

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

CHRIS VAIL, AN UNMARRIED MAN,
Plaintiff/Counterdefendant/Appellant,

v.

GILBERT A. CATALAN AND JANE DOE CATALAN,
HUSBAND AND WIFE,
Defendants/Counterclaimants/Appellees.

No. 2 CA-CV 2014-0062
Filed December 4, 2014

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c); Ariz. R. Civ. App. P. 28(c).

Appeal from the Superior Court in Pima County
Nos. C20116865 and C20116866 (Consolidated)
The Honorable Ted B. Borek, Judge

AFFIRMED

COUNSEL

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By Michael W. Capp
Counsel for Plaintiff/Counterdefendant/Appellant

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Gust Rosenfeld P.L.C., Phoenix
By Scott A. Malm and Justin M. Scorza
Counsel for Defendants/Counterclaimants/Appellees

MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Miller and Judge Espinosa concurred.

ECKERSTROM, Chief Judge:

¶1 Plaintiff/appellant Chris Vail challenges the judgment entered in favor of defendant/appellee Gilbert Catalan and his wife.¹ After a bench trial, the court found Vail had failed to establish a prescriptive easement to use a driveway on Catalan's property. We affirm.

Factual and Procedural Background

¶2 "When reviewing issues decided following a bench trial, we view the facts in the light most favorable to upholding the court's ruling." *Smith v. Beesley*, 226 Ariz. 313, ¶ 3, 247 P.3d 548, 550 (App. 2011), quoting *Bennett v. Baxter Grp., Inc.*, 223 Ariz. 414, ¶ 2, 224 P.3d 230, 233 (App. 2010).

¶3 Vail offered the essential testimony in support of his alleged prescriptive easement over his neighbor's south driveway. The alleged dominant estate was acquired by Vail's parents in 1976, and Vail has lived on the property most of the time since then. He acquired title to it in 1996 and continued to live there after his parents had moved away. According to Vail, both he and his

¹Although Catalan had denied in his answer that he was married, we need not address or disturb this aspect of the judgment, as it is irrelevant to the issues presented on appeal. For the sake of simplicity, we refer only to Gilbert Catalan in the remainder of our decision.

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parents had regularly used Catalan's driveway on the alleged servient estate for about three decades. Vail was incarcerated at different points during that period of time, however, for approximately three years total. Furthermore, other witnesses testified that a locked gate had been installed on Catalan's property around 2003 that prevented Vail from using the driveway.

Discussion

¶4 "A party claiming an easement by prescription 'must establish that the land in question has actually and visibly been used for ten years, that the use began and continued under a claim of right, and [that] the use was hostile to the title of the true owner.'" *Spaulding v. Pouliot*, 218 Ariz. 196, ¶ 14, 181 P.3d 243, 248 (App. 2008), quoting *Paxson v. Glovitz*, 203 Ariz. 63, ¶ 22, 50 P.3d 420, 424 (App. 2002) (alteration in *Paxson*); see A.R.S. §§ 12-521, 12-526. The ten-year period of use must be continuous, *Stamatis v. Johnson*, 71 Ariz. 134, 138, 224 P.2d 201, 203-04 (1950); *Maricopa Cnty. Mun. Water Conserv. Dist. No. 1 v. Warford*, 69 Ariz. 1, 10, 206 P.2d 1168, 1173 (1949); *Ammer v. Ariz. Water Co.*, 169 Ariz. 205, 210, 818 P.2d 190, 195 (App. 1991), and must be "hostile" in the sense that it is without the owner's permission. See *Spaulding*, 218 Ariz. 196, ¶¶ 14-15, 181 P.3d at 248.

¶5 A prescriptive easement is disfavored in the law because it inflicts a loss of rights upon another. *Krencicki v. Petersen*, 22 Ariz. App. 1, 3, 522 P.2d 762, 764 (1974). The party claiming the easement therefore must prove its existence by clear and convincing evidence. See *Inch v. McPherson*, 176 Ariz. 132, 135, 859 P.2d 755, 758 (App. 1992); see also *Spaulding*, 218 Ariz. 196, ¶ 24, 181 P.3d at 250 (noting adverse possession principles generally apply to prescriptive easements); *Miller v. McAlister*, 151 Ariz. 435, 437, 728 P.2d 654, 656 (App. 1986) ("[C]laim of the adverse possessor must be proven by clear and positive evidence, which is analogous to the rigorous 'clear and convincing' standard of proof."). It is the role of the trial court, not this court, to determine whether a party has met this standard of proof. *Inch*, 176 Ariz. at 135, 859 P.2d at 758. Hence, we will not reverse a trial court's judgment if it finds any support in the record. *Id.*

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¶6 We have no basis to disturb the judgment here, for two reasons. First, the trial court appears to have weighed the evidence supporting Vail’s claim and simply found it wanting. When a court serves as the trier of fact, it may reject testimony from an interested party, even when that testimony is not contradicted. *See Walsh v. Advanced Cardiac Specialists Chartered*, 229 Ariz. 193, ¶ 12, 273 P.3d 645, 649 (2012). Here, not only was Vail’s credibility suspect due to his interest in the case, but he also was impeached with his prior felony conviction. *See Ariz. R. Evid.* 609. And, his specific testimony about the locked gate, and his access through it, was contradicted by other witnesses.

¶7 Furthermore, Vail’s testimony attempting to establish a continuous ten-year term of use of the easement lacked details and sometimes appeared to lack foundation, given his periods of incarceration. *See Ariz. R. Evid.* 602 (requiring personal knowledge of matter testified to). For example, when asked if his parents had used the driveway on a daily basis Vail responded, “Yeah, I think. You know, they had their car, I had mine.” Given all these factors affecting Vail’s credibility, the record supports the trial court’s conclusion that he “did not demonstrate by clear and convincing evidence all of the elements necessary to obtain a prescriptive easement.”

¶8 Our second reason for rejecting Vail’s challenge is that the appellate record is incomplete. An appellant carries the duty of ensuring a complete record on appeal, *Ariz. R. Civ. App. P.* 11(b); *Winters v. Ariz. Bd. of Educ.*, 207 Ariz. 173, n.3, 83 P.3d 1114, 1118 n.3 (App. 2004), and we presume any missing transcript would support the trial court’s ruling. *Thiele v. City of Phoenix*, 232 Ariz. 40, n.2, 301 P.3d 206, 208 n.2 (App. 2013). Vail has failed to provide the transcript from the afternoon session of the first day of trial, during which time he was cross-examined by Catalan and questioned by the court. Based on Vail’s missing testimony, the court expressly found that he and his predecessors had been given permission to use the subject property. Although the parties both have access to this missing transcript and dispute its meaning and effect, Vail’s failure to confirm that the transcript was included in the record on appeal provides an alternative basis to uphold the judgment. We

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simply cannot conclude the judgment is unsupported by, or contrary to, the evidence when we have only a partial record before us.

Disposition

¶9 For the foregoing reasons, the judgment is affirmed. Catalan has requested an award of costs and attorney fees on appeal pursuant to A.R.S. § 12-1103(B). We grant his request, subject to his compliance with Rule 21, Ariz. R. Civ. App. P.