Circuit Court for Baltimore County
Case No. 03-C-17-012199

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2245

September Term, 2018

P. DOUGLAS GERSTMYER, Trustee of the P. Douglas Gerstmyer Revocable Trust

v.

TONYA M. WOLFE, et al.

Meredith,
Wright,**
Graeff,

JJ.

Opinion by Meredith, J.

Filed: February 27, 2020

**Wright, J., participated in the hearing and conference of this case while an active member of this Court; he participated in the adoption of this opinion as a specially assigned member of this Court.

P. Douglas Gerstmyer, as Trustee of the P. Douglas Gerstmyer Revocable Trust, appellant, sued Tonya Wolfe and Daniel Mullens, appellees, in the Circuit Court for Baltimore County because the appellees' mailbox was located on real property to which the Trust held record title, and the appellees placed their trashcans next to their mailbox on trash collection days. Appellant's complaint alleged trespass, and made various claims for relief. At the conclusion of a one-day bench trial, the trial court, ruling from the bench, rejected appellant's claims. This appeal followed.

QUESTIONS PRESENTED

Appellant presented the following questions, which we have re-ordered, for our review:

1. Did the trial court err by awarding affirmative relief to the appellees, despite their failure to plead by counterclaim or affirmative defense?

2. Did the trial court err by concluding that appellees were entitled to judgment in their favor?

3. Did the trial court err by failing to issue a written declaration of the property rights of the parties, despite the demand for declaratory judgment?

We find no reversible error and will affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

In 2004, P. Douglas Gerstmyer purchased a farmhouse located at 1109 Cockeys Mill Road in Reistertown, Maryland, from the Keyser family. On July 14, 2015, Mr. Gerstmyer conveyed by deed the entire property at 1109 Cockeys Mill Road in fee simple

to the P. Douglas Gerstmyer Revocable Trust; he appointed himself and his son, William "Alex" Gerstmyer, as trustees of the Trust.

Appellant's farmhouse is surrounded by a fence. On the side of appellant's farmhouse that abuts Cockeys Mill Road, there is a strip of land approximately 24 to 30 inches wide between the fence and the edge of Cockeys Mill Road, as to which the Trust holds record title, where three of appellant's neighbors (including the appellees) have, for many years, maintained their mailboxes and placed their trashcans on trash collection days. Those three neighbors reside in the vicinity of appellant's property—but on the opposite side of Cockeys Mill Road—at 1042 Cockeys Mill Road, 1100 Cockeys Mill Road, and 1038 Cockeys Mill Road.

In 2005, appellees purchased the property located at 1042 Cockeys Mill Road from Kathryn Benjes, the previous homeowner. From the time when Ms. Benjes first acquired the property in 1980, she maintained her mailbox on the above-mentioned strip of land at the edge of the road on appellant's side of Cockeys Mill Road. Ms. Benjes also placed her trashcans on that strip of land next to her mailbox on trash collection days. Two of Ms. Benjes's neighboring property owners, who resided at 1100 Cockeys Mill Road and 1038 Cockeys Mill Road, had done the same. After appellees took title to Ms. Benjes's property in 2005, appellees continued to maintain a mailbox on the strip of land at the edge of appellant's property, and they continued to place their trashcans next to the mailbox on trash collection days.

In 2017, Ms. Wolfe complained to the Baltimore County zoning office that Grayson Brown, another neighbor in the area, was parking commercial earth-moving equipment at his nearby home. Mr. Brown was fined by the county, and he told the Gertsmyers, who considered Mr. Brown to be "like family," of the complaint that Ms. Wolfe made against him and the fine that he had paid. After learning that Ms. Wolfe had caused a problem for Mr. Brown, Alex Gerstmyer left the following voicemail message for Ms. Wolfe, demanding that Ms. Wolfe remove her mailbox and keep her trashcans off appellant's property:

> MR. GERSTMYER: Hi, this call is for Tonya Wolfe. My name is Alex Gerstmyer. I, I'm down there at the property on 1109 Cockeys Mill Road. You keep your trashcans and your (INAUDIBLE) on our property (INAUDIBLE) mailbox.
>
> We've (INAUDIBLE) neighbors but you have made it a one (INAUDIBLE) battle against a family friend of ours, Grayson Brown, who lives down the street in regards to his small business. So keep your stuff off our property or we will have you cited repeatedly with failure on every instance of occurrence.
>
> In case you think this is a false, you know, obligation you're wrong. Doug Gerstmyer, the owner of the property of 1109, considers Grayson a second son to the family and he doesn't care for (INAUDIBLE) putting on, so (INAUDIBLE) our property with your trash, your mail, your recycling is forbidden. Keep it off. Figure out another place to keep all your stuff.
>
> With your attitude and your general behavior towards the neighbor and his (INAUDIBLE) business and to take better care of himself and his wife (INAUDIBLE) and we're not gonna stand for it so your rights to use our property for anything are revoked.
>
> If you have any issues with this my phone number is [redacted]. But just be understood, Doug Gerstmyer will use every legal means possible to go after you and money is not an issue for him so if you'd like to handle it be welcome then.

Cut the shit and stay off our property.

Have a good day.

Upon receiving Alex Gerstmyer's voicemail, Ms. Wolfe spoke with the zoning office and the Baltimore County Department of Public Works about relocating appellees' mailbox and a possible new location for placing their trashcans on collection days. After speaking with both offices, she determined that it was not safe to install a mailbox on the side of Cockeys Mill Road opposite from the appellant's property because of a nearby drainage ditch, and she concluded that she should continue placing the appellees' trashcans and recycling bins next to their mailbox, in the same location where Ms. Benjes had placed them, in order to ensure their trash was collected.

But Ms. Wolfe removed the mailbox from the appellant's property in October 2017 for thirty days while she sought the advice of a lawyer because the voicemail from Alex Gerstmyer had "scared [her] to death[]" and "[she] did not know what to do." After receiving legal advice, appellees resumed their previous practice of maintaining their mailbox and placing their trashcans on the appellant's property as they had been doing since they purchased the property from Ms. Benjes in 2005.

Appellant then filed a complaint in the Circuit Court for Baltimore County against appellees, asserting five counts: trespass (count one); ejectment and possession of property (count two); preliminary injunction (count three); permanent injunction (count four); and, subject to a contingency, a request for a declaratory judgment (count five). In count five, appellant pled as follows:

37. Plaintiff pleads this Count in the alternative**, in the event Defendants disclaim any possession, interest, or affiliation with the one or more mailboxes** presently standing upon Plaintiff's Property.

38. One or more mailboxes presently stand upon Plaintiff's Property. Such mailboxes were installed or erected without the consent, permission, authorization, or knowledge of the Plaintiff. Such mailboxes are not the property of the Plaintiff's.

39. Plaintiff is without information or resources sufficient to determine who may claim an ownership interest in said mailboxes.

40. As the mailboxes have been left upon Plaintiff's Property without any indicia of ownership, Plaintiff presumes such mailboxes have been abandoned.

41. **In the event Defendants disclaim possession, interest, or affiliation with the mailboxes, Plaintiff seeks a declaration** from this Court that such mailboxes have been abandoned, as a matter of law.

(Emphasis added.)

Appellees filed an answer and asserted a general denial as to all counts. They also identified the following affirmative defenses: laches, estoppel, statute of limitations, waiver, and license.

After conducting discovery, each party moved for summary judgment. Appellees argued that they were entitled to summary judgment because it was undisputed that their predecessor-in-interest, Kathryn Benjes, had acquired and conveyed to them, a prescriptive easement to use appellant's property. They attached a copy of Ms. Benjes's affidavit, dated May 11, 2018, in support of their motion. The affidavit of Ms. Benjes indicated that she owned and resided at 1042 Cockeys Mill Road without interruption

between August 1, 1980 and August 15, 2005, when she sold the property to appellees. Her affidavit also indicated that, when she purchased the property, her mailbox had already been installed on the property known as 1109 Cockeys Mill Road, and that, for the entire 25 years she lived at 1042 Cockeys Mill Road, she placed her trashcans next to her mailbox on 1109 Cockeys Mill Road for trash collection. She never sought permission to use the property for the site of her mailbox, nor was she ever asked to remove the mailbox or discontinue placing her trashcans on that property.

On July 20, 2018, the court heard argument on the motions for summary judgment, denied both the parties' motions, and proceeded with a bench trial on the merits.

At trial, appellant called only Alex Gerstmyer as a witness. Alex Gerstmyer testified that, when his father purchased the farmhouse at 1109 Cockeys Mill Road in 2004, he had an opportunity to view the property with his father. At that time, they observed that the mailboxes for the three neighbors who reside at 1038 Cockeys Mill Road, 1042 Cockeys Mill Road, and 1100 Cockeys Mill Road, had been installed on the property known as 1109 Cockeys Mill Road. They did not talk to the neighbors who used the mailboxes, and did not, at that time, object to the mailboxes being on the property that Douglas Gerstmyer purchased. Alex Gerstmyer also testified that they saw that the same three neighbors would place trashcans next to the mailboxes, but he and his father took no action regarding the trashcans until the incident concerning Grayson Brown in 2017.

Appellees called only Ms. Benjes and Ms. Wolfe as witnesses.

At the conclusion of trial, the court announced its oral opinion and ruling from the bench, explaining why the court was ruling in favor of the appellees:

> THE COURT: . . . Defendants [*i.e.*, Ms. Wolfe and Mr. Mullens] have raised the issue of obtaining an easement by prescription as a reason why they're not trespassing on the property or liable for the other claims made by the Plaintiff [Mr. Gerstmyer, Trustee]. The Court of Appeals and the Court of Special Appeals in a number of cases have discussed what is required to establish an easement by prescription. I'm going to read liberally from the case I cited when I decided the Motion for Summary Judgment, *Banks v. Pusey*, P u s e y, 393 Md. 688 decided in 2006. Actually let me go back to *Zimmerman v. Summers*, 24 Md. App. 100 decided in 1975. The court discussed what was necessary to prove the requirements of an easement by prescription.
>
> The court said:
>
> > "In the absence of an expressed grant it was necessary for the Plaintiffs to prove an adverse exclusive and uninterrupted enjoyment of the right of way in question for 20 years."
>
> If I understand [appellant's counsel] properly that the real issue in this case is whether the use of the property, that strip of land in front of the Plaintiff's property was adverse. The evidence establishes that it was exclusive and uninterrupted for over 20 years. So those elements of an easement by prescription are satisfied. The question is whether the use was adverse.
>
> And in *Zimmerman v. Summers* and in *Banks v. Pusey*, 393 Md. 688 the court discussed the meaning of adverse.
>
> The court said:
>
> > "By adverse is meant a user without license or permission for an adverse right of an easement cannot grow out of a mere permissive enjoyment. The real point of distinction being between a permissive or tolerated user and one which it claims as a matter of right. Where one however

> has used the right of way for 20 years unexplained it is but fair to presume the user is under a claim of right unless it appears to have been by permission. 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's 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."
>
> The court goes on to say:
>
> "The presumption of adverse use will not arise if the use of the land appears to have been by permission. As the court stated in *Cox* the real point of distinction being between a permissive or tolerated user and one which is claimed as a matter of right."
>
> The court goes on to say:
>
> "Logic dictates that a presumption of adverse use is created only when there is an absence of any evidence which would indicate the respondent had the permission of his parents to use the farm lane for access to his 127 acre parcel. Phrased another way it is only when no appearance of permission permeates the record that a presumption of adverse use will arise. In the absence of a presumption of adverse use the burden of establishing such use is on the party claiming it."

Ms. Benjes testified that she bought the property at 1042 Cockeys Mill Road in 1980 and lived there from 1980 until August 15, 2005. That's 25 years. During that time she placed trashcans in the same area which was next to the mailbox . . . in front of 1109 Cockeys Mill Road.

So again it was a continuous use for 25 years that Ms. Benjes used that strip of land in front of 1109 Cockeys Mill Road for her mailbox and to put her trash out. **In those 25 years she never had a conversation with anyone regarding the use of the mailbox or the trash collection. She . . . testified she presumed she could use the mailbox because her house number was on it and other three neighbors who had mailboxes in that area had indicated to her where to put the trash. But she said she used the mailbox because her house number was on it and the other three neighbors there did the same thing. She never had a conversation with**

the person at 1109. She did not even meet that person, Mrs. Keiser [sic], for years after she moved in.

Again on cross examination Ms. Benjes testified the neighbors and [Realtors] told her where the mailboxes were and where the trash should go. **She had no contact with Mrs. Keiser [sic] and no permission from Mrs. Keiser [sic].** And she testified she didn't even know the property belonged to the person who owned 1109, in other words that strip of property where she placed her trashcans and where her mailbox was located, she didn't even know the property belonged to 1109. It was an area between the fence and the road. She said there was always a fence there.

And again this area was described by Mrs. Wolfe as a 24 to 30 inch strip. It's shown in Exhibits, the pictures that were marked as Exhibit 3. It's a 24 to 30 inch area between the edge of the road and the fence.

. . . **Ms. Wolfe testified she believed she had a right to use the mailbox[] and put the trash there. And I believe that's consistent with the evidence from Mrs. Benjes. I draw a different conclusion from her testimony than [appellant's counsel]. She said she used the mailboxes because her, mailbox because her number was on the mailbox. She didn't have permission from anybody. She didn't know who owned it. It was an area between the fence and the road, the fence being the, the fence for 1109 Cockeys Mill Road. It's . . . outside that fence so I, I believe her testimony is consistent with . . . Ms. Wolfe that she had a right to use the mailbox.**

So I find that the use of this two to three foot strip along Cockeys Mill Road for the mailbox and the trashcans was as a matter of right by Ms. Benjes, it was her belief, and not from permission or as a tolerated user. But even if the evidence didn't establish that easement by prescription outright, which I believe it does, but even if we apply this law regarding presumption again the Court of Appeals said:

> **"That the presumption of adverse use is created only when there is an absence of any evidence which would indicate that the Respondent had the permission to use the land."**

I find that there is an absence of any evidence which indicates that Ms. Benjes had permission from the owner of 1109 Cockeys Mill, Cockeys Mill Road to use the property.

And I also look at this language in the Court[] of Appeals opinions that when one . . . used a right of way for 20 years unexplained it is but fair to presume the user is under a claim of right. Again there's no appearance here that it was by permission. Ms. Benjes says nothing of the sort that it was used by permission or that she believed she had permission from someone.

But, so again there is, **I believe there is an absence of any evidence which indicates that Ms. Benjes had permission from the owner of 1109 Cockeys Mill Road to use the property and therefore the presumption applies. The Plaintiffs** [sic] **have not rebutted the presumption with any evidence whatsoever and therefore again the court finds that Defendants have acquired an easement by prescription to use this strip of property in front of 1109 Cockeys Mill Road for their mailbox and for trash and recycle collection.**

The Complaint asserts a claim for trespass, it has five Counts. **The relief is denied in all five Counts because I find that the Defendants have acquired a prescription to use the property for their mailbox and for trash and recycle collection.** But even going further Count 1 alleges a cause of action for trespass, the Plaintiff has not proved any damages whatsoever.

. . . Count 2 requests . . . ejectment and it requests an Order granting immediate possession to the Plaintiffs [sic] and ejecting Defendants from the property. That request is denied as I find it is an easement.

Count 3 requests preliminary injunction. Again without the finding of an easement by prescription the courts have said many times what is required to establish both a preliminary injunction and a permanent injunction. There are four elements required.

(1) The likelihood that the Plaintiff will succeed on the merits.

Well I've found that the Plaintiff did not succeed on the merits.

> (2) The balance of convenience determined by whether a greater injury would be done to the Defendant by granting the injunction that would result from its refusal.
>
> **The Plaintiffs [sic] have not established that they would be injured at all by continuing to allow the Defendants to keep their mailbox and trashcans on this strip.** I find from the evidence that the Plaintiffs [sic] motive to seek an injunction and file this lawsuit was vindictive. It was retaliation because the Defendants made a complaint with the County over a good friend of the Plaintiffs [sic].
>
> (3) Whether the Plaintiff will suffer irreparable injury unless the injunction is granted.
>
> There's no evidence that the Plaintiff would suffer irreparable injury[. And (4)] the public interest. The public interest also does not weigh in the Plaintiffs [sic] favor in terms of having an injunction granted.
>
> So the request for an injunction is denied.
>
> Count 5, declaratory judgment. In this Count the Plaintiffs [sic] request an order from the court declaring that the Plaintiff's property be abandoned as a matter of law by the Defendants, that request is denied for all the reasons I've stated.
>
> **So a judgment will be entered in favor of the Defendants and against the Plaintiffs [sic] for the reasons stated.**

(Emphasis added.)

On July 20, 2018, the trial judge signed an order granting judgment in favor of Ms. Wolfe and Mr. Mullens and assessing costs against P. Douglas Gerstmyer, Trustee of the P. Douglas Gerstmyer Revocable Trust. In accordance with Rule 2-601(b), the circuit court entered the judgment on the docket of the electronic case management system it uses, Maryland Electronic Courts ("MDEC"), on July 20, 2018. But an entry made 7/20/18 includes references to both 7/20/2018 and 7/24/2018, and includes a reference

stating: "AMENDCORRECT: JUDGMENT." The document in the record captioned "JUDGMENT" is also ambiguous, stating that "it is this 20th Day of July, 2018 ORDERED AND ADJUDGED THAT:" judgment for costs was "assessed against P. Douglas Gerstmyer Trustee of The P. Douglas [sic]," but also including a notation stating: "Date Issued: 07/24/18." On July 24, 2018, the judgment was "recorded and indexed," and the clerk of the circuit court sent copies of the judgment to the parties and entered a separate docket entry in MDEC to record the date that she sent copies of the judgment to the parties, in accordance with Rule 2-601(c). On August 22, 2018, appellant filed a notice of appeal.

If the judgment was entered by the clerk on July 20, 2018, the time for filing a notice of appeal in this case began to run on July 20, 2018, and because the thirtieth day after July 20 fell on August 19, 2018, which was a Sunday, the notice of appeal would have been due on Monday, August 20, 2018. *See* Maryland Rule 1-203(a)(1). But, if the clerk entered judgment on July 24, 2018, as some of the clerk's notations suggest, the deadline was August 23, 2018.

The appellees raised no issue regarding the timeliness of this appeal. We will assume this appeal was timely filed, and, in the interest of completeness, because the issues were fully briefed and argued, we will explain that we will affirm the judgment of the circuit court for the following reasons.

STANDARD OF REVIEW

"When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses." Maryland Rule 8-131(c). Therefore, we will not disturb the circuit court's factual conclusions when those conclusions are supported by competent evidence. *Mavromoustakos v. Padussis*, 112 Md. App. 59, 74 (1996) (citing Rule 8-131(c)). "The clearly erroneous standard, however, does not apply to legal conclusions." *Banks v. Pusey*, 393 Md. 688, 697 (2006) (citations omitted). We review whether the circuit court's conclusions of law are legally correct under a *de novo* standard of review. *Id.*

DISCUSSION

I. Did the trial court err by awarding affirmative relief to the appellees, despite their failure to plead by counterclaim or affirmative defense?

Appellant asserts that the trial court "went beyond denying the relief sought by the Appellant – it *created* an easement," and further, the court "erred by awarding affirmative relief to the Appellees' [sic] despite their failure to seek such relief by affirmative defense or counterclaim[.]" Appellant further argues that appellees' failure to amend their answer constituted a waiver of their prescriptive easement defense at trial and violated the "fundamental concept of notice pleading."

Appellees assert that appellant *was* put on notice of their prescriptive easement defense through the responses to his interrogatories, the affidavit of Ms. Benjes, the

arguments made in support of their motion for summary judgment, and the answer that they filed in which they asserted "laches" and "statute of limitations" as affirmative defenses to the trespass claim. They also contend that, because the language of the counterclaim rule, Maryland Rule 2-331, is permissive in nature, they were not required to file a counterclaim.

We are not persuaded that appellees waived their prescriptive easement defense, or that the trial court granted appellees affirmative relief in its judgment. The record reflects that the trial court did not "create" an easement or "grant affirmative relief" in the document memorializing its judgment. Although the court's oral opinion recognized that the appellant was not entitled to prevail on any of his claims because the evidence showed the appellees had the right to use the property pursuant to a prescriptive easement that ripened in 2000, the trial court did not *grant* any affirmative relief to the appellees. The trial court merely entered a judgment in favor of the defendants, Ms. Wolfe and Mr. Mullens, for $0.00 and assessed court costs against Mr. Gerstmyer, as the circuit courts typically do when a plaintiff has failed to prevail.

Indeed, the trial transcript does not indicate that appellees asked the court to enter a declaration confirming the prescriptive easement. As noted above, the trial court's oral opinion demonstrates that it only addressed the issues generated by appellant's complaint. We perceive no error on the part of the trial court with respect to the appellees' lack of a claim for affirmative relief.

And we see no merit in the appellant's argument regarding lack of notice. The existence of an "easement by prescription" is not an affirmative defense to a claim of trespass that must be pleaded in an answer pursuant to Maryland Rule 2-323(g), which provides:

> **(g) Affirmative Defenses.** Whether proceeding under section (c) or section (d) of this Rule, a party shall set forth by separate defenses: (1) accord and satisfaction, (2) merger of a claim by arbitration into an award, (3) assumption of risk, (4) collateral estoppel as a defense to a claim, (5) contributory negligence, (6) duress, (7) estoppel, (8) fraud, (9) illegality, (10) laches, (11) payment, (12) release, (13) res judicata, (14) statute of frauds, (15) statute of limitations, (16) ultra vires, (17) usury, (18) waiver, (19) privilege, and (20) total or partial charitable immunity.
>
> In addition, a party may include by separate defense any other matter constituting an avoidance or affirmative defense on legal or equitable grounds. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court shall treat the pleading as if there had been a proper designation, if justice so requires.

See Ben Lewis Plumbing, Heating & Air Conditioning, Inc. v. Liberty Mut. Ins. Co., 354 Md. 452, 465 (1999) ("The plain language of [Rule 2-323] section (g) evidences the intent that the class of affirmative defenses that are to be set forth separately in an answer not be open ended."); *id.* at 466 ("the second paragraph of [Rule 2-323] section (g) . . . is permissive and not mandatory."). We also note that, "[i]n Maryland, counterclaims are permissive and not compulsory." *Brault Graham, LLC v. Law Offices of Peter G. Angelos, P.C.*, 211 Md. App. 638, 672 (2013) (citing *Rowland v. Harrison*, 320 Md. 223, 233 (1990)). *See Moore v. Nissan Motor Acceptance Corp.*, 376 Md. 558, 564–65 (2003) (quoting commentary to § 22(1) of the Restatement (Second) of Judgments (1982)) ("[t]he justification for the existence of such an option is that the defendant should not be

required to assert his claim in the forum or the proceeding chosen by the plaintiff but should be allowed to bring suit at a time and place of his own selection.").

II. Did the trial court err by concluding that appellees were entitled to judgment in their favor?

Appellant contends that the trial court erred by finding that there was "an absence of any evidence which indicates that Ms. Benjes had permission from the owner of [appellant's property] to use the property." Although appellant's claim for trespass was initially premised upon an *absence of permission* given, appellant now argues that Ms. Benjes's testimony provided inescapable evidence that there *was* permission given to Ms. Benjes to use appellant's predecessor's property. In support of his argument, appellant directs us to Ms. Benjes's answer on direct examination, in which she was asked if she had used appellant's property "as a matter of right" and, in response, she testified: "I just thought that's where it [the mailbox] was. I don't know what 'matter of right' means?" Appellant also directs us to a portion of Ms. Benjes's testimony on cross examination, in which the following transpired:

> [COUNSEL FOR APPELLANT]: And you also testified that you only began using the mailboxes at, across the street, across Cockeys Mill Road because of a discussion you had with your neighbors. And they told you[,] ["]well that's where we get our mail["]?
>
> [MS. BENJES]: Well I was taken there by a [Realtor] and they pointed it out as well. . . . This is where the mailboxes are, the trash goes, here's the drive.
>
> [COUNSEL FOR APPELLANT]: And if the [Realtor] had told you this is not for you[,] you wouldn't have used [the] mailbox[]; correct?
>
> [MS. BENJES]: Well yes.

* * *

> [COUNSEL FOR APPELLANT]: . . . But if you were told, if Ms. Keiser [sic] had knocked on your door and said[,] ["]listen Ms. Benjes, your mailbox is on my land["] - -
>
> * * *
>
> [COUNSEL FOR APPELLANT]: - - would you have removed your mailbox?
>
> * * *
>
> [MS. BENJES]: If I had been asked to remove the mailbox?
>
> [COUNSEL FOR APPELLANT]: Correct.
>
> [MS. BENJES]: Well yes, **but I never had contact with her [i.e., Ms. Keyser].**

(Emphasis added.)

Appellant contends that Ms. Benjes's testimony, as quoted above, is evidence that "precludes the application of the presumption of adversity from applying" because her testimony "reflects that she knew that if permission was revoked by the landowner, she would have to vacate the land."

Appellees respond that the trial court's finding was correct because Ms. Benjes's testimony was evidence that "she used the land of another's as she would her own, [and] she never inquired [or] sought permission[.]"

We agree with the appellees that this snippet of testimony by Ms. Benjes, taken out of context from the balance of her testimony, does not undermine the trial court's finding that Ms. Benjes used the strip of property at 1109 Cockeys Mill Road for 25 years

adversely to the record owner of that property, and thereby established a prescriptive easement years before the property was sold to appellant.

"An easement is a nonpossessory interest in the real property of another. An easement can be created expressly or by implication. One form of implied easement is an easement by prescription. A prescriptive easement arises when a party makes an adverse, exclusive, and uninterrupted use of another's real property for twenty years." *Kirby v. Hook*, 347 Md. 380, 403-404 (1997) (citations omitted). The *Kirby* Court explained:

> A party's use is adverse if it occurs without license or permission. When a person has used a right of way openly, continuously, and without explanation for twenty years, it is presumed that the use has been adverse under a claim of right. The burden then shifts to the landowner to show that the use was permissive.

Kirby, at 403-404 (1997) (citations omitted).

The "presumption of adverse use" was explained in further detail by the Court of Appeals in *Banks v. Pusey*, 393 Md. 688, 700-01 (2006):

> While we recognize that a presumption of adversity may possibly arise under some circumstances[,] such a presumption will not arise if the use . . . *appears to have been by permission. Cox*, 60 Md. at 79. The Court discussed adverse use—as it relates to prescriptive easements—in *Cox* over a century ago, stating:
>
> > "By *adverse* is meant a *user*, without license or permission, for an adverse right of an easement cannot grow out of a mere permissive enjoyment, **the real point of distinction being between a permissive or tolerated user, and one which is claimed as a matter of right.** Where one, however, has used a right of way for twenty years **unexplained,** it is but fair to presume the user is under a claim of right, **unless it appears to have been by permission.** 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."

(Emphasis added in *Banks*.)

Here, there is competent evidence in the record to support the trial court's finding that there was "an absence of evidence which indicates that Ms. Benjes had permission from the owner of 1109 Cockeys Mill [Road] . . . to use the property." The record reflects that Ms. Benjes used the disputed area to access her mailbox as she saw fit, without ever asking for, or receiving, permission from the owner of record for an uninterrupted period of 25 years. Ms. Benjes testified that she accessed the disputed property for 25 years, not because she was granted permission from the owner of 1109 Cockeys Mill Road, but because that was where her mailbox was located. And she testified that she believed that that was her mailbox because it displayed her street number ("1042") on it. She also testified that she did not have any conversations with any owners of 1109 Cockeys Mill Road regarding the mailbox or trash cans during the 25 years that she lived at 1042 Cockeys Mill Road. And Ms. Benjes testified that the reason she placed her trashcans next to her mailbox was because that was where her neighbors indicated was the location where waste management collected the neighbors' trash and recycling.

Ms. Wolfe testified at trial that, after she and Mr. Mullens purchased the property from Ms. Benjes in 2005, they used the same mailbox that Ms. Benjes had used. Ms. Wolfe also testified that they placed their trashcans in that location in the same manner that Ms. Benjes, and their other neighbors, did for trash collection. Based upon Ms.

Wolfe's testimony, the trial court could reasonably conclude that, until 2017, when Alex Gerstmyer demanded that the appellees remove their mailbox and trashcans from appellant's property, neither Ms. Wolfe nor Mr. Mullens had any reason to know that the Gerstmyer Trust owned the land upon which appellees' mailbox and trashcans were placed, or that Mr. Gerstmyer had previously granted anyone permission to use his property. In other words, for a period of 37 years, or more, no owner of 1109 Cockeys Mill Road had ever communicated with the residents of 1042 Cockeys Mill Road regarding their use of the above described strip of land for maintaining their mailbox and placing their trash cans. Under the circumstances in this case, no appearance of permission permeated the record. *See Banks*, *supra*, 393 Md. at 701. Indeed, there was no evidence in this case of any affirmative offer of permission.

Therefore, the trial court's finding that there was an absence of evidence regarding any "permission given" was not clearly erroneous. In light of the prescriptive easement that ripened during Ms. Benjes's ownership, the trial court did not err in rejecting appellant's claim for damages from a trespass; nor did the trial court err in refusing to issue an injunction or an order of ejectment.

III. Did the trial court err by failing to issue a written declaration of the property rights of the parties, despite the demand for declaratory judgment?

Appellant contends that, at a minimum, we should remand the case because the trial court failed to issue a written declaration as requested in Count Five.

Appellees disagree, arguing that there was no need for the trial court to issue a written declaration. In support of their argument, they note that appellant's claim for

declaratory judgment was pled in the alternative, *i.e.*, the court was asked to enter a declaratory decree of abandonment only "in the event Defendants [*i.e.*, Ms. Wolfe and Mr. Mullens] disclaim any possession, interest, or affiliation with one or more mailboxes presently standing upon Plaintiff's property." Because the appellees did not "disclaim" an interest in their mailbox after the complaint was filed, appellees assert that the condition pled in Count Five did not arise.

We agree with appellees that the trial court was not required to grant the conditional request for a declaratory decree. Here, appellant asked the court to enter a declaratory judgment decreeing that Ms. Wolfe's and Mr. Mullens's mailbox had been abandoned, but only "in the event that Defendants disclaim any possession, interest, or affiliation" with their mailbox. That contingency did not arise, and therefore, there was no reason for the court to grant the conditional request for a declaratory judgment. "[T]he declaratory judgment process is not available to decide purely theoretical questions or questions that may never arise, or questions which have become moot, or merely abstract questions." *Hamilton v. McAuliffe*, 277 Md. 336, 340 (1976) (citations and quotation marks omitted).

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.