

SUPREME COURT OF NEW HAMPSHIRE

Bonardi v. Kazmirchuk

146 N.H. 640 (2001) · Decided July 18, 2001

SUMMARY

The New Hampshire Supreme Court affirmed a judgment declaring that the defendant had established a prescriptive easement over the plaintiff’s driveway. The court held that regular, continuous use of the driveway for more than twenty years, with the owners’ knowledge but without permission, was adverse and sufficient to create the easement; subjective beliefs about permission were immaterial.

CASE DETAILS

|                       |                                                                                                                                                                                                             |
|-----------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | Supreme Court of New Hampshire                                                                                                                                                                              |
| WRITING FOR THE COURT | Nadeau, J.; Duggan, J.; Gray, J., specially assigned; Manias, J., specially assigned; Barry, J., sat for oral argument but did not participate in the final vote                                            |
| JURISDICTION          | New Hampshire                                                                                                                                                                                               |
| DECIDED               | July 18, 2001                                                                                                                                                                                               |
| DISPOSITION           | affirmed                                                                                                                                                                                                    |
| PROCEDURAL POSTURE    | Plaintiff appealed from a Superior Court judgment declaring that defendant had established a prescriptive easement over plaintiff's driveway.                                                               |
| STANDARD OF REVIEW    | Whether use of property is adverse is an issue of fact. The Supreme Court will reverse the trial court's findings and rulings only if they are unsupported by the evidence or erroneous as a matter of law. |
| PRECEDENTIAL VALUE    | Published New Hampshire Supreme Court opinion                                                                                                                                                               |
| PARTIES               | Nicholas Bonardi v. Donna Kazmirchuk                                                                                                                                                                        |

TOPICS

- prescriptive easements
- easements
- real estate

PRACTICE AREAS

- real estate
- property law

## QUESTIONS PRESENTED

1. Whether defendant's use of plaintiff's driveway was adverse, rather than permissive, for purposes of establishing a prescriptive easement.
2. Whether the trial court's finding of adverse use was supported by the evidence.
3. Whether defendant's or her mother's subjective belief that they had permission defeated the adverse-use element.
4. Whether permission allegedly given by plaintiff in 1993 or 1994 defeated the prescriptive easement claim.

## HOLDINGS

1. Defendant established adverse use because she or her mother regularly used plaintiff's driveway as the primary access to the property for more than twenty years, with the knowledge but without the permission of the owners.
2. Permission allegedly granted in 1993 or 1994 did not defeat the claim because the prescriptive easement had already matured after twenty years of use in approximately 1986 or 1987.
3. The subjective belief of defendant or her mother that they had permission was irrelevant because the nature of the use, rather than subjective intent, controls whether use is adverse.

## KEY QUOTATIONS

*“To establish a prescriptive easement, the defendant must prove by the balance of the probabilities that she used the plaintiff’s driveway for twenty years and that her use was “adverse, continuous, and uninterrupted ... in such a manner as to give notice to [the plaintiff] that an adverse claim was being made to it.”” (642)*

*“The evidence established that the defendant or her mother used the driveway as their primary access to the defendant’s residence regularly for over twenty years with the knowledge of, but without the permission of, the plaintiff’s predecessors-in-title. Such use was trespassory, and, therefore, adverse.” (643)*

*“When determining whether a claimant’s use is adverse, the claimant’s “[s]ubjective intent is immaterial; it is the nature of the use that is controlling.”” (644)*

## FACTUAL BACKGROUND

The parties owned adjacent residential properties in Bedford. Defendant or her mother used plaintiff's driveway as the primary access to defendant's property from 1966 or 1967 through 1997, despite another access road, and did so with knowledge of plaintiff's predecessors-in-title but without evidence of actual permission. Plaintiff acquired his property in 1989, later asked defendant not to use the driveway, and brought a declaratory judgment action.

## PROCEDURAL HISTORY

The Superior Court held a hearing on October 4, 1999, and found that defendant or her mother had used plaintiff's driveway as their primary access for more than twenty years without permission. The court entered

judgment declaring that defendant had established a prescriptive easement. The Supreme Court of New Hampshire affirmed.

#### DISPOSITION

affirmed

#### CASES CITED

- Sandford v. Town of Wolfeboro, 143 N.H. 481, 484, 485-86, 489 (1999)
- Ellison v. Fellows, 121 N.H. 978, 981 (1981)
- Zivic v. Place, 122 N.H. 808, 815 (1982)
- Town of Warren v. Shortt, 139 N.H. 240, 242 (1994)
- Catalano v. Town of Windham, 133 N.H. 504, 510 (1990)
- Nelson v. Johnson, 679 P.2d 662, 665 (Idaho 1984)
- Hewes v. Bruno, 121 N.H. 32, 34 (1981)
- Kellison v. McIsaac, 131 N.H. 675, 680 (1989)