tract to the west. In November of 1988, defendant Smith purchased the SW¼ from the Farm Credit Bank of Omaha, as successor to the O'Neill PCA. In December of that year, Smith assigned



a one-third interest each to the other defendants. A deed from the Farm Credit Bank of Omaha to Smith was recorded in January of 1994.

6. The plaintiff Garry D. Wilson (Garry) testified that ownership was conveyed to the PCA, he continued to use the trail road in much the same way that he had previously. The use consisted mainly of occasional access to the 32½ acre tract to cut wood or for general recreational purposes. The evidence demonstrates to this court that there was little occasion to use the trail.

7. The defendant Chris E. Hoffman testified that after the defendants acquired the property, he and Garry had a conversation in which Hoffman gave permission to the Wilsons to continue to use the trail. While Garry does not admit the conversation, he initially did not expressly deny the conversation, stated that he did not recall any permission, and admitted on cross examination that he may have been given permission to use the trail road even though he did not recall the conversation. After Hoffman testified regarding the specific location of the conversation, Garry testified on rebuttal that he did not recall the conversation and did not believe that he had ever been in that location.

8. All of the evidence shows that there was no problem until the Wilsons desired to sell the 32½ acre tract. The Wilsons entered into a contract to sell the 32½ acre tract to the plaintiff Borer. That contract stated: “This contract of sale is contingent upon Sellers securing an easement for the benefit (sic) of the subject premises allowing ingress and egress to said premises over and across a road way approximately 30 feet wide and extending South (sic) from the South East Corner (sic) of the subject property and to the East West (sic) county road.” Exhibit 8.

9. The plaintiff Borer testified that she telephoned and talked to Hoffman prior to the purchase. She asked if the defendants would grant an easement across the trail road to the 32½ acre tract. Hoffman asked what use Borer intended to make of the 32½ acre tract. Borer told Hoffman that she would move a house onto the property and intended to make the house her principal residence. Hoffman refused to consent to the requested easement. Borer admitted that, after the conversation with Hoffman, Borer visited with the Wilsons. But she did not recall when that conversation occurred and testified that she did not know if it was before or after she signed the purchase contract.

10. The Wilson-Borer contract is dated August 16, 1999. Exhibit 8. Although the month and year of Borer’s acknowledgment before a notary public are legible, the precise date is not legible. She did

testify that she met with the Wilsons at their home before signing the agreement. She testified that the Wilsons told her that the county board of supervisors had told the Wilsons that the trail road was on a section line and that the defendants could not keep Borer out of the 32½ acre tract.

11. The Wilsons apparently consulted an O'Neill attorney (not trial counsel). That lawyer wrote a letter to Hoffman on behalf of the Wilsons attempting to obtain an easement for the trail road. The letter was dated November 16, 1998. Exhibit 25. That letter made no reference to any claim of a prescriptive easement. No easement was obtained.

12. About 18 months later, the plaintiffs' present lawyer wrote to the defendants. Exhibit 26. This letter asserted a claim of a prescriptive easement but nevertheless offered to either purchase ownership of a 1,350' by 20' tract corresponding to the trail road location or to purchase a permanent easement across the same tract. The letter also stated that failing either of those responses, the plaintiffs would begin a court proceeding to obtain the easement. This action followed.

13. In *Walsh v. Walsh*, 156 Neb. 867, 58 N.W.2d 337 (1953), the Nebraska Supreme Court announced several principles directly applicable to this case. The court stated that, where a grantor of real estate remains in possession of a part or all of the property after the conveyance, the possession of the grantor is presumed to be permissive and subject to the rights of the grantee. The court also stated that the permissive use of a road, however long continued, cannot ripen into a prescriptive right. The court next stated that a prescriptive right to property being used by permission cannot arise until 10 years after it has been brought home to the owner in some plain and unequivocal manner that the person in possession is claiming adversely to him. The court concluded that in the case of continued use by a grantor, the possession cannot be adverse until notice of the adverse claim is brought home to the other party. *Id.*

14. That is precisely the situation in this case. The Wilsons conveyed the land to PCA, and its successor conveyed to the defendants. Any continued use of the road by the Wilsons was presumed to be permissive. This court finds a total absence of any facts demonstrating any action prior to 1999 of such character as to bring home to the defendants in some plain and unequivocal manner that the plaintiffs claimed adversely. To the extent that any such action ever occurred, it only occurred from and after the time of the sale of the 32½ acre tract. Obviously, nowhere near ten years has expired since that time. The plaintiffs have failed to show adverse use remotely approaching the type of use necessary to shift the burden

of proof to the defendants. On closing argument, plaintiffs' counsel urged that Garry's continued activities constituted the required adverse use. To the contrary, *Walsh* holds that mere continuation of former activities by a grantor are presumed permissive. The plaintiffs never rebutted that presumption of permission. Indeed, the greater weight of the evidence runs against the plaintiffs and in favor of permissive use by the defendants.

15. Moreover, the solicitation of written easements is rather inconsistent with a claim of ownership, and constitutes some evidence of an admission to the contrary. That conduct raises an inference that the plaintiffs knew and understood that they had no legal right or entitlement to use of the road contrary to the owners' permission. While the final letter from the plaintiffs' current attorney carefully preserves the claim of prescriptive right, the plaintiffs' earlier conduct bespeaks knowledge of the absence of any vested legal right. It is by no means conclusive, but adds to the crushing weight of evidence against the plaintiffs' claim.

16. Although the factual situation differs somewhat from this case, this court reminds the parties of the words of wisdom recited in *Connot v. Bowden*, 189 Neb. 97, 100-102, 200 N.W.2d 126, ____ (1972), where the Supreme Court stated:

The situation appears to be similar to that described in *Burk v. Diers*, 102 Neb. 721, 169 N.W. 263, wherein it is stated: "The road in controversy, if it was a road, which is disputed, was a neighborhood road. Oftentimes farmers or owners of city lots, out of mere generosity and neighborly feeling, permit a way over their land to be used, when the entire community knows that the use is permissive only, without thought of dedication or adverse user. This use ought not to deprive the owner of his property, however long continued. Such rule would be a prohibition of all neighborhood accommodations in the way of travel. . . .

"The use necessary to estop the owner from claiming his land must be such that interruption would affect private rights or public convenience. Where the public has exercised no control or dominion over the road, nor used it to such an extent as to inform the owner, exercising reasonable care for his rights, that the public is using it under claim of right, then neither implied dedication nor adverse user is shown. There is no evidence in this case that the general public has depended upon the existence of this road and will be seriously inconvenienced by the loss of it; nor have private persons made improvements in the belief that this is a road. In fact, the road is a cul-de-sac."

In the vast holdings of grazing lands in western Nebraska, many well-defined trails may be found which are accessible to all through gates provided. Entry by nonowners of the land for various purposes cannot ordinarily be deemed to be adverse. It is not under

a claim of right but generally recognized as permissive in nature. In the present case, no “claim of right” was ever asserted until the incidents occurred which gave rise to this action. As stated in *Stubblefield v. Osborn*, 149 Neb. 566, 31 N.W.2d 547: “In the instant case the evidence by the plaintiffs shows the original entry and use to have been permissive. The plaintiffs did not inform Bolton that they claimed a right-of-way and perpetual easement across his land. They crossed the land on occasions to go hunting, as did others. There was no claim of right or exclusive use. The most that can be said as to their crossing the lands in question is that it was permissive only, a neighborly act on the part of the owners or tenants on the land. There was no claim of ownership on the part of plaintiffs of such a nature that they openly and forcibly asserted directly against the actual owners of the land in such a manner that the owners would be required to take affirmative action against the plaintiffs.” It is well settled that a permissive use cannot ripen into a prescriptive right until 10 years after notice of the adverse claim is brought home to the landowner. See *Walsh v. Walsh*, 156 Neb. 867, 58 N.W.2d 337. “A permissive use of the land of another, that is a use or license exercised in subordination to the other's claim and ownership, is not adverse and cannot give an easement by prescription no matter how long it may be continued. . . .”

17. Whatever the Wilsons may have related to Borer about the discussions with the county board, Borer admitted that she talked to Hoffman by phone prior to the purchase and that upon learning of Borer's intentions regarding the 32½ acre tract, Hoffman declined to consent to or approve of any easement for travel on the trail road. Borer made improvements to that tract despite defendants' clear statements denying the existence of any right-of-way. Her actions cannot be attributed to any reasonable belief of the legal existence of a road.

18. The evidence fails to sustain the plaintiffs' petition, and the petition must be dismissed with prejudice at the plaintiffs' cost.

19. Although defendants purport to request affirmative relief in their answer, they did not set forth any counterclaim. Further, their answer failed to allege facts sufficient to state a cause of action to quiet title or for injunctive relief from repeated trespass. A counterclaim must allege facts sufficient to support an independent cause of action in favor of the defendants and against the plaintiffs and must be more than a mere defense to the plaintiffs' cause of action. *State ex rel. Douglas v. Ledwith*, 204 Neb. 6, 281 N.W.2d 729 (1979). The defendants have failed to set forth any proper claim for affirmative relief.

20. The file shows that all costs were incurred by the plaintiffs. Therefore, it is not necessary to grant any monetary judgment against the plaintiffs.

21. This is intended as a final judgment adjudicating all of the claims and the rights and liabilities of all parties. NEB. REV. STAT. § 25-1315(1) (Cum. Supp. 2000).

DECREE: IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that:

1. The plaintiffs' second amended petition is dismissed with prejudice and all costs are taxed to the plaintiffs.

2. Any requests for attorneys' fees, express or implied, are denied.

3. Any claim of any party to this action not otherwise expressly determined above is denied.

This is a final judgment adjudicating all of the claims of all parties.

Signed at **O'Neill**, Nebraska, on **February 7, 2002**;
DEEMED ENTERED upon file stamp date by court clerk.
If checked, the court clerk shall:

BY THE COURT:

- Mail a copy of this order to all counsel of record and any pro se parties.
Done on _____, 20____ by _____.
- Note the decision on the trial docket as: [date of filing] **Signed "Decree" entered.**
Done on _____, 20____ by _____.
- Mail postcard/notice required by § 25-1301.01 within 3 days: **"Decree entered; petition dismissed with prejudice at plaintiffs' cost."**
Done on _____, 20____ by _____.

William B. Cassel, District Judge

Mailed to: