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KENTON CIRCUIT/DISTRICT COURT
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JOHN C. MIDDLETON
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COMMONWEALTH OF KENTUCKY
KENTON CIRCUIT COURT
DIVISION I
CASE NO. 18-CI-1603

MARC TISCHBEIN and PEGGY RANKIN **PLAINTIFFS**

vs.

SCOTT HILL, LORRIE HILL and GENERAL ELECTRIC CREDIT UNION **DEFENDANTS**

SCOTT HILL and LORRIE HILL **DEFENDANTS/THIRD-PARTY PLAINTIFFS**

vs.

DAVID A. KLINGSHIRN INDIVIDUALLY and DAVID A. KLINGSHIRN AS TRUSTEE OF THE DAVID A. KLINGSHIRN TRUST **THIRD-PARTY DEFENDANTS**

NOTICE OF APPEAL

Notice is given that Scott Hill and Lorrie Hill, Defendants and former Third-Party Plaintiffs in this proceeding, hereby appeal to the Kentucky Court of Appeals from the following: (A) the final judgment of the Kenton Circuit Court entered on February 1, 2022 and styled "Order Granting Summary Judgment" (a copy of which is attached hereto as Exhibit A) including but not limited to the Kenton Circuit Court determinations in that Order (i) sustaining Motion of Plaintiffs, Marc Tischbein and Peggy Rankin, for Summary Judgment on their adverse possession claim regarding the Main House garage and prescriptive easement claim regarding the entry gate and driveway, (ii) overruling Defendants', Hills, Motion to Dismiss Plaintiffs' Claim for Want of Prosecution Pursuant to CR 77.02, (iii) overruling Defendants', Hills, Motion Requesting that the Court Rule on All Pending Motions as moot, (iv) overruling Defendants', Hills, Motion to Require Plaintiffs to Post Bond as moot, and (v) sustaining Plaintiffs' Motion to Dismiss Defendants' Second Amended Counterclaim and dismissing those claim in light of the

granting of Plaintiffs' Motion for Summary Judgment on their claims for adverse possession and prescriptive easement; (B) the Order of the Kenton Circuit Court, entered on April 6, 2020 and styled "Order Granting Partial Summary Judgment" (a copy of which is attached hereto as Exhibit B) overruling Motion of Defendants, Scott Hill and Lorrie Hill, for summary judgment;, sustaining Motion of Plaintiffs, Marc Tischbein and Peggy Rankin to gain "immediate possession of the Main House garage in the same condition as it was when they relinquished possession, as well as unobstructed access to it through the gate and driveway in the same manner," and ordering that Partial Summary Judgment be granted; (C) any order of the Kenton Circuit Court entered on April 8, 2020 (such an order having been referenced by the Kentucky Court of Appeals in its Order Denying Motion for Emergency Relief entered May 28, 2020 in Kentucky Court of Appeals Case No. 2020-CA-000692-I although no such order appears on the Kenton Circuit Court docket); (D) the Order of the Kenton Circuit Court, entered on May 18, 2020 (a copy of which is attached hereto as Exhibit C), overruling the Hills' Motion to Vacate (and ordering that the "Hills shall relinquish possession of the Main house garage and provide unobstructed access to it through the gate and driveway in the same manner as immediately prior to their possession, within ten (10) days of entry of this order. If the mailbox, in any way obstructs use of the area previously used by [Marc] Tischbein and [Peggy] Rankin for additional parking, that too shall be moved."); and (E) the failure of the Kenton Circuit Court to rule on and the failure of the Kenton Circuit Court to grant the Hills' Motion to Compel Plaintiff Marc Tischbein, entered on February 26, 2020 (a copy of which is attached hereto as Exhibit D).

The names of the appellants are Scott Hill and Lorrie Hill.

The names of the appellees against whom this appeal is taken are Defendant Marc Tischbein, Defendant Peggy Rankin, and Defendant General Electric Credit Union. Third Party

Defendants David A. Klingshirn Individually and David A. Klingshirn as Trustee of the David A. Klingshirn Trust are also named as appellees against whom this appeal is taken out of an abundance of caution, in light of the fact that the Kenton Circuit Court's February 1, 2022 Order caused a copy of its February 1, 2022 Order to be served upon counsel for Mr. Klingshirn even though all claims of Scott Hill and Lorrie Hill against Mr. Klingshirn and all claims of Mr. Klingshirn against Scott Hill and Lorrie Hill had previously been dismissed without prejudice pursuant to Kenton Circuit Court Order signed November 1, 2021 and entered November 10, 2021.

The Kenton Circuit Court Judge is the Honorable Kathleen S. Lape.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing notice was served on all opposing counsel at their last known addresses via first class U.S. Mail, postage prepaid, and via e-mail at the following addresses, all this 2nd day of March, 2022:

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J. Jeffrey Landen

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COMMONWEALTH OF KENTUCKY
KENTON CIRCUIT COURT
FIRST DIVISION
CASE NO. 18-CI-1603

MARC TISCHBEIN, et. al. **PLAINTIFFS**

vs.

SCOTT HILL, et. al. **DEFENDANTS/THIRD-PARTY PLAINTIFFS**

vs.

DAVID A. KLINGSHIRN, et. al. **THIRD-PARTY DEFENDANTS**

ORDER GRANTING SUMMARY JUDGMENT

Procedural Posture:

This matter is before the court pursuant to motion of Plaintiffs, Marc Tischbein and Peggy Rankin ("Tischbein and Rankin"), for partial summary judgment filed April 4, 2020. Defendants/Third-Party Plaintiffs, the Hills, responded on April 16, 2020. Tischbein and Rankin filed a Reply on April 27, 2020.

There are also other motions pending before the court which will be addressed herein.

In early 2019 cross motions for summary judgment/partial summary judgment were filed by the parties. By order entered April 6, 2020 this court granted partial summary judgment to Plaintiffs finding that they, at a minimum, had an irrevocable license to use the property at the center of this controversy. This court also did a full adverse possession analysis pursuant to Defendants' motion for summary judgment which sought to have Plaintiffs' adverse possession claim dismissed. This court found that Plaintiffs' adverse possession claim was compelling and overruled Defendants' motion for summary judgment.

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Now Plaintiffs have filed this motion for partial summary judgment on their adverse possession and easement claims. The record is extensive and the relevant facts extend over a thirty (30) year period of time.

Facts:

This action involves a property dispute. Plaintiffs, Tischbein and Rankin, own 422 Riverside Drive (technically 420-422 Riverside Drive), referred to herein as the Main House. Defendants, the Hills, own 109 Shelby Street, referred to herein as the Coach House. They are adjoining properties.

In 1986 David A. Klingshirn ("Klingshirn"), Third Party Defendant, purchased the Main House. He partnered with Tischbein in the purchase and renovation of the Main House. They lived together in the Main House through 1993. Klingshirn paid approximately two-thirds of the expenses during that period and Tischbein paid approximately one-third.

On April 30, 1993, Klingshirn, Tischbein and Tischbein's then-fiancé, Rankin, jointly purchased the Coach House. In 1993-94 Klingshirn, Tischbein and Rankin, remodeled and updated the Coach and Main Houses, and constructed two garages, a driveway, gate and walkways between them. At that time Tischbein and Rankin contributed additional funds to "settle up" the difference in the amount Klingshirn had previously paid for the Main House over what Tischbein paid. Tischbein and Rankin then paid approximately two-thirds of the remodels and new construction. Klingshirn paid approximately one-third. After the construction and remodels were complete, Klingshirn moved into the Coach House and Tischbein and Rankin resided in the Main House. Klingshirn was still the only person on the Main House deed.

As part of the Coach House remodel a new Coach House "front door" that faced Riverside Drive on the north side of the property was constructed, as well as a walkway from

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that front door to Riverside Drive. Klingshirn located his mailbox on that walkway and used 420 Riverside Drive as his address. Technically, the Coach House address was 109 Shelby Street, but it was important to Klingshirn to maintain the prestigious Riverside Drive address (when he lived with Tischbein in the Main House the address for the two units were 420 and 422 Riverside Drive.). The walkway was located on the Main House lot and ran along the west side of the Main House through its side yard.

Originally, only one new garage was constructed on the property and it was for the Coach House. It had an exit directly into the Coach House basement. After the Coach House garage was built the parties explored building a Main House garage on the west side of the Main House in its side yard. They ran into some difficulties with that placement so Klingshirn, Tischbein and Rankin built it next to the Coach House garage between the two houses. The outside windows of the then existing Coach House garage were removed and the new Main House garage connected to the Coach House garage with a common wall. The driveway was constructed so as to service both garages. The only access to the garages and driveway parking was through a shared gate. The electricity for the Main House garage was connected directly to the Main House. There was no way to access one garage from the other. The construction of the two garages, the driveway and the gate were paid approximately two-thirds by Tischbein and Rankin, and approximately one-third by Klingshirn. Klingshirn, Tischbein and Rankin agreed in their depositions that the Main House garage was built for use by the Main House occupant(s) and the Coach House garage was built for use by the Coach House occupant(s).

From 1993 to 2001, the parties shared some ownership of the property and shared the use of the common driveway, gate and paved walkways among the properties in a manner consistent with their verbal agreement at the time they designed and renovated the properties. They treated

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them as one property shared by the three of them. The Coach House and the Coach House garage were used and paid for entirely by Klingshirn (exclusive of any mortgage payments), and the Main House and the Main House garage were used and paid for entirely by Tischbein and Rankin (exclusive of any mortgage payments until later in 1990's). The additional driveway parking, which might be considered a walkway, was used exclusively by Tischbein and Rankin.

From the beginning, the relationship between Tischbein and Klingshirn was one of complete trust and friendship. Tischbein paid approximately one-third of the Main House mortgage(s) in the early years and was on at least one loan, yet he was not on the deed. Some of the financing was secured with Klingshirn's pharmacies. When Klingshirn, Tischbein and Rankin purchased the Coach House in 1993 and renovated the properties, no written agreement was executed between the three of them. The financial contributions, living arrangements and use of the properties were discussed and agreed to by all three. As the parties testified in their depositions, they were like family to each other. All financial contributions were made into an account named "Tischbein Properties" and Klingshirn made the payments from that account.

Rankin testified that sometime in the late 1990's she and Tischbein took over one hundred percent of the Main House mortgage payments to which Klingshirn had been contributing (it appears at the rate of approximately 50%). There was no mortgage on the Coach House. In 1998, Klingshirn deeded one-half interest of the Main House to Tischbein (then married to Rankin). Then, according to Klingshirn, in 2001 he felt growing concern that his pharmacies were leveraged by the Main House mortgage. Rankin testified that since she and Tischbein were making all the mortgage payments for the Main House, they wanted to refinance with a lower interest rate. So, in 2001 Rankin, Tischbein and Klingshirn decided that Tischbein and Rankin would refinance the Main House mortgage in their names and the three of them

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would legally realign their ownership interests in the two properties. Tischbein and Rankin became the sole owners of the Main House, and Klingshirn became the sole owner of the Coach House. From what the court can discern, the Main House was then mortgaged in Tischbein and Rankin's names, and the Coach House was mortgage-free.

The deeds depicted the boundaries of the two lots as they were before Klingshirn, Tischbein and Rankin purchased the Coach House. Most of the gate, driveway and Main House garage that were built after the 1993 purchase were located within the Coach House property line. Most of the walkway from the Coach House door to Riverside Drive was located within the Main House property line. The driveway parking spots/walkway were located within the Main House property line, and the Coach House garage was located within the Coach House property line. Other paved walkways ran between the boundary lines of the two properties. From the deposition testimony of Klingshirn, Tischbein and Rankin, it appears that none of them gave a second thought to the property lines. After the 2001 property exchange, their living arrangements and use of the properties continued for the next seventeen (17) years as they had for the previous eight (8) years.

The Main House garage continued to be used and paid for exclusively by the Main House occupants, Tischbein and Rankin, and the Coach House garage continued to be used and paid for exclusively by the Coach House occupant, Klingshirn. They continued to share the driveway and gate. During this period, Tischbein and Rankin expended significant funds to replace the Main House garage door, install a new outside light, purchase garage door openers, paint the garage and install shelving. The electricity to the gate was assessed to the Coach House. After 2012 Tischbein and Rankin took over all maintenance costs, including $2,290.00 for a new gate motor. They further paid over $8,000.00 to repair the driveway. All expenses and repairs related

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solely to the Coach House garage were paid exclusively by Klingshirn and all expenses related solely to the Main House garage were paid exclusively by Tischbein and Rankin (there is some controversy concerning whether Klingshirn paid property taxes and insurance associated with the Main House garage).

According to Klingshirn's deposition testimony, upon division of the property and during the entire seventeen (17) years that followed, there was never any discussion or commentary regarding ownership or permissive use of the Main House garage, driveway, gate and walkways. When asked in deposition if Tischbein ever told Klingshirn that he owned the garage, Klingshirn responded "I think [Marc] thought that he owned that garage because he parked there...."[1]

Klingshirn, Tischbein and Rankin testified that there was an agreement in 1993-94, when they built the Main House garage, that it would be for the Main House. Klingshirn testified in his deposition that at the time of realignment of the properties in 2001, he assumed that Tischbein and Rankin would keep using the Main House garage and he, Klingshirn, would keep using the paved walkway from the Coach House north entrance through the Main House side yard and maintain his 420 Riverside Drive address. Klingshirn testified that the "gentlemen's agreement" was created in 1993-94 so that Tischbein would have a garage and Klingshirn would keep a Riverside Drive address. He further testified that after they split the properties, they continued to treat them as one property and he assumed they would sell the properties together. Tischbein and Rankin testified that they believed when they split the properties in 2001, they got full ownership of the Main House garage. In fact, Rankin testified that when they discussed splitting the properties in 2001, the three of them verbally agreed that she and Tischbein would continue to own the garage.

[1] Klingshirn deposition, June 17, 2019, page 106.

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At some point prior to Klingshirn's sale of the Coach House, Klingshirn expressed to Tischbein an interest to sell. He wanted to sell the properties together to maximize the profit. If not sold together he had hoped that Tischbein and Rankin would buy the Coach House from him. Tischbein and Rankin entertained selling the properties together. They had prospective buyers view the Main House. They were disappointed that the value of the two properties together were assessed by a real estate professional below their expectations. They didn't have any serious buyers express an interest to pay the amount they desired.

Klingshirn blamed Rankin for the failure to sell the properties together. He was upset that Tischbein and Rankin did not offer to purchase the Coach House from him. In 2017 he decided to list the Coach House. He informed Tischbein of his decision.

In light of the Klingshirn's decision to sell, Tischbein and Klingshirn had discussions about getting easements before the Coach House was sold. Klingshirn testified that he wanted the "gentlemen's agreement" to pass to the new owners. Tischbein that he "just wanted to get clarity of a document that confirms our ownership."[2] He said, "all we know is that we were owners of that garage and access to that garage."[3]

On the original MLS listing of the Coach House property, based upon the property plat maps filed of record, two garages were listed. Sometime in 2017, Klingshirn's realtor, Michael Hinckley ("Hinckley"), had brochures made to market the Coach House. The brochures listed the property as having two garages. Tischbein and Rankin were upset when they saw the brochures and told Klingshirn he needed to change them to reflect that the Coach House had only one garage. Klingshirn agreed and had Hinckley redo the brochures. The MLS listing was also changed to reflect that the property had only one garage. Klingshirn did an interview with a

[2] Tischbein deposition, page 85.
[3] Tischbein deposition, page 86.

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reporter who was writing an article for the Enquirer about the new unique property going on the market. The published article described the property as having one garage. The reporter executed an affidavit stating that Klingshirn told him the property had one garage.

On October 23, 2017, Klingshirn executed a Seller's Disclosure of Property Condition. In it Klingshirn acknowledged that he did not know the property boundaries, and that he was not aware of any encroachments or unrecorded easements related to the property. He further disclosed that there were features of the property shared in common with adjoining landowners without explanation.

Hinckley discussed with potential buyers that most of the neighbors' garage was on the Coach House property without an easement. He also discussed that the walkway from the Coach House door leading to Riverside Drive was on the Main House property without an easement. At least one potential buyer expressed an interest in getting easements for both before making an offer to purchase. In the end, no offer was made by that potential buyer.

On February 16, 2018, Lorrie Hill, Defendant/Third Party Plaintiff went through the Coach House with her realtor, Sharon Hilinski ("Hilinski"). She emailed Hilinski afterward that she was surprised that it was listed as a two-car garage when it seemed the garage was only one space. She had seen the original MLS listing stating the property had two garages. She questioned whether the Main House garage was owned by the Main House or if there was an easement. Hilinsky responded to Lorrie stating that Hinkley told her the neighbor's garage is on Klingshirn's property, and that there is no easement, just a "gentlemen's agreement." Hinkley told Klingshirn to put the arrangement in in writing in legal terms and Klingshirn said he would when he found a buyer.

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Klingshirn reached out to a city official on March 26, 2018 via email stating, "I need direction and advice to have a document [regarding] easement for 422 Riverside Drive [and] 109 Shelby. We share a common drive and walkway;"[4] Klingshirn was not happy that he might have to pay a professional to obtain the easements. Tischbein testified that he assumed Klingshirn was handling the matter. Rankin testified that she assumed Tischbein and Klingshirn were handling the matter. Klingshirn testified that he looked into it but chose not to follow through because he thought Tischbein and Rankin should have to pay for it since they earned more money than him. He admitted he was "perturbed" with Tischbein and Rankin for not offering to pay for it.

On March 17, 2018, the Hills made an offer to purchase the Coach House for $575,000.00. The asking price was $725,000.00. The Hills expressed that the rationale for the low offer included the fact that there was actually one garage, not two. They had Hilinski convey that rationale to Klingshirn.

On March 19, 2018, the Hills signed the Seller's Disclosure of Property Condition.

Klingshirn countered the Hills' offer for $625,000.00. The Counter-Offer stated that as an integral part of the contract, "[t]he adjoining property (422 Riverside Dr.) garage is partially on the subject property." On March 23, 2018, the Hills executed the Contract to Purchase for $625,000.00. Both Lorrie and Scott Hill testified that at that point in time, ownership of the Main House garage was questionable in their minds. They were, however, aware of the past and ongoing Main House garage usage by Tischbein and Rankin.

The Coach House was then appraised for $650,000.00 based upon one one-car garage. Prior to the June 4, 2018 closing, the Hills had the property surveyed. The May 31, 2018 survey report revealed that most of the Main House garage was located on the Coach House property.

[4] Defense exhibit 8.

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In an email to Hilinski on June 3, 2018, Lorrie Hill said she was pleasantly surprised that the survey revealed that most of the Main House garage was on the Coach House property. She wanted assurance that no new easements or agreements had been filed regarding the Coach House property since they signed the Contract to Purchase. Klingshirn and the Hills closed on the sale on June 4, 2018.

On June 29, 2018, a meeting took place between the Hills and Tischbein and Rankin regarding use of the Main House garage. A written license agreement was offered by the Hills. There was disagreement between them.

In July of 2018 the Hills, and Tischbein and Rankin, hired attorneys who conveyed to each other their positions regarding the property dispute. The Hills physically blocked Tischbein and Rankin from using the garage, gate and driveway.

Some time at the end of August, 2018, Klingshirn met with the Hills at Notre Dame Academy ("NDA") in Park Hills, Kentucky. The Hills' daughter was to attend NDA and Klingshirn wanted to introduce the Hills to the Notre Dame sisters. During their time at NDA, Klingshirn and the Hills discussed the property situation between the Hills and Tischbein and Rankin. Lorrie Hill, unbeknownst to Klingshirn, recorded the conversation between Klingshirn, Scott Hill and herself. A transcript of that recording has been entered into the record.

During that conversation, Lorrie Hill conveyed to Klingshirn that if he did not say that he gave permission to Tischbein to use that garage, then Tischbein would own it. She then suggested that their attorney would, in turn, sue Klingshirn. She went on to say that there was no need for that because Klingshirn just needed to sign an affidavit saying he gave Tischbein and Rankin permission to use the garage and that would put a stop to the lawsuit. Scott Hill told Klingshirn that Lorrie could type up an affidavit and send it on to Klingshirn's attorney.

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Klingshirn responded "here's the deal, whatever, you write it up."[5] Lorrie Hill prepared the August 27, 2018 affidavit and Klingshirn signed it.

That affidavit stated that Klingshirn specifically allowed and permitted Tischbein and Rankin to use the Main House garage and that Tischbein and Rankin paid no expenses relating to its use except for a periodic service call on the electric gate and driveway maintenance. He stated that Tischbein and Rankin never made any claim or assertion or act that they had any ownership interest in it. He further attested that Tischbein and Rankin knew or should have known that use of the Main House garage was allowed by Klingshirn as an ongoing gesture of goodwill and friendship and nothing more.

This action was filed on August 31, 2018 by Tischbein and Rankin.

On May 2, 2019, Klingshirn executed another affidavit incorporating the previous affidavit. He further stated that he inquired about an easement for the Main House garage but nothing came of it. He stated that he has always maintained that he owned the Main House garage, and between the time he accepted the Hills' offer on the Coach House and the time they closed on the sale, he informed the Hills that he allowed Tischbein and Rankin to use it pursuant to a "gentlemen's agreement."

Klingshirn was deposed on June 17, 2019 and July 2, 2019. In his depositions he stated that the only verbal discussion regarding the use of the Main House garage was the gentlemen's agreement between he and Tischbein in 1993-94 when Klingshirn, Tishbein and Rankin purchased the Coach House and designed the renovation of the Coach House property and Main House property for their shared use as one property, with the common goal that Tischbein would have a garage and Klingshirn would have a Riverside Drive address.[6] He further testified that

[5] Klingshirn June 17, 2019 deposition, page 147.
[6] Klingshirn June 17, 2019 deposition, p. 73.

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they never discussed ownership or permissive use of the Main House garage after that. He stated that the permissive nature of the use of the Main House garage wa assumed.

Findings and Conclusions:

Summary Judgment

The standard for summary judgment requires the court to view the record in the light most favorable to the non-movant; and for the movant to show the non-existence of any issue of material fact, and make that showing with such clarity that there is no room left for controversy. CR 56.03. The failure of the non-moving party to present evidence in contradiction to the evidence in support of the motion for summary judgment does not in itself justify a granting of the motion; however, the party opposing "…a properly supported summary judgment motion" cannot defeat such a motion without presenting "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." See Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 475 (1991). The inquiry is whether, from the evidence in the record, facts exist which would make it possible for the non-moving party to prevail.

Adverse Possession

In order to establish title through adverse possession all of the following must be met at all time throughout a fifteen-year statutory period:

> (1) Possession must be hostile and under a claim of right; (2) it must be actual; (3) it must be open and notorious; (4) it must be exclusive, and (5) it must be continuous.[7]

The minimum fifteen-year period of time at issue here begins in 2001.

[7] *Tartar v. Tucker*, 280 S.W.2d 150, 152 (Ky.1955).

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Starting with the fifth requirement and moving backward, the deposition and affidavit testimony of Klingshirn, Tischbein and Rankin is undisputed. During the period of 2001 through 2017 only Tischbein and Rankin used the Main House garage. The use was continuous.

The fourth requirement, that possession be exclusive is also undisputed. The Main House garage could not be accessed from the Coach House garage. Klingshirn never used or even attempted to use the Main House garage. Klingshirn, Tischbein and Rankin all testified that the Main House garage was used exclusively by Tischbein and Rankin for the entire time. Klingshirn admitted that he always thought of it as "Marc's garage" or "Marc's mancave."

In order to satisfy the third element, that possession be open and notorious, possession must be conspicuous and not secret, so that the legal title holder has notice of the adverse use.[8] After 2001, Klingshirn was the title holder of most of the property upon which the Main House garage was built. Klingshirn was aware that Tischbein and Rankin exercised control over the Main House garage in a manner that would appear to the world that they owned it.

Not only did Tischbein openly used the Main House garage, all maintenance for it was paid for by Tischbein and Rankin. A new garage door was chosen and paid for by Tischbein and Rankin, as well as new openers, outside lighting and painting. Tischbein and Rankin had storage shelves constructed in that garage. Klingshirn was aware of all of this. By their use and action Tischbein and Rankin showed that they intended to possess the Main House garage to the exclusion of all others. Tischbein and Rankin testified that they believed they owned the garage after the property was realigned. They believed that the Main House garage went with the Main House. Klingshirn, Tischbein and Rankin all testified that they believed that when they built the Main House garage in 1993-94, it was built and intended for that purpose.

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[8] *Appalachian Regional Healthcare, Inc. v. Royal Crown Bottling Co.*, 824 S.W.2d 878,880 (Ky.1992), citing *Sweeten v. Sartin*, 256 S.W.2d 524, 526 (Ky.1953).

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Defendants argue that Klingshirn paid additional real estate tax and insurance because of his ownership of the garages. That claim is questionable, but that alone would not destroy Tischein's and Rankin's claim of adverse possession.

The second requirement is that Tischbein and Rankin actually possessed the Main House garage. The testimony on this point is not in dispute. The uncontroverted testimony reflects that Tischbein cleaned his car in the driveway almost every day and parked it in the garage every night. The testimony further shows that Tischbein spent a lot of time in his garage and stored his and Rankin's personal property in there. According to Klingshirn, Tischbein hung out in that garage all the time with his dog and his radio.

The first requirement, that possession be hostile and under a claim of right is where the Hills contend that Tischbein and Rankin's adverse possession claim fails.

"In order to make an adverse claim definite, the adverse possessor must have *either* some color of title that will show the extent of the claim *or* there must be a definite boundary."[9] If someone is in actual adverse possession of property without color of title, he must have well-defined boundaries of his possession.[10]

The only color of title that Tischbein and Rankin have is that a portion of the north wall (closest to the Main House) is located within the Main House property line. Otherwise, the boundary of the Main House garage which Tischbein and Rankin are asserting ownership of, is obviously well-marked and adjacent to the Main House. It is separated from the Coach House garage by a wall. It is inaccessible from the Coach House garage. It adjoins and is partially on the Main House property. The electricity line to the Main House garage connects to the Main House. Tischbein and Rankin have clearly defined their claim of right.

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[9] *Appalachian Regional Healthcare*, at 880, citing *Coulton v. Simpson*, 96 S.W.2d 856 (Ky.1936).
[10] *Shepherd v. Morgan*, 246 S.W.2d 131 (Ky.1951).

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In order for possession to be adverse, a possessor must "openly evince a purpose to hold dominion over the property with such hostility that will give the non-possessory owner notice of the adverse claim."[11] "[T]he character of the property, its physical nature and the use to which it has been put, determines the character of acts necessary to put the true owner on notice that a hostile claim is being asserted."[12] These factual assertions of hostility by Tischbein and Rankin are discussed in this opinion analyzing the third element of an adverse claim, that possession be open and notorious. Tischbein and Rankin used the Main House garage in a manner consistent with the size and character of the property and its intended purpose upon construction by them and Klingshirn. In full sight of Klingshirn, they treated it as their property, with all the benefit and responsibility that accompanies ownership. Klingshirn testified that Tischbein thought he owned it.

When an occupant obtains possession of land under the mistaken belief that the property is his, and he conveys no intention of surrendering the disputed property, he is, in fact, holding the property adversely[13]. Furthermore, physical improvement to the property demonstrates the possessor's intent to adversely hold the property.[14]

Klingshirn maintains that Tischbein and Rankin's possession of the property was permissive rather than hostile. This is the real crux of this controversy. Where an owner of property has granted someone permission to use [that] property, a claim of adverse possession cannot be deemed hostile.[15] "[P]ossession by permission cannot ripen into title no matter how long it continues."[16]

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[11] *Appalachian Regional Healthcare,* at 880.
[12] *Ely v. Fuson,* 180 S.W.2d 90 (Ky.App.1944).
[13] *Tartar,* at 153.
[14] *Appalachian Regional Healthcare,* at 880.
[15] *United Hebrew Congregation of Newport v. Bolser,* 50 S.W.2d 45 (Ky.1932).
[16] *Phillips v. Akers,* 103 S.W.3d 705, 708 (Ky.App.2002).

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Klingshirn asserts that Tischbein and Rankin's permitted use of the Main House garage was pursuant to a "gentlemen's agreement" but he admits that this verbal agreement was entered into in 1993-94 when Klingshirn, Tischbein and Rankin jointly owned the Coach House and they made plans together for renovations. According to Klingshirn, Tischbein and Rankin, the agreement encompassed building the Coach House garage for use by the Coach House occupant, building a Main House garage for use by the Main House occupant, building a walkway from a newly constructed Coach House front door to Riverside Drive for usage by the Coach House occupant to retain the Riverside Drive address, and building a gate, driveway and other walkways for the shared use by the occupants of both houses. Klingshirn testified that this "gentlemen's agreement" was never discussed between himself and Tischbein and/or Rankin any time after the design and construction of the property renovations which took place prior to 2001 and which included the construction of the Main House garage. He simply testified that the permissive nature of Tischbein and Rankin's use of the Main House garage after the property realignment was assumed. Tischbein and Rankin testified that they believed they owned it, and openly behaved consistent with that belief.

Furthermore, rather than discuss his ownership of the Main House garage and Tischbein's use thereof as permissive after the property split, Klingshirn openly treated it as Tischbein's garage and was aware of and expected Tischbein and Rankin's incurrence of expenses to upgrade and maintain it. When asked in deposition if he paid for any of the maintenance, upkeep or improvement of the Main House garage, he answered that there would have been no reason for him to do so.

Klingshirn, Tischbein and Rankin had an unusual relationship over the thirty years or so. They did not routinely reduce to writing their business dealings amongst themselves. For

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example, Klingshirn and Tischbein bought the Main House together with Tischbein initially paying approximately one-third of the mortgage payments. He was on at least one loan agreement with Klingshirn. After approximately seven years Tischbein evened up his investment in the Main House with Klingshirn's. Still, it wasn't until 1998, that Tischbein was put on the deed with Klingshirn as a co-owner. Large sums were spent on the purchase of the Coach House and the improvements of the two properties in 1993-94, yet nothing was put into writing specifying the percentage of ownership or expense obligations of Klingshirn, Tischbein and Rankin.

The deeds to the Coach House and the Main House were never combined to reflect one property, but they all treated them as one. When they split the property they simply conveyed the original deeds to each other. The failure to specify in the deeds that the Main House garage was part of the Main House property would appear typical of the manner in which Klingshirn, Tischbein and Rankin did business together.

Tischbein and Rankin testified that they believed that they got exclusive ownership of the Main House garage upon realignment of the properties in 2001. Rankin testified that in 2001, when the properties were conveyed to each other, they had a verbal agreement that she and Tischbein would retain exclusive ownership of the Main House garage.

In every way Tischbein and Rankin openly treated the Main House garage as their property. When Klingshirn put the Coach House on the market and the realtor printed flyers showing the property had two garages, Tischbein and Rankin immediately objected by expressing that the Coach House had only one garage. Klingshirn acted consistent with that belief by changing the sales literature.

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When Tischbein and Rankin refused to purchase the Coach House from Klingshirn, and pulled out of selling the two properties together, Klingshirn admitted he was hurt and upset. It wasn't until he had potential buyers show interest that he expressly claimed ownership. That expression, however, was to the potential buyers, not Tischbein and Rankin, and it was seventeen years after he obtained exclusive ownership of the Coach House.

Even if Tischbein and Rankin exercised ownership of the garage knowing the title was with Klingshirn the hostility element of adverse possession is not destroyed. The fact that Klingshirn did not object to Tischbein and Rankin's continued use of the garage after the deeds were executed does not constitute permission. "The owner's mere knowledge of the possession [by a third party] … [does] not destroy hostility."[17]

Without some act by Klingshirn conveying his assent to Tischbein and Rankins's use of his property, permission cannot be implied. Otherwise, there would essentially be no claim for adverse possession in the Commonwealth of Kentucky.

The only people who can testify as to whether, at any time during the fifteen years beginning in 2001, Klingshirn made any assertion that Tischbein's and Rankin's use of the garage was permissive are Klingshirn, Tischbein and Rankin. Tischbein and Rankin testified that he did not. Klingshirn testified that it was never discussed after the 1993-94 renovation plans when all three parties owned the Coach House.

There were two affidavits executed by Klingshirn after the onset of this legal controversy. One was on August 27, 2018, after his discussion with Lorrie Hill, wherein he made the conclusory statement that from 2001 through 2018 Tischbein's and Rankin's use was permissive

[17] *Herringer v. Brewster*, 357 S.W.3d 920, 930 (Ky.App.2012), citing 3 Robert W. Keats, et. al., *Kentucky Practice: Methods of Practice* ¶5.3 (3d ed. 1989).

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and that they knew or should have known that the use was an ongoing gesture of goodwill and friendship. He made no claim that he made any act or gesture to convey that to them.

The second affidavit was executed on May 2, 2019 well after this action was underway. In that one he states that he "allowed and permitted the Tischbeins to continue to use the second garage at 109 Shelby, even though they no longer had an ownership interest in the property." When specifically asked about that permission in deposition, he testified that they never discussed it during the period of time that he owned the Coach House exclusively. He further states in his affidavit that he informed the Hills that he allowed the Tischbeins to use the Main House garage pursuant to a gentlemen's agreement. All Klingshirn testimony regarding verbal agreement of the use of the Main House garage referenced the "gentlemen's agreement" entered into around 1993 when he and Tischbein both owned the Coach House and discussed plans for the building of the garage, the walkway to Riverside Drive and other renovations.

Following both affidavits Klingshirn was deposed. Once on June 17, 2019 and once on July 2, 2019. When asked directly whether he specifically gave permission to Tischbein and Rankin to use the Main House garage upon and since realignment of the property in 2001, he simply said it was assumed. Again, he pointed to no positive act conveying his assent to their use of the garage.

In deposition, Klingshirn testified that he assumed either the two properties would be sold together, or that Tischbein and Rankin would buy the Coach House from him when he was ready, so there was no need to discuss who owned the Main House garage. Klingshirn's internal thought process, however, is not equivalent to an act of assent. He has shown no act inferring or expressing permission.

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Klingshirn's testimony of the facts surrounding the division of the property in 2001, the timing of the "gentleman's agreement" around 1993 when they bought the Coach House together and planned renovations, his testimony that Tischbein believed he owned the garage and he that never made an expression to the contrary to Tischbein, and his own behavior toward Tischbein's use of the garage for the seventeen (17) years beginning in 2001 make it clear that no expression of permission to use or act of assertion of ownership of the garage was ever conveyed to Tischbein and Rankin during the period that he was the sole owner of the Coach House. The 1993 gentlemen's agreement was simply an oral agreement establishing shared use of jointly owned property.

Plaintiffs have established title through adverse possession by establishing the existence of all five elements of their claim for a fifteen-year period. Defendants, in turn, have failed to show any act by Klingshirn asserting his ownership or conveying his consent to Tischbein's and Rankins's use of the property which would bar their claim.

Finally, the Hills argue that because Tischbein and Rankin were part owners of the Coach House when it was deeded to Klingshirn, the long-established rule that a vendor of land that remains in possession of the land after the conveyance is deemed to hold under the vendee, not against the vendee applies. The Hills rely on *Dishman v. Marsh*[18]. In *Dishman*, the property in question was land adjoining a home that had been in the grantor's family for many years. Mrs. Dishman conveyed the property to her son-in-law in 1911 in return for their care of her in her later years. Five years later, though, her daughter and son-in-law left town. The son-in-law continued to pay property tax on the property in his name. The property was eventually purchased to satisfy his tax debt.

[18] 128 S.W.2d 235 (Ky.App.1939).

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The court found that there was no change of the character of Mrs. Dishman's possession for the twenty years after her son-in-law left town, so there is a presumption that her possession was peaceable. That presumption could only be challenged by a showing of her open, notorious, continuous and adverse possession.[19] The court found that there was no such showing. The court further found and considered that an innocent buyer was involved.

That brings us right back to where we started. There is a *presumption* that the title holder retains ownership of property unless the elements of adverse possession have been proven by clear and convincing evidence.

In this case, the situation is a little more complicated because Klingshirn is also the grantor of the Main House garage. He, along with Tischbein and Rankin, conveyed legal title to himself.

Furthermore, the Hills were not innocent buyers. They purchased the property knowing that Tischbein and Rankin's right to the Main House garage was questionable. The court is not convinced that simply because Tischbein and Rankin did not move out of the garage, then move back in after the 2001 conveyance, they are barred from asserting an adverse possession claim under the vendor/vendee rule.

Easement

Plaintiffs also seek prescriptive and/or quasi easements for the use of the Main House driveway and entrance gate.

"As with adverse possession of a fee simple estate, a prescriptive easement can be acquired by actual, hostile, open and notorious, exclusive and continuous possession of the

[19] *Id.*, at 237.

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property for the statutory period of fifteen years."[20] Once those elements are met, the burden shifts to the landowner to offer evidence, either direct or circumstantial, that the claimant's use was permissive only.[21]

For all the reasons stated above finding Plaintiff's adverse possession of the Main House garage, this court finds a prescriptive easement for the use of the driveway and gate to access the Main House garage.

The material facts relied upon by this court to determine the outcome herein are not controverted. The real controversy, as argued by Defendants in the memorandums following the April 6, 2020 order, is the court's characterization of those facts and their application to the law. That makes this matter appropriate for summary judgment. All relevant parties have been deposed. The resolution of this matter lies with their testimony. It is not possible for Defendants to prevail from the facts that exist in the record. The only way they could prevail is if Klingshirn were to change his testimony at trial. If that possibility could preclude summary judgment, there would never be cause for a court to entertain the motion.

Based upon the herein discussion and the court being in all ways advised,

IT IS HEREBY ORDERED AND ADJUDGED by the court as follows:

1. Motion of Plaintiffs, Marc Tischbein and Peggy Rankin, for Summary Judgement on their adverse possession claim regarding the Main House garage and prescriptive easement claim regarding the entry gate and driveway is **SUSTAINED**.

2. Tischbein and Rankin, at their expense, shall have a Kentucky licensed surveyor/engineer prepare a legal description of the adversely possessed property and submit it to the court and Defendants, the Hills, and/or their attorney for any objections. Upon approval

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[20] *Columbia Gas Transmission Corp. v. Consol of Kentucky, Inc.*, 15 S.W.3d 727, 730 (Ky.2000).
[21] *Melton v. Cross*, 580 S.W.3d 510 (Ky.2019).

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by the court, Tischbein and Rankin shall further submit the description and a corresponding identification plat to the Kenton County and Municipal Planning and Zoning Commission for approval.

4. Tischbein and Rankin, at their expense, shall secure a legal description of the prescriptive easement through the entry gate and over the driveway for access to the Main House garage and submit it to the Defendants, the Hills, and/or their attorney for any objections before submission to the court for approval.

3. Defendants', Hills, Motion to Dismiss Plaintiffs' Claims for Want of Prosecution Pursuant to CR 77.02 is **OVERRULED.**

4. Defendants', Hills, Motion Requesting that the Court Rule on All Pending Motions is **OVERRULED** as now MOOT.

5. Defendants', Hills, Motion to Require Plaintiffs to Post Bond is **OVERRULED** as MOOT.

6. In light of the granting of Plaintiffs' Motion for Summary Judgment on their claims for adverse possession and prescriptive easement, Plaintiffs' Motion to Dismiss Defendants' Second Amended Counterclaim is **SUSTAINED** and those claims are **DISMISSED.**

There being no just cause for delay this is a final and appealable order.

Done this 1st day of February, 2022.

KATHLEEN S. LAPE, J.
Kenton Circuit Judge

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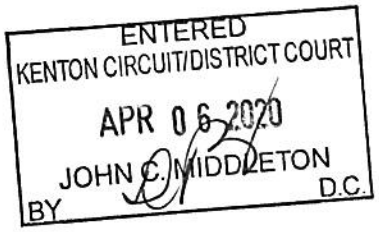
COMMONWEALTH OF KENTUCKY
KENTON CIRCUIT COURT
FIRST DIVISION
CASE NO. 18-CI-1603



MARC TISCHBEIN, et. al. **PLAINTIFFS**

vs.

SCOTT HILL, et. al. **DEFENDANTS/THIRD-PARTY PLAINTIFFS**

vs.

DAVID A. KLINGSHIRN, et. al. **THIRD-PARTY DEFENDANTS**

ORDER GRANTING PARTIAL SUMMARY JUDGMENT

Procedural Posture:

This matter is before the court pursuant to the following:

1. Motion of Defendants, Scott Hill and Lorrie Hill (the "Hills") for summary judgment filed February 22, 2019.
2. Motion of Plaintiffs, Marc Tischbein and Peggy Rankin ("Tischbein and Rankin"), for partial summary judgment filed March 1, 2019.
3. Motion of Defendants/Third-Party Plaintiffs, the Hills, to dismiss the counterclaim of Third-Pary Defendants, David A. Klingshirn, individually ("Klingshirn"), and David A. Klingshirn, as Trustee of the David A. Klingshirn Trust (the "Trustee") (Klingshirn and the Trustee collectively referred to as the "Third-Party Defendants"), filed November 12, 2019.
4. Plaintiffs' motion to dismiss Third-Party Defendant, Klingshirn's Cross-Claim filed November 19, 2019.

Facts:

This action involves a property dispute. Plaintiffs, Tischbein and Rankin, own 422 Riverside Drive (technically 420-422 Riverside Drive), referred to herein as the Main House. Defendants, the Hills, own 109 Shelby Street, referred to herein as the Coach House. They are adjoining properties.

In 1986 Klingshirn purchased the Main House. He partnered with Tischbein in the purchase and renovation of the Main House. They lived together in the Main House through 1993. Klingshirn paid two-thirds of the expenses during that period and Tischbein paid one-third.

On April 30, 1993, Klingshirn, Tischbein and Tischbein's then-fiancé, Rankin, jointly purchased the Coach House and Main House. In 1993-94 co-owners, Klingshirn, Tischbein and Rankin, remodeled and updated the Coach and Main Houses, and constructed two garages, a driveway, gate and walkways between them. At that time Tischbein and Rankin contributed additional funds to "settle up" the difference in the amount Klingshirn had previously paid for the Main House over what Tischbein paid. Tischbein and Rankin then paid two-thirds of the remodels and new construction. Klingshirn paid one-third. After the construction and remodels were complete, Klingshirn moved into the Coach House and Tischbein and Rankin resided in the Main House.

As part of the Coach House remodel a new Coach House "front door" that faced Riverside Drive on the north side of the property was constructed, as well as a walkway from that front door to Riverside Drive. Klingshirn located his mailbox on that walkway and used 420 Riverside Drive as his address. Technically, the Coach House address was 109 Shelby Street,

but it was important to Klingshirn to maintain the prestigious Riverside Drive address (when he lived with Tischbein in the Main House the address for the two units were 420 and 422 Riverside Drive.). The walkway was located on the Main House lot and ran along the west side of the Main House through its side yard.

Originally, only one new garage was constructed on the property and it was for the Coach House. It had an exit directly into the Coach House basement. After the Coach House garage was built the parties explored building a Main House garage on the west side of the Main House in its side yard. They ran into some difficulties with that placement so Klingshirn, Tischbein and Rankin built it next to the Coach House garage between the two houses. The outside windows of the then existing Coach House garage were removed and the new Main House garage connected to the Coach House garage with a common wall. The driveway was constructed so as to service both garages. It also extended north toward the Main House to allow for additional Main House parking. The only access to the garages and driveway parking was through a shared gate. The electricity for the Main House garage was connected directly to the Main House. There was no way to access one garage from the other. The construction of the two garages, the driveway and the gate were paid two-thirds by Tischbein and Rankin, and one-third by Klingshirn. Klingshirn, Tischbein and Rankin agreed in their depositions that the Main House garage was built for use by the Main House occupant(s) and the Coach House garage was built for use by the Coach House occupant(s).

From 1993 to 2001, the three co-owned both properties and shared the common driveway, gate and paved walkways among the properties in a manner consistent with their verbal agreement at the time they designed and renovated the properties. They treated them as one property shared by the three of them. The Coach House and the Coach House garage were

used and paid for entirely by Klingshirn (exclusive of any mortgage payments), and the Main House and the Main House garage were used and paid for entirely by Tischbein and Rankin (exclusive of any mortgage payments until later in 1990's). The additional driveway parking was used by Tischbein and Rankin.

From the beginning, the relationship between Tischbein and Klingshirn was one of complete trust and friendship. Tischbein paid one-third of the Main House mortgage(s) in the early years and was on at least one loan, yet he was not on the deed. Some of the financing was secured with Klingshirn's pharmacies. When Klingshirn, Tischbein and Rankin purchased the Coach House in 1993 and renovated the properties, no written agreement was executed between the three of them. The financial contributions, living arrangements and use of the properties were discussed and agreed to by all three. As the parties testified in their depositions, they were like family to each other. All financial contributions were made into an account named "Tischbein Properties" and Klingshirn made the payments from that account.

Rankin testified that sometime in the late 1990's she and Tischbein took over one hundred percent of the Main House mortgage payments to which Klingshirn had been contributing (it appears at the rate of 50%). There was no mortgage on the Coach House. In 1998, Klingshirn deeded one-half interest of the Main House to Tischbein (then married to Rankin). Then, according to Klingshirn, in 2001 he felt growing concern that his pharmacies were leveraged by the Main House mortgage. Rankin testified that since she and Tischbein were making all the mortgage payments for the Main House, they wanted to refinance with a lower interest rate. So, in 2001 Rankin, Tischbein and Klingshirn decided that Tischbein and Rankin would refinance the Main House mortgage in their names and the three of them would legally realign their ownership interests in the two properties. Tischbein and Rankin became the sole

owners of the Main House, and Klingshirn became the sole owner of the Coach House. From what the court can discern, the Main House was then mortgaged in Tischbein and Rankin's names, and the Coach House was mortgage-free.

The deeds depicted the boundaries of the two lots as they were before Klingshirn, Tischbein and Rankin purchased the Coach House. Most of the gate, driveway and Main House garage that were built after the 1993 purchase were located within the Coach House property line. Most of the walkway from the Coach House door to Riverside Drive was located within the Main House property line. The driveway parking spots were located within the Main House property line, and the Coach House garage was located within the Coach House property line. Other paved walkways ran between the boundary lines of the two properties. From the deposition testimony of Klingshirn, Tischbein and Rankin, it appears that none of them gave a second thought to the property lines. After the 2001 property exchange, their living arrangements and use of the properties continued for the next seventeen (17) years as they had for the previous eight (8) years.

The Main House garage continued to be used and paid for exclusively by the Main House occupants, Tischbein and Rankin, and the Coach House garage continued to be used and paid for exclusively by the Coach House occupant, Klingshirn. They continued to share the driveway and gate. During this period, Tischbein and Rankin expended significant funds to replace the Main House garage door, install a new outside light, purchase garage door openers, paint the garage and install shelving. The electricity to the gate was assessed to the Coach House. After 2012 Tischbein and Rankin took over all maintenance costs, including $2,290.00 for a new gate motor. They further paid over $8,000.00 to repair the driveway. All expenses and repairs related solely to the Coach House garage were paid exclusively by Klingshirn and all expenses related

solely to the Main House garage were paid exclusively by Tischbein and Rankin (there is some controversy concerning whether Klingshirn paid property taxes and insurance associated with the Main House garage).

According to Klingshirn's deposition testimony, upon division of the property and during the entire seventeen (17) years following, there was never any discussion or commentary regarding the ownership or permissive use of the Main House garage, driveway, gate and walkways. Klingshirn did testify in his deposition that "I think [Marc] thought that he owned that garage because he parked there and there's ...you're using semantics on a word."[1]

Klingshirn, Tischbein and Rankin testified that there was an agreement in 1993-94, when they built the Main House garage, that it would be for the Main House. Klingshirn testified in his deposition that at the time of realignment of the properties in 2001, he assumed that Tischbein and Rankin would keep using the Main House garage and he, Klingshirn, would keep using the paved walkway from the Coach House north entrance through the Main House side yard and maintain his 420 Riverside Drive address. He further testified that after they split the properties, they continued to treat them as one property and he assumed they would sell the properties together. Tischbein and Rankin testified that they believed when they split the properties in 2001, they got full ownership of the Main House garage. In fact, Rankin testified that when they discussed splitting the properties in 2001, the three of them verbally agreed that she and Tischbein would continue to own the garage.

At some point prior to Klingshirn's sale of the Coach House, Klingshirn expressed to Tischbein an interest to sell. He wanted to sell the properties together to maximize the profit. If not sold together he had hoped that Tischbein and Rankin would buy the Coach House from him. Tischbein and Rankin entertained selling the properties together. They had prospective buyers

[1] Klingshirn deposition, June 17, 2019, page 106.

view the Main House. They were disappointed that the value of the two properties together were assessed by a real estate professional below their expectations. They didn't have any serious buyers express an interest to pay the amount they desired.

Klingshirn blamed Rankin for the failure to sell the properties together. He was upset that Tischbein and Rankin did not offer to purchase the Coach House from him. In 2017 he decided to list the Coach House. He informed Tischbein of his decision.

In light of the Klingshirn's decision to sell, Tischbein and Klingshirn had discussions about getting easements before the Coach House was sold. According to Tischbein he "just wanted to get clarity of a document that confirms our ownership."[2] He said, "all we know is that we were owners of that garage and access to that garage."[3] Klingshirn and Tischbein agreed that they needed a written document/easement so that after the Coach House was sold, the new Coach House owners could maintain the Riverside Drive address by using the walkway in the Main House side yard, and Tischbein and Rankin could continue to use the gate and driveway to access the Main House garage and the parking spaces that laid within the Main House property line.

On the original MLS listing of the Coach House property, based upon the property plat maps filed of record, two garages were listed. Sometime in 2017, Klingshirn's realtor, Michael Hinckley ("Hinckley"), had brochures made to market the Coach House. The brochures listed the property as having two garages. Tischbein and Rankin were upset when they saw the brochures and told Klingshirn he needed to change them to reflect that the Coach House had only one garage. Klingshirn agreed and had Hinckley redo the brochures. The MLS listing was also changed to reflect that the property had only one garage. Klingshirn did an interview with a

[2] Tischbein deposition, page 85.
[3] Tischbein deposition, page 86.

reporter who was writing an article for the Enquirer about the new unique property going on the market. The published article described the property as having one garage. The reporter executed an affidavit stating that Klingshirn told him the property had one garage.

On October 23, 2017, Klingshirn executed a Seller's Disclosure of Property Condition. In it Klingshirn acknowledged that he did not know the property boundaries, and that he was not aware of any encroachments or unrecorded easements related to the property. He further disclosed that there were features of the property shared in common with adjoining landowners without explanation.

Hinckley discussed with potential buyers that most of the neighbors' garage was on the Coach House property without an easement. He also discussed that the walkway from the Coach House door leading to Riverside Drive was on the Main House property without an easement. At least one potential buyer expressed an interest in getting easements for both before making an offer to purchase. In the end, no offer was made by that potential buyer.

On February 16, 2018, Lorrie Hill went through the Coach House with her realtor, Sharon Hilinski ("Hilinski"). She emailed Hilinski afterward that she was surprised that it was listed as a two-car garage when it seemed the garage was only one space. She had seen the original MLS listing stating the property had two garages. She questioned whether the Main House garage was owned by the Main House or if there was an easement. Hilinsky responded to Lorrie stating that Hinkley told her the neighbor's garage is on Klingshirn's property, and that there is no easement, just a "gentlemen's agreement." Hinkley told Klingshirn to put the arrangement in in writing in legal terms and Klingshirn said he would when he found a buyer.

Klingshirn reached out to a city official on March 26, 2018 via email stating, "I need direction and advice to have a document [regarding] easement for 422 Riverside Drive [and] 109

Shelby. We share a common drive and walkway;"[4] Klingshirn was not happy that he might have to pay a professional to obtain the easements. Tischbein testified that he assumed Klingshirn was handling the matter. Rankin testified that she assumed Tischbein and Klingshirn were handling the matter. Klingshirn testified that he looked into it but chose not to follow through because he thought Tischbein and Rankin should have to pay for it since they earned more money than him. He admitted he was "perturbed" with Tischbein and Rankin for not offering to pay for it.

On March 17, 2018, the Hills made an offer to purchase the Coach House for $575,000.00. The asking price was $725,000.00. The Hills expressed that the rationale for the low offer included the fact that there was actually one garage, not two. They had Hilinski convey that rationale to Klingshirn.

On March 19, 2018, the Hills signed the Seller's Disclosure of Property Condition.

Klingshirn countered the Hills' offer for $625,000.00. The Counter-Offer stated that as an integral part of the contract, "[t]he adjoining property (422 Riverside Dr.) garage is partially on the subject property." On March 23, 2018, the Hills executed the Contract to Purchase for $625,000.00. Both Lorrie and Scott Hill testified that at that point in time, ownership of the Main House garage was questionable in their minds. They were, however, aware of the past and ongoing Main House garage usage by Tischbein and Rankin.

The Coach House was then appraised for $650,000.00 based upon one one-car garage. Prior to the June 4, 2018 closing, the Hills had the property surveyed. The May 31, 2018 survey report revealed that most of the Main House garage was located on the Coach House property. In an email to Hilinski on June 3, 2018, Lorrie Hill said she was pleasantly surprised that the survey revealed that most of the Main House garage was on the Coach House property. She

[4] Defense exhibit 8.

wanted assurance that no new easements or agreements had been filed regarding the Coach House property since they signed the Contract to Purchase. Klingshirn and the Hills closed on the sale on June 4, 2018.

On June 29, 2018, the Hills initiated a meeting with Tischbein and Rankin in an attempt to execute a written license agreement for the use of the walkway to Riverside Drive, the gate, the driveway and the Main House garage. There was disagreement between them.

In July of 2018 the Hills, and Tischbein and Rankin, hired attorneys who conveyed to each other their positions regarding the property dispute. The Hills physically blocked Tischbein and Rankin from using the garage, gate and driveway.

Some time at the end of August, 2018, Klingshirn met with the Hills at Notre Dame Academy ("NDA") in Park Hills, Kentucky. The Hills' daughter was to attend NDA and Klingshirn wanted to introduce the Hills to the Notre Dame sisters. During their time at NDA, Klingshirn and the Hills discussed the property situation between the Hills and Tischbein and Rankin. Apparently, Lorrie Hill, unbeknownst to Klingshirn, recorded the conversation between Klingshirn, Scott Hill and herself.

The recording is not in the record but is referenced and quoted by Tischbein and Rankin's attorney during Klingshirn's deposition. Supposedly, during that conversation, Lorrie Hill told Klingshirn that if he did not say that he gave permission to Tischbein to use that garage, then Tischbein would own it and the Hills' attorneys would sue Klingshirn. She went on to say that there was no need for that because Klingshirn just needed a statement saying he gave Tischbein and Rankin permission. She said that if Klingshirn would sign a paper, it would put a stop to the

lawsuit. Scott Hill told Klingshirn that Lorrie could type up an affidavit and send it on to Klingshirn's attorney. Klingshirn responded "here's the deal, whatever, you write it up."[5]

On August 27, 2018, Klingshirn executed an affidavit stating that he specifically allowed and permitted Tischbein and Rankin to use the Main House garage and that Tischbein and Rankin paid no expenses relating to its use except for a periodic service call on the electric gate and driveway maintenance. The document evidence contradicts this. He further attested that Tischbein and Rankin knew or should have known that use of the Main House garage was allowed by Klingshirn as an ongoing gesture of goodwill and friendship and nothing more. He never stated that he expressly gave them permission.

This action was filed on August 31, 2018 by Tischbein and Rankin.

On May 2, 2019, Klingshirn executed another affidavit incorporating the previous affidavit. In this affidavit he asserted that he *expressly* permitted Tischbein and Rankin to use the gate, driveway and Main House garage after ownership of the two properties were realigned. He further stated that he inquired about an easement for the Main House garage but nothing came of it. He stated that he has always maintained that he owned the Main House garage, and between the time he accepted the Hills' offer on the Coach House and the time they closed on the sale, he informed the Hills that he allowed Tischbein and Rankin to use it pursuant to a "gentlemen's agreement."

Klingshirn was deposed on June 17, 2019 and July 2, 2019. In his depositions he acknowledged that he never gave verbal permission to Tischbein and Rankin to use the Main House garage. He testified that the subject of the Main House garage ownership was never discussed amongst them. The verbal gentlemen's agreement was actually discussed and initiated

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[5] Klingshirn June 17, 2019 deposition, page 147.

in 1993-94 when the three of them owned the two properties together and designed the renovations for their combined usage of them as one property.

Findings and Conclusions:

Summary Judgment

The standard for summary judgment requires the court to view the record in the light most favorable to the non-movant; and for the movant to show the non-existence of any issue of material fact, and make that showing with such clarity that there is no room left for controversy. CR 56.03. The failure of the non-moving party to present evidence in contradiction to the evidence in support of the motion for summary judgment does not in itself justify a granting of the motion; however, the party opposing "... a properly supported summary judgment motion" cannot defeat such a motion without presenting "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." See Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 475 (1991). The inquiry is whether, from the evidence in the record, facts exist which would make it possible for the non-moving party to prevail.

Adverse Possession

In order to establish title through adverse possession all of the following must be met at all time throughout a fifteen-year statutory period:

> (1) Possession must be hostile and under a claim of right; (2) it must be actual; (3) it must be open and notorious; (4) it must be exclusive, and (5) it must be continuous.[6]

The minimum fifteen-year period of time at issue here begins in 2001.

[6] *Tartar v. Tucker*, 280 S.W..2d 150, 152 (Ky.1955).

Starting with the fifth requirement and moving backward, the deposition and affidavit testimony of Klingshirn, Tischbein and Rankin is undisputed. During the period of 2001 through 2017 only Tischbein and Rankin used the Main House garage. The use was continuous.

The fourth requirement, that possession be exclusive is also undisputed. The Main House garage could not be accessed from the Coach House garage. Klingshirn never used or even attempted to use the Main House garage. Klingshirn, Tischbein and Rankin all testified that the Main House garage was used exclusively by Tischbein and Rankin for the entire time. Klingshirn admitted that he always thought of it as "Marc's garage" or "Marc's mancave."

In order to satisfy the third element, that possession be open and notorious, possession must be conspicuous and not secret, so that the legal title holder has notice of the adverse use.[7] After 2001, Klingshirn was the title holder of most of the property upon which the Main House garage was built. Klingshirn was aware that Tischbein and Rankin exercised control over the Main House garage in a manner that would appear to the world that they owned it.

Not only did Tischbein openly used the Main House garage, all maintenance for it was paid for by Tischbein and Rankin. A new garage door was chosen and paid for by Tischbein and Rankin, as well as new openers, outside lighting and painting. Tischbein and Rankin had storage shelves constructed in that garage. Klingshirn was aware of all of this. By their use and action Tischbein and Rankin showed that they intended to possess the Main House garage to the exclusion of all others. Tischbein and Rankin testified that they believed they owned the garage after the property was realigned. They believed that the Main House garage went with the Main House. Klingshirn, Tischbein and Rankin testified that they believed that when they built the Main House garage in 1993-94, it was built and intended for that purpose.

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[7] *Appalachian Regional Healthcare, Inc. v. Royal Crown Bottling Co.*, 824 S.W.2d 878,880 (Ky.1992), citing *Sweeten v. Sartin*, 256 S.W.2d 524, 526 (Ky.1953).

Plaintiffs argue that Klingshirn paid additional real estate tax and insurance because of his ownership of the garages. That claim is questionable, but that alone would not destroy Tischein's and Rankin's claim of adverse possession.

The second requirement is that Tischbein and Rankin actually possessed the Main House garage. The testimony on this point is not in dispute. The uncontroverted testimony reflects that Tischbein cleaned his car in the driveway almost every day and parked it in the garage every night. The testimony further shows that Tischbein spent a lot of time in his garage and stored his and Rankin's personal property in there. According to Klingshirn, Tischbein hung out in that garage all the time with his dog and his radio.

The first requirement, that possession be hostile and under a claim of right is where the Hills contend that Tischbein and Rankin's adverse possession claim fails.

"In order to make an adverse claim definite, the adverse possessor must have *either* some color of title that will show the extent of the claim *or* there must be a definite boundary."[8] If someone is in actual adverse possession of property without color of title, he must have well-defined boundaries of his possession.[9]

The only color of title that Tischbein and Rankin have is that a portion of the north wall (closest to the Main House) is located within the Main House property line. Otherwise, the boundary of the Main House garage which Tischbein and Rankin are asserting ownership of, is obviously well-marked and adjacent to the Main House. It is separated from the Coach House garage by a wall. It is inaccessible from the Coach House garage. It adjoins and is partially on the Main House property. The electricity line to the Main House garage connects to the Main House. Tischbein and Rankin have clearly defined their claim of right.

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[8] *Appalachian Regional Healthcare*, at 880, citing *Coulton v. Simpson*, 96 S.W.2d 856 (Ky.1936).
[9] *Shepherd v. Morgan*, 246 S.W.2d 131 (Ky.1951).

In order for possession to be adverse, a possessor must "openly evince a purpose to hold dominion over the property with such hostility that will give the non-possessory owner notice of the adverse claim."[10] "[T]he character of the property, its physical nature and the use to which it has been put, determines the character of acts necessary to put the true owner on notice that a hostile claim is being asserted."[11] These factual assertions of hostility by Tischbein and Rankin are discussed in this opinion analyzing the third element of an adverse claim, that possession be open and notorious. Tischbein and Rankin used the Main House garage in a manner consistent with the size and character of the property and its intended purpose upon construction by them and Klingshirn. In full sight of Klingshirn, they treated it as their property, with all the benefit and responsibility that accompanies ownership. Klingshirn testified that Tischbein thought he owned it.

When an occupant obtains possession of land under the mistaken belief that the property is his, and he conveys no intention of surrendering the disputed property, he is, in fact, holding the property adversely[12]. Furthermore, physical improvement to the property demonstrates the possessor's intent to adversely hold the property.[13]

Klingshirn maintains that Tischbein and Rankin's possession of the property was permissive rather than hostile. This is the real crux of this controversy. Where an owner of property has granted someone permission to use [that] property, a claim of adverse possession cannot be deemed hostile.[14] "[P]ossession by permission cannot ripen into title no matter how long it continues."[15]

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[10] *Appalachian Regional Healthcare*, at 880.
[11] *Ely v. Fuson*, 180 S.W.2d 90 (Ky.App.1944).
[12] *Tartar*, at 153.
[13] *Appalachian Regional Healthcare*, at 880.
[14] *United Hebrew Congregation of Newport v. Bolser*, 50 S.W.2d 45 (Ky.1932).
[15] *Phillips v. Akers*, 103 S.W.3d 705, 708 (Ky.App.2002).

Klingshirn asserts that Tischbein and Rankin's permitted use of the Main House garage was pursuant to a "gentlemen's agreement" but he admits that this verbal agreement was entered into in 1993-94 when Klingshirn, Tischbein and Rankin owned the property together and built the Main House garage. According to Klingshirn, Tischbein and Rankin, the agreement encompassed building the Coach House garage for use by the Coach House occupant, building a Main House garage for use by the Main House occupant, building a walkway from a newly constructed Coach House front door to Riverside Drive for usage by the Coach House occupant to retain the Riverside Drive address, and building a gate, driveway and other walkways for the shared use by the occupants of both houses. Klingshirn testified that this "gentlemen's agreement" was never discussed between himself and Tischbein and/or Rankin any time after the design and construction of the property renovations which included the construction of the Main House garage. He simply stated that the permissive nature of Tischbein and Rankin's use of the Main House garage after the property realignment was assumed. Tischbein and Rankin testified that they believed they owned it, and openly behaved consistent with that belief.

Furthermore, rather than discuss his ownership of the Main House garage and Tischbein's use thereof as permissive after the property split, Klingshirn openly treated it as Tischbein's garage and was aware of and expected Tischbein and Rankin's incurrence of expenses to upgrade and maintain it. When asked in deposition if he paid for any of the maintenance, upkeep or improvement of the Main House garage, he answered that there would have been no reason for him to do so.

Klingshirn, Tischbein and Rankin had an unusual relationship over the thirty years or so. They did not routinely reduce to writing their business dealings amongst themselves. For example, Klingshirn and Tischbein bought the Main House together with Tischbein initially

paying one-third of the mortgage payments. He was on at least one loan agreement with Klingshirn. After approximately seven years Tischbein evened up his investment in the Main House with Klingshirn's. Still, it wasn't until 1998, that Tischbein was put on the deed with Klingshirn as a co-owner. Large sums were spent on the purchase of the Coach House and the improvements of the two properties in 1993-94, yet nothing was put into writing specifying the percentage of ownership or expense obligations of Klingshirn, Tischbein and Rankin.

The deeds to the Coach House and the Main House were never combined to reflect one property, but they all treated it as one. Klingshirn testified that he considered it one property. When they split the property they simply conveyed the original deeds to each other. The failure to specify in the deeds that the Main House garage was part of the Main House property would appear typical of the manner in which Klingshirn, Tischbein and Rankin did business together.

Tischbein and Rankin testified that they believed that they got exclusive ownership of the Main House garage upon realignment of the properties in 2001. Rankin testified that in 2001, when the properties were conveyed to each other, they had a verbal agreement that she and Tischbein would retain exclusive ownership of the Main House garage.

In every way Tischbein and Rankin openly treated the Main House garage as their property. When Klingshirn put the Coach House on the market and the realtor printed flyers showing the property had two garages, Tischbein and Rankin immediately objected by expressing that the Coach House had only one garage. Klingshirn agreed and acted consistent with that belief by changing the sales literature.

When Tischbein and Rankin refused to purchase the Coach House from Klingshirn, and pulled out of selling the two properties together, Klingshirn admitted he was hurt and upset. It wasn't until he had potential buyers show interest that he expressly claimed ownership. That

expression, however, was to the potential buyers, not Tischbein and Rankin, and it was seventeen years after he obtained exclusive ownership of the Coach House.

Even if Tischbein and Rankin exercised ownership of the garage knowing the title was with Klingshirn the hostility element of adverse possession is not destroyed. The fact that Klingshirn did not object to Tischbein and Rankin's continued use of the garage after the deeds were executed does not constitute permission. "The owner's mere knowledge of the possession [by a third party] … [does] not destroy hostility."[16]

Without some act by Klingshirn conveying his assent to Tischbein and Rankins's overtly hostile claim of ownership of his property, permission cannot be implied.

Klingshirn testified that he assumed either the two properties would be sold together, or that Tischbein and Rankin would buy the Coach House from him when he was ready, so there was no need to discuss who owned the Main House garage. Klingshirn's internal thought process, however, is not equivalent to a granting or expression of permission.

Finally, the Hills argue that because Tischbein and Rankin were part owners of the Coach House when it was deeded to Klingshirn, the long established rule that a vendor of land that remains in possession of the land after the conveyance is deemed to hold under the vendee, not against the vendee applies. The Hills rely on *Dishman v. Marsh*[17]. In *Dishman*, the property in question was land adjoining a home that had been in the grantor's family for many years. Mrs. Dishman conveyed the property to her son-in-law in 1911 in return for their care of her in her later years. Five years later, though, her daughter and son-in-law left town. The son-in-law continued to pay property tax on the property in his name. The property was eventually purchased to satisfy his tax debt.

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[16] *Herringer v. Brewster*, 357 S.W.3d 920, 930 (Ky.App.2012), citing 3 Robert W. Keats, et. al., *Kentucky Practice: Methods of Practice* ¶5.3 (3d ed. 1989).
[17] 128 S.W.2d 235 (Ky.App.1939).

The court found that there was no change of the character of Mrs. Dishman's possession for the twenty years after her son-in-law left town, so there is a presumption that her possession was peaceable. That presumption could only be challenged by a showing of her open, notorious, continuous and adverse possession.[18] The court found that there was no such showing. The court further found and considered that an innocent buyer was involved.

That brings us right back to where we started. There is a *presumption* that the title holder retains ownership of property unless the elements of adverse possession have been proven by clear and convincing evidence.

In this case, the situation is a little more complicated because Klingshirn is also the grantor of the Main House garage. He, along with Tischbein and Rankin, conveyed legal title to himself.

Furthermore, the Hills were not innocent buyers. They purchased the property knowing that Tischbein and Rankin's right to the Main House garage was questionable. The court is not convinced that simply because Tischbein and Rankin did not move out of the garage, then move back in after the 2001 conveyance, they are barred from asserting an adverse possession claim under the vendor/vendee rule.

The court has gone to great length to closely read and consider the extensive record, including each deposition. All the relevant parties to this claim have been deposed. The record is replete with supporting documentation. The court believes that Tischbein and Rankin have a significant probability of success on their adverse possession claim, and therefore, will not grant summary judgment to the Hills on that claim.

Easement

[18] *Id.*, at 237.

Since Defendants' motion for summary judgment must fail on the adverse possession claim it certainly must fail on the easement claim. Many of the elements required to establish adverse possession are also required to establish an easement claim. Since the record is supportive of the adverse possession claim, Defendants could not possibly meet the burden of summary judgment on the easement claim.

The court will refrain from delving into the elements of prescriptive and quasi easements as Plaintiffs have not sought summary judgment on their easement claim.

Irrevocable License

Without abandoning their adverse possession and easement claims, Plaintiffs assert that they have, at a minimum, an irrevocable license to use the gate, driveway and Main House garage. They rely on *PSP North, LLC v. Attyboys, LLC*[19] in support of this claim.

The *PSP North, LLC* case involved a ramp built on two adjoining properties in Covington, Kentucky. One lot was owned by The Point/ARC of Northern Kentucky, Inc. ("The Point"), an agency servicing developmentally and physically disable individuals. The adjoining lot was owned by Kenton County.

In 1991 Kenton County Fiscal Court built a ramp on over half of Kenton County's property and the rest over and affixed to The Point's property to assist The Point's clients in entering and leaving its building. It was funded in part by a Fiscal Court grant of $3,500 and in part by donations of $20,000 secured by The Point.

In 1999 The Point sold its property to Attyboys, LLC ("Attyboys"). Kenton County allowed Attyboys to continue using the ramp. Eventually, Kenton County sold its property to

[19] 391 S.W.3d 396 (Ky.App.2013).

PSP North, LLC ("PSP"). Once in possession of the property, PSP demanded rent from Attyboys for use of the ramp.

The court found that, as a matter of law, the license granted by Kenton County to The Point was irrevocable. It further held that a successor-in-interest who has notice of an irrevocable license prior to purchasing the property was barred by equitable principles from revoking the license.

Applying this holding to the case at bar, the court must first make a determination as to whether a license to use the gate, driveway and Main House garage located on the Coach House property was granted by Klingshirn to Tischbein and Rankin and whether that license was irrevocable.

This court finds that, at a minimum, Tischbein and Rankin had a license from Klingshirn to use them. If their use is determined to be permissive, as argued by The Hills and Klingshirn, it would amount to a license based upon Klingshirn's own testimony.

A license becomes irrevocable when "with the knowledge of the owner, the licensee makes valuable improvements in reliance upon the continued existence of the license."[20] This has been clearly established in this case. With Klingshirn's knowledge Tischbein and Rankin spent substantial funds on the Main House garage, the driveway and the gate. Those facts are well documented in the record.

In *PSP North, LLC*, the court noted that the ramp was intended to be a permanent fixture and that PSP purchased the real estate with full knowledge and notice of its encroachment. For these reasons the irrevocable license passed to PSP, the successor-in-interest.

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[20] *PSP North, LLC*, at 398; citing *Bob's Ready to Wear, Inc. v. Weaver,* 569 S.W.2d 715, 720 (Ky.App.1978 (citing *Hoolbrook v. Taylor,* 532 S.W.2d 763 (Ky.1976).

Here, the undisputed testimony is that Klingshirn, Tischbein and Rankin believed that their 1993-94 arrangement would be permanent. They all testified that was their intention when they built the Main House garage, the driveway and the gate. They all testified that when the properties split, they understood that the arrangement would continue indefinitely. Tischbein and Rankin relied upon that when they expended considerable funds upgrading, repairing and maintaining the garage and when Tischbein and Rankin took over all expenses related to the upgrading, repairing and maintaining of the gate and driveway.

Klingshirn's intention is evidenced by the addendum in the Contract for Sale with the Hills stating that the 422 Riverside garage encroached upon the Coach House property, by his inquiry to obtain easements, and by selling the Coach House to the Hills under advisement of the "gentlemen's agreement".

The Hills acknowledged that they were aware of the past and ongoing arrangement concerning the Main House garage, the gate and the driveway prior to purchasing the Coach House. They used that knowledge to negotiate a lower sale price. Weeks after taking possession of the Coach House they even attempted to memorialize it in a written licensing agreement.

It is this court's opinion that, as a matter of law, Tischbein and Rankin have, at a minimum, an irrevocable license of which the Hills are barred from revoking by equitable principles. In finding this, however, the court is not precluding Tischbein and Rankin from continuing to pursue their adverse possession and easement claims.

Motion to Dismiss Counterclaim

The Hills filed a Third-Party Complaint against Klingshirn for breach of general warranty deed and fraudulent inducement. Klingshirn, in turn, filed a counterclaim for malicious prosecution and abuse of process. The Hills moved to dismiss Klingshirn's counterclaim.

A very strict standard governs a motion to dismiss. Such motions should be granted only where "it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim."[21]

With regard to the malicious prosecution claim, this court agrees with the Hills that the Third-Party Complaint must terminate in Klingshirn's favor before he can file a claim for malicious prosecution.

One of the six elements necessary to establish a malicious prosecution claim is that "the proceeding ... terminated in favor of the person against whom it was brought ".[22] Until then the claim is not ripe and this court lacks subject matter jurisdiction.

Regarding the abuse of process claim, its essential elements are "(1) an ulterior purpose and (2) a willful act in the use of the process not proper in the regular conduct of the proceeding."[23] Paragraph nine of Klingshirn's Counterclaim asserts that this action was filed in an attempt to renegotiate downward the purchase price the Hills paid for the Coach House, and to compel Klingshirn to contribute to the Hills' litigation costs.

CR 8.01(1) requires only that the facts or conclusions set out in the complaint are sufficient to identify the basis of a claim.[24] "The test is whether the pleading sets forth *any* set of facts which – if proven- would entitle the party to relief. If so, the pleading is sufficient to state a

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[21] *Pari-Mutual Clerks' Union v. Kentucky Jockey Club*, 551 S.W.2d 801 (Ky.1977).
[22] *Martin v. O'Daniel*, 507 S.W.3d 1, 12 (Ky.2016).
[23] *Simpson v. Laytart*, 962 S.W.2d 392, 394 (Ky.1998).
[24] *Grand Aerie Fraternal Order of Eagles v. Carneyhan*, 169 S.W.3d 840 (Ky.2005).

claim."[25] For purposes of a motion to dismiss, the facts as pleaded in the complaint are treated as true and construed in a light most favorable to the Plaintiff.[26]

This court finds that the abuse of process claim was sufficiently pled in Klingshirn's Counterclaim to defeat a motion to dismiss.

Motion to Dismiss Cross-Claim

Klingshirn filed a Cross-Claim against Tischbein and Rankin for Slander of Title on October 29, 2019. Tischbein and Rankin have moved to dismiss this claim.

Paragraph two of the Cross-Claim states "[p]ursuant to a purchase contract dated March 24, 2018, Third-Party Defendants, Klingshirn, sold the property at 109 Shelby Street, including a garage(s) located thereon, to the Defendants/Third-Party Plaintiffs, the Hills, for $625,000.00. At closing, the Third-Party Defendants, Klingshirn, executed a deed in favor of the Defendants/Third-Party Plaintiffs, the Hills, with covenants of general warranty."

Klingshirn plead in paragraph five of his Cross-Claim that "[a]s a result of Plaintiffs, Tischbein's, knowing, malicious and false statement, the Third-Party Defendants, Klingshirn, have incurred special damages, including attorney's fees and other costs and expenses connected to the defense of this action, as well as mental and emotional distress."

Klingshirn closed on the Coach House sale on June 4, 2018. This action for adverse possession was filed by Plaintiffs, Tischbein and Rankin, on August 31, 2018.

> In order to maintain a slander of title action in this jurisdiction, the plaintiff must plead and prove that defendant has knowingly and maliciously communicated, orally or in writing, a false statement which has the effect of disparaging the plaintiff's title to property; he must also plead and prove that he has incurred

[25] *Mitchell v. Coldstream Laboratories, Inc.*, 337 S.W.3d 642 (Ky.App.2010).
[26] *Gall v. Scroggy*, 725 S.W.2d 867 (Ky.App.1987); *Edmondson County v. French*, 394 S.W.3d 410 (Ky.App.2013).

special damage as a result.[27]

The court in *Bonnie Braes Farms* went on to say that "[t]he special damage required may consist of either a loss by the plaintiff of a sale of his property or a diminution in its fair market value."[28]

In this case, Klingshirn makes no claim that he lost a sale or that the sale price was diminished because of any spoken or written statements by Tischbein and/or Rankin.

Klingshirn argues that *Bonnie Braes Farms* should be read that the special damages can include loss by the plaintiff of a sale of his property or a diminution in its fair market value but are not limited to them. This court disagrees.

In *Continental Realty Co.* the court found that no special damage was alleged because the complaint did not charge that the market value of the property was either impaired or lessened, or that plaintiff was prevented from selling it. An allegation of special damages in the complaint is essential to a slander of title claim.

In *Keith v. Laurel County Fiscal Court.*[29] (overruled on other grounds), reasoned that plaintiff's claim therein failed because a slander of title claim requires proof of special damages and plaintiff failed to plead "either a loss of a sale of his property or a diminution in its fair market value."[30]

Furthermore, Klingshirn makes no allegation that Tischbein and Rankin made disparaging remarks or written statements while he owned the property

The *Keith* case also held that plaintiff's case failed because "the falsehood allegedly uttered by [defendant] did not involve property owned by [plaintiff].[31] Also, in *Stahl v. St.*

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[27] *Bonnie Braes Farms, Inc. v. Robinson*, 598 S.W.2d 765, 766 (Ky.App.1980) citing *Ideal Savings Loan & Building Ass'n v. Blumberg*, 175 S.W.2d 1015 (Ky.1943); *Hardin Oil Co. v. Spencer*, 266 S.W. 654 (Ky.App.1924).
[28] *Id.*, citing *Continental Realty Co. v. Little*, 117 S.W. 310 (Ky.App.1909).
[29] 254 S.W.3d 842 (Ky.App.2008).
[30] *Id.*, at 846.
[31] *Id.*

Elizabeth Medical Center[32] involving a slander of title claim, the court noted that "[plaintiff] does not, and did not at the time of the filing of the lis pendens, have title to the property. This fact alone should preclude any finding of a cause of action as title to the property is a necessary element of the tort."[33] For these reasons Klingshirn's slander of title must fail.

Based upon the herein discussion and the court being in all ways advised,

IT IS HEREBY ORDERED AND ADJUDGED by the court as follows:

1. Motion of Defendants, Scott Hill and Lorrie Hill, for summary judgment is **OVERRULED.**
2. Motion of Plaintiffs, Marc Tischbein and Peggy Rankin, for partial summary judgment is **SUSTAINED.** Marc Tischbein and Peggy Rankin shall have immediate possession of the Main House garage in the same condition as it was when they relinquished possession, as well as unobstructed access to it through the gate and driveway in the same manner.
3. Motion of Defendants/Third-Party Plaintiffs, Scott Hill and Lorrie Hill, to dismiss the counterclaim of Third-Party Defendants, David A. Klingshirn, individually, and David A. Klingshirn, as Trustee of the David A. Klingshirn Trust is **SUSTAINED IN PART** and **OVERRULED IN PART** as follows:
   (a) The motion to dismiss is **SUSTAINED** as to the malicious prosecution claim and it is hereby **DISMISSED.**
   (b) The motion to dismiss is **OVERRULED** as to abuse of process claim.

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[32] 948 S.W.2d 419 (Ky.App.1997).
[33] *Id.*, at 424.

4. Motion of Plaintiffs, Marc Tischbein and Peggy Rankin, to dismiss Third-Party Defendant, Klingshirn's Cross-Claim is **SUSTAINED** and the slander of title claim is hereby **DISMISSED**.

Done this 6th day of April, 2020.

KATHLEEN S. LAPE
Kenton Circuit Judge

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COMMONWEALTH OF KENTUCKY
KENTON CIRCUIT COURT
FIRST DIVISION
CASE NO. 18-CI-1603

FILED
KENTON CIRCUIT/DISTRICT COURT
MAY 18 2020
JOHN C. MIDDLETON
BY _____ D.C.

MARC THISCHBEIN, et.al. **PLAINTIFFS**

vs.

SCOTT HILL, et. al. **DEFENDANTS/THIRD-PARTY PLAINTIFFS**

Vs.

DAVID A. KLINGSHIRN, et. al. **THIRD-PARTY DEFENDANTS**

ORDER

This matter is before the court pursuant to Defendants/Third-Party Plaintiffs, Scott and Lorrie Hill's ("the Hills"), motion to vacate filed April 16, 2020. Plaintiffs responded on April 27, 2020, and the Hills filed a Reply on May 1, 2020.

As a basis to vacate this court's order entered April 6, 2020, the Hills maintain that the court prematurely rendered its decision on Plaintiffs' March 1, 2019 Motion for Partial Summary Judgment because on August 15, 2019 an Agreed Scheduling Order was entered by the court. That agreed order included that "[a]ll amendments and supplements and substitution to pending motions and related pleadings shall be filed with the Court by April 16, 2020."

This court does not permit the filing of sur-replies to pending motions without its permission. This Motion for Partial Summary Judgment was fully briefed by May 24, 2019. The record was complete for ruling on this motion. All relevant depositions, affidavits and exhibits were considered by the court in rendering its April 6, 2020 decision.

Next, the Hills complain that the court relied on facts not supported by the record. On this issue, the court will acknowledge that on page two, paragraph three, first sentence of its

Order Granting Partial Summary Judgment, the words "and Main House" are incorrect. The court inadvertently failed to remove them prior to entering the order. In fact, it was just the Coach House that Klingshirn, Tischbein and Rankin purchased on April 30, 1993. The remainder of the Order make that clear. This factual misstatement had no bearing on the outcome of the motion.

Regarding the remainder of the Hills' issue with facts relied upon by the court, this court finds their concerns baseless. Despite the fact that unresponsive answers were given in the depositions at times, the court relied upon the relevant answers that directly related and responded to the questions asked. Where an affidavit was specifically contradicted in later deposition testimony, the court relied upon the responsive, relevant deposition testimony.

The court further relied on the parties' testimony and supporting documents to paint a picture of the relationship that developed between the parties and the property in issue over a thirty (30) year + period. Defendants call into question such things as the court's characterization of an area which extended from the driveway onto the Main House property that Rankin used for additional parking as "additional parking" instead of a "walkway," and the Klingshirn /Tischbein split of costs as "two-thirds to one-third" instead of "65/35," or the characterization by the court of an entrance as a "front door." Such characterization disagreements do not create genuine issues of material fact for trial; nor does the court stating that a deponent testified to a certain fact or that the court is drawing certain conclusions from the aggregate testimony. All material facts upon which the court relied to resolve the motion before it are properly supported by the record.

Finally, before the court was a Motion for Partial Summary Judgment by Plaintiffs, and a Motion for Summary Judgment by the Hills. Plaintiffs sought possession of the Main House

garage and its access on the basis that, *at a minimum*, they had an irrevocable license should their adverse possession claim fail. The Hills' Motion for Summary Judgment sought to have Plaintiffs' adverse possession and easement claims dismissed.

What the court found was that dismissal of the adverse possession and easement claims was not warranted. In fact, the court opined that Plaintiffs' adverse possession claim was compelling. Regarding the Motion for Partial Summary Judgment, the court found that Plaintiffs were entitled to immediate possession of and access to the garage by virtue of having *at a minimum* an irrevocable license, at most adverse possession. A motion for summary judgment by Plaintiffs on their adverse possession and easement claims was not then before the court.

The Hills seek to stay enforcement of the court's order granting possession of the Main House garage to Plaintiffs because the Hills moved back to Connecticut and leased the Coach House. They left "a number of their belongings" stored in the Main House garage. The tenants of the Coach House travelled to Florida and left their car parked directly in front of the entrance to the Main House garage. The Hills' claim that they cannot relinquish possession until the COVID-19 travel restrictions are lifted.

It was not disclosed when the Hills moved or why they left personal items in the Main House garage, or when the tenant left for Florida and why that individual left his/her car in front of the Main House garage entrance, but the Motion for Partial Summary Judgment has been before the court since March 1, 2019. It was fully briefed by May 24, 2019. This court ordered the Hills to relinquish possession on April 6, 2020. Whatever belongings the Hills chose to leave in the Main House garage can and shall be removed. So too can arrangements be made to move the tenant's car.

This court finds the Hills' Motion to Vacate meritless. Pending now before the court is Plaintiffs' Motion for Summary Judgment on their adverse possession and easement claims. The Hills shall relinquish possession of the garage to Plaintiffs pending resolution of this matter, which the court believes will determine under which claim the Plaintiffs are entitled to possession, not whether they are entitled to it.

IT IS THEREFORE ORDERED AND ADJUDGED, that the Hills' Motion to Vacate is **OVERRULED**. The Hills shall relinquish possession of the Main house garage and provide unobstructed access to it through the gate and driveway in the same manner as immediately prior to their possession, within ten (10) days of entry of this order. If the mailbox in any way obstructs use of the area previously used by Tischbein and Rankin for additional parking, that too shall be moved.

Done this 18th day of May, 2020.

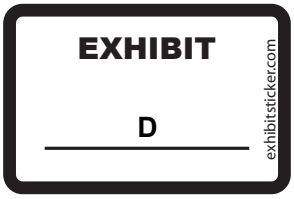
KATHLEEN S. LAPE
Kenton Circuit Judge

Distribution:

Original	-	Kenton Circuit Clerk
One Copy	-	Hon. Kevin Murphy
One Copy	-	Hon. Kent Seifried
One Copy	-	Hon. Patrick Walsh
One Copy	-	Hon. Thomas A. Wietholter

COMMONWEALTH OF KENTUCKY
KENTON CIRCUIT COURT
DIVISION I
CASE NO. 18-CI-1603

FILED ELECTRONICALLY



MARC TISCHBEIN, *et al*. **PLAINTIFFS**

VS.

SCOTT HILL, *et al.* **DEFENDANTS/THIRD-PARTY PLAINTIFFS**

VS.

DAVID A. KLINGSHIRN, *et al.* **THIRD-PARTY DEFENDANTS**

MOTION TO COMPEL

The Defendants/Third-Party Plaintiffs, Scott and Lorrie Hill (the "Hills"), by and through counsel, respectfully submit the following Motion to Compel Plaintiff, Marc Tischbein ("Plaintiff"), to produce a complete and accurate set of text messages between him and Third-Party Defendant, David A. Klingshirn ("Klingshirn"). A memorandum in support of this Motion and a proposed order are attached.

NOTICE OF HEARING

Please take notice that the Hills' Motion to Compel will be heard at 9:00 a.m. on Monday, March 2, 2020.

CERTIFICATION OF COUNSEL

Pursuant to Local Rule 5, on November 14, 2019, after entering an appearance as counsel for the Hills, the undersigned asked Plaintiff's counsel to produce text messages that were discussed in Klingshirn's deposition testimony. On November 21, 2019, Plaintiff's counsel produced what they claimed were purportedly the text messages between Plaintiff and Klingshirn.

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However, the text messages, as produced, appeared to be typed and did not have any date or time stamps, which made them largely unusable.

On November 25, 2019, the Hills' counsel followed up with Plaintiff's counsel regarding the text messages. Specifically, the Hills raised their concerns about the format in which the texts were produced and how the text messages were gathered. On December 10, 2019, Plaintiff's counsel responded and asserted that the texts "were collected through a program that prints a straight-line copy of the texts."

On December 13, 2019, the Hills' counsel again followed up with Plaintiff's counsel regarding the texts and asked which program was used to collect the texts. On December 17, 2019, Plaintiff's counsel stated that the texts came from an Apple phone and were printed from an Apple computer, which created the format of the texts and does not date the texts.

On December 19, 2019, the Hills' counsel asked Plaintiff's counsel to provide screenshots of the text messages, since that is the most cost efficient and least burdensome manner to provide date stamped copies of the texts in a form that is usable. The following day, on December 20, 2019, Plaintiff's counsel indicated that he was checking on dating the texts.

After the holiday break and the Court mandated mediation, on January 21, 2020, the Hills' counsel followed up with Plaintiff's counsel regarding screenshots of the text messages. Plaintiff's counsel did not respond to that email.

On February 12, 2020, the Hills' counsel sent another follow up email to Plaintiff's counsel regarding screenshots of the text messages. The following day, on February 13, 2020, Plaintiff's counsel left the Hills' counsel a voicemail and stated that there had been a death in the family and asked if he could get back to us the following week. The Hills' counsel returned that voicemail the same day and informed Plaintiff's counsel that the following week was fine and expressed

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condolences.

Plaintiff's counsel failed to get back to the Hills' counsel the following week. As such, on February 24, 2020, the Hills' counsel called Plaintiff's counsel. Plaintiff's counsel indicated that he had screenshots of the text messages and that he was willing to agree to an extension of time given the discovery deadline set for March 2, 2020. The following morning, the Hills' counsel sent a follow up email informing Plaintiff's counsel that the screenshots needed to be produced. Otherwise, the Hills would have to file a Motion to Compel to get the issue before the Court prior to the discovery cutoff since this was a Court imposed deadline that the Court already indicated would not be changed.

Shortly thereafter, Plaintiff's counsel produced copies of screenshots of the texts. However, that supplemental production raised more concerns. Specifically, there were texts that were included in the screenshots that were not previously produced. Additionally, there was no logical continuation of the conversation, which shows that texts are missing. Furthermore, there were text messages that were included in the initial production that were not included in the screenshots. Based on what has been provided, it is readily apparent that the Hills do not have a complete and accurate copy of the texts.

Based on the screenshots, the Hills' counsel sent a follow up email to Plaintiff's counsel and raised the foregoing concerns. The Hills' counsel also asked for a complete and accurate production of screenshots of the texts. While the Hills are hopeful that this matter can be resolved between the parties, the Hills are proceeding with a Motion to Compel so that their Motion can be

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heard at the next motion hour before the discovery cutoff passes.

Respectfully submitted,

/s/ Kevin L. Murphy
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MEMORANDUM IN SUPPORT

The Defendants/Third-Party Plaintiffs, Scott and Lorrie Hill (the "Hills"), by and through counsel, respectfully submit the following Memorandum in Support of their Motion to Compel Plaintiff, Marc Tischbein ("Plaintiff"), to produce a complete and accurate set of screenshots of his text messages with Third-Party Defendant, David A. Klingshirn ("Klingshirn").

The timeline surrounding the Hills' requests for the text messages (and subsequent screenshots) is set out in detail above in the Certification of Counsel, and therefore will not be reiterated again here. All the Hills want are a complete and accurate set of the text messages between Plaintiff and Klingshirn, with dates and time stamps. Based on what has been produced, it is clear that a complete set of the text messages has not been produced. There were some texts in the original production that were not included in the screenshots, and vice versa. There are also texts that are clearly missing in the screenshots that were provided because there is no logical continuation of the conversation.

While the Hills are hopeful that this matter can be resolved between the parties, the Hills are filing this Motion in an abundance of caution due to the upcoming discovery cutoff that the Court previously indicated would not be changed. To the extent this issue cannot be resolved by the parties prior to the motion hour on Monday, the Hills respectfully request that the Court order Plaintiff to provide complete and accurate screenshots of his text messages with Klingshirn.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served on the following via e-mail, this 26th day of February, 2020:

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COMMONWEALTH OF KENTUCKY
KENTON CIRCUIT COURT
DIVISION I
CASE NO. 18-CI-1603

FILED ELECTRONICALLY

MARC TISCHBEIN, *et al*. **PLAINTIFFS**

VS.

SCOTT HILL, *et al.* **DEFENDANTS/THIRD-PARTY PLAINTIFFS**

VS.

DAVID A. KLINGSHIRN, *et al.* **THIRD-PARTY DEFENDANTS**

ORDER

Currently pending before the Court is Defendants/Third-Party Plaintiffs', Scott and Lorrie Hill (the "Hills"), Motion to Compel. The Court having reviewed the Motion, and the Court being sufficiently advised,

IT IS ORDERED that the Hills' Motion is granted. Plaintiff, Marc Tischbein, shall produce a complete and accurate set of screenshots of his text messages with Third-Party Defendant, David A. Klingshirn, within 10 days of the entry of this Order.

SO ORDERED THIS _____ DAY OF MARCH, 2020.

_____
JUDGE KATHLEEN LAPE
KENTON CIRCUIT COURT

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The Circuit Clerk shall mail copies of this Order to the following:

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