



Note: In the case title, an asterisk () indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

ENTRY ORDER

JANUARY TERM, 2025

Gretchen S. Conkey & Jacquelyn D.	}	APPEALED FROM:
Schmidt, Co-Trustees v. Richard Ess* &	}	
Robert Ess* et al.	}	
	}	Superior Court, Addison Unit, Civil Division
	}	CASE NO. 86-5-20 Ancv
	}	Trial Judge: Mary Miles Teachout

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

Defendants Richard and Robert Ess appeal from the trial court’s determination that plaintiffs obtained a prescriptive right of access over a private road known as Wolf Road. We affirm.

Following a bench trial, the court made the following findings and conclusions. Plaintiffs are co-trustees of a trust that owns lakefront property on Lake Champlain in the Town of Addison, Vermont. Their property consists of an approximately one-acre lot with a cottage and garage (Schmidt camp). The trust also owns several adjacent undeveloped parcels to the east of the Schmidt camp. Legal access to the Schmidt camp is provided by a 20-foot-wide right-of-way on a gravel road called Lakeside Lane. Notwithstanding this access route, Schmidt family members have used a portion of Wolf Road, located to the north of the trust property, for many years. Plaintiffs sought a declaration that they had obtained an easement by prescription on a portion of Wolf Road to access their property.

Defendants, including the Esses, have or were alleged to have legal interests in Wolf Road. The Esses own property adjacent to and north of the Schmidt camp. Their parents owned the property before them. The Esses hold a right of access to their property via Wolf Road and a portion of Wolf Road crosses their property. Other property owners in the area who hold access rights over portions of Wolf Road were joined as additional defendants.

The portion of Wolf Road at issue here (“section A”) runs in a straight line from Lake Street westerly toward Lake Champlain via a 40-foot-wide right-of-way to the Ess property. Wolf Road then makes a ninety degree turn to the north on the Ess property. Another section of Wolf Road (“section B”) runs northerly along the backside of shorefront properties. A third section (“section C”) was added later; it leaves the initial part of the road a few hundred feet from Lake Street and runs in a northwesterly direction, providing access to properties to the north.

Plaintiffs' claim applies only to section A, which the court found also contained three segments. Plaintiffs claimed a prescriptive easement across all three segments of section A for access to the Schmidt camp. During the period of claimed adverse use, defendants Ess blocked a portion of the road.

The court made findings concerning the historical use of Wolf Road. One of the co-trustees, Jacquelyn Schmidt, was in her eighties and had grown up going to the Schmidt camp. Her parents bought the camp in 1963 and she began spending summers there the following year. Her parents accessed the property via Lakeside Lane and did not use Wolf Road. Ms. Schmidt went to the camp continuously after her parents purchased it. From the mid-1960s through the mid-1980s, an active community of families spent time every summer at the lakefront cottages in the neighborhood. The children of these families moved freely around the area, regularly using both Wolf Road and Lakeside Lane, which at that time were unnamed, one-lane, dirt camp roads. Summer residents openly used Wolf Road without specific permission. The road was not used by the public at-large, aside from an occasional ice fisherman. The summer residents shared a common community spirit, engaged in many activities together, and traveled freely from one property to another.

Ms. Schmidt knew that her family did not have a deeded right to use Wolf Road for access to their camp. While she used that road occasionally, she did not use it routinely for access. Ms. Schmidt was a friend of the Esses' parents, and she understood that the portion of Wolf Road just north of the Schmidt camp was owned by the Ess family and that her family had no right of access over it. Nonetheless, Ms. Schmidt's husband periodically filled in potholes on Wolf Road. During the 1970s and 1980s, Ms. Schmidt and her family regularly visited the camp during the summer and fall. Ms. Schmidt and her brother eventually acquired equal interests in the camp, which they conveyed to the trust in the mid-1990s.

In 1995, the State of Vermont organized a 911 system of addresses to enable first responders to locate properties for emergency services. Ms. Schmidt was notified that her camp's address was 223 Wolf Road, and she received a sticker with the address on it. Before that time, neither Wolf Road nor Lakeside Lane had official names. Because of the address assignment, Ms. Schmidt believed that she became entitled to use Wolf Road for access and she and her family began using it regularly to access their camp.

Between 1997, when Ms. Schmidt's husband retired, and 2017, the Schmidts stayed at the camp full-time for several months each summer. They put up a mailbox on Lake Street at the end of Wolf Road and received mail there. A pole on Lake Street at the turn to Wolf Road had small shingle-type signs containing the names of Wolf Road residents, including the Schmidts. The Schmidts used Wolf Road to access their camp. Ms. Schmidt's husband regularly maintained the pertinent portion of Wolf Road, including adding and spreading gravel on it, trimming fallen trees and branches, and mowing along it. The Schmidts had propane delivered to the camp via Wolf Road and engaged a trash service that used Wolf Road to get to the camp. After 1995, Amazon and UPS routinely used Wolf Road for deliveries to the camp, as did friends, contractors and those providing services to the camp. A co-trustee testified that Google Maps leads people to the Schmidt camp via Wolf Road. At some point after 2004, a very visible homemade sign was posted listing the residents of the relevant portion of Wolf Road, including the Schmidts and the Esses.

Mr. Schmidt died in 2019 and the Schmidts' daughter succeeded him as co-trustee. In April 2019, Kevin Ess erected a barrier across the spur of Wolf Road on the Esses' southern

boundary adjacent to the Schmidt property, thereby blocking traffic from passing to the Schmidt camp from Wolf Road. The physical barrier remained at the time of the court's decision. In May 2019, the "Schmidt" sign on the pole at the end of Wolf Road on Lake Street was gone. Plaintiffs filed this suit in 2020.

Based on these and other findings, the court considered plaintiffs' prescriptive-easement claim. To establish their claim, plaintiffs needed to show "an adverse use or possession which is open, notorious, hostile and continuous for a period of fifteen years, and acquiescence in the use or possession by the person against whom the claim is asserted." Cmty. Feed Store, Inc. v. Ne. Culvert Corp., 151 Vt. 152, 155 (1989).

The court rejected plaintiffs' assertion that these elements were satisfied beginning in 1965 and continuing uninterrupted until the barrier was erected in 2019. It found no hostile use of Wolf Road between 1965 and 1995. During that period, Ms. Schmidt did not use Wolf Road for access to and from the camp. She, her parents, and her family used Lakeside Lane, which was their legal access route. They knew they didn't have legal access over Wolf Road and did not use it for that purpose. While summer residents used Wolf Road freely, this was essentially for social and recreational purposes among neighbors. The Schmidts did not assert entitlement to use it for ingress and egress to their camp during this time.

The court found that this changed in 1995, the year that the property was acquired by the trust and, more significantly, the year that local authorities assigned the 223 Wolf Road address to the Schmidt camp and physically delivered a sticker with that address. The court recognized that the agency in charge of the 911 program could not create and assign a legally enforceable easement interest to the trust. It concluded, however, that the event prompted Ms. Schmidt and her husband, then co-trustees of the trust, to openly use and assert a claim to use Wolf Road for access to their property. From that point on, the Schmidts put up a mailbox to have mail delivered to them full-time each summer at the Wolf Road address; they used the relevant portion of Wolf Road regularly to access their property; they maintained gravel on the relevant portion of the road; they put up a sign at the intersection of Lake Street and Wolf Road indicating to visitors and service people that the way to get to their camp was via Wolf Road; they put up another sign along Wolf Road showing that they lived straight ahead, in the same way the Esses and another family showed that they lived on Wolf Road; and they maintained the road by filling potholes, adding gravel, trimming brush, and mowing. The court found no evidence that the Schmidts sought or obtained permission to do these things. It found their use constant and frequent every summer.

The court concluded that the Schmidts' use was open, notorious, hostile, and continuous beginning as early as 1995, but at least from 1997 through 2019. They had "unfurl[ed] [their] flag" and "ke[pt] it flying," Barrell v. Renehan, 114 Vt. 23, 29 (1944), the hallmark of adverse use for purposes of asserting a prescriptive-easement claim. The court thus concluded that plaintiffs obtained a prescriptive easement for ingress and egress to the Schmidt camp over the relevant portion of Wolf Road as of 2012. The court discussed the scope of the easement, which is not an issue in this appeal. It ordered the Esses to remove the barricade on their common property line and any other obstructions on the relevant portion of Wolf Road that prevented plaintiffs' access to the property via Wolf Road. This appeal followed.

The Esses argue that the court improperly relied on plaintiffs' subjective beliefs in reaching its conclusion, specifically, their belief about the consequences of the State's

assignment of a 911 address. They also challenge the court’s finding that plaintiffs’ use of Wolf Road was hostile, presenting their view of the evidence.

There was no error. The court’s decision did not turn on plaintiffs’ subjective beliefs. Instead, the court considered the actions that plaintiffs took following the assignment of a 911 address. Those actions are detailed above. The court’s findings regarding these actions are supported by the record and they support the court’s conclusion that the Schmidts engaged in open, notorious, and hostile use of Wolf Road between at least 1997 and 2019. See First Congregational Church of Enosburg v. Manley, 2008 VT 9, ¶ 17, 183 Vt. 574 (mem.) (explaining that on appeal, evidence is viewed in favor of prevailing party, and findings will stand unless clearly erroneous, and upholding trial court’s decision where findings supported court’s conclusion). While the Esses argue that the use was not hostile, the court found otherwise and acted within its discretion in doing so. See Cmty. Feed Store, Inc., 151 Vt. at 159-60 (“The general rule is that open and notorious use will be presumed to be adverse.”). The court did not find that the Esses had granted implied or express permission to the Schmidts to use Wolf Road. Cf. Greenberg v. Hadwen, 145 Vt. 112, 114 (1984) (upholding trial court’s conclusion that use was not hostile where unchallenged findings showed that “defendants had given the plaintiff implied permission to use the disputed area for ingress to and egress from the land in common”). It explained why it determined that the use of Wolf Road had changed from the “social and recreational” use prior to 1995 to one where the Schmidts were openly asserting a claim of right to use the road. Essentially, the Esses challenge the way in which the court weighed the evidence, a matter reserved exclusively for the trial court. Mullin v. Phelps, 162 Vt. 250, 260 (1994). We do not reweigh the evidence on appeal. There is no basis to disturb the trial court’s decision.

Affirmed.

BY THE COURT:

Harold E. Eaton, Jr., Associate Justice

William D. Cohen, Associate Justice

Nancy J. Waples, Associate Justice