IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID J. VONDRAK; NANCY KNIGHTEN; DAN PETERSON AND BARBARA PETERSON,
Appellants,
vs.
COUNTY OF ESMERALDA, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA THROUGH ITS BOARD OF COUNTY COMMISSIONERS,
Respondent.

No. 38144

FILED

FEB 06 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a final judgment granting declaratory relief for a prescriptive easement in favor of the County of Esmeralda ("Esmeralda"). On appeal, David J. Vondrak and Nancy Knighten ("Vondraks") and Dan and Barbara Peterson ("Petersons") make several arguments.

First, they allege Esmeralda failed to raise the issue of a prescriptive easement during the litigation. We agree.

Our review of the record indicates Esmeralda denied in its answer the allegations in the Vondraks' complaint that Esmeralda may claim a prescriptive easement. In addition, Esmeralda did not allege it was entitled to a prescriptive easement in its counterclaim for declaratory relief. The relief prayed for by Esmeralda was to have the road declared an R.S. 2477 road. This issue was disposed of in a summary judgment motion brought by the Vondraks.

Second, the Vondraks and Petersons allege that even if Esmeralda had pleaded a prescriptive easement existed, there was

insufficient evidence to support a conclusion that Esmeralda possessed a prescriptive easement. We agree.

"The party claiming an easement by prescription must establish the easement by clear and convincing evidence."[1] The court will not disturb a district court's finding of fact unless clearly erroneous.[2] There must be substantial evidence to support the conclusion of the district court.[3] Substantial evidence is defined as "'that which "a reasonable mind might accept as adequate to support a conclusion."'"[4]

Prescriptive easements require "adverse, continuous, open and peaceable use for a five-year period."[5] Use over a long period of time without the landowner's knowledge is not necessarily adverse.[6] Use by

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[1]Michelsen v. Harvey, 107 Nev. 859, 864, 822 P.2d 660, 663 (1991) (citing Wilfon v. Hampel 1985 Trust, 105 Nev. 607, 608, 781 P.2d 769, 770 (1989)).

[2]Jordan v. Bailey, 113 Nev. 1038, 1044, 944 P.2d 828, 832 (1997) (citing Hermann Trust v. Varco-Pruden Buildings, 106 Nev. 564, 566, 796 P.2d 590, 591-92 (1990)).

[3]Id. (citing Nelson v. Peckham Plaza Partnerships, 110 Nev. 23, 25, 866 P.2d 1138, 1139 (1994)).

[4]McClanahan v. Raley's, Inc., 117 Nev. ___, ___, 34 P.3d 573, 576 (2001) (quoting State, Emp. Security v. Hilton Hotels, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986) (quoting Richardson v. Perales, 402 U.S. 389, 401 (1971))).

[5]Jordan, 113 Nev. at 1044, 944 P.2d at 832 (citing Stix v. La Rue, 78 Nev. 9, 11, 368 P.2d 167, 168 (1962)).

[6]Turrillas v. Quilici, 72 Nev. 289, 291, 303 P.2d 1002, 1003 (1956) (citing Howard v. Wright, 38 Nev. 25, 29, 143 P. 1184, 1187 (1914)).

express or implied permission is a license and does not create a prescriptive easement.[7]

Esmeralda failed to introduce clear and convincing evidence of adverse, continuous use for a five-year period. The property was primarily used permissively for recreational purposes. Thus, insufficient evidence supported the prescriptive easement claim.

Because we conclude the district court erred in finding a prescriptive easement, we do not address the remaining arguments raised on appeal.

Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court to enter judgment in favor of the Vondraks and Petersons.

_____, J.
Rose

_____, J.
Maupin

_____, J.
Gibbons

cc: Hon. John P. Davis, District Judge
Peter I. Alpert
Harrison Kemp & Jones, Chtd.
Esmeralda County District Attorney
Esmeralda County Clerk

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[7]Lorang v. Hunt, 693 P.2d 448, 450 (Idaho 1984).