Circuit Court for Prince George's County
Case No.: CAE-18-01758

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0805

September Term, 2019

BRYTANI SUMBY

v.

LINDA JACKSON

Wells,
Reed,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: March 9, 2021

Appellant, Brytani Sumby brings this appeal, arguing that the Circuit Court for Prince George's County erred as a matter of law when it denied her motion for a directed verdict and allowed appellee, Linda Jackson's easement by implication and nuisance claims to be heard by the jury.

In bringing this appeal, Appellant presents two question for our review,[1] which we have rephrased:

I. Did the circuit court err as a matter of law when it denied Appellant's Motion for a Directed Verdict on Appellee's easement by implication claims after she presented her case-in-chief?

II. Did the circuit court err as a matter of law when it denied Appellant's Motion for a Directed Verdict on Appellee's nuisance claim after she had presented her case-in-chief?

For the following reasons, we answer the first question in the affirmative and the second question in the negative. We reverse the circuit court's judgment.

FACTUAL & PROCEDURAL BACKGROUND

A. Nature of the dispute

On November 9, 1988, Appellee purchased the property located at 124 Maryland Park Drive, Capitol Heights, Maryland 20743, lots 35 and 36 ("124 Maryland Park Drive",

[1] Appellant presented the following questions *verbatim*:

> Did the trial court erred when it failed to grant defendant's motion for directed verdict, on the easement issues, as a matter of law after Plaintiff presented her case-in-chief?
>
> Did the trial court erred when it failed to grant defendant's motion for directed verdict, on Plaintiff's claim of nuisance, as a matter of law after Plaintiff presented her case-in-chief?

"Appellee's property", or "lots 35 and 36"). At that time, Roscoe Swinson and his wife, Arnetta Swinson owned the adjacent property addressed 122 Maryland Park Drive, Capitol Heights, Maryland 20743, lots 37 and 38 ("122 Maryland Park Drive", "Appellant's property", or "lots 37 and 38"). 122 Maryland Park Drive was foreclosed upon and later purchased by Kenneth Awkward on March 25, 2009, then the property was purchased by a man named Nashville Peart on May 27, 2015. Mr. Peart sold his interest in 122 Maryland Park Drive to Appellant on September 8, 2016. More than twenty-seven years after the Appellee purchased the property.

Appellee contends that she had used the driveway adjoining the two properties since 1988 until Appellant purchased 122 Maryland Park Drive and erected a six-foot-wooden fence blocking the "shared" driveway. The parties began to dispute Appellee's use of the driveway and Appellant sought intervention from the courts and was granted a Peace Order against Appellee and her adult son. After the Peace Order was appealed and denied, Appellee filed a Complaint for Injunctive Relief to Establish Prescriptive Easement; Easement by Implication; Easement by Necessity; Statutory Easement; Irrevocable License in Real Property; and Damages for Nuisance Interference with Easement and Damages for Obstruction of Access to Easement against Appellant.

B. Evidence Presented at Trial

On May 7, 2019, the parties participated in a jury trial in the Circuit Court for Prince George's County. During Appellee's case-in-chief, she offered Mark Ferguson as an expert in land planning. After the court accepted him as an expert in that field, Mr.

Ferguson testified to the following:

1. Mr. Ferguson conducted a chain of title search on Appellee's property and prepared a titled history on both Appellee and Appellant's property.

2. Appellee's property is described Lots 35 and 36, whereas Appellant's property is listed as Lots 37 and 38.

3. Appellee purchased her property on November 9, 1988.

4. Appellant's property was previously owned by Roscoe Swinson and Arnetta Swinson as of January 6, 1971. Mrs. Swinson died prior to 1988, and on May 8, 1988 Mr. Swinson and his daughter, Dolores Matthews became the titled owners of Appellant's property.

5. The Swinsons' property was foreclosed upon and later purchased by Kenneth Awkward on March 25, 2009. Then Nashville Peart purchased the property on May 27, 2015 and sold the property to Appellant on September 8, 2016.

6. Mr. Ferguson reviewed the county's geographical information system site called "PG Atlas" which had photographs on each piece of property going back to 1938.

7. Plaintiff's Exhibit 3 consisted of a serial listing of aerial photographs of Appellant and Appellee's properties taken in 1938, 1965, 1977, 1980, 1984, 1993, 1998, 2000, 2005, 2007, 2009, 2011, 2014, 2015, 2016, and 2017.

8. The driveway in question has been in existence from 1988 through 2008.

9. Appellant and Appellee's property were in common ownership from 1940 through 1970 by Steven Nolle and his wife.

10. Neither of the properties existed in 1938.

11. Mr. Ferguson has not spoken to the individuals who owned Appellee's property in 1965 and never visited the properties in question.

12. He observed a car in the back of Appellee's property in the years 1980, 1998, 2000, and 2005.

13. Mr. Ferguson could not testify with any degree of reasonable certainty that the 1965 aerial photograph shows a vehicle behind Appellee's home.

14. The 1977 aerial photograph does not show any vehicle parked on Appellee's property, and Mr. Ferguson had no affirmative knowledge whether the owner of the property used the garage attached to Appellee's property.

15. Mr. Ferguson had no affirmative knowledge that the owner of 122 Maryland Drive had a vehicle in 1980 and could not state with definiteness that the 1984 aerial photo shows a vehicle behind Appellee's property.

16. Mr. Ferguson had not spoken to the individual who owned Appellee's property in 1984 and had no idea if that person owned a vehicle in 1984.

17. It was unlikely that a car was parked in Appellee's driveway in the 1993 aerial photograph, however, the aerial photo showed 'three or four' vehicles parked on Appellant's property.

18. Appellee's home was built it 1940 and Appellant's home was built in 1948. There is no mention of any specific easement in either of the parties' deeds.

Appellee also testified in her case-in-chief. She testified that she had purchased the property located at 124 Maryland Park Drive in November of 1988 and currently resides at the property. She stated that Roscoe and Arnetta Swinson were her neighbors in 1988 at the listed address of 122 Maryland Park Drive and that she began using the driveway in question when she first moved into her home. According to her testimony at trial:

1. Appellee never made a claim of ownership of the driveway.

2. Appellee parked her car in the driveway and would immediately move her car if a neighbor needed to get out.

3. Appellee saw the survey of her property when she purchased her house in 1988 and believed she was entitled to use the driveway on Appellant's property because it stated 'dirt driveway' on her survey.

4. Appellee's survey showed lot 34 belong to the neighbor on the opposite side of her home but she never made any claim that she had the right to use lot 34.

5. When Appellee first moved in, she did not know who the driveway belonged to.

6. Appellee used the driveway to get to her garage and there was no issue until Appellant moved in.

7. When Appellant asked Appellee to move her vehicle, she did it with no problem.

Appellee also claimed Appellant interfered with the reasonable use and enjoyment of her property and the driveway in dispute. At trial, Appellee testified that she frequently used the garage until August 14th, 2017 when Appellant built a fence to block her access to the garage. Appellee further testified that she used to love to sit on her porch on nice days to read books and magazines, listen to music, talk to neighbors, and enjoy the company of her friends. But now, she is no longer able to do so after Appellant posted two large dogs at the entrance of the driveway. According to Appellee, the dogs barked excessively and would sometimes break loose from their chains, making Appellee uncomfortable, unable to use the driveway, or enjoy her front yard. Based upon these facts, the circuit court denied Appellant's Motion for a Directed Verdict. Appellant then presented her case-in-chief.

At the close of all the evidence, Appellant again moved for a directed verdict, adopting all previous arguments. The court denied her motion and the matter was submitted to the jury. The jury found that: (1) Appellee maintained an implied easement of necessity and prescription in the driveway, and (2) Appellant's interference with Appellee's reasonable use and enjoyment of her property constituted a nuisance.

Appellant brings this present appeal. She challenges the circuit court's denial of her Motion for a Directed Verdict on both the easement and nuisance claims.

STANDARD OF REVIEW

On appeal, a motion for judgment in a civil case is reviewed *de novo*. *Ayala v. Lee*, 215 Md. App. 457, 467 (2013). "The evidence and inferences therefrom that support the basis of the motion are viewed in the light most favorable to the non-moving party." *Id*. "If there was any evidence, no matter how slight, that was legally sufficient to generate a jury question, the motion was properly denied." *Id*. (internal citation and quotation marks omitted). However, if the evidence before the court is insufficient "to generate a jury question, i.e., permits but one conclusion, the question is one of law and the motion must be granted."*Id*. (internal citation omitted).

DISCUSSION

I. EASEMENTS

A. Preservation

Appellant ask this Court to reverse and vacate the circuit court's judgment, arguing that the circuit court erred when it denied her Motion for a Directed Verdict on the easement claims after Appellee presented her case-in-chief.

At trial, Appellant made a Motion for a Directed Verdict, [2] which is functionally equivalent to a motion for judgment under Maryland Rule 2-519. Maryland Rule 2-519 provides:

[2] The phrase "motion for a directed verdict" relates back to Maryland Rule 552(b), which was replaced by the current Maryland Rule 2-519. According to the official notes to Rule 2-519, "[s]ection (a) is new and replaces former Rules 535 and 552 a. Section (b) is in part derived from the 1968 version of Fed. R. Civ. P. 41 (b) and is in part new. Section (c) is derived from former Rule 552 b. Section (d) is derived from former Rule 552 c."

> **(a) Generally**. A party may move for judgment on any or all of the issues in any action at the close of the evidence offered by an opposing party, and in a jury trial at the close of all the evidence. The moving party shall state with particularity all reasons why the motion should be granted. No objection to the motion for judgment shall be necessary. A party does not waive the right to make the motion by introducing evidence during the presentation of an opposing party's case.
>
> **(b) Disposition**. When a defendant moves for judgment at the close of the evidence offered by the plaintiff in an action tried by the court, the court may proceed, as the trier of fact, to determine the facts and to render judgment against the plaintiff or may decline to render judgment until the close of all the evidence. When a motion for judgment is made under any other circumstances, the court shall consider all evidence and inferences in the light most favorable to the party against whom the motion is made.
>
> **(c) Effect of Denial**. A party who moves for judgment at the close of the evidence offered by an opposing party may offer evidence in the event the motion is not granted, without having reserved the right to do so and to the same extent as if the motion had not been made. In so doing, the party withdraws the motion.
>
> **(d) Reservation of Decision in Jury Cases**. In a jury trial, if a motion for judgment is made at the close of all the evidence, the court may submit the case to the jury and reserve its decision on the motion until after the verdict or discharge of the jury. For the purpose of appeal, the reservation constitutes a denial of the motion unless a judgment notwithstanding the verdict has been entered.

As an initial matter, Appellee asks that we deny the present appeal, contending that Appellant's claim overlooks Maryland Rule 2-519(c), which states:

> A party who moves for judgment at the close of the evidence offered by an opposing party may offer evidence in the event the motion is not granted, without having reserved the right to do so and to the same extent as if the motion had not been made. In so doing, the party withdraws the Motion for Judgment.

Because Appellant opted to present evidence in an effort to controvert the Appellee's case, Appellee argues that Appellant effectively withdrew her Motion for Judgment. Appellee supports her argument by citing *Driggs Corp. v. Md. Aviation Admin.*, 348 Md. 389 (1998), which states:

> A party who makes and loses such a motion has an option. The party (B) may proceed to present additional evidence in an effort to controvert, or further controvert, the evidence produced in A's case, in which event B effectively withdraws the motion for judgment and may not complain on appeal about the denial of it (Md. Rule 2–519(c)), or B may rest on the denial of the motion and challenge on appeal the court's determination that the evidence was legally sufficient.

Id. at 403. We disagree and note that Appellee's recitation of the law is incomplete.

As Appellant correctly countered, "a motion for judgment, made at the close of an opponent's case and thereafter denied, is withdrawn when the party making the motion offers evidence in its own case, but after offering evidence, the motion may be reoffered or renewed." *Smith v. Carr*, 189 Md. 338 (1947). Appellant directs our attention to *K & K Management, Inc. v. Lee*, 316 Md. 137 (1989), in which the Court of Appeals determined that a renewed motion for judgment at close of all the evidence "on all the same bases" as those asserted previously without "taking the court's time to argue further… satisfied Rule 2–519(a)'s requirement that the grounds of a motion for judgment be stated with particularity." *Id*. at 153.

A review of the record shows that Appellant moved for a directed verdict at the close of Appellee's case-in-chief in accordance with Maryland Rule 2-519.

> [APPELLANT'S COUNSEL]: I do have a motion for a directed verdict at this point.

***

I will submit to this [c]ourt that Plaintiff has not met her burden in a number of the counts in this case and I'll reference the [c]ourt as follows. One of the count[s], I'll start with is easement by necessity....[T]here is no evidence that has been before this [c]ourt that can satisfy [the third] element and it says, and finally, the party asserting [the existence] of [an] easement must demonstrate the necessity existing at the time of the grant. That means at the time that the property was severed. And if you recall I asked Mr. Ferguson, Mr. Ferguson, you have no idea how this property was being used in 1971. He said other than it being a house, no. Do you have any evidence that you could say to this [c]ourt that the owner of 124 Maryland Park Drive had a vehicle? He testified, no. Do you have any evidence that they used the driveway? He testified, no. Did you have any conversation with anyone who lived at either of these propert[ies] in 1971? That's the time when it was severed. Testimony, no.

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Regarding the prescriptive easement or easement by prescription…there is no evidence that [Appellee] put forward that[] established that she used this property adversely, exclusively and uninterrupted for 20 years.

***

And the moment Ms. Jackson testified that, we never had any problems with the neighbors, when they asked me to move out the driveway I would move. The moment her son testified, when I would be doing work on the car, when they asked me to move[,] I would move. And that's permission. That's not hostile, that's not exclusive, that's not adverse.

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Regarding the easement by implication…there's no law prohibiting a [landowner] from cutting himself off.... There's no testimony that the Noells in 1971 lived at that property and therefore walked up and down that driveway or drove up and down that driveway…. That's Plaintiff's burden to show. There's no testimony that any of the occupants or the owners of 124 Maryland Park Drive, prior to 1988, walked up and down that driveway or drove up and down the driveway. To make any presumptions, even after the state of the proceedings, I think would be error.

The circuit court denied Appellant's motion and Appellant proceeded with her case-in-chief. At the close of all evidence, Appellant renewed her motion for a directed verdict.

[APPELLANT'S COUNSEL]: Just for the record, Your Honor, I would like to renew my motion for directed verdict at this point.

> THE COURT: Are you going to adopt your prior argument?
>
> [APPELLANT'S COUNSEL]: I will adopt my prior arguments and now that [Appellant] and all of her witnesses have testified, I renew my motion on each and every one of those counts, adopting all the arguments that I have made previously.

Like the court in *K & K Management*, we hold that Appellant's adoption of her prior arguments was with respect to judicial efficiency and satisfied Rule 2–519(a)'s requirement that the grounds of a motion for judgment be stated "with particularity." *Id*. at 153.

For this reason, we find that the current appeal has been properly preserved for our review, and we will only consider the evidence and arguments set forth in Appellant's initial motion for a directed verdict. We now address whether the motion for directed verdict should have been granted on the merits of Appellant's easement claims.

B. Easement by Implication

"An easement is a nonpossessory interest in the real property of another," and can "'be created by expressed grant, by reservation in a conveyance in land, or by implication." *Lindsay v. Annapolis Roads Prop. Owners Ass'n*, 431 Md. 274, 290 (2013) (internal citation, quotation marks, and brackets omitted). An easement "'by implication may arise by prescription, necessity, the filing of plats, estoppel, and implied grant or reservation where a quasi-easement has existed while the two tracts are one." *Id*. at 291. Such easements are "'based on the presumed intention of the parties at the time of the grant or reservation as disclosed from the surrounding circumstances, and this intention is a factual question." *Anderson v. Great Bay Solar I, LLC*, 243 Md. App. 557, 601 (2019). "Grants of

easements by implication are looked upon with jealousy and are construed with strictness by the courts." *Bacon v. Arey*, 203 Md. App. 606, 638 (2012) (internal citation, quotation marks, and brackets omitted). In the present matter, Appellee maintains that she has an easement by implication based on necessity and prescription.

i. Easement by Necessity

Appellant contends that she was entitled to a directed verdict at the end of Appellee's case-in-chief, because Appellee presented no evidence to support the third element of her easement by necessity claim. She notes the three prerequisites for an easement by necessity:

> (1) initial unity of title of the parcels of real property in question; (2) severance of the unity of title by conveyance of one of the parcels; and (3) the easement must be necessary in order for the grantor or grantee of the property in question to be able to access his or her land, with the necessity existing both at the time of the severance of title and at the time of the exercise of the easement.

Sandbury v. MDR Development, LLC, 390 Md. 476, 488 (2006). Although Appellant stipulates to the first two prerequisites, she argues that "'[Appellee] produced no legally relevant and competent evidence from which a rational mind could infer that the owner of [Appellee's] property in 1970 or 1971 had a need to use the driveway located on [Appellant's] property in 1970 or 1971, when the properties were severed."

As a general matter, easements by necessity exist in two forms: implied reservation and implied grant. *Purnell v. Beard & Bone, LLC*, 203 Md. App. 495, 506 (2012). "'An implied easement arising from necessity involves a presumption that the parties intended to create an easement.":' *Rau v. Collins*, 167 Md. App. 176, 187 (2006).

> A distinction has been maintained in the law between implied grants and implied reservations. If an easement is continuous and apparent and necessary to the reasonable enjoyment of the premises granted, it will be implied that the grant included the easement. However, if a grantor intends to reserve any rights or uses in or over the tenement granted, he must reserve them expressly, and the only exception is of easements, including ways, of actual, strict necessity. The reason for the last rule is said to be that a grantor cannot derogate from his grant....

Id. at 188. Appellee contends that she has an easement implied by grant over Appellant's driveway because her use was continuous, apparent, and necessary to the reasonable enjoyment of her backyard garage. Appellant disagrees, arguing that Appellee failed to show strict necessity and presented no evidence or testimony regarding the intent of the grantor or any circumstances surround the use of the driveway at the time the property was severed. While we agree with Appellee that the present matter concerns the existence of an implied grant, we are not convinced that the evidence presented at trial was sufficient to present the issue to a jury.

The Court of Appeals addressed the issue of implied easements in *Eliason v. Grove*, 85 Md. 215, (1897). Petitioner appealed, in part, the trial court's ruling that precluded his implied grant claim from reaching the jury. According to the trial record, Dr. Miller owned two adjoining lots where he erected two double brick houses. *Id*. at 844. There was a water well at the rear of the contiguous lots near the division between the houses. *Id*. As evidenced by the record,

> During Dr. Miller's ownership of the property he occupied the west side and rented the east side. He and his tenants used the well in common, and he testified that 'the well of which I have spoken and the houses were so constructed that the occupants of both sides of the house could have free access to the well for the use of the water'; that the tenants 'were entitled to

> the use of the water, and the houses were so constructed as to give them the undivided right to it.'

Id. Dr. Miller sold his ownership interest in the west lot first then sold the east lot to a separate buyer. For nearly 30 years, there was shared, uninterrupted use of the water well until respondent purchased the property. Upon these facts, the Court of Appeals reversed the trial court's judgment and held that,

> there [was] evidence to the effect that the well was, at the time Dr. Miller sold [the west lot], used by the occupants of both properties as if it belonged to both, and that it was so used that it could fairly be inferred that it was the intention and expectation of the parties that the use of it should continue after the sale.

Id. at 846. The Court of Appeals explained, and we reiterate, that

> it is [] well settled that if, during the unity of ownership, the owner of two properties uses one for the benefit of the other in such manner as would have given rise to the presumption that an easement existed if the tenements had been held by different persons, then, upon a conveyance of the property so used, an easement will be granted to the purchaser, provided the use has been such that the easement resulting from it would be of the class known as continuous and apparent, and would be necessary for the reasonable enjoyment of the property conveyed. The difficulty that often presents itself is the determination of the question whether the facts of the particular case before the court bring it within that class. There has been confusion in some of the cases, because they have not distinguished between implied grants of easements and implied reservations. By no court has the distinction been more clearly defined than in the case of *Mitchell v. Seipel*, 53 Md. 251[, 258 (1880)], where Judge Miller delivered an able and exhaustive opinion on the subject. The reason for sustaining implied grants is apparent, as 'a grantor shall not derogate from his grant,' and when he intends to limit, restrict, or burden the use of property conveyed by him for the benefit of property retained he should express his intention in language that is not easily misunderstood. **While courts should not be too ready to sustain grants by implication, yet if, at the time of the purchase of property, there are visible and apparent easements and privileges annexed to it**, **which are necessary for its reasonable enjoyment**, we must assume that they were

> taken into consideration when the price was agreed upon, and that the use of them was paid for.

Id. at 845. Guided by the Court's reasoning in *Eliason*, we hold that the circuit court erred as a matter of law when it denied Appellant's Motion for a Directed Verdict.

By the close of Appellant/ee?'s case-in-chief, the evidence showed, in relevant part, that lots 35, 36, 37, and 38 were in common ownership from 1940 through 1970 by Steven and Madeline Nolle. Having survived her husband, Madeline Nolle sold her interest in the lots to James and Jane Feddin in September of 1970. On January 6, 1971, Roscoe and Arnetta Swinson purchased lots 37 and 38. The lots were foreclosed upon and were later purchased by Kenneth Awkward on March 25, 2009 then by a man named Nashville Peart on May 27, 2015. Mr. Peart sold his interest in lots 37 and 38 to Appellant on September 8, 2016. Appellee purchased lots 35 and 36 on November 9, 1988 during the time the Swinsons' owned lots 37 and 38.

At trial, Mr. Ferguson, an expert in land planning, reviewed the county's geographical information system site called PG Atlas, which provided a serial listing of aerial photographs of Appellant and Appellee's properties taken in 1938, 1965, 1977, 1980, 1984, 1993, 1998, 2000, 2005, 2007, 2009, 2011, 2014, 2015, 2016, and 2017. Neither of the properties existed in 1938. During the direct examination of Mr. Ferguson, the following colloquy ensued:

> [COUNSEL]: Do you have an opinion as to whether or not the driveway that is the subject of this particular case has been in existence from 1988 through 2008?
>
> [FERGUSON]: I do.

[COUNSEL]: And what is that opinion?

[FERGUSON]: The driveway had been in existence from 1988 through 2008.

Mr. Ferguson was then questioned on cross examination concerning his observation of the aerial photographs. He answered:

> [FERGUSON]: You can see in the 2017 aerial photograph that there were also very clear cars in the back of [Appellant]'s property.... you can see from other photographs as you go back in time, there was a car, for instance, in the back of [Appellee]'s property in the 2009 photograph.
>
> ***
>
> There's a photograph—there's a car in the back of [Appellee]'s lot in the 2005 photograph, in the 2000 photograph, in the 1988 photograph. Nineteen eighty-four is very blurry. It is difficult to tell. Similarly, 1980, there appears to be one. The 1965 photograph also appears to have a car in the rear as well.

Mr. Ferguson admitted on cross that he did not speak to anyone who owned the property in 1965 and could not "'state definitively" that the object seen in the 1965 photograph was a vehicle. He did not observe a vehicle parked on Appellee's property in the 1977 aerial photograph, "[had] no idea whether or not the individual that owned [Appellee's] property in 1977 had a vehicle," and "[had] no idea whether...the owner of the property [in 1977] used the garage that's attached to the property." Mr. Ferguson had "no affirmative knowledge" whether the 1980 or 1984 owners of lots 35 and 36 had a vehicle, could not state with definiteness that the photographs showed a vehicle behind the house, and did not speak to any of the owners. Mr. Ferguson noted that Appellee's home was built it 1940 while Appellant's home was built approximately eight years later in 1948.

He testified that he had never visited either property to examine the driveway firsthand Addedly, there was no indication, in either deed, that the individuals who owned lots 35 and 36 had a written easement effective against the owners of lots 37 and 38.

Having considered the evidence presented during plaintiff's case-in-chief, we hold that Appellee failed to present evidence that the Feddins used the driveway belonging to lots 37 and 38 for the benefit of lots 35 and 36 "in such manner as would have given rise to the presumption that an easement existed if the tenements had been held by different persons." *Eliason*, 85 Md. 215; *see also Anderson*, 85 Md. at 601. As we previously stated, implied grants are contingent on "the presumed intention of the parties at the time of the grant...as disclosed from the surrounding circumstances, and this intention is a factual question." *Anderson*, 243 Md. App. at 601.

Here, Appellee did not present any evidence concerning the parties' intent or the circumstances at the time of the grant. Instead, Appellee introduced a series of aerial photographs, some of which depicted a vehicle on her property and some that did not. She maintains that "[b]y inference, the photographs circumstantially establish[ed]" that the driveway existed continuously since 1965 and was the only access connecting the rear of both properties to the public road. Appellee argues that, upon these facts, there is a reasonable inference that the driveway was intended to be used by both properties. Such facts are too attenuated to be considered evidence of the parties' intent at the time of the grant.

Drawing from the reasoning in *Eliason,* the "easement[] and [the] privileges annexed to it" must have been "visible and apparent" at the time the Swinsons' purchased lots 37 and 38, severing the unity of title from lots 35 and 36. Unlike the party in *Eliason*, Appellee failed to produce any evidence or testimony concerning how the Feddins' used the driveway in relation to the two lots, as well as, any testimony or evidence concerning the Swinsons' understanding of the privileges and burdens annexed to their property. For this reason, we hold that the circuit court erred in submitting this issue to the jury.

ii. Easement by Prescription

Appellant next contends that Appellee failed to produce any evidence to justify submitting her easement by prescription claim to the jury and therefore her directed verdict should have been granted. Whether an owner's "use of [a] disputed area established a prescriptive easement, is a legal question...Therefore, we will review the issue *de novo*." *Turner v. Bouchard*, 202 Md. App. 428, 442–43 (2011). "To establish an easement by prescription a person must make an adverse, exclusive, and uninterrupted use of another's real property for twenty years." *Id*. at 441. However, a permissive use of another's land is insufficient to establish a prescriptive easement. *Id*.

(1) Adverse Use

Appellant first contends that Appellee "produced no legally relevant and competent evidence from which a rational mind could infer that her use of the driveway in question was adverse between 1988 and 2016." When demonstrating adverse use, this Court previously explained in *Turner* that, "[o]rdinarily, the person claiming a prescriptive

easement bears the burden of showing that [their use] has had the character and is of the duration required by law." *Turner*, 202 Md. App. at 443 (internal citations and marks omitted). "When a person has used a right of way openly, continuously, and without explanation for twenty years it is fair to presume adverse use. In such a case, the burden then shifts to the landowner to show that the use was permissive." *Banks v. Pusey*, 393 Md. 688, 699 (2006) (internal citations, marks, and brackets omitted). If the court finds that the claimants use appears to have been by permission, the burden will not shift. *Id*. "The presumption applies in Maryland only when the use over the twenty-year period is unexplained—that is, when the claimant of the easement has used the property as he or she sees fit, without asking for or receiving permission to do so." *Mavromoustakos v. Padussis*, 112 Md. App. 59, 65 (1996) (internal citations and marks omitted).

According to the trial record in the present case, Appellee testified that when she purchased 124 Maryland Park she learned from the real estate agent that the driveway was there for her to use. After the agent showed her the driveway and the garage in the back of the property, the agent told her: "when you move in this house, this is how you get to—how you access the garage." After Appellee purchased the property she and her son used the driveway to park their car, for family events, to play basketball, and to have friends over. The circuit court found that Appellee's use was open, continuous, and without explanation for the requisite period to shift the burden persuasion to Appellant.

To show permissive use, "the servient owner must do more than merely present evidence of permission—he or she must *prove* its existence by affirmative

evidence....[M]erely presenting some evidence of permission will not overcome the presumption of adversity in [Maryland]." *Mavromoustakos*, 112 Md. App. at 68–69. Moreover, permission cannot be found by acquiescence, i.e. by failing to protest. *Banks*, 393 Md. at 704 (2006).

According to Appellant, Appellee use was permissive because she never made any claim of ownership to the driveway. In fact, the evidence shows that when the Swinsons' asked Appellee or her son to move their car, they would move their car immediately. When Appellant moved in to 122 Maryland Park and asked Appellee and her son to move their vehicle, Appellee would move the vehicle with no protestation. Appellant further contends that Appellee did nothing to put her neighbors on notice that she believed that the driveway belonged to her. Without citing any legal authority that would require Appellee to take such action, Appellant argues that the evidence presented could not "lead a rational mind to infer that [Appellee's] use of the driveway in question was hostile or that the Swinsons submitted to her use as opposed to permitting her use of the right of way."

Drawing on our reasoning in *Turner* and *Mavromoustakos*, Appellant bears the burden to prove permissive use by presenting affirmative evidence of permission. The fact that Appellee and her son would move their vehicle upon request is not enough to prove permissive use. *See Turner*, 202 Md. App. at 446 ("[E]vidence of a permissive use of the servient estate will not be overcome by allegations of neighborly accommodation."). In *Senez v. Collins*, 182 Md. App. 300 (2008), we found the Washington State case, *Lilly v. Lynch*, 88 Wash. App. 306 (1997), citing *Frolund v. Frankland*, 71 Wash. 2d 812 (1967)

informative on the issue. In reviewing a dispute concerning the ownership of a boat ramp between adjoining landowners, the Washington Supreme Court held:

> [T]he evidence reveals that the children of the parties, as well as those of other neighbors, played about and over the various neighborhood beach areas with no more than the usual parental approval and restraint, and that the parties themselves occasionally, socially, and casually visited back and forth, and sometimes assisted one another in the performance of various work projects, e.g., beaching the swimming raft for winter storage. Such conduct, under the circumstances, denotes neighborliness and friendship. It does not amount to a subordination of defendants' adverse claim to the disputed wedge....

Senez, 182 Md. App. at 339; *Lilly*, 945 P.2d at 732 (quoting *Frolund*, 431 P.2d at 192 (Lilly's emphasis omitted)). Appellant and Appellee's use of the adjoining driveway is no different.

We agree with the circuit court that Appellant failed to show that permission was given. Appellee's use of the driveway was open, continuous, and without explanation for twenty years, thus, her use is presumed to be adverse. [3]

(2) Exclusive Use

Similarly, Appellant contends that Appellee "produced no legally relevant and competent evidence from which a rational mind could infer that she was the only person

[3] Moreover, according to the Statute of Frauds, "[n]o corporeal estate, leasehold or freehold, or incorporeal interest [i.e. easement] in land may be assigned, granted, or surrendered, unless it is in writing signed by the party assigning, granting, or surrendering it, or his agent lawfully authorized by writing, or by act and operation of law." Md. Real Property § 5-103. Although Appellant maintains the Swinsons gave Appellee permission to use the land, there is no evidence that permission was granted by writing or otherwise.

whose conduct with respect to the driveway in question was that of a true owner." The circuit court found that Appellee met the exclusive use requirement, explaining that,

> viewing all things in the light most favorable to the [Appellee, the exclusivity requirement is] not like adverse possession where you have to use it exclusively to the whole world. It just has to be exclusively used, even if the owners, [Appellant] and the people before her, used it as well. It's just that she has to be the one who's using it as against those persons. So it doesn't have to be that she's using it against the entire world. It's just the fact that she is using it exclusively as defined with respect to prescriptive easements.

Although, the court's articulation of the rule is incorrect, we agree that Appellee's use of the driveway satisfied the exclusivity requirement.

"The exclusive requirement means the claim of user must not depend on the claim of someone else. Even though a claimant may not have been the only user, it is sufficient if he used the way under a claim of right independently of others." *Turner*, 202 Md. App. at 451–52 (internal citations and marks omitted). Moreover, the claim of right "must be exclusive as against the right of the community at large." *Furman E. Hendrix, Inc. v. Hanna*, 250 Md. 443, 446 (1968). In *Turner*, two adjoining property owners disputed over the right to use a portion of the petitioner's driveway. *Id.* at 428. There was no evidence presented at trial that the disputed area was shared with the public, rather the record suggested that the area was used only by Bouchard and his tenants. *Id*. at 452. In affirming the circuit court's ruling, which found Bouchard maintained a prescriptive easement over the disputed area, this Court held that "Bouchard's use of the disputed area was exclusive because Bouchard '[did] not depend on the rights of anyone else in order to have the right to use the driveway and what [he] thought was [his] front yard.'"

Like in *Turner*, there is no evidence here that would suggest the public used Appellant's driveway or that Appellee's use of the driveway depended on the claim of use by? anyone else. The evidence showed that the driveway was used by Appellee, her son, and their respective guests. Accordingly, the court held correctly that Appellee's use was exclusive.

(3) Claim of Right

Lastly, Appellant contends that Appellee "produced no legally relevant and competent evidence from which a rational mind could infer that her claim of right was independent of others." However, Appellant bears the burden to show that Appellee's use of the driveway was permissive and not by claim of right. *See Turner*, 202 Md. App. at 451 ("it was Turner's burden to produce affirmative evidence that Bouchard's use of the disputed area was permissive....The record contains no other evidence to suggest that Bouchard or his tenants used the disputed area with permission."). We further explained in *Turner*,

> In determining whether a use is adverse, the real point of distinction [is] between a permissive or tolerated user, and one which is claimed as a matter of right.... In other words, the use of a way over the lands of another whenever one sees fit, and without asking leave, is an *adverse* use, and the burden is upon the owner of the land, to show that the use of the way was by license or contract inconsistent with a claim of right.

Id. at 448. The evidence before the court showed that Appellee and her family openly and continuously used the driveway for 28 years. Appellant did not present any affirmative evidence that Appellee's use of the driveway was permissive. Accordingly, we find no error.

II. NUISANCE

Appellant also asks this court to reverse the circuit court's ruling on the nuisance issue, arguing that "[Appellee]'s claim for nuisance interference with her property right failed as a matter of law and [Appellant] was entitled to a directed verdict on [the] issue." Without citing any legal authority, Appellant contends that Appellee's claim fails because Appellee produced no evidence that she had exclusive control and use over the driveway. Further, there was no evidence that Appellant's conduct prevented Appellee's use and enjoyment of the driveway. On the other hand, Appellee contends that the evidence at trial established a *prima facie* nuisance claim. She refutes Appellant's assertion that she must have an ownership interest or exclusive control over the driveway to pursue her claim. We agree with Appellee.

As it pertains to private nuisance claims, "[v]irtually any disturbance of the enjoyment of the property may amount to a nuisance so long as the interference is substantial and unreasonable[,] and such as would be offensive or inconvenient to the normal person." *Hoffman v. United Iron & Metal Co.*, 108 Md. App. 117, 133 (1996) (internal citation and marks omitted). Although a landowner may file a nuisance claim, ownership is not necessary. *Id*. at 133. As long as the claimant is in lawful possession of or has a right to occupy the land, he or she has standing to bring a private nuisance claim. *Id*. at 133.

The Court of Appeals addressed a similar issue in *Maddran v. Mullendore*, 206 Md. 291 (1955), in which Maddran brought an action for assault and battery against

Mullendore. Mullendore maintained an easement to pass through a three-foot alley at the rear of his property to transport goods and inventory to his grocery store nearby. *Id*. at 295. Maddran became displeased by the blood dripping in the alley from the meat Mullendore transported to his store. *Id*. at 296. Maddran affixed a new padlock on the gate of the alley and did not give Mullendore a key. *Id*. Maddran then grabbed a chair and sat in the alley to block Mullendore from passing through with his meat. *Id*. Mullendore then pushed Maddran and the chair out the out the alley causing minor injury to Maddran. *Id*. Mullendore counterclaimed that Maddran's interfered with his right to pass through the alley. The circuit court granted Mullendore's Motion for a directed verdict and the Court of Appeals affirmed, stating: "'It is axiomatic that the owner of a servient tenement cannot close or obstruct the easement against those who are entitled to its use in such manner as to prevent or interfere with their reasonable enjoyment." *Id*. at 297. In fact, the Court explained that the aggrieved party has the right to abate the nuisance if done so in a peaceable manner. *Id*. at 299–300.

Maddran illustrates the legal principle controlling in the present case: the owner of a servient tenement cannot close or obstruct an easement against the owner of the dominant tenements, thereby preventing or interfering with the reasonable use and enjoyment of the land. We conclude that is exactly what happened here. Accordingly, we hold that Appellee maintains a prescriptive easement in the use of the driveway and, thus, Appellant may not obstruct her right of way. Moreover at trial, Appellee presented sufficient evidence to submit the nuisance claim to the jury. Id. Appellee testified that she frequently used the

garage until August 14th, 2017 when Appellant built a fence to block her access to the garage. Appellee further testified that she loved to sit on her porch on nice days to read books and magazines, listen to music, talk to neighbors, and enjoy the company of her friends, however she is no longer able to do so because Appellant posted two large dogs at the entrance of the driveway. The dogs would bark excessively and break loose from their chains, making Appellee uncomfortable and unable to use the driveway and enjoy her front yard. The jury had sufficient evidence from which to conclude that Appellant's actions constituted a nuisance, because those actions obstructed Appellee's prescriptive easement. Consequently, we find no error.

CONCLUSION

We reverse the circuit court's judgment in sending the easement by necessity issue to the jury, but affirm the jury's finding an easement by prescription. The evidence adduced at trial supported the jury finding that Appellee's use of the driveway had been adverse, exclusive, and uninterrupted for twenty years. Further, the evidence supported the jury finding that Appellant failed to prove that Appellee's use of the driveway was permissive. Thus, we hold that the jury correctly found that Appellee maintains a prescriptive easement. Finally, the court committed no error when it submitted the nuisance claim to the jury, since any obstruction of a prescriptive easement may constitute a nuisance

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY REVERSED IN PART AND AFFIRMED IN PART. APPELLANT TO PAY THE COSTS.