FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-4059

OKEFENOKE RURAL ELECTRIC MEMBERSHIP CORPORATION,

Appellant/Cross-Appellee,

v.

DAYSPRING HEALTH, LLC, a Florida Limited Liability Company,

Appellee/Cross-Appellant.

On appeal from the Circuit Court for Nassau County.
Steven Fahlgren, Judge.

July 15, 2020

WINOKUR, J.

Dayspring Health, LLC (Dayspring) brought an inverse condemnation claim against Okefenoke Rural Electric Membership Corporation (OREMC), an entity with the legal authority of eminent domain. Dayspring alleged that OREMC took a strip of its property without compensation, while OREMC asserted a prescriptive easement over this land. The trial court found no prescriptive easement existed and entered judgment in

favor of Dayspring. We disagree and reverse for judgment to be entered in favor of OREMC.[1]

In the 1950s, OREMC erected a series of power poles and transmission lines on a right-of-way belonging to the Florida Department of Transportation along U.S. Route 301. However, an inspection station in the road resulted in a "jog" in the right-of-way boundary, and OREMC inadvertently placed several poles on private property outside of the right-of-way. Approximately fifty years later, Douglas Adkins bought this property, deeded it to Dayspring (which he owns), and Dayspring filed suit. Dayspring later revoked permission for OREMC to use its property, but OREMC took no corrective action. In its complaint, Dayspring specifically stated that neither it and nor any predecessors in title previously knew that the poles were on their property, and believed them to be on the right-of-way, but nonetheless the poles stood only with their consent.[2] All evidence presented at trial, including from all of OREMC's witnesses, supported Dayspring's allegation that both OREMC and all of the property owners mistakenly believed that the poles were on the right-of-way until over fifty years after their placement. The trial court ruled that no prescriptive easement existed, finding that presence of the power poles was never adverse because they were in place only with the consent of the property owners and the electricity they supplied benefitted the owners.

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[1] Our disposition of this issue moots OREMC's second argument and both of Dayspring's cross-appeal arguments.

[2] "Such placement of utility poles was at all times consensual by [Dayspring's] predecessors in title, although such consent was based upon the deliberate, but mistaken belief of the aforesaid predecessors in title and [Dayspring] that the same were placed and located on the State Right of Way of US 1/301 and were not upon the subject property of [Dayspring]. . . . Such permission and consent was upon the mutual, but mistaken belief that such poles were not located upon the property of [Dayspring] or its predecessors in title[.]"

A party may establish entitlement to a prescriptive easement by proving the following four elements:

> (1) that he or she and any predecessors in title have made actual, continuous and uninterrupted use of the lands of another for the prescriptive period (twenty years); (2) that (when the claim is to a right-of-way) the use has entailed a definite route with a reasonably certain line, width and termini; (3) that the use has been either with the actual knowledge of the owner or so open, notorious and visible that knowledge of the use must be imputed to the owner; and (4) that the use has been adverse to the owner—that is, without permission (express or implied) from the owner, under some claim of right, inconsistent with the rights of the owner and such that, for the entire period, the owner could have sued to prevent further use.

Suwannee River Water Mgmt. Dist. v. Price, 651 So. 2d 749, 750 (Fla. 1st DCA 1995) (citations omitted). There is a presumption in favor of finding that any use is permissive because the acquisition of prescriptive rights is not favored, and the party claiming a prescriptive easement has the burden to overcome this presumption. *Id.*; *see also Downing v. Bird*, 100 So. 2d 57, 64 (Fla. 1958).

The only disputed element in this case is adversity.[3] Dayspring argues, and the trial court found, that there was no adverse use of the property because all prior owners consented to the presence of the poles on the property during the twenty years after their placement. However, all record evidence shows that OREMC believed that it had erected power poles on a state-owned right-of-way, and no private owner had ever objected to the poles or consented to them. Dayspring's complaint agreed that none of the property owners knew that the poles were placed on their property until several decades later. The suggestion that these owners consented to the presence of power poles—that they did not

[3] We reject Dayspring's argument that OREMC's description of "a definite route with a reasonably certain line, width and termini" was insufficient because the survey introduced as evidence of this element was erroneously admitted.

believe were on their land—is not supported by any evidence and contrary to logic. *See Gay Bros. Constr. Co. v. Florida Power & Light Co.*, 427 So. 2d 318, 319–20 (Fla. 5th DCA 1983) (affirming a finding of a prescriptive easement after power lines were mistakenly placed on private property outside of an easement; "Where lands are occupied under the mistaken belief that the occupier has title, so that the occupation is under a *claim of right*, the holding is adverse.").

Dayspring relies solely upon the presumption of permissive use, arguing that OREMC did not provide direct evidence from someone with personal knowledge from the 1950s and thus cannot overcome its burden. This argument fails for two reasons. First, Dayspring's own complaint alleged that no owner of the property discovered that the poles were on the private land until some fifty years later. Landowners cannot be unaware that their property is being used and simultaneously be consenting to this use. Second, direct evidence from a witness with personal knowledge of the events of sixty years ago is not required. *See Hunt Land Holding Co. v. Schramm*, 121 So. 2d 697, 700 (Fla. 2d DCA 1960) ("Declarations or assertions by a claimant are not essential to possession or use under claim of right; rather, the adverse character of possession or use is a question discoverable and determinable from all the circumstances of the case."). All circumstances of this case and evidence presented indicate that no prior owner of the property (or OREMC) previously knew that the power poles were on private property, and thus no consent or permission was granted.

We also disagree with the argument that OREMC's use of the power poles was not adverse to the property owners (prior to Dayspring's purported revocation of permission) because the poles were part of a system that delivered electricity to the property and thus benefitted the property. We have seen no precedent to support this theory, and the logical extension is that no public utility service could be entitled to a prescriptive easement, a conclusion in clear contrast with case law. *See*, *e.g.*, *Gay Bros.*, 427 So. 2d at 320. This theory might have merit if the utility provided free or discounted service, or if it provided service when not required to, but that is not the case here. *See Farley v. Hiers*, 668 So. 2d 248, 250 (Fla. 1st DCA 1996) (finding that the property owner's paying

for water from a well on his property indicated that the presence of the well was adverse).

Dayspring's lawsuit claimed that OREMC's accidental misplacement of power poles outside of the state right-of-way and on private property was not discovered until approximately fifty years later. This assertion was supported by all of the evidence presented at trial. This fact necessarily means that the property owners did not consent to the power poles being on their property. Thus, OREMC's use of the land was not with consent, but adverse to the owners, and this adversity is not negated by the fact that the owners received electricity from OREMC. No other element being in question, we find that OREMC has demonstrated entitlement to a prescriptive easement.

REVERSED.

ROWE and KELSEY, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

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