



Appellants-plaintiffs Roger J. Willett and Shannon Willett (collectively, the Willetts) appeal the trial court's judgment in favor of William E. Long and Joyce Long (collectively, the Longs) with regard to a prescriptive easement on certain real property in Fountain County. Specifically, the Willetts argue that the Longs failed to satisfy the requirements for adverse possession to gain an easement for their septic system that encroached on the property. Moreover, the Willetts claim that only a license was created for the Longs' permissive use of the property and that the license was revocable without any remuneration due to the Longs. Concluding that the trial court properly determined that the Longs satisfied the elements of adverse possession with regard to the establishment of a prescriptive easement, we affirm.

### FACTS

On August 10, 2004, the Willetts purchased real estate in Fountain County from Barbara Phelps. Phelps had owned the residence and property with her husband, Marcus A. Phelps, who is now deceased. Prior to that time, the Phelpses had purchased the residence from Frank and Helen Shelby (the Shelbys). The Longs own three separate parcels of land immediately to the north of the western portion of the Willetts' property, which they had purchased from the Shelbys. At the time, no survey on the property had been performed.

The Longs own and operate B & J Mobile Home Park (mobile home park), which is on the middle parcel of the land. To gain approval for operation of the mobile home park from the Indiana Department of Health (the Department), the Longs had an architect prepare a plot plan (plan). Thereafter, the plan was submitted to the Department in 1975. The plan

indicated that the mobile home park's septic tank and system were located on the Longs' property.

Thereafter, the Longs became aware of the possibility that the septic tank might encroach on the adjoining land to the south, which was owned by the Phelps. The Longs also discovered that they would need to place a second exit at the end of the mobile home park's driveway to obtain the Department's final approval. Thus, William Long obtained a handwritten note from Marcus Phelps, granting permission for both uses:

06-28-75

I Marcus A. Phelps give permission to William Long to put a septic tank and driveway on my property located at RR1 on 300 N. Covington IN this 28th day of June 1975.

/s/ Marcus A. Phelps

Witness: /s/ Dewey Crigger

Appellants' App. p. 105. The Longs did not approach Barbara Phelps regarding any such permission, and she was not aware of the document or the discussion leading to its creation. Moreover, Barbara did not know of the septic tank's location, and the document was not recorded.

The Phelps divorced in 1982, and Marcus quitclaimed the property to Barbara. Barbara lived on the property until 2004, when she sold the land to the Willetts. Although Barbara did not know of the septic system's location, the Longs had maintained the septic system through the years. Specifically, while Barbara was living on the property, the Willetts had the tank pumped every one to two years. A truck was parked on the roadway with a hose

leading up and into the tank. The Longs also “short-mowed” around the septic system and occasionally checked the tank. Tr. p. 102-05.

Prior to purchasing the property, the Willetts walked the land and saw no visible evidence of the septic tank located on the adjoining property. Additionally, they were not told of the location of the septic tank or the existence of the written permission from Marcus Phelps to the Longs. After the Willetts purchased the property in 2004, a dispute arose, and the Willetts believed they owned an additional 100 square feet of land adjacent to the south end of the Longs’ easternmost parcel.

The Willetts also desired to fence their property from the Mobile Home Park. Thus, they obtained a boundary survey, which did not initially include the presence of the access lid for the Longs’ septic system that was located on the Willetts’ property. However, after the Willetts noticed the lid, the survey was revised to account for the tank’s location.

On October 24, 2005, the Willetts filed a complaint “To Quiet Title and Assertion of Easement” against the Longs. Appellants’ App. p. 5-9. In essence, the Willetts claimed that the Longs’ septic system encroached on their property and that the Longs’ claim to any interest in the property was a “cloud upon [the Willetts’] title” to the property. Id. at 7. Moreover, the Willetts claimed that they were entitled to a twelve-foot prescriptive easement over a portion of the real estate and that the Longs’ claim and superior right to the easement was “without right and unfounded.” Id.

The Longs denied the material allegations in the complaint and filed a counterclaim against the Willetts, alleging that the real estate upon which the septic tank was located

should be deemed their property under the doctrine of adverse possession. Hence, the Longs asserted that title to the property should be quieted in their favor. Additionally, the Longs alleged that they had been in control of the property and had maintained the septic tank since its installation. Moreover, the Longs claimed that the Willetts had trespassed on the property and had removed several trees without consent. As a result, the Longs sought compensatory and punitive damages for the Willetts' willful and wanton damage to the property.

Following a bench trial on November 8, 2006, the trial court entered judgment for the Longs. Thereafter, the trial court entered the following findings of fact and conclusions of law:

One way to establish an easement in Indiana would be for the Longs to demonstrate by "clear and convincing" evidence that each element of adverse possession, specifically, Control, Intent, Notice, and Duration, have been met. Fraley v. Minger, 829 N.E.2d 476, 486 (Ind. 2005). The Longs did sufficiently establish that the requirements of Control and Duration were met; they clearly exercised use and control over the septic tank continuously for more than twenty (20) years. . . . The Longs demonstrated that their claim of right was "exclusive" and "hostile" as defined under the Intent requirement by actually installing the system as required by State law to operate their business and thereafter actually operate said business.

The Longs demonstrated by "clear and convincing" evidence that the Notice requirement was also met. Notice . . . must be sufficient to give actual or constructive notice. As for constructive notice, no recording of the written permission from Marcus A. Phelps was ever made and the only record concerning the location of the Longs' septic tank is contained in the 1975 Plan Plot submitted by the Longs' architect to the State of Indiana Department of Health. Said Plot Plan provides a rendering that clearly shows the Longs' entire septic system, including the septic tank, to be on the Longs' property and there was no real reason to dispute that showing as no surveys were ever conducted until the issues herein arose. However, the Longs maintained the system, came upon the property to pump out the waste as needed, at least once every one to two years, providing actual notice to all interested persons that the system was installed and was being maintained by the Longs. The State

Health Inspector [knew] of its general location and did actually view the system in 2005.

Willetts' removal of trees from the Long property was inadvertent and not an intentional act against Longs such as to rise to the level of "conversion" as contemplated by statute.

Wherefore, the court finds for the [Longs] on their counterclaim and against the Plaintiffs on their complaint. [The Longs] are responsible for any damage to the [Willetts'] property in so far as leakage of hazardous waste or other damages that might result from a failure of the septic system. [The Longs] shall conduct, at their expense, soil sampling and testing to determine what if any, damage there might be to the [Willetts'] real estate and shall be responsible for any clean up that may be deemed appropriate to restore and maintain said property in uncontaminated state.

Appellants' App. p. 25-26. The Willetts now appeal.

## DISCUSSION AND DECISION

### I. Standard of Review

When, as here, the trial court enters specific findings of fact and conclusions thereon, we apply a two-tiered standard of review. Anthony v. Ind. Farmers Mut. Ins. Group, 846 N.E.2d 248, 252 (Ind. Ct. App. 2006). First, we consider whether the evidence supports the findings. Id. In doing so, we liberally construe the findings in support of the judgment, and determine whether the findings are clearly erroneous. Id. "Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference." Nieto v. Kezy, 846 N.E.2d 327, 332 (Ind. Ct. App. 2006).

The second step in our review is to determine whether the findings support the judgment. Anthony, 846 N.E.2d at 252. If a judgment relies on an incorrect standard, it is clearly erroneous. Nieto, 846 N.E.2d at 332. We do not defer to the trial court's conclusions of law. Id. at 333. We do not reweigh the evidence and must consider the evidence most

favorable to the judgment with all reasonable inferences drawn in favor of the judgment. Id.

We also note that the Willetts are appealing from a negative judgment. A party who had the burden of proof at trial appeals from a negative judgment and will prevail only if it establishes that the judgment is contrary to law. Helmuth v. Distance Learning Sys. Ind., Inc., 837 N.E.2d 1085, 1089 (Ind. Ct. App. 2005). A judgment is contrary to law when the evidence is without conflict and all reasonable inferences to be drawn from the evidence lead only to one conclusion, but the trial court reached a different conclusion. Id.

## II. The Willetts' Claims—Adverse Possession

The Willetts contend that the trial court's determination that an easement was created through adverse possession was clearly erroneous. Moreover, the Willetts assert that the Longs only had a license to use the property, which was created by Marcus Phelps's written permission. Thus, the Willetts claim that because they were bona fide purchasers of the property without notice, the license was revocable and nothing was owed to the Longs.

In determining whether the elements of adverse possession were satisfied in this instance, we initially observe that our Supreme Court has determined that adverse possession judgments are reviewable only for clear error. Fraley v. Minger, 829 N.E.2d 476, 482 (Ind. 2005). In essence, the question on appeal is whether a reasonable trier of fact could conclude from the facts found by the trial court that the challenged elements of adverse possession were established by clear and convincing evidence. Id. The necessary elements of an adverse possession claim are as follows:

- (1) Control—The claimant must exercise a degree of use and control over the parcel that is normal and customary considering the characteristics of the land

(reflecting the former elements of “actual,” and in some ways “exclusive,” possession);

(2) Intent—The claimant must 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”);

(3) Notice—The claimant’s actions with respect to the land must be sufficient to give actual or constructive notice to the legal owner of the claimant’s intent and exclusive control (reflecting the former “visible,” “open,” “notorious,” and in some ways the “hostile,” elements); and,

(4) Duration—the claimant must satisfy each of these elements continuously for the required period of time (reflecting the former “continuous” element).

Id. at 486.<sup>1</sup>

In this case, the Willetts concede the sufficiency of the “control” element set forth in Fraley. Appellants’ Br. p. 7. Indeed, the evidence at trial established that the Longs “short-mowed” the area around the tank so they could access the tank lid and allow state inspectors to view it if necessary.

As for the “notice” requirement, the Longs regularly checked the tank and they summoned pumper trucks to clean the tank as needed. Tr. p. 103-04. Although the Willetts argue that there was an absence of any recorded information concerning the septic system’s location, it is the use of the land that establishes an adverse possession claim, despite the absence of any record. Fraley, 829 N.E.2d at 486. As a result, the evidence established that the Longs “controlled” the land by using it in a manner consistent with its characteristics, and

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<sup>1</sup> The reformulation announced in Fraley with regard to adverse possession also applies to the establishment of prescriptive easements, except for those differences required with regard to fee interests and easements. Wilfong v. Cessna Corp., 838 N.E.2d 403, 406 (Ind. 2005).

the use of the property was sufficiently open and visible to place Barbara Phelps on constructive notice of the Longs' control of the property.

Similarly, the Willetts concede—and we agree—that the duration element was satisfied. Specifically, the evidence demonstrated that Barbara was the sole owner of the land from 1982 until 2004, and the Longs continuously used the property around the septic tank throughout that time. Tr. p. 62-63. In accordance with Indiana Code section 32-23-1-1, only twenty years of uninterrupted adverse use is required, and these facts establish twenty-two years of such use with regard to Barbara Phelps.

Thus, the final question pertains to the element of intent. In essence, the Willetts' arguments in this regard focus on the express grant of permission to use the land from Marcus Phelps to the Longs. In particular, the Willetts assert that because the Longs sought permission, the requisite hostile intent was not established. Appellants' Br. p. 9.

Notwithstanding this claim, Barbara Phelps never granted such permission, and her ownership of the property is at issue in this case. Indeed, the Willetts overlook the fact that Barbara was the only fee owner of the land from 1982 onward, and she never granted the license that her former husband had originally granted. Hence, any authority that Marcus had to grant such a license to the Longs was necessarily extinguished when he quitclaimed his interest in the property to Barbara, regardless of whether the Longs had any belief that his permission had remained valid. See Fraley, 829 N.E.2d at 485 (observing that adverse possession may occur without reference to the good or bad faith of the adverse claim asserted by the occupant).

Finally, we note that the Willetts prove too much with regard to their claim that they cannot be bound by an unrecorded license of which they had no knowledge. Indeed, those same rules establish that the handwritten license was equally ineffective against Barbara, who had no knowledge that Marcus had granted it. Hence, at all times—at least after 1982—the evidence established that the Longs’ encroachment was hostile as against Barbara. Thus, there was sufficient evidence to allow the trial court to conclude that the remaining element of intent for purposes of adverse possession as set forth in Fraley was satisfied.

The judgment of the trial court is affirmed.

BAILEY, J., and VAIDIK, J., concur.