

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2001-458

APRIL TERM, 2002

	}	APPEALED FROM:
	}	
Charles J. Glode, Jr.	}	Essex Superior Court
	}	
v.	}	DOCKET NO. 40-10-97 Excv
	}	
Aprel Woods	}	Trial Judge: Merideth Wright
	}	
	}	

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

Plaintiff Charles J. Glode, Jr. appeals from a superior court judgment awarding a prescriptive easement for use of a dock to defendant Aprel Woods. Glode contends: (1) the evidence did not support a finding of continuity of use over the requisite time period; (2) the court erred in finding that Woods was entitled to maintain the dock at its current size; and (3) the evidence did not support a finding that the prescriptive use was made under a claim of right. We affirm.

The parties own adjoining lots on Neal Pond in the Town of Lunenburg. The lots were created by the same subdividers, who conveyed the northerly lot to Woods's husband (now deceased) and his first wife in 1963. Glode acquired his lot in 1965. Glode commenced this quiet-title action in 1997 after a dispute arose over the location of his northern property line abutting the Woods property. Glode alleged that Woods had located a dock on land claimed by Woods but which a survey showed was actually owned by Glode. Woods answered and counterclaimed, alleging that the dock was located on her property, and further that it had been in clear, obvious and uncontested use by Woods and her predecessors for a period in excess of fifteen years.

Following a court trial, the court issued oral findings and conclusions from the bench. The court ruled that the boundary and title to the disputed property were as claimed by Glode, but that Woods had acquired a nonexclusive prescriptive easement to have access to and from the dock over the disputed property, to tie-up boats to objects on the shore and directly to the south of the dock, and "[t]o repair, maintain and replace the dock to its present extent and in its present location." The court denied the parties' motions to alter or amend. This appeal followed.

Glode first contends the evidence was insufficient to establish continuity of use of the dock for the requisite fifteen year period. We will not set aside a trial court's findings unless they are clearly erroneous, nor disturb its conclusions if they are reasonably supported by the findings. Findings are reviewed in the light most favorable to the judgment, disregarding modifying evidence, and will not be disturbed merely because they are contradicted by substantial evidence; rather, an appellant must show that there is no credible evidence to support the finding. New England P'ship, Inc. v. Rutland City Sch. Dist., 786 A.2d 408, 415 (Vt. 2001).

Assessed in light of this standard, the court's ruling must be affirmed. The elements necessary to establish a prescriptive easement and adverse possession are essentially the same under Vermont law: 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. Cnty. Feed Store, Inc. v. Northeastern Culvert Corp., 151 Vt. 152, 155

(1989). Multiple witnesses in this case testified to having observed a dock in its current location since the 1970's or early 1980's.⁽¹⁾ Although the evidence showed that the dock had deteriorated and been replaced at least twice, the latest one dating from 1986 or 1987, this does not defeat a showing of continuous use. "[C]ontinuous use is not synonymous with constant use. Continuity of use is merely such use as an average owner would make of the property, taking into account its nature and condition." Darling v. Ennis, 138 Vt. 311, 313-14 (1980). Docks by their nature deteriorate and need to be replaced; the non-existence of a dock during brief periods of reconstruction and replacement, therefore, do not defeat the requisite continuity of use. Although Glode testified that the dock disappeared for a substantial period during the 1980's, and adduced several photographs during this period in which the dock was not visible, this evidence was contradicted by other testimony attesting to its presence and suggesting that it occasionally submerged when in disrepair. Accordingly, we conclude that the evidence was sufficient to show the requisite continuity of use.

Glode also suggests in passing that a new period of adversity was required each time the dock was absent for repairs or submerged, in order to put him on notice that Woods had "unfurled his flag." See Moran v. Byrne, 149 Vt. 353, 355 (1988) (adverse possessor "must unfurl his flag on the land, and keep it flying so that the owner may see, if he will, that an enemy has invaded his dominions and planted his standard of conquest") (citation omitted). Acts of possession are deemed sufficiently open and notorious if they would put a person of ordinary prudence on notice of the claim. Jarvis v. Gillespie, 155 Vt. 633, 641 (1991). Evidence of the Woods' continual use of a dock in its current location over the requisite time period was sufficient to put a reasonably prudent person on notice of an "unfurled flag," notwithstanding the occasional interruptions occasioned by the repair or submerging of the dock.

Glode next contends the court erred in granting a prescriptive easement for use of the dock at its current size, citing evidence that the current dock is substantially larger than earlier versions. Glode notes that the extent of a prescriptive easement is fixed by the use through which it was created, see Cnty. Feed Store, Inc., 151 Vt. at 157, and that the owner of an easement may not materially increase the burden upon the servient estate. Dennis v. French, 135 Vt. 77, 79 (1977). Glode cites nothing in the record evidence, however, showing any material change or increase in the Woods' use of the dock over time that would suggest a materially increased burden on the servient estate resulting from the varying dimensions of the dock. Accordingly, we discern no error.

Finally, Glode contends the evidence was insufficient to establish that the prescriptive use of the dock was under a claim of right. "The general rule is that open and notorious use will be presumed to be adverse and under a claim of right, unless there is found an exception which rebuts that presumption, such as evidence of permission of the owner of the land to use the right-of-way." Buttolph v. Eriksson, 160 Vt. 618, 618 (1993) (mem.). Glode contends the presumption was effectively rebutted through two pieces of evidence: the testimony of Patricia Scott, one of Norman Woods's daughters, that she recalled no intent on the part of her father to claim Glode's land; and a letter from April Woods to Glode, dated October 7, 1996, stating that she had no current or past "intention of claiming or using any property that does not belong to me."

The contention is unpersuasive. As a number of courts have observed, "adverse use must be established by the acts, not the subjective beliefs, of a claimant." Dunbar v. Heinrich, 622 P.2d 812, 812 (Wash. 1980); see also Brown v. Sneider, 400 N.E.2d 1322, 1324-25 (Mass. App. Ct. 1980) ("[T]he uncommunicated mental attitude of the possessor is irrelevant where his acts import an adverse character to his holding.") (quoting Ottavia v. Savarese, 155 N.E.2d 432, 435 (Mass. 1959)); Otto v. Cornell, 349 N.W.2d 703, 705 (Wis. Ct. App. 1984) ("The subjective intent of the parties is irrelevant to the determination of an adverse possession claim."). Even if subjective intent were relevant, however, Scott's testimony provided little that was probative of her father's intentions, and the statement in the letter - as shown from the context - was premised upon the writer's firm belief that she owned the land in question; a later letter, dated August 28, 1997, shows the same writer stating, "it is my position that the dock is clearly on my land and I do not have any intention of moving it without an order from the court." Accordingly, we discern no basis to disturb the judgment.

Affirmed.

BY THE COURT:

John A. Dooley, Associate Justice

James L. Morse, Associate Justice

Denise R. Johnson, Associate Justice

1. For example, Richard Santaw, April Woods's son, testified that he regularly visited the camp between 1981 and 1989, and always remembered using the dock, although he recalled rebuilding it in 1982 or 1983 after it had submerged, and specifically recalled using the dock in 1985 for a party, and using it during the 1990's during visits. A number of witnesses testified that the present dock was rebuilt again in 1986 or 1987. April Woods testified that she recalled a dock at the site when she was first there in 1980, and further recalled that it was there in 1982 when she was married, and in 1985 for a graduation party. She also recalled rebuilding the dock in 1986 or 1987.