

IN THE COURT OF COMMON PLEAS  
ADAMS COUNTY, OHIO

PAUL A. CORNUELLE, et al.,

Plaintiffs,

v.

SHAWNEE STATE FOREST,  
STATE OF OHIO, DEPARTMENT  
OF NATURAL RESOURCES, et al.,

Defendants.

Case No. CVH 20060560

Judge Brett M. Spencer

FINAL JUDGMENT ENTRY

FILED  
ADAMS COUNTY  
CLERK OF COURTS  
2008 SEP - 8 AM 8:04  
Brett M. Spencer  
CLERK

This cause commenced on November 28, 2006, with the filing of Plaintiffs' Complaint. Service of summons was made on all Defendants. Answers were filed, through counsel, on behalf of Defendant Shawnee State Forest, State of Ohio, Department of Natural Resources ("State of Ohio") and Defendant John C. Hawn. A response to the Complaint was filed, *pro se*, by Defendant Robert J. Metz for himself and on behalf of Defendant James W. Gable. Defendants David Horsley and Anita Horsley did not file a response to the Complaint.

Subsequently, the Estate of John C. Hawn, deceased, was substituted for Defendant John C. Hawn, through an Amended Complaint based on a Suggestion of Death filed on December 26, 2007. John C. Hawn died on December 20, 2007. Answers to the Amended Complaint were filed, through counsel, by Defendant State of Ohio and Defendant Estate of John C. Hawn, deceased.

A trial on this cause was held on July 9 and 10, 2008. Prior to trial, it was determined that Defendants D. K. Bilyeu and Delores Bilyeu sold their property to Defendants David Horsley

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and Anita Horsley, and were no longer parties in interest to the proceedings. Plaintiffs were represented by Attorney Steven W. Purtell. Defendant State of Ohio was represented by Assistant Attorney General John P. Bartley. Defendant Estate of John C. Hawn, deceased, was represented by Attorney Charles H. Wilson, Jr. Also participating at trial were Defendant James W. Gable and Defendant Robert J. Metz, Jr. who both proceeded *pro se*. Defendant Robert J. Metz, Jr. also appeared, *pro se*, on behalf of his spouse, Defendant Linda C. Metz. Defendants David Horsley and Anita Horsley did not participate at trial as defendants, though David Horsley did appear as a witness for Plaintiffs.

At the conclusion of trial, the Court issued its decision from the bench, based on the evidence admitted, testimony presented and arguments of counsel heard at trial. The Court's decision is now formally entered in this Final Judgment Entry.

#### I. FINDINGS OF FACT

1. Plaintiffs, all members of the Cornuelle family, own 461.981 acres of land in Green Township, Adams County as evidenced by an instrument recorded in OR Book 246, Page 739, Adams County Recorder's Office.
2. Defendant State of Ohio owns 223.342 acres of land in Green Township, Adams County by a deed recorded in OR Book 134, Page 844, Adams County Recorder's Office.
3. Prior to his death on December 20, 2007, Defendant John G. Hawn owned 51.227 acres of land in Green Township, Adams County by a deed recorded in Volume 283, Page 190, Adams County Recorder's Office and 6.091 acres of land in Green Township, Adams County by a deed recorded in Volume 292, Page 574, Adams County Recorder's Office.

4. Defendants James W. Gable, Robert J. Metz, Jr. and Linda C. Metz own 73.941 acres of land in Green Township, Adams County by a deed recorded in Volume 304, Page 214, Adams County Recorder's Office.
5. A road is the subject of this case. The road intersects with Long Lick Road (Green Township Road 181-A), traverses the lands of all of the Defendants and then continues onto Plaintiffs' property.
6. Plaintiffs' predecessors in title used the road, at times, as a way of going to and from their property, beginning at some time in the 1930s.
7. Plaintiffs have used the road, at times, as a way of going to and from their property, both before and after their acquisition of their property.
8. The evidence and testimony presented at trial demonstrate that Plaintiffs' and their predecessors in title's use of the road was not of an adverse and hostile nature for a statutory period of 21 years, as to meet the requirements for an easement by prescription to issue.
9. The evidence and testimony presented at trial demonstrate that Plaintiffs' and their predecessors in title's use of the road was not of an open and notorious nature for a statutory period of 21 years, as to meet the requirements for an easement by prescription to issue.
10. The evidence and testimony presented at trial demonstrate that Plaintiffs' and their predecessors in title's use of the road was not in a manner of occupation and use as to put the landowners on notice of an adverse claim of right, because use of the road was shared by neighbors and others in the vicinity.

## II. CONCLUSIONS OF LAW

1. To prove the existence of a prescriptive easement, a party must establish use of the land in question that is open, notorious, continuous, and adverse to the property owner's rights, and that such open, notorious, continuous and adverse use continued for at least twenty-one years. *Hindall v. Martinez* (1990), 69 Ohio App.3d 580, 583, 591 N.E.2d 308.
2. Obtaining an easement by prescription is a disfavored doctrine in Ohio jurisprudence. *Grace v. Koch* (1998), 81 Ohio St. 3d 577, 580; 692 N.E.2d 1009, 1011-1012.
3. A party claiming an easement by prescription must prove by clear and convincing evidence each requisite element of the doctrine: open, notorious, continuous, and adverse use of land that continued for at least twenty-one years. *Coleman v. Penndel Co.* (1997), 123 Ohio App.3d 125, 131, 703 N.E.2d 821.
4. Failure of proof by clear and convincing evidence as to any of the elements results in failure to acquire an easement by prescription. *Grace v. Koch* (1998), 81 Ohio St. 3d 577, 580, 692 N.E.2d 1009, *Pennsylvania Rd. Co. v. Donovan*, (1924) 111 Ohio St. 341, 349-50, 145 N.E. 479, 482.
5. Evidence of adverse possession must be positive and must be strictly construed against the person claiming a prescriptive right to an easement. *Hinman v. Barnes* (1946), 146 Ohio St. 497, 66 N.E.2d 911, paragraph two of the syllabus.
6. The requirement for open and notorious use is for the protection of those against whom possession is claimed to be adverse, to enable them to protect themselves by preventing its continuance. *Jennewine v. Heinig*, 1995 Ohio App. LEXIS

5816 (Dec. 29, 1995), Greene App. No. 95CA12, unreported.

7. The test for adversity is that the use of land must be done with an intention on the part of the person using the land to claim a right, so manifested by his declaration or acts, that a failure of the actual landowner to prosecute within the time limited, raises a presumption of an extinguishment or a surrender of his claim. *Grace v. Koch* (1998), 81 Ohio St. 3d 577, 692 N.E.2d 1009.
8. The Court concludes, as a matter of law, that Plaintiffs' and Plaintiff's predecessors in title's use of the subject road, in and of itself, for a prescriptive period of time does not give rise to adverse use.
9. The Court concludes, as a matter of law, that Plaintiffs have failed to prove the requisite elements, by clear and convincing evidence, to support the existence of an easement by prescription; that is use which is open, notorious, continuous, and adverse to the property owner's rights, and that such open, notorious, continuous and adverse use continued for at least twenty-one years.

Based on the foregoing findings of fact and conclusions of law, it is hereby ORDERED, ADJUDGED AND DECREED:

1. That Plaintiffs have no easement, right, title or interest, by prescription, in the 223.342 acres of land (*Tax Parcel Id. # 188-00-00-032-002*) that Defendant State of Ohio, Department of Natural Resources acquired by a deed recorded in OR Book 134, Page 844, Adams County Recorder's Office and that said acreage is free from, unencumbered by, unimpaired and unaffected by any such easement, right, title or interest of Plaintiffs;

2. That Plaintiffs have no easement, right, title or interest, by prescription, in the 51.227 acres of land (*Tax Parcel Id. # 179-00-00-033-000*) and in the 6.091 acres of land (*Tax Parcel Id. # 179-00-00-032-001*) that John G. Hawn acquired by a deed recorded in Volume 283, Page 190, Adams County Recorder's Office and by a deed recorded in Volume 292, Page 574, Adams County Recorder's Office, respectively, now held by Defendant Estate of John G. Hawn, deceased, and that said acreage is free from, unencumbered by, unimpaired and unaffected by any such easement, right, title or interest of Plaintiffs;
3. That Plaintiffs have no easement, right, title or interest, by prescription, in the 73.941 acres of land (*Tax Parcel Id. # 188-00-00-032-000*) that Defendants James W. Gable, Robert J. Metz, Jr. and Linda C. Metz acquired by a deed recorded in Volume 304, Page 214, Adams County Recorder's Office and that said acreage is free from, unencumbered by, unimpaired and unaffected by any such easement, right, title or interest of Plaintiffs;
4. That Defendants David Horsley and Anita Horsley having been served with summons, but having failed to defend thereafter, shall be bound by the findings of fact, conclusions of law and Orders of the Court set forth in this Entry with regard to the subject road on their lands;
5. That Plaintiffs pay all costs of this action.

FURTHER,

1. Pursuant to Civil Rule 54(B), the Court hereby makes an express determination that there is no just reason for delay;

2. Pursuant to Civil Rule 58, the Clerk of Courts is hereby instructed to enter this Final Judgment Entry upon the journal and to serve all parties notice of the Final Judgment Entry and its date of entry upon the journal.

It is so ORDERED.

9/5/08  
DATE

Brett M. Spencer  
BRETT M. SPENCER, JUDGE

APPROVED:

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## MEMORANDUM

TO: Dale T. Vitale, Chief, EES  
Julie Bull, Assistant Chief, EES ✓  
Raymond J. Studer, AAG, Unit Supervisor/ODNR

FROM: John P. Bartley *JPB*  
Assistant Attorney General

DATE: September 12, 2008

RE: *Cornuelle, et al. v. Shawnee State Forest, State of Ohio, Dep't of*  
*Natural Resources, et al.*  
Case No. CVH 20060560

Attached please find a copy of the Final Judgment Entry in the *Cornuelle* case referenced above. A trial was held on July 9<sup>th</sup> and 10<sup>th</sup>, 2008, before Judge Brett M. Spencer in the Adams County Court of Common Pleas. Plaintiffs were attempted to obtain an easement by prescription across a portion of Shawnee State Forest as well as across lands owned by private parties. Although the Plaintiffs presented evidence and testimony from several witnesses that they used the subject road, we did not believe they established, by clear and convincing evidence, that they had a right to a prescriptive easement. Alternatively, we maintained that any easement rights Plaintiffs' predecessors may have created, had long been abandoned or legally extinguished.

Judge Spencer agreed with our defense of the case and, at the end of the trial, he issued a well reasoned ruling from the bench in favor of all the defendants at 8:25 pm on the second day of trial. The Judge's ruling is reflected in the attached Final Judgment Entry. Of importance to our client, ODNr and its Division of Forestry, was that the Court ordered that Plaintiffs have no easement, right, title, or interest in ODNr's Shawnee State Forest property. We do not think Plaintiffs are planning to appeal this case to the 4<sup>th</sup> District Court of Appeals. If they do, they will need to do so within 30 days of the September 8, 2008 Entry.

Assistant Attorney General Karol Fox offered to assist at trial, and her guidance and insights throughout, especially for closing argument, were of great value. The Judge, in his ruling, favorably picked up on a point Karol suggested should be made in our closing argument.

Assistant Attorney General Rachel Stelzer provided a well researched, clearly written memorandum of law for a motion *in limine*. I used her memorandum of law, at trial, as we successfully argued that a significant piece of evidence attempted to be introduced by Plaintiffs was improper, and should not be introduced.

The trial had its moments of optimism coupled with equal measures of concern. In the end, the Judge ruled correctly, given the testimony and evidence presented. All in all, it was a solid, successful team effort by our Attorney General staff at ODNR. Please let me know if additional information is needed at this time.

cc: Karol Fox, AAG  
Rachel Stelzer, AAG