IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 123,823

DENNIS D. PYLE and JENNIFER J. PYLE,
Appellees,

v.

JAMES N. GALL JR., Individually and as Trustee of the
JAMES N. GALL FAMILY TRUST,
Appellants.

SYLLABUS BY THE COURT

1.

A prescriptive easement is established by the use of a private way that is (1) open; (2) exclusive, meaning unique to the prescriptor; (3) continuous; (4) for a set prescriptive period; and (5) adverse.

2.

The exclusivity requirement for a prescriptive easement is met if the landowner's actions fail to substantially interrupt the prescriptor's use of the land for the prescriptor's specific purpose during the prescriptive period.

Review of the judgment of the Court of Appeals in an unpublished opinion filed April 29, 2022. Appeal from Brown District Court; JAMES A. PATTON, judge. Oral argument held February 2, 2023. Opinion filed July 7, 2023. Judgment of the Court of Appeals reversing the district court on the issue subject to review is reversed. Judgment of the district court is affirmed.

Charles D. Baskins, of Euler Law Offices, LLC, of Troy, argued the cause and was on the briefs for appellants.

James S. Willard, of Willard Law Office, LLC, of Topeka, argued the cause and was on the briefs for appellees.

The opinion of the court was delivered by

WILSON, J.: The Pyles claim a prescriptive easement over land owned by their neighbors, the Galls. The district court determined a prescriptive easement existed, but a panel of the Court of Appeals reversed. The panel reasoned that the Pyles' use was not exclusive because the Pyles did not exclude all others from the asserted easement. We reverse the panel on the issue subject to review and affirm the district court.

FACTS AND PROCEDURAL BACKGROUND

The Pyles own a tract of farmland in Brown County, Kansas, which lies directly east of a tract of farmland owned by the James N. Gall Family Trust. Walnut Creek flows northeast across both tracts, leaving a small field (the Field) on the Pyle tract accessible only from a neighbor's field to the north or by crossing the Gall tract from the west. The Pyles took ownership of their tract in the 1990s and have since accessed the nearly 2-acre Field by crossing the northern 60 feet of the Gall tract. The Gall tract has been farmed by James and Lee Mueller for around 20 years. The Pyles and their agents farm the Field.

Tensions arose when the parties disagreed on the appropriate north-south boundary line between their respective tracts. The Galls unsuccessfully offered to purchase the Field. Both parties then hired surveyors to determine the boundaries of the tracts. The surveyors reached different conclusions and the Galls erected a fence in accordance with their surveyor's findings.

The Pyles then petitioned the district court to quiet the title to the land. The petition alleged the Pyles acquired the contested boundary land by adverse possession

and also alleged they acquired either a prescriptive easement or an easement by necessity to the Field over the northern 60 feet of the Gall tract.

Following a bench trial, the district court found the Pyles acquired the disputed boundary land by adverse possession. The court also found the Pyles acquired a prescriptive easement across the northern 60 feet of the Galls' land. The court did not consider whether the Pyles had also acquired an easement by necessity.

The Galls appealed. A panel of the Kansas Court of Appeals affirmed the district court's adverse possession findings but reversed the district court's finding of a prescriptive easement and remanded the case to the district court to reach the easement by necessity claim. *Pyle v. Gall*, No. 123,823, 2022 WL 1277628, at *1 (Kan. App. 2022) (unpublished opinion).

Citing *Koch v. Packard*, 48 Kan. App. 2d 281, 288-89, 294 P.3d 338 (2012), *rev. denied* 298 Kan. 1203 (2013), the panel said the evidence "did not show that the Pyles exclusively used the northern boundary of the Galls' land. Pyle and the Muellers both used the northern boundary for agricultural purposes—Pyle used it to reach his field, and the Muellers planted the northern boundary and used it to cross the Galls' land." *Pyle*, 2022 WL 1277628, at *4. Further, "both [the Muellers and the Pyles] used the route to reach their respective crops." 2022 WL 1277628, at *4. The panel then concluded the district court erred in finding exclusivity and thus erred in finding the existence of a prescriptive easement. 2022 WL 1277628, at *4. The Pyles petitioned this court for review of the panel's holding that the Pyles did not exclusively use the asserted prescriptive easement.

Jurisdiction is proper. See K.S.A 20-3018(b) (providing for petitions for review of Court of Appeals decisions); K.S.A. 60-2101(b) (Supreme Court has jurisdiction to review Court of Appeals decisions upon petition for review.).

ANALYSIS

Standard of Review

Whether a prescriptive easement exists is a question of fact. See *Fiest v. Steere*, 175 Kan. 1, 6, 259 P.2d 140 (1953); see also 28A C.J.S. Easements § 270. The existence of a prescriptive easement must be shown by clear and convincing evidence. *Hale v. Ziegler*, 180 Kan. 249, 256, 303 P.2d 190 (1956). Clear and convincing evidence is evidence sufficient to establish that the truth of the facts asserted is highly probable. *In re Adoption of C.L.*, 308 Kan. 1268, 1278, 427 P.3d 951 (2018). Clear and convincing evidence is an intermediate standard of proof between a preponderance of the evidence and beyond a reasonable doubt. 308 Kan. at 1278.

We review a district court's findings of fact for substantial competent evidence and exercise unlimited review over legal conclusions based on those factual findings. *Rivera v. Schwab*, 315 Kan. 877, 914, 512 P.3d 168 (2022). We consider whether the district court's findings of fact "are sufficient for the plaintiffs to have prevailed on their claims under the correct legal standard." 315 Kan. at 914. "Substantial competent evidence refers to legal and relevant evidence that a reasonable person could accept as being adequate to support a conclusion." *State, ex rel. Secretary, DCF v. M.R.B.,* 313 Kan. 855, 862, 491 P.3d 652 (2021). While conducting this review, "'an appellate court does not weigh conflicting evidence, evaluate witnesses' credibility, or redetermine questions of fact.'" *Board of Miami County Comm'rs v. Kanza Rail-Trails Conservancy, Inc.*, 292 Kan. 285, 325, 255 P.3d 1186 (2011) (quoting *Hodges v. Johnson*, 288 Kan. 56, 65, 199 P.3d 1251 [2009]). "Rather, the appellate court should review the facts of the case in the light most favorable to the prevailing party below to ascertain whether the trial court's decision is properly supported by substantial competent evidence." *In re Adoption of J.M.D.*, 293 Kan. 153, 171, 260 P.3d 1196 (2011). Put differently, "appellate review of factual

questions should accord a great deal of deference to the trial judge's determination, even in those instances where the appellate jurists might have decided the case differently." 293 Kan. at 171.

Prescriptive Easements in Kansas

In 1953, we outlined the elements of a prescriptive easement:

> "'A prescriptive right to a private way is substantially the same in quality and characteristics and would arise in substantially the same manner as would title to land by adverse occupancy. It must not only be continued for the requisite period, but it must be adverse, and under a claim of right, and must be exclusive and uninterrupted; and all this with the knowledge and against the consent of the owner of the estate out of which the easement is claimed; reasonable opportunity for knowledge on his part being accounted to him for such knowledge. If one claiming an easement has been occupying an estate for the given period with the consent of the owner, this does not constitute adverse possession, but is simply a license so to do, out of which an estate by prescription can never arise. " *Fiest*, 175 Kan. at 5-6 (quoting *Insurance Co. v. Haskett*, 64 Kan. 93, 96, 67 P. 446 [1902]).

Fiest also noted:

> "'To obtain an easement for a private way by prescription, the use of such private way must be substantially such a use as, if applied to land, would give title by adverse occupancy. It must have been continuous, exclusive to the extent the nature of the use will permit, and adverse. A use under a mere license will not ripen into an easement by prescription.'" 175 Kan. at 5 (quoting *Haskett*, 64 Kan. 93, Syl. ¶ 2).

A prescriptive easement arises if the individual asserting the easement, the prescriptor, continuously uses another's land for a unique purpose over a set prescriptive period. The prescriptor's use must be open, thereby providing notice to the landowner and

obligating the landowner to substantially interrupt the prescriptor's use. See Saxe, *When "Comprehensive" Prescriptive Easements Overlap Adverse Possession: Shifting Theories of "Use" and "Possession,"* 33 B.C. Envtl. Aff. L. Rev. 175, 190 (2006) (explaining continuity "is highly dependent upon the nature and character of the use itself" and that generally "the primary concern in evaluating continuity is whether an interruption in use has occurred that significantly interfered with the user"). Should the landowner fail to interrupt the prescriptor's use, then the prescriptor acquires a right of use over the land. Finally, the prescriptor's use must be what has been variously described as "adverse," "hostile," or "under a claim of right." Morgan, *Balancing Interests: How the Prescriptive Easement Doctrine Can Continue to Efficiently Support Public Policy*, 50 Wake Forest L. Rev. 1253, 1256-57 (2015) ("Comment b to § 2.16 of the Restatement [Third] states that an 'adverse' use means 'a use made without the consent of the landowner, or holder of the property interest used, and without other authorization.'"); 33 B.C. Envtl. Aff. L. Rev. at 187 ("For an easement by prescription to ripen, the use must be adverse or hostile to that of the true owner, thereby indicating a claim of right.").

From this, we clarify these elements are necessary to establish a prescriptive easement in Kansas: use of a private way that is (1) open; (2) exclusive, meaning unique to the prescriptor; (3) continuous; (4) for a set prescriptive period; and (5) adverse.

This clarification is necessary because over time the elements of prescriptive easements have become conflated with the elements of adverse possession, a related but distinct doctrine of property law. Some of our earliest prescriptive easement cases suggested adverse possession and prescriptive easements were similar. See, e.g., *Chinn v. Strait*, 173 Kan. 625, 630, 250 P.2d 806 (1952); *Jobling v. Tuttle*, 75 Kan. 351, 362-64, 89 P. 699 (1907); *Insurance Co. v. Haskett*, 64 Kan. 93, 96, 67 P. 446 (1902).

In 1963, the Legislature enacted K.S.A. 60-503 as part of a broad revision to the Kansas Code of Civil Procedure. The statute codified the elements of adverse possession. It provides:

> "No action shall be maintained against any person for the recovery of real property who has been in open, exclusive and continuous possession of such real property, either under a claim knowingly adverse or under a belief of ownership, for a period of fifteen (15) years. This section shall not apply to any action commenced within one (1) year after the effective date of this act." K.S.A. 60-503.

Nearly a decade later, in *Armstrong v. Cities Service Gas Co.*, 210 Kan. 298, 502 P.2d 672 (1972), we discussed the details of K.S.A. 60-503 while evaluating prescriptive easement claims. We noted: "Thus we see statutory authorization of a doctrine of adverse possession *(or prescription in the case of easements)* which gives protection to those who in good faith enter and hold possession of land for the prescribed period in the belief it is theirs." (Emphasis added.) 210 Kan. at 308. The language and reasoning of *Armstrong* show we understood the doctrines of adverse possession and prescriptive easements to be mutually informing.

A panel of the Court of Appeals recognized this language in *Allingham v. Nelson*, 6 Kan. App. 2d 294, 298, 627 P.2d 1179 (1981). The panel, citing *Armstrong* and two adverse possession cases, explained that adverse possession and prescriptive easements were traditionally distinguished but the distinction in Kansas had become "blurred" with "the cases on prescriptive easements us[ing] the statute of adverse possession (K.S.A. 60-503) as a basis for evaluating claims." 6 Kan. App. 2d at 298.

Since *Allingham*, two more of our cases likely contributed to this conflation. First, in *Union Gas System, Inc. v. Carnahan*, 245 Kan. 80, 87, 774 P.2d 962 (1989), *superseded by statute as stated in Northern Natural Gas Co. v. Martin, Pringle*, *et. al.*, 289 Kan. 777, 217 P.3d 966 (2013), we cited K.S.A. 60-503 when evaluating theories of

adverse possession and a prescriptive easement. We rejected both theories in one paragraph without separating our analysis. 245 Kan. at 87. Second, in *State ex rel. Meek v. Hays*, 246 Kan. 99, 107, 785 P.2d 1356 (1990), we considered a public prescriptive easement claim and, citing K.S.A. 60-503, explained the prescriptive period was 15 years.

Exclusivity in Prescriptive Easements

Because cases have sometimes discussed the two doctrines without carefully separating their respective analyses, the exclusivity element of a prescriptive easement has become "blurred" with the exclusivity element of adverse possession. We have never directly evaluated this element and various Court of Appeals panels have understood it differently. For example, in *Dameron v. Kelsay*, No. 96,462, 2007 WL 2580598, at *5 (Kan. App. 2007) (unpublished opinion), the panel explained:

> "We agree that the type of 'exclusiveness' is not the same for a prescriptive easement and adverse possession. Adverse possession requires that the possession of the property be exclusive, while a prescriptive easement requires that the use of the land be exclusive only to the extent the nature of the use will permit."

Five years later, another panel provided a contrary evaluation of prescriptive easement exclusivity in *Koch*, 48 Kan. App. 2d at 284-89. The case involved Koch's claim of a prescriptive easement across his neighbor's land. The panel observed that Kansas courts look to the rules of adverse possession when considering prescriptive easements. It then explained exclusivity by citing *Stith v. Williams*, 227 Kan. 32, 37, 605 P.2d 86 (1980), and *Thompson v. Hilltop Lodge, Inc.*, 34 Kan. App. 2d 908, 910-11, 126 P.3d 441 (2006), both of which only involved adverse possession claims. The panel also cited the *Allingham* court's language describing how Kansas courts have blurred the distinction between adverse possession and prescriptive easements. Indeed, it explicitly

recognized the *Allingham* court's discussion of how this blurring has moved Kansas away from the traditional understanding of prescriptive easements as being non-exclusive rights acquired by the manner of use. *Koch*, 48 Kan. App. 2d at 286.

The *Koch* court then found exclusivity did not exist because, among other things, the roadway had been used by others. 48 Kan. App. 2d at 287. It rejected Koch's argument "that the exclusivity requirement does not mean the land at issue must be used solely by the person claiming the prescriptive easement." 48 Kan. App. 2d at 288. The panel conceded that other states sided with Koch's argument that sole usage should not define exclusivity for prescriptive easements, and instead exclusivity should mean the claimant's use is "exclusive against the public at large" and is not dependent on the similar rights of others. 48 Kan. App. 2d at 288.

The panel observed that out-of-state "decisions seem reasonable in light of the fact that a party is not claiming title to real estate but is claiming access," but noted "[n]o Kansas court has ever analyzed the element of exclusivity in a similar manner. When Kansas courts have considered the requirement of exclusivity in the adverse possession context, those courts have determined the claimant's use of the property at issue must be to the exclusion of *all other persons*." *Koch*, 48 Kan. App. 2d at 288.

Our review of relevant authorities suggests the *Dameron* court's understanding was correct, and the *Koch* court was wrong. The Third Restatement explains:

> "The term 'exclusive,' borrowed from adverse-possession doctrine, causes confusion in prescription cases because servitudes are generally not exclusive. The servient owner is entitled to make any use of the servient estate that will not unreasonably interfere with enjoyment of the servitude. In addition, several parties may enjoy similar servitudes in the same land without conflict, as with easements to use roads. In adverse-possession doctrine, the exclusivity requirement describes the behavior of an ordinary possessor and serves to give notice to the owner. In servitudes cases, however, it puts courts into the

awkward position of explaining that the requirement does not mean that the use is such as to exclude others, or, that the user in fact has excluded others from the servient estate. Instead, they explain, it simply requires that the user have acted independently of rights claimed by others." Restatement (Third) of Property (Servitudes) § 2.17, comment g (2000).

Corpus Juris Secundum agrees:

"The term 'exclusive' does not mean that the easement must be used by one person only, but simply that the right does not depend for its enjoyment on a similar right in others; it must be exclusive as against the community or public at large. The claimant must show that his or her use is exclusive in the sense that his or her claim of right would have to be particular to himself or herself as opposed to arising simply as a member of the general public." 28A C.J.S., Easements § 35.

Moreover:

"It is frequently asserted that an adverse use must be exclusive for one to obtain a prescriptive easement. This requirement, however, has sharply limited significance. Exclusivity does not mean that the claimant must be the only person using the easement, to the exclusion of all others. It simply connotes that the claimant's use must be independent and not contingent upon the enjoyment of a similar right by others. Hence, use shared with the owner of the servient estate generally may form the basis for a prescriptive easement. Similarly, two persons may independently acquire prescriptive easements across the same land. An individual's use of land in connection with the general public, however, cannot support a private prescriptive right unless the claimant's use is distinctive in some manner. Use by a claimant's customers and lessees does not represent use by the general public, but rather is derivative of the claimant's usage and evidences a claim of right." The Law of Easements & Licenses in Land § 5:23.

Beyond these authorities, we recognize that many other states understand exclusivity differently than the *Koch* court and the panel below. See, e.g., *Nationwide*

Financial, LP v. Pobuda, 21 N.E.3d 381, 391 (Ill. 2014) ("'Exclusive' in the context of a prescriptive easement claim 'does not mean that no one may or does use the way, except the claimant of the easement. It means no more than that his right to do so does not depend upon a like right in others, and it does not mean that the claim is necessarily well founded.'") (quoting *Petersen v. Corrubia*, 21 Ill. 2d 525, 531, 173 N.E.2d 499 [Ill. 1961]); *Keener Properties, L.L.C. v. Wilson,* 912 So.2d 954, 957 (Miss. 2005) ("We conclude that the distinction to be made when using the term 'exclusive' as it relates to a prescriptive easement does not mean to keep all others out, but to show a right to use the land above other members of the general public."); see also The Law of Easements & Licenses in Land § 5:23 n.10 (defining the view of prescriptive easement exclusivity in *Koch* as a minority view).

Thus, we take this opportunity to correct any "blurring" of the exclusivity elements in adverse possession and prescriptive easements, and thereby distinguish one from the other. Exclusivity in the context of adverse possession is different than exclusivity in the context of prescriptive easements. In a successful adverse possession claim, the possessor acquires ownership of the owner's interest in the land. The adverse possessor's exclusion of all others during the prescriptive period acts as a challenge to the landowner's right to own and possess the land for all purposes allowed by what he owns. 50 Wake Forest L. Rev. at 1264 (exclusivity in adverse possession refers to "challenging the true owner's right to use the property or preventing the true owner from using the land" so that the possessor's use is "exclusive against all others"). Often, this involves the possessor erecting fencing or other barriers to prevent the landowner and others from making productive use of the land during the prescriptive period. 50 Wake Forest L. Rev. at 1264.

But a prescriptor's exclusive challenge in a prescriptive easement operates differently. In a successful prescriptive easement claim, the prescriptor mounts a more limited challenge because the burden a prescriptor imposes on the land is less onerous

than the challenge of the adverse possessor. Cf. 28A C.J.S., Easements § 35 (lesser challenge of a prescriptive easement is justified because of the lesser interests at stake in gaining the easement and because it is possible for titleholder and prescriptor to use the same strip of property simultaneously). Rather than challenge everyone's ability to enter the land, a prescriptor asserting a prescriptive easement challenges the landowner to prevent the prescriptor from using the land for the prescriptor's particular purpose. 50 Wake Forest L. Rev. at 1264 ("In the prescriptive easement context, on the other hand, exclusive use tends to refer to a challenge to the true owner's right to prevent the [prescriptor] from using the land for the particular use for which the easement is claimed."). So the prescriptor meets the exclusivity requirement for a prescriptive easement if the landowner's actions fail to substantially interrupt the prescriptor's use of the land for the prescriptor's specific purpose during the prescriptive period. Because a prescriptive easement only arises from the prescriptor's specific challenge that the landowner failed to address, a prescriptive easement does not arise if others are expressly or implicitly permitted to do the same thing the prescriptor views as a challenge.

And so, we clarify that even though the elements of adverse possession and prescriptive easements are "substantially the same," the exclusivity test for each doctrine is critically different. *Fiest,* 175 Kan. at 5; *Taylor Inv. Co. v. Kansas City Power & Light Co.*, 182 Kan. 511, 518, 322 P.2d 817 (1958). Necessarily, any analysis of these elements must specifically focus on how the element is understood within the particular doctrine at issue.

The element of exclusivity was established here in the context of a prescriptive easement.

We now turn to the issue on appeal. The Pyles argue the panel erred by applying an incorrect understanding of exclusivity when reviewing the district court's prescriptive easement finding. We agree. The panel made an error of law by relying on *Koch*'s erroneous exclusivity definition when it held that exclusivity does not exist unless the

prescriptor's use is "'to the exclusion of *all other persons*.'" *Pyle*, 2022 WL 1277628, at *4 (quoting *Koch*, 48 Kan. App. 2d at 288). For that reason, the panel erroneously concluded the Pyles' use of the land was not exclusive because the Pyles did not exclude everyone from the land.

There is substantial competent evidence for the district court's finding that the Pyles and their agents were the only individuals using the asserted easement for the particular purpose of accessing the Field. Testimony from Dennis Pyle and his agents support this finding. While the Muellers testified they also used the Gall tract during the prescriptive period, and the Galls sometimes allowed sportsmen to hunt or fish on it, no one who owned or possessed the Gall tract substantially interrupted the Pyles' access to the Field.

Each group, therefore, used the asserted easement over the Gall tract for unique purposes. The Pyles and their agents used the asserted easement as a corridor to access the Field, the hunters and anglers used the asserted easement for outdoor recreation, and the Galls and Muellers used the land for planting and growing crops. Importantly, the Pyles' use of the land was unique to them. Moreover, no one else had a similar right to use the Galls' land as a corridor to the Field. Aside from the occasional errant hunter or fisherman, the Pyles were the only ones that challenged the Galls to exclude them from their asserted easement.

Framed differently, the fact that various individuals used the same strip of the Galls' land is irrelevant to the exclusivity determination of an asserted prescriptive easement. Instead, the relevant question is *how* that land was used. The district court found the Pyles used the land to access the Field. The panel agreed, but it also concluded that "Pyle and the Muellers both used the northern boundary for agricultural purposes." *Pyle*, 2022 WL 1277628, at *4. While both the district court and the panel were correct, the use described by the district court was more specific and was unique to the Pyles. As

we have explained, "prescriptive easements are interpreted narrowly because they are created by the adverse use of the property, with the use during the prescriptive period defining the scope of the easement." *Stroda v. Joice Holdings*, 288 Kan. 718, 721, 207 P.3d 223 (2009). It matters not that there may be a common use of the land. It matters whether there is a factor distinguishing the Pyles' use from the use of others.

The element of adversity is not before us.

Turning to another element of prescriptive easements, the Galls argued on direct appeal to the panel that the Pyles' use of their land was not adverse. The panel did not reach this issue because it determined the Pyles' use of the land was not exclusive and therefore the district court erred in finding the Pyles acquired a prescriptive easement. See *Pyle*, 2022 WL 1277628, at *4 ("Because a prescriptive easement does not exist without exclusivity, we need not examine the Galls' argument concerning adversity."). Though the Galls make a one-sentence reference to the adversity argument in their supplemental brief, and also raised the issue at oral arguments before us, the Galls did not cross-petition or file a conditional cross-petition asking us to review the adversity issue. The district court's adversity finding therefore controls. *Friends of Bethany Place v. City of Topeka*, 297 Kan. 1112, 1121, 307 P.3d 1255 (2013). We decline to address whether the Pyles' use was adverse. See Supreme Court Rule 8.03(c)(3)(B) (2023 Kan. S. Ct. R. at 57) ("If the Court of Appeals does not decide an issue properly presented to it, the cross-petitioner must raise that issue to preserve it for review."); Rule 8.03(c)(4)(B) (2023 Kan. S. Ct. R. at 58) ("If the Court of Appeals does not decide an issue properly presented to it, the conditional cross-petitioner must raise that issue to preserve it for review.").

The facts have not been reweighed.

As a final matter, the Pyles argue the panel erroneously substituted its own findings of fact for those of the district court. But the district court and the panel agreed

on the relevant facts. The disagreement centered on the legal question of how to understand exclusivity, rather than a factual question about who was on the land. As we explained above, the panel erred in this regard by (1) relying on the exclusivity definition in *Koch*, and (2) failing to narrowly interpret the Pyles' use of the prescriptive easement.

CONCLUSION

We find the panel erred in its holding on the exclusivity element of the Pyles' prescriptive easement claim. We do not consider the Galls' issue of adversity in the context of the Pyles' claim of a prescriptive easement. Finally, we find no error in the panel's consideration of the facts. We thus reverse the panel's conclusion that the Pyles did not establish a prescriptive easement over the Gall tract.

Judgment of the Court of Appeals reversing the district court on the issue subject to review is reversed. Judgment of the district court is affirmed.