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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Court of Appeals of New Mexico
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Mark Reynolds

ROBERT SCHOOLCRAFT,

Plaintiff-Appellee,

v. **No. A-1-CA-42231**

ROSS TOWNSEND,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF EDDY COUNTY
Jane Schuler Gray, District Court Judge

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for Appellee

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for Appellant

MEMORANDUM OPINION

IVES, Judge.

{1} Ross Townsend appeals the district court's judgment granting Robert Schoolcraft a private prescriptive easement over Townsend's property.[1] We

[1]Schoolcraft's claim for a private prescriptive easement was the only claim decided by the district court and is therefore the only claim pertinent to this appeal. This appeal presents no question about public prescriptive easements. Nor does it present any question about easements by necessity because, although Townsend's

conclude that the district court's finding of continuous use, an element of a prescriptive easement, is not supported by substantial evidence, and so it is unnecessary for us to address Townsend's other claims of error. We therefore reverse and remand for entry of judgment in favor of Townsend.

BACKGROUND

{2} This case is before us for the second time. *See Schoolcraft v. Townsend*, A-1-CA-38447, mem. op. (N.M. Ct. App. Sept. 7, 2021) (nonprecedential). We provide a brief overview of the procedural history before turning to the parties' arguments.

{3} Townsend and Schoolcraft own adjacent properties in New Mexico. Schoolcraft purchased his property in 2016 knowing that it was "landlocked" by adjacent properties and lacked legal access. Adjacent landowners, including Townsend, were unwilling to sell Schoolcraft a right-of-way across their properties. Schoolcraft sued Townsend in 2017, seeking to establish a prescriptive easement over a pathway on Townsend's property that would enable Schoolcraft to access his own property from a nearby road.

{4} After a bench trial, the district court found in Townsend's favor and denied Schoolcraft's claim to a prescriptive easement. The district court relied on *Hester v. Sawyers*, in which our Supreme Court recognized a "neighbor accommodation"

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original complaint included a claim for easement by necessity, his amended complaint did not.

exception to the presumption of adversity. 1937-NMSC-056, ¶ 22, 41 N.M. 497, 71 P.2d 646. Under that exception, use of "large bodies of privately owned land" are permissive if they are "open and un[e]nclosed," as "it is a matter of common knowledge that the owners do not object to persons passing over them for their accommodation and convenience." *Id.* The district court determined that this proposition was dispositive based on evidence that unknown persons entered Townsend's land and that his property had never been fenced.

{5} Schoolcraft appealed. We reversed because we concluded that the district court "erroneously applied a bright-line rule" based on *Hester* "that bars users of land from obtaining a prescriptive easement in all cases where the land at issue is unenclosed and the land's owner is aware of the use." *Schoolcraft*, A-1-CA-38447, mem. op. ¶ 1. We remanded the case to the district court for further proceedings consistent with our opinion. *Id.* ¶ 3.

{6} On remand, the district court granted Schoolcraft a prescriptive easement, finding that Townsend was aware of nonpermissive use of the pathway that occurred for more than ten years.

DISCUSSION

{7} "On appeal, we decide whether substantial evidence supports the district court's findings and whether these findings support the conclusions that the elements required to establish a[n] . . . easement by prescription were . . . proved by clear and

convincing evidence." *Algermissen v. Sutin*, 2003-NMSC-001, ¶ 9, 133 N.M. 50, 61 P.3d 176. "Review for substantial evidence is a deferential standard, and even in a case involving issues that must be established by clear and convincing evidence, it is for the finder of fact, and not for reviewing courts, to weigh conflicting evidence and decide where the truth lies." *McFarland Land & Cattle Inc. v. Caprock Solar 1, LLC*, 2023-NMSC-018, ¶ 8, 533 P.3d 1078 (text only) (citation omitted).

{8} Townsend contends that the district court erroneously found that Schoolcraft proved by clear and convincing evidence continuous use for ten years. *See Algermissen*, 2003-NMSC-001, ¶ 10 ("[A]n easement by prescription is created by [(1)] an adverse use of land, that is [(2)] open or notorious, and [(3)] continued without effective interruption for the prescriptive period (of ten years)."). Specifically, Townsend argues that there is not substantial evidence to support the district court's finding of continuous use because Schoolcraft had not owned his property for ten years—the minimum length of time needed to establish continuous use—at the time of trial and Schoolcraft's predecessors-in-interest did not claim a prescriptive easement. Schoolcraft argues that there is substantial evidence to support the district court's finding of continuous use because he presented evidence of use by people other than himself over several years before he acquired the property and because such use may be relied on under the doctrine of tacking.

{9} Schoolcraft relied on this tacking theory at trial. He testified that he had used the pathway at least once, but to meet the ten-year requirement, he sought to "tack on" time periods established by other users of the pathway. At trial, Schoolcraft's witnesses testified to their personal use of the pathway dating back to at least 1982, and witnesses for both parties testified to use of the pathway by unknown people. The district court found "undisputed claims by [Schoolcraft] that there was use of the [pathway] for more than ten years, [and] there was evidence of a [pathway] across the [Townsend] property supported by photographs and testimony of witnesses." Although periods of use may be tacked if certain requirements are met, we conclude—for reasons we will explain—that substantial evidence does not establish all the requirements.

{10} "Periods of prescriptive use may be tacked together to make up the prescriptive period if there is a transfer between the prescriptive users of either the inchoate servitude or the estate benefited by the inchoate servitude." Restatement (Third) of Prop.: Servitudes § 2.17 (2000); *see Algermissen*, 2003-NMSC-001, ¶ 10 (adopting the elements of prescriptive easements set forth in Sections 2.16 and 2.17 of the Restatement (Third) of Property: Servitudes (2000)); *cf. Hester*, 1937-NMSC-056, ¶¶ 28-29 (indicating that tacking is available for establishing a prescriptive easement under the right conditions). Here, ownership of the property to be benefited

by a prescriptive easement was transferred when Schoolcraft purchased his property in 2016.

{11} However, not all use that predates a transfer of ownership may be tacked. "Prescriptive uses need not be made personally by the owner of the claimed prescriptive servitude, but may be made by tenants, customers, guests, and visitors of the claimant" or servicers such as "meter readers, mail carriers, school buses, and delivery services." Restatement (Third) of Prop.: Servitudes § 2.16 cmt. e (2000). Importantly though, "use by strangers and members of the general public does not qualify as prescriptive use to establish servitude rights in an individual." *Id.*; *accord Garmond v. Kinney*, 1978-NMSC-043, ¶ 7, 91 N.M. 646, 579 P.2d 178 ("A finding that the general public used the roadway is inconsistent with the conclusion that [the] plaintiffs established a prescriptive easement."). In sum, use of a claimed easement by someone other than the claimant may help establish continuous use so long as the use is made in connection with the claimant's property, such as the connections exemplified in the Restatement, and thus is not made by a mere "member[] of the general public." *See* Restatement (Third) of Prop.: Servitudes § 2.16 cmt. e.

{12} In this case, the evidence did not establish that the users of the pathway at issue had a sufficient connection to Schoolcraft's property to establish ten years of continuous use. Although Schoolcraft's witnesses testified to their personal use of the pathway, and witnesses for both parties testified to observing usage by unknown

individuals dating back at least to 1982, evidence was presented that these users did not own the Schoolcraft property. Further, no evidence suggests that the users of the pathway were tenants, customers, guests, visitors, or servicers of the Schoolcraft property.[2] *See id.* The evidence therefore suggests that the users of the pathway were strangers to the Schoolcraft property, which is inconsistent with Schoolcraft's claim to a private prescriptive easement because he cannot tack on the periods of time during which the general public used the pathway to establish the element of continuous use. *See id.*; *Garmond*, 1978-NMSC-043, ¶ 7. Even reviewing the evidence in the light most favorable to Schoolcraft, the evidence presented does not support Schoolcraft's claim of continuous use of the pathway for ten years. *See Stanley v. N.M. Game Comm'n*, 2024-NMCA-006, ¶ 13, 539 P.3d 1224 ("We thus review the evidence in the light most favorable to the prevailing party, indulging all reasonable inferences in support of the judgment and disregarding all inferences or evidence to the contrary." (text only) (citation omitted)).

[2]We note that one witness testified that he had personally used the pathway "hundreds and hundreds" of times and had been on the Schoolcraft property to ride a dirt bike or hunt. Yet the witness did not appear to know who owned the property prior to Schoolcraft, and there is no evidence that any owner somehow invited this witness onto the property for these activities in a way that might be expected for a tenant, customer, guest, visitor, or servicer. Thus, the testimony is insufficient to find that this witness had a closer connection to the Schoolcraft property than would a member of the general public. *See id.*

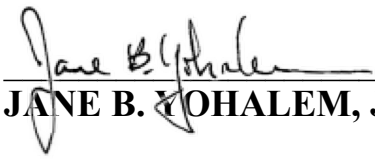
CONCLUSION

{13} We reverse and remand to the district court for entry of judgment in favor of Townsend.

{14} **IT IS SO ORDERED.**

ZACHARY A. IVES, Judge

WE CONCUR:



JANE B. YOHALEM, Judge

GERALD E. BACA, Judge