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the district court so determined. The district court was correct when it denied the Association's motion for summary judgment and granted FNMA's motion for summary judgment. The decision of the district court is affirmed.

AFFIRMED.

MICHAEL P. FELONEY, APPELLANT, V.
ROBERT W. BAYE, APPELLEE.
815 N.W.2d 160

Filed June 1, 2012. No. S-11-879.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Easements: Words and Phrases.** An easement is an interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose.
4. **Easements.** A claimant may acquire an easement through prescription.
5. **Easements: Adverse Possession.** The use and enjoyment that will establish an easement through prescription are substantially the same in quality and characteristics as the adverse possession that will give title to real estate, but there are some differences between the two doctrines.
6. **Easements.** The law treats a claim of prescriptive right with disfavor.
7. **Easements: Proof: Time.** A party claiming a prescriptive easement must show that its use was exclusive, adverse, under a claim of right, continuous and uninterrupted, and open and notorious for the full 10-year prescriptive period.
8. **Easements: Presumptions: Proof: Time.** Generally, once a claimant has shown open and notorious use over the 10-year prescriptive period, adverseness is presumed. At that point, the landowner must present evidence showing that the use was permissive.
9. **Easements: Presumptions.** When an owner permits his unenclosed and unimproved land to be used by the public, or by his neighbors generally, a use thereof by a neighboring landowner and others, however frequent, will be presumed to be permissive and not adverse in the absence of any attendant circumstances to the contrary.

10. ____: ____. The presumption of permissiveness that arises from unenclosed lands applies when the land in question is wilderness.
11. **Judgments: Appeal and Error.** An appellate court will affirm a lower court's ruling that reaches the correct result, although based on different reasoning.
12. **Easements: Presumptions.** When a claimant uses a neighbor's driveway or roadway without interfering with the owner's use or the driveway itself, the use is to be presumed permissive.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Affirmed.

W. Eric Wood, of Downing, Alexander & Wood, and Russell S. Daub for appellant.

David V. Drew, of Drew Law Firm, for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, and MCCORMACK, JJ., and PIRTLE, Judge.

CONNOLLY, J.

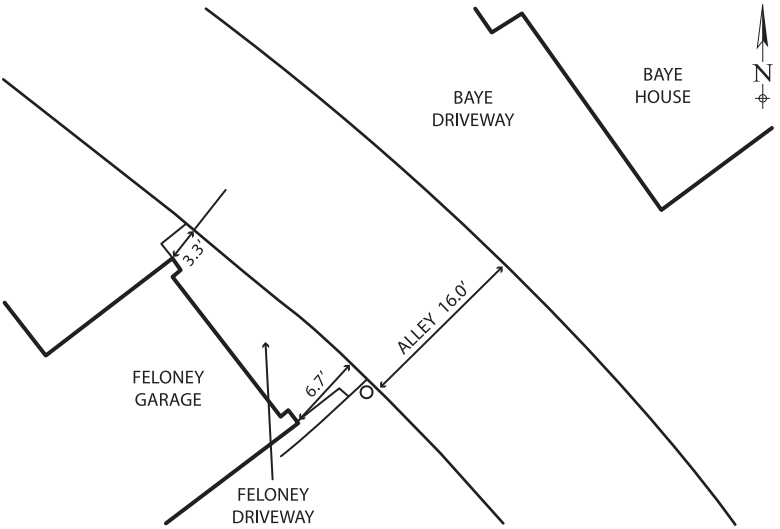
For several years, Michael P. Feloney used his neighbor's driveway to turn his vehicle to enter his garage. This was apparently necessary because the narrow alley that separated Feloney's property from his neighbor's did not leave adequate room for Feloney to make the sharp turn into his garage. Eventually, the neighbor, Robert W. Baye, decided to build a retaining wall on his driveway. This construction prevented Feloney from using Baye's driveway to get in and out of his garage.

Feloney sued Baye in the district court for Douglas County. Feloney requested the court to impose a prescriptive easement on Baye's driveway for ingress and egress. Feloney also requested the court to require Baye to remove at least part of his retaining wall. Baye moved for summary judgment. The district court granted it, concluding that Feloney's use of the driveway was permissive and thus Feloney could not prove the elements required for a prescriptive easement. Although our rationale differs from that of the district court, we affirm.

BACKGROUND

Feloney lives at 714 North 58th Street in Omaha, Nebraska. Baye lives at 720 North 58th Street. An alley that runs generally

in a northwest-southeast direction separates the homes. Both properties, at least at one time, had driveways. These driveways were directly across from one another on opposite sides of the alley. Baye's driveway did not have any fence or gate surrounding it. A diagram showing the locations of the driveways is included below.



Feloney's driveway is very short. At its longest, it is 6.7 feet in length, and at its shortest, it is only 3.3 feet long. The alley separating the two driveways is only 16 feet wide. Because of the narrow alley, Feloney would use Baye's driveway to help him make the turn into his garage. Baye, however, apparently used his own driveway rarely, if ever, instead choosing to park his car on the street. But Baye's roommate did use the driveway to access Baye's garage. The record does not show that Feloney's use of the driveway ever interfered with Baye's or his roommate's use.

Feloney moved into the house in the summer of 2006. The prior occupants lived in the house for 8 years. They stated that in exiting their garage, they would "occasionally" back into Baye's driveway. They never did any maintenance on

Baye's driveway. Feloney, however, did shovel snow from Baye's driveway.

Before Baye built the retaining wall, he and Feloney had a good relationship. They would talk frequently, visit each other's home, and attend neighborhood gatherings together. They were friendly neighbors.

The friendly neighbors became less friendly when Baye later decided to build a retaining wall over his driveway to combat a drainage problem. This construction prevented Feloney from using Baye's driveway.

After Baye built the retaining wall, Feloney sued in the district court for Douglas County. He sought an order imposing a prescriptive easement over a portion of the area that was once Baye's driveway and an order requiring Baye to remove a portion of his retaining wall. Baye counterclaimed to quiet title.

Baye moved for summary judgment and the district court sustained the motion. The court noted that courts should generally presume adverseness if the claimant can prove uninterrupted and open use over the prescriptive period, which is 10 years. But the court concluded that an exception to this rule applied. The court reasoned that the presumption of adverseness does not apply when the use is over unenclosed land, and Baye's driveway was unenclosed. On such facts, the use is presumed to be permissive. And the court ruled that Feloney had not presented any evidence that would rebut such a presumption. Because Feloney could not show that his use was adverse, the court granted Baye summary judgment.

ASSIGNMENTS OF ERROR

Feloney assigns that the court erred in applying the presumption that Feloney's use of the land was permissive and in granting Baye summary judgment.

STANDARD OF REVIEW

[1,2] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or the ultimate inferences that may be drawn

from those facts and that the moving party is entitled to judgment as a matter of law.[1] In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[2]

ANALYSIS

We begin with some general propositions of prescriptive easements. The law of prescriptive easements has been called "a tangled mass of weeds."[3] Nevertheless, the core principles of the doctrine are well established in Nebraska.

[3-5] An easement is "[a]n interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose."[4] Our cases recognize that a claimant may acquire an easement through prescription.[5] The use and enjoyment that will establish an easement through prescription are substantially the same in quality and characteristics as the adverse possession that will give title to real estate,[6] but there are some differences between the two doctrines.[7]

[6] We have previously noted "the law treats a claim of prescriptive right with disfavor."[8] The reasons are obvious—"'[t]o allow a person to acquire prescriptive rights over the lands of another is a harsh result for the burdened landowner.'"[9] And further, a prescriptive easement "essentially

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[1] See *Golden v. Union Pacific RR. Co.*, 282 Neb. 486, 804 N.W.2d 31 (2011).

[2] *Id.*

[3] *O'Dell v. Stegall*, 226 W. Va. 590, 599, 703 S.E.2d 561, 570 (2010).

[4] Black's Law Dictionary 585-86 (9th ed. 2009).

[5] See, e.g., *Werner v. Schardt*, 222 Neb. 186, 382 N.W.2d 357 (1986).

[6] See *Teadtke v. Havranek*, 279 Neb. 284, 777 N.W.2d 810 (2010).

[7] See *Plettner v. Sullivan*, 214 Neb. 636, 335 N.W.2d 534 (1983).

[8] *Sjuts v. Granville Cemetery Assn.*, 272 Neb. 103, 109, 719 N.W.2d 236, 241 (2006).

[9] *Waters v. Ellzey*, 290 Ga. App. 693, 697, 660 S.E.2d 392, 396 (2008).

rewards a trespasser, and grants the trespasser the right to use another's land without compensation."[10]

[7] In our prescriptive easement cases, we have held that a party claiming a prescriptive easement must show that its use was exclusive, adverse, under a claim of right, continuous and uninterrupted, and open and notorious for the full 10-year prescriptive period.[11] Here, the point in contention is whether Feloney's use was adverse, that is, was it under a claim of right?

Feloney points to two acts that would establish adverse use: (1) his and the prior occupants' use of the driveway to turn around and (2) his shoveling snow off the driveway. But the shoveling of the driveway would have begun in 2006, at the earliest, when Feloney moved into his home. Assuming that shoveling snow off Baye's driveway would establish the adverseness element, it has not been occurring for the 10 years required to establish a prescriptive easement. Thus, the only act that is relevant is the use of the driveway to turn around.

[8] Generally, once a claimant has shown open and notorious use over the 10-year prescriptive period, adverseness is presumed.[12] At that point, the landowner must present evidence showing that the use was permissive.[13] But this rule "is not without exceptions."[14] In certain factual situations, we have applied a presumption of permissiveness. One of these exceptions is when a claimant seeks an easement over land that is unenclosed. Here, the district court found that the land was unenclosed and thus that the use was presumptively permissive.

[9] In its decision, the district court relied on *Scoville v. Fisher*.[15] In *Scoville*, the plaintiff sought to establish a

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[10] *O'Dell, supra* note 3, 226 W. Va. at 599, 703 S.E.2d at 570.

[11] *Sjuts, supra* note 8.

[12] See, e.g., *Teadtke, supra* note 6.

[13] See *id.*

[14] *Gerberding v. Schnakenberg*, 216 Neb. 200, 204, 343 N.W.2d 62, 65 (1984).

[15] *Scoville v. Fisher*, 181 Neb. 496, 149 N.W.2d 339 (1967).

prescriptive easement over an unenclosed lot in the business district of a small town. The lot was graveled and belonged to a neighboring business. The plaintiff had used the lot for parking and unloading trucks. And the evidence showed that others used the lots for parking. We cited a rule providing that a presumption of permissiveness arises when the land is unenclosed. We held that

> when an owner permits his unenclosed and unimproved land to be used by the public, or by his neighbors generally, a use[] thereof by a neighboring landowner and others, however frequent, will be presumed to be permissive and not adverse in the absence of any attendant circumstances to the contrary.[16]

Applying this rule, we concluded that the use was permissive, despite that the land was graveled (i.e., improved) and in a business district.

Feloney argues that the district court erred in applying the "unenclosed land" rule to Baye's driveway and, implicitly, that *Scoville* was incorrectly decided. Feloney argues that the presumption of permissive use should apply only when the land is unenclosed and undeveloped. We agree.

[10] The rule providing for a presumption of permissiveness in the case of unenclosed land has traditionally been applied to land such as wilderness. The Idaho Supreme Court has said that the presumption of permissiveness applies to "wild and unenclosed lands."[17] A Missouri appeals court has said that "[t]he 'wild lands' exception to prescriptive easements is inapplicable where [the] defendant's land is located in a well settled county and forms no part of an extensive, unimproved, uninhabited area."[18] Washington courts apply the presumption "[w]here the land is vacant, open, unenclosed,

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[16] *Id.* at 502, 149 N.W.2d at 343.

[17] See *Hodgins v. Sales*, 139 Idaho 225, 232, 76 P.3d 969, 976 (2003). See, also, *Rancour v. Golden Reward Mining Co., L.P.*, 694 N.W.2d 51 (S.D. 2005).

[18] *Behen v. Elliott*, 791 S.W.2d 475, 476 (Mo. App. 1990).

and unimproved."[19] Maryland courts have stated that the exception applies "'[w]hen unenclosed and unimproved wildlands or woodlands are involved.'"[20] Arkansas courts have said that "[i]t is well established that where there is passage over property that is unenclosed, uninhabited, and unimproved, there is a presumption that such use is permissive."[21] The lesson of these cases is clear: The presumption of permissiveness arises when the land is unenclosed wilderness; the presumption is not properly applied to an unenclosed parking lot in a downtown shopping center; nor is it applicable to a driveway in a suburban neighborhood.

In fact, a treatise author has lamented applications of this rule like ours in *Scoville*. The treatise reads:

> The term "unenclosed" is the most frequently used, but it is misleading, and has occasionally led a court to confuse the subject *by invoking the principle in the case of vacant lots or blocks in an urban district, though cleared and cared for*. Obviously it cannot apply to a residential lawn, though unenclosed. The more appropriate terms [sic] is "unimproved."[22]

This statement lends strong support to Feloney's interpretation of the rule.

Courts have advanced several rationales for the rule. One, a landowner who owns hundreds or thousands of acres of wilderness may not notice a person crossing his land and thus would have no opportunity to protect his or her rights.[23] Two, even if he or she did discover the use, there would likely be no incentive to stop it—a landowner might not want to upset

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[19] *Granite Beach v. Natural Resources*, 103 Wash. App. 186, 200, 11 P.3d 847, 855 (2000). See, also, *Drake v. Smersh*, 122 Wash. App. 147, 89 P.3d 726 (2004).

[20] *Turner v. Bouchard*, 202 Md. App. 428, 447, 32 A.3d 527, 537 (2011), quoting *Forrester v. Kiler*, 98 Md. App. 481, 633 A.2d 913 (1993).

[21] *Cook v. Ratliff*, 104 Ark. App. 335, 346, 292 S.W.3d 839, 847 (2009).

[22] Annot., 170 A.L.R. 776, 820 (1947).

[23] See *Rancour, supra* note 17. See, also, *Friend v. Holcombe*, 196 Okla. 111, 162 P.2d 1008 (1945).

neighborly relations when the use of his land causes him no injury.[24] Three, it is also possible that the "rule springs from the modern tendency to restrict the right of prescriptive use to prevent mere neighborly acts from resulting in deprivation of property."[25]

Whatever its theoretical underpinnings, we agree that the rule should not apply to cases like the one before us. The land at issue is not wilderness; it is a residential driveway in the middle of the largest city in Nebraska. The presumption of permissiveness arising from unenclosed, vacant, and unimproved land does not apply here. And it should not have applied in *Scoville* either.

[11] But an appellate court will affirm a lower court's ruling that reaches the correct result, although based on different reasoning.[26] And we find that on these facts, a different presumption of permissiveness arises.

In *Dan v. BSJ Realty, LLC*,[27] a Florida appeals court considered an alleged prescriptive easement over a 25-foot strip of land. The land was a private roadway on a piece of commercial real estate that was used by two adjacent businesses, those of the plaintiffs and the defendants. The roadway, however, was entirely on the defendants' property. And the defendants eventually built a fence that prevented the plaintiffs from using the property. The plaintiffs sued, claiming a prescriptive easement.

The appellate court affirmed the district court's decision that the plaintiffs had not established an easement. The court noted that the defendants' predecessors had allowed the plaintiffs and their predecessors free use of the roadway and that the defendants had also used the roadway. The court cited a rule that "use in common with the owner is presumed to be in subordination of the owner's title and with his or her

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[24] See *Rancour, supra* note 17.

[25] *Granite Beach, supra* note 19, 103 Wash. App. at 200, 11 P.3d at 855.

[26] *Doe v. Bd. of Regents, ante* p. 303, 809 N.W.2d 263 (2012).

[27] *Dan v. BSJ Realty, LLC*, 953 So. 2d 640 (Fla. App. 2007).

permission."[28] Applying this rule, the court found the plaintiffs' use to be permissive.

Thus, when the owner of a property has opened or maintained a right of way for his own use and the claimant's use appears to be in common with that use, the presumption arises that the use is permissive.[29] The foundation for the presumption is the likelihood that the owner is acting neighborly as opposed to acquiescing in a tortious trespass over his land.[30] Several other courts have applied similar presumptions.[31] And we have stated a similar rule, although in dicta. In *Gerberding v. Schnakenberg*,[32] we stated that a presumption of permissiveness arises when the use is "over a way opened by the landowner for his own purposes."

[12] We believe a similar rule should apply here. We hold that when a claimant uses a neighbor's driveway or roadway without interfering with the owner's use or the driveway itself, the use is to be presumed permissive. As noted, the law disfavors prescriptive easements.[33] And using a neighbor's driveway to turn around in is a common act. Landowners who permit such acts out of neighborly accommodation would likely stop doing so if their continued accommodation meant that they would one day lose the power to control the development of their land. "'Such [a] rule would [lead to] a prohibition of all neighborhood accommodations in the way of travel.'"[34]

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[28] *Id.* at 642-43.

[29] See *Guerard v. Roper*, 385 So. 2d 718 (Fla. App. 1980).

[30] See *id.*

[31] See, e.g., *Dewey Beach Lions Club, Inc. v. Longanecker*, 905 A.2d 128 (Del. Ch. 2006); *Chen v. Conway*, 121 Idaho 1000, 829 P.2d 1349 (1992); *Bulatovich v. Easton*, 435 N.E.2d 997 (Ind. App. 1982); *Wilfon v. Hampel 1985 Trust*, 105 Nev. 607, 781 P.2d 769 (1989); *Kawulok v. Legerski*, 165 P.3d 112 (Wy. 2007).

[32] *Gerberding, supra* note 14, 216 Neb. at 205, 343 N.W.2d at 66.

[33] See, e.g., *Sjuts, supra* note 8.

[34] *Connot v. Bowden*, 189 Neb. 97, 101, 200 N.W.2d 126, 129 (1972), quoting *Burk v. Diers*, 102 Neb. 721, 169 N.W. 263 (1918).

Of course, this rule merely creates a presumption. And a claimant can rebut the presumption by showing the claimant is making the claim as of right.[35] But here, Feloney adduced evidence showing that he only cleared Baye's driveway of snow. Even if we assume that this act would have put Baye on notice of Feloney's hostile claim, Feloney's clearing of the driveway did not span the full 10-year prescriptive period. Feloney's use was presumed permissive until he clearly put Baye on notice that he was claiming under right.[36] Ten years have not passed since that time. The district court properly granted summary judgment.

CONCLUSION

We conclude that Feloney's use of Baye's driveway is presumptively permissive. And Feloney did not present any evidence that would create a question of fact as to that question. Accordingly, we affirm.

AFFIRMED.

MILLER-LERMAN, J., not participating.

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[35] See *Kimco Addition v. Lower Platte South N.R.D.*, 232 Neb. 289, 440 N.W.2d 456 (1989).

[36] See, e.g., *Connot, supra* note 34.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. MICHAEL JAMES MURPHY, RESPONDENT.

814 N.W.2d 107

Filed June 1, 2012. No. S-12-278.

Original action. Judgment of public reprimand.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

PER CURIAM.

INTRODUCTION

The Counsel for Discipline of the Nebraska Supreme Court, relator, has filed a motion for reciprocal discipline