Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-191

DECEMBER TERM, 2002

Ronald D. Forant, Sr. and Carmel Allaire v. Jules and Kate Chatot, et al.	}	APPEALED FROM: Washington Superior Court DOCKET NO. 47-1-00 Wncv Trial Judge: Alan W. Cheever

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

The Washington Superior Court issued an order granting plaintiffs two easements by prescription over defendants' property in Cabot, Vermont. Defendants challenge the order arguing that the court erroneously failed to limit the easements' scope by including residential uses in the list of permissible uses over the easements, thereby increasing the burden on defendants' servient estate. Defendants also claim the court erred by concluding that plaintiffs' predecessor did not abandon the secondary easement, referred to as the " alternate route." Finally, defendants appeal the trial court' s decision to admit deposition testimony of a former owner of plaintiffs' property. We find no error and affirm.

In January 2000, Pauline Bolton initiated the present action against defendants claiming that she had a right of way over defendants' property to access an adjoining parcel she owned. That parcel is known as the Roy Lot. The right of way is located on an old road called the Bayley Hazen Road. The Bayley Hazen Road intersects with West Shore Road in West Danville, cuts through defendants' property, and continues through the Roy Lot, eventually meeting up with West Shore Road again. After plaintiffs purchased the Roy Lot in 1991, they were substituted as plaintiffs in this action. Plaintiffs also claim an easement over the alternate route, which Pauline Bolton' s husband, William, had constructed in the 1950s to allow trucks to avoid a steep ledge area on the Bayley Hazen Road.

William Bolton owned a farm and residence in Cabot where he, Pauline, and his family resided. Since at least 1941, and continuing through the early 1990s, the family used the Bayley Hazen Road to access the Roy Lot. They used the Roy Lot for pasturing livestock and to extract firewood. Various family members also used the Bayley Hazen Road to pick berries and apples, to hunt, and to gather flat stones from nearby stone walls. The Bolton family' s use of the road varied from daily to a few times per week. Although the findings indicate that the family used the road primarily in the Spring, Summer, and Fall, they also used it in the winter for logging and to cut Christmas trees. They navigated the road by foot, and in cars, trucks, and tractors. The alternate route was used regularly by motorized vehicles from the 1960s through 1983 or 1984 when William Bolton placed a boulder on the route to prevent motor vehicles from traveling that way. In 1989, William Bolton made improvements to the Bayley Hazen Road to allow trucks to move more easily over the length of the right of way up to the Roy Lot. The family believed it had a right of way over defendants' property and never asked defendants' predecessors in title for permission to use the road or the alternate route.

After hearing evidence on plaintiffs' complaint, the trial court concluded that they had proved the existence of a prescriptive easement for personal residential, logging, and farming purposes over the portion of Bayley Hazen Road

that cuts through defendants' property, as well as the alternate route. Defendants concede in their brief that the Bolton family' s use of the road and alternate route gave rise to some prescriptive rights. They complain, however, that the trial court' s order does not sufficiently limit the easements' scope, resulting in an overburdening of their property. They suggest that the trial court should have excluded residential uses from the uses permitted over the easements.

An easement is created by prescription where the evidence shows open, notorious, hostile and continuous use of the property for a period of fifteen years. Buttolph v. Erikkson, 160 Vt. 618, 618 (1993) (mem.). The extent of the easement holder' s rights over the right of way is determined by the uses through which the prescriptive easement was created. Cmty. Feed Store, Inc. v. Northeastern Culvert Corp., 151 Vt. 152, 157 (1989). In this case, the trial court properly defined the easement to include the uses that the Bolton family made of the rights of way. Defendants' claim that residential uses should be excluded because they cause an excessive burden on defendants' servient estate is without any support in the court' s findings or the evidence. Defendants failed to produce any evidence that plaintiffs have used, or imminently intend to use, the easements inconsistent with their original purpose. They also failed to show that plaintiffs have used the easements with a frequency that exceeds that which gave rise to plaintiffs' prescriptive rights. In the absence of such a showing, we find no reason to reverse and remand the order for the trial court to impose further limits on the scope of the rights of way. See Jost v. Resta, 536 A.2d 1113, 1115 n.3 (Me. 1988) (refusing to limit prescriptive easement to " one single-family, seasonal dwelling" where defendants did not present any evidence showing that plaintiff was overburdening easement, or was proposing to do so imminently).

Defendants also claim the court erred, by concluding that plaintiffs may use the Bayley Hazen Road and the alternate route for hunting, berry and apple picking, and for walking, because members of the general public also used the easements for those purposes. According to defendants' theory, the Boltons' use of the easements was presumptively permissive, defeating plaintiffs' claim of rights by prescription, because the public also used the rights of way. We do not agree. " The general rule is 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, such as evidence of permission of the owner of the land to use the right-of-way." Buttolph, 160 Vt. at 618. Moreover, that members of the general public use the right of way does not negate the hostility of use, although it may raise a presumption that the use is permissive. Patch v. Baird, 140 Vt. 60, 65 (1981); see also Restatement (Third) of Property: Servitudes § 2.17, cmt. a (2000) (unlike adverse possession, exclusivity of use is not required to establish a prescriptive easement). " [T]he effect of any such presumption is dissipated with the introduction of any evidence that the use is claimed against the rights of an owner in fee." Patch, 140 Vt. at 65. In this case, the court found that the Bolton family used the rights of way believing that they had the legal right to do so to the exclusion of others, and therefore they never sought permission from anyone to use the road. The record evidence supports that finding, which is sufficient to negate any presumption that their use was permissive.

Defendants next claim that plaintiffs do not enjoy any easement for the purpose of commercial logging. This argument also lacks merit. The trial court' s order does not distinguish between commercial and noncommercial logging because the evidence would not support such a distinction. The record shows that the Bolton family consistently used the easements for logging purposes, sometimes retaining all the wood for themselves and other times selling it. They performed the logging operations themselves, but also hired others to do the work for them. Just as defendants failed to produce evidence that plaintiffs are using the easements for purposes different from the Bolton family' s purposes, defendants made no showing below that plaintiffs have used, or will use, the easements for logging beyond the logging that had been performed since the early 1940s. Again, we find no reason to reverse the court' s order based on hypothetical circumstances.

The next claim of error relates to the size of the easements. Defendants contend that the court' s order is too vague with regard to the width of the easements. We believe the court' s order satisfies the applicable standard set out in our Community Feed Store decision. It is enough that the person claiming the easement present sufficient evidence to prove the general outlines of the easement with reasonable certainty. 151 Vt. at 158. The court' s order defines the easements as wide enough for trucks, cars, and logging vehicles to pass safely over the rights of way. We find nothing overly vague with that description, which is consistent with the easements' historical use.

Citing no supporting authority, defendants also argue that the court erred by concluding that William Bolton did not intend to abandon the easement he had over the alternate route when he placed boulders on the route to prevent

motorized vehicles from traveling over it. The burden on defendants to prove abandonment is a heavy one. Lague, Inc. v. Royea, 152 Vt. 499, 503 (1989). Conclusive and unequivocal acts by the owner of the dominant estate which either manifest a purpose inconsistent with continuance of the easement, or which manifest a clear intent to relinquish the easement, will extinguish the easement. Id. The court found that the boulders did not impede non-vehicular traffic over the alternate route, and that there was no unequivocal intent by either Pauline Bolton or her husband to abandon their easement over the alternate route. Defendants make no showing that those findings were clearly erroneous. Cmty. Feed Store, 151 Vt. at 154-55 (findings will be upheld on appeal if credible evidence supports them even if contrary evidence exists). We therefore find no reversible error in the court' s rejection of defendants' abandonment argument.

Lastly, defendants challenge the court' s decision to admit the deposition testimony of Pauline Bolton. Plaintiffs offered the deposition into evidence because Pauline Bolton was not available to testify at trial due to her advanced age and poor health. Defendants contend the court should have excluded the deposition because they claim Pauline Bolton' s daughter procured her mother' s absence at trial, and the Boltons' interests were so closely aligned with plaintiffs' interests that the court should have found plaintiffs responsible for the witness' s absence from trial. See V.R.C.P. 32(a)(3) (a deponent is not unavailable as a witness if the proponent of the deposition wrongfully prevents the witness from attending trial or testifying). Two reasons convince us that defendants' claim here is unavailing. First, the trial court found that at the time of trial, Pauline Bolton was eighty-one years old, in poor health, and nine hours away by car from the court. Attending trial would have put her health at risk. The credible evidence in the record supports the court' s findings, and they must stand. Cmty. Feed Store, 151 Vt. at 154-55. Second, defendants never made the argument they make here before the trial court. At trial, they simply argued that they did not know that the deposition might be used at trial, and that there was no showing that the witness was suffering from any medical condition preventing her from attending trial. Because they failed to make the same argument below that they make here, they have waived the argument on appeal. Harrington v. Dep' t of Employment & Training, 152 Vt. 446, 448 (1989).

Affirmed.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice