MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT

Zachary J. Stock
Zachary J. Stock, Attorney at Law, P.C.
Carmel, Indiana

ATTORNEYS FOR APPELLEE

James R. Williams
Matthew L. Kelsey
Defur Voran LLP
Muncie, Indiana

IN THE COURT OF APPEALS OF INDIANA

Darren K. Day and Gabrielle A. Day,

Appellants-Defendants,

v.

Deborah Whitaker, Diane Cormican, William R. Hoskins, Garnet Gail Kuntz, Denise Kruthaupt, and Elizabeth Hoskins,

Appellees-Plaintiffs.

April 18, 2022

Court of Appeals Case No. 21A-MI-1975

Appeal from the Franklin Circuit Court

The Honorable Clay M. Kellerman, Judge

Trial Court Cause No. 24C02-2011-MI-631

Mathias, Judge.

[1] Darren K. Day and Gabrielle A. Day appeal the trial court's judgment finding that Deborah Whitaker, Diane Cormican, William R. Hoskins, Garnet Gail Kuntz, Denise Kruthaupt, (collectively, "the Hoskins children") and Elizabeth Hoskins (collectively, "the Hoskinses") have an easement by prescription on the Days' property. The Days present a single issue for our review, namely, whether the trial court's judgment is clearly erroneous.

[2] We reverse.

Facts and Procedural History

[3] In 1959, Garnett and Elizabeth Hoskins acquired fifty acres of real property located just off of McGuire Ridge Road in Franklin County ("Hoskins property"). In 1976, Donald and Gabrielle Day acquired several acres of real property, including ten acres directly south of the Hoskins property ("Day property"). The Day property includes a driveway that has been used by both the Hoskinses and the Days to access their homes on their respective properties. The Hoskinses have also consistently used part of the driveway to access a barn south of the Hoskins residence. The driveway lies mostly on the Day property. Garnett and Donald had an "agreement" regarding their mutual use of the driveway. Tr. p. 40.

[4] After Garnett died, in 2008, Elizabeth transferred ownership of the Hoskins property to the Hoskins children, but she kept a life estate. And after Donald died, also in 2008, Gabrielle transferred ownership of the Day property to Darren. Since 2008, Darren has continued to use the driveway to access the

Day residence, and the Hoskinses have continued to use the driveway to access the Hoskins residence and barn with "no problems at all until recently." *Id.* at 15.

[5] On November 13, 2020, the Hoskinses filed a complaint against Darren seeking a prescriptive easement over the driveway on the Day property "for ingress and egress" to the Hoskins property. Appellants' App. Vol. 2 at 10. On March 31, 2021, they amended their complaint to add Gabrielle as a defendant. Following a bench trial, the trial court entered judgment for the Hoskinses. The court found that the Days had not rebutted the presumption that the Hoskinses' open and continuous use of the driveway for more than twenty years was adverse. This appeal ensued.

Discussion and Decision

[6] The Days contend that the trial court clearly erred when it entered judgment for the Hoskinses on their complaint for a prescriptive easement. As our Supreme Court has explained:

> Our approach to prescriptive easements recognizes that they generally "are not favored in the law." *Carnahan v. Moriah Prop. Owners Ass'n., Inc.*, 716 N.E.2d 437, 441 (Ind. 1999). For that reason "the party claiming [a prescriptive easement] must meet 'stringent requirements.'" *Id.* (quoting *Fleck v. Hann*, 658 N.E.2d 125, 128 (Ind. Ct. App. 1995)). A party claiming the existence of a prescriptive easement must provide evidence showing "an actual, hostile, open, notorious, continuous, uninterrupted adverse use for twenty years under a claim of right." *Id.* Furthermore, "[e]ach . . . element[ ] . . . must be established as a necessary, independent, ultimate fact, the burden of showing

> which is on the party asserting the prescriptive title, and the failure to find any one such element [is] fatal . . . , for such failure to find is construed as a finding against it." *Id.* at 441–42 (quoting *Monarch Real Estate Co. v. Frye*, 77 Ind. App. 119, 124–25, 133 N.E. 156, 158 (1921)).
>
> In . . . *Fraley v. Minger*, 829 N.E.2d 476 (Ind. 2005), we reviewed the history of the doctrine of adverse possession in Indiana and reformulated the elements necessary for a person without title to obtain ownership to a parcel of land. We held that the claimant in such circumstances must establish clear and convincing proof of (1) control, (2) intent, (3) notice, and (4) duration.[] *Id.* at 486. This reformulation applies as well for establishing prescriptive easements, save for those differences required by the differences between fee interests and easements.

Wilfong v. Cessna Corp., 838 N.E.2d 403, 405–06 (Ind. 2005). The Court explained further, in relevant part, that the "intent" element requires that the claimant "demonstrate intent to claim full ownership of the tract superior to the rights of all others, particularly the legal owner (reflecting the former elements of 'claim of right,' 'exclusive,' 'hostile,' and 'adverse')[.]" *Id.* at 406 n.1.

[7] This Court has held that "[t]he *unexplained use* of an easement for 20 years is presumed to be under a claim of right, adverse, and sufficient to establish title by prescription unless that use is contradicted or explained." *Fleck*, 658 N.E.2d at 128 (emphasis added). In other words, "a rebuttable presumption that use is adverse arises under those circumstances, and in order to rebut that presumption the owner must explain such use by demonstrating that he merely permitted the claimant to use his land." *Id.* Here, we may affirm the trial court's judgment that the Hoskinses have a right to use the driveway by means of a

prescriptive easement "if the evidence established that there had been continuous, *adverse* use of the drive[way] by the [Hoskinses] and their predecessors-in-title with the knowledge of the [Days] and their predecessors-in-title for a period of at least twenty years." *Capps v. Abbott*, 897 N.E.2d 984, 988 (Ind. Ct. App. 2008) (emphasis added).

[8] The parties agree that each of the elements required to support a prescriptive easement is satisfied except for the intent element. In their brief on appeal, the Days contend that the trial court erred when it found that the evidence supported the rebuttable presumption that the Hoskinses' use of the driveway for more than twenty years was adverse to the Days. The Days maintain that the Hoskinses' use of the driveway was not "unexplained" but by "agreement" between Garnett and Donald, the parties' predecessors-in-interest. And the Days point out that "'[a] use which is merely permissive or which is exercised under a mere license cannot ripen into an easement.'" Appellants' Br. pp. 7–8 (quoting *Fleck*, 658 N.E.2d at 128).

[9] "Adverse use has been defined as a 'use of the property as the owner himself would exercise, disregarding the claims of others entirely, *asking permission from no one*, and using the property under a claim of right.'" *Carnahan v. Moriah Prop. Owners Ass'n, Inc.*, 716 N.E.2d 437, 442 (Ind. 1999) (quoting *Nowlin v. Whipple*, 120 Ind. 596, 598, 22 N.E. 669, 670 (1889)). Here, the undisputed evidence shows that the Hoskinses have used the driveway since 1959 pursuant to an "agreement" between Garnett and Donald. Tr. p. 40. There is no evidence that that agreement ceased when the Hoskins property and the Day property

transferred to the current owners. To the contrary, the Hoskinses have continued to use the driveway with "no problems at all until recently." *Id.* at 15. Thus, the evidence does not show that the Hoskinses' use of the driveway was "unexplained," as is required to support the presumption of adversity. *See Carnahan*, 716 N.E.2d at 442.

[10] Still, the Hoskinses contend that the evidence supports the trial court's finding that their use of the driveway has been unexplained and without permission. In support, they allege that,

> [a]t the time the Days purchased the property [the driveway] had already been used for twenty-one (21) years to access [the Hoskins' property] through the gate. Perhaps even longer than twenty-one (21) years. In any event, a prescriptive easement existed prior to the Days even having an interest in the driveway. There is no evidence in the record or any allegation that the use was permissive prior to the Days taking title in 1976. Thus, this appellate court need not even consider [the Days'] allegation that there was a subsequent "agreement" and the use was "permissive" due to a subsequent "handshake."

Appellees' Br. pp. 10–11 (citations omitted). This evidence, they maintain, supports the presumption that their use of the driveway was adverse. We cannot agree.

[11] The Hoskinses' argument turns on the assumption that the Days had the burden to prove that "the use was permissive prior to the Days taking title in 1976" in order to defeat the presumption. *See id.* To the contrary, it was the Hoskinses' burden to prove that the use by the Days' predecessors-in-interest was

"unexplained" for at least twenty years in order to invoke the presumption. *See* *Carnahan*, 716 N.E.2d at 441; *Fleck*, 658 N.E.2d at 128. Again, the undisputed evidence shows that the Hoskinses have used the driveway due to an "agreement" between Garnett and Donald since 1976, and the Hoskinses do not direct us to any evidence in the record showing that their use of the driveway prior to 1976 was "unexplained." Thus, the Hoskinses' contention on this issue is without merit.

[12] In sum, the Hoskinses did not present evidence at trial that their continuous use of the driveway, or the use by their predecessors-in-interest, was unexplained for at least twenty years. The undisputed evidence shows that the Hoskinses' use of the driveway since 1976 was by "agreement" between Garnett and Donald, which agreement did not cease to operate until "recently." Tr. p. 15, 40. And the Hoskinses did not present evidence of any other twenty-year period of "unexplained" continuous use by them or their predecessors-in interest. Accordingly, the trial court erred when it found that the presumption of adverse use applied here. Without evidence to support the prescriptive easement for the Hoskinses, we reverse the trial court's judgment.[1]

[13] Reversed.

---

[1] The Hoskinses assert, in the alternative, that they are entitled to an easement by necessity. However, they did not seek an easement by necessity in their complaint, and they raise this issue for the first time on appeal. It is well settled that a party waives issues presented for the first time on appeal. *See* *Stainbrook v. Low*, 842 N.E.2d 386, 396 (Ind. Ct. App. 2006), *trans. denied*. Accordingly, we do not address this issue.

Bailey, J., and Altice, J., concur.