Court of Appeal, Sixth District, California.

Teresa COBB, Plaintiff and Appellant,

v.

Carmen GABRIELE et al., Defendants and Respondents.

No. H029796.

(San Benito County Super. Ct. No. CU0300023)

Not Reported in Cal.Rptr.3d, 2007 WL 1247308

April 30, 2007.

Nancy Elizabeth Lofdahl, San Francisco, CA, for Plaintiff and Appellant.

Alan J. Smith, Grunsky, Ebey, Farrar & Howell, Watsonville, CA, Robert P. Herendeen, Herendeen & Bryan, Salinas, CA, for Defendants and Respondents.RUSHING, P.J.

Statement of the Case

*1 Defendants Carmen and Renee Gabriele had a written easement for a driveway over property owned by their neighbor, plaintiff Teresa Cobb. In 1995, they built a driveway, part of which went outside the easement. In 2003, Cobb filed an action against the Gabrieles. She sought to quiet title and prayed for declaratory and injunctive relief. She also asserted causes of action for trespass, nuisance, breach of contract, negligence, waste, failure to maintain, unreasonable use, fraud, diversion and diminution of water, and damages to trees, and she sought compensatory and punitive damages.

Before trial, the court granted the Gabrieles' motion for summary adjudication on the claims for trespass, nuisance, negligence, waste, fraud, diversion/ diminution, and damage to trees and the request for punitive damages, finding them barred by the three-year statute of limitations. A jury trial commenced, and during it, the court granted nonsuit on the claims for breach of contract and unreasonable use. Thereafter, a jury found in Cobb's favor on her claim for failure to maintain and awarded her $30,000 in damages.

Under an agreement by the parties, the quiet title claim was submitted to the court, which found that the Gabrieles had a prescriptive easement over the property where the driveway went outside of the written easement.

Cobb appeals from the judgment. She claims the court erred in finding a prescriptive easement, failing to balance the equities in determining whether to grant injunctive relief, granting nonsuit on her contract claim, and granting summary adjudication on her claims for fraud, trespass, nuisance, and negligence.

We affirm the judgment.

Facts

In 1989, the Gabrieles bought a parcel of unimproved land along Salinas Road in San Juan Bautista in San Benito County. They had their engineer, Roger Grimsley, prepare and submit plans for a driveway directly onto their parcel from Salinas Road, but the county would not permit it because the land there was too steep. Thereafter, the Gabrieles discussed an easement with their neighbor Mrs. Phyllis Hoehne. She was open to the idea but wanted an access road for herself. Nothing happened for three years. Then, in January 1993, Hoehne executed and recorded a formal "Grant of Easement," which was drafted by Grimsley. It granted a "non-exclusive easement for ingress, egress and public utilities [purposes] over [legally described land]." The easement also provided that the Gabrieles would "construct a driveway, drainage facilities, erosion improvements and fencing over, across, and around said easement" and "allow [Hoehne] to use said driveway portion to access the lower spring and retention dam located on [her] property." The Gabrieles further agreed "to grade and construct a 10 wide [sic] access road across the dam to the existing building pad of [Hoehne]."

Grimsley had already previously prepared a grading plan for the driveway, which, if constructed as described, would gone outside the easement. In 1994, Hoehne sold her property to Cobb. Cobb testified that she did not really pay attention to the existence of the easement until after escrow.

*2 Carmen Gabriele (hereafter Gabriele) testified that when he first met Cobb near the property, she was unhappy about the easement. Cobb testified that she asked Gabriele to keep her informed about his plans because she had animals and a gate, and he agreed to do so.

However, in October 1995, Gabriele commenced construction of a driveway without notice. Cobb testified that one day she saw heavy equipment and

asked Gabriele why he had not consulted with her. She wanted him to stop for a day so they could go over his plans. He declined because the heavy equipment was costly to hire. According to Cobb, Gabriele threatened to have her arrested if she interfered with construction. However, Gabriele gave her a copy of the original easement drawings, on which he sketched the proposed driveway. The diagram showed the proposed driveway completely within the easement boundaries.

Gabriele testified that throughout the construction, Cobb indicated concern about the driveway and possible damage to her property and frustration that someone would be using part of it. Although the driveway was not constructed in accordance Grimeley's original plan, it still went outside the easement and encroached on between 100 and 120 feet on Cobb's property.

As soon as the driveway was completed, the Gabrieles started using it and have continuously used it ever since. In 1997, the Gabrieles paved the driveway with concrete. The county gave its final approval of the driveway in 2001.FN1

FN1. During the initial construction, a county inspector went to the site and approved the rough grading of the driveway in its present location.

In August 1998, Cobb wrote to the Gabrieles asking about her access road. In September 1998, Gabriele wrote back. He explained that the road he had agreed to build for Hoehne was to be "a roughed in dirt road the [width] of a bulldozers [sic] front blade, about 10 ft. wide and used only for a fire exit." He noted that Grimsley had previously explained to Hoehne that "the roughed in road could not be an approved road by the county of San Benito because of the steepness of the grade approaching the house side. Based on the engineers [sic] determination Mrs. Hoehne understood that it could only be an emergency first exit road and not used as a primary or secondary driveway."

Gabriele further recounted his conversation with Cobb when the driveway construction first began, in which they talked about the agreement with Hoehne to "rough doze" a "fire exit road." At that time, Cobb said she did not want the area disturbed with a road, so he offered to do work on her house equivalent to the cost of building the road. She said she would get back to him, but she never did. Gabriele concluded the letter by offering to buy the easement land if she was amenable to selling it. At trial, Gabriele reiterated that during the initial construction, Cobb informed him she did not want the access road and told him not to touch the hill over which it would be built.

Cobb did not respond to Gabriele's 1998 letter. She testified that she first considered the possibility that the driveway had been mislocated when a stranger came by and informed her that the driveway had not been properly constructed and was not where it was supposed to be. Later, in March 2000, Cobb's attorney wrote to the Gabrieles about the easement. He asserted that some of the improvements that were supposed to have been constructed in connection with the driveway had not been completed; nor had the "10 wide access road across the [dam] to the existing building pad" been constructed. He further claimed that "the driveway [had] been construed in a location outside of that designated by the easement." Cobb testified that at that time she did not have "absolute knowledge" that the driveway was outside the easement. She said her attorney had made that accusation to cover all possibilities should there be litigation.

*3 A year before filing her action, Cobb hired an expert, who advised her that the driveway went outside the easement. At that time, she did not know exactly where the encroachment was. On April 25, 2003, Cobb filed her complaint. Later, in the fall of 2003, Cobb received the results of a survey by Michael Geotz, which confirmed that part of the driveway was outside the easement.

At trial, Geotz testified that the driveway did not follow the original grading plan prepared by Grimsley in 1992. Geotz said that the driveway was about 100 to 120 feet outside the easement.

Cobb testified that she did not know "for sure" that the driveway encroached on her property until Goetz had completed his survey. Gabriele also testified that he did not know that the driveway exceeded the easement and encroached on Cobb's property until after she filed the lawsuit.

Declaratory Relief

In her first cause of action to quiet title, Cobb sought a declaration of the parties' rights concerning the area of encroachment. Cobb contends that the court

erred in finding that the Gabrieles had a prescriptive easement.

Despite some variation in how they are articulated, the elements necessary to establish a prescriptive easement are well settled. (Warsaw v. Chicago Metallic Ceilings, Inc. (1984) 35 Cal.3d 564, 570 (Warsaw).) "The party claiming such an easement must show use of the property which has been open, notorious, continuous and adverse for an uninterrupted period of five years. [Citations]" (Ibid.; Gilardi v. Hallam (1981) 30 Cal.3d 317, 321-322 ["open and notorious use or possession that is continuous and uninterrupted, hostile to the true owner, and under a claim of title"]; Taormino v. Denny (1970) 1 Cal.3d 679, 686 [same]; see Civ.Code, 1007; Code of Civ. Proc., 321.) FN2

FN2. Civil Code section 1007 provides: "Occupancy for the period prescribed by the Code of Civil Procedure as sufficient to bar any action for the recovery of the property confers a title thereto, denominated a title by prescription, which is sufficient against all, but no possession by any person, firm or corporation no matter how long continued of any land, water, water right, easement, or other property whatsoever dedicated to a public use by a public utility, or dedicated to or owned by the state or any public entity, shall ever ripen into any title, interest or right against the owner thereof."

Code of Civil Procedure section 321 provides: "In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the property is presumed to have been possessed thereof within the time required by law, and the occupation of the property by any other person is deemed to have been under and in subordination to the legal title, unless it appear that the property has been held and possessed adversely to such legal title, for five years before the commencement of the action."

The purpose of the open-and-notorious element is to " 'insure that the owner of the real property which is being encroached upon has actual or constructive notice of the adverse use and to provide sufficient time to take necessary action to prevent that adverse use from ripening into a prescriptive easement.' " (Twin Peaks Land Co. v. Briggs (1982) 130 Cal.App.3d 587, 593; see Rest.3d Property, Servitudes, 2.17, com. h, illus. 17-30, pp. 273-279.) FN3 Thus, it follows that prescriptive rights do not arise if an adverse use was hidden, concealed, or clandestine. (Connolly v. McDermott (1984) 162 Cal.App.3d 973 (Connolly), 977; Costello v. Sharp (1924) 65 Cal.App. 152, 157.)

FN3. "The purpose of the requirement that the use be open or notorious is to give the owner of the servient estate ample opportunity to protect against the establishment of prescriptive rights. To satisfy this requirement, the adverse use must be made in such a way that a reasonably diligent owner would learn of its existence, nature, and extent. 'Open' generally means that the use is not made in secret or stealthily. It may also mean that it is visible or apparent. 'Notorious' generally means that the use is actually known to the owner, or is widely known in the neighborhood. Although the terms are often stated conjunctively, the requirements are disjunctive. A use that is actually known to the owner of the servient estate satisfies the requirement even though it is not open. An openly visible and apparent use satisfies the requirement even if the neighbors have no actual knowledge of it. A use that is not open but is so widely known in the community that the owner should be aware of it also satisfies the requirement." (Rest.3d Property, Servitudes, 2.17, com. h, p. 273.)

The requirement that the use be hostile and adverse and under claim of right means that the property owner has not expressly consented to or permitted, allowed, or authorized the use of his or her land; and the user does not recognize or acknowledge the owner's rights. (Aaron v. Dunham (2006) 137 Cal.App.4th 1244, 1249; Felgenhauer v. Soni (2004) 121 Cal.App.4th 445, 450; see Sorensen v. Costa (1948) 32 Cal.2d 453, 459; e.g., Applegate v.. Ota (1983) 146 Cal.App.3d 702.) However, this does not necessarily mean that one must know that the use constitutes an encroachment or trespass. "[T]he requisite hostile possession and claim of right may be established when the occupancy or use occurred through mistake," unless the user did not intend to claim the right to occupancy or use if title belonged in another. (Gilardi v. Hallam, supra, 30 Cal.3d at pp. 322-324, italics added; Sorensen v. Costa, supra, 32 Cal.2d at pp. 459-460.)

*4 Nor must a user believe that his or her use is legally valid. "As to 'claim of right,' it is 'not

necessary in order that a use be adverse that it be made either in the belief or under a claim that it is legally justified. The essential quality is that it be not made in subordination to those against whom it is claimed to be adverse. Yet he who claims a right in himself is impliedly asserting an absence of any right in another inconsistent with the right claimed. Hence one who uses under a claim of right in himself is denying a use by the permission of another.' [Citations.]" (Lord v. Sanchez (1955) 136 Cal.App.2d 704, 707; see Clark v. Redlich (1957 147 Cal.App.2d 500, 507-508.)

In short, where one openly and continuously, even mistakenly, uses another's property for the requisite period without the owner's interference, it is presumed that the use was adverse, hostile, and by claim of right. (Warsaw, supra, 35 Cal.3d at pp. 571-572; Fleming v. Howard (1906) 150 Cal. 28, 30 [prima facie showing]; Aaron v. Dunham, supra, 137 Cal.App.4th at p. 1249; MacDonald Properties, Inc. v. Bel-Air Country Club (1977) 72 Cal.App.3d 693, 702-703; but see O'Banion v. Borba (1948) 32 Cal.2d 145, 148-150 [rejecting presumption]; discussion 6 Miller Starr, Cal. Real Estate (3d ed.2000) 15.32, p. 123-124.)

"Whether the elements of prescriptive use have been established is a question of fact for the trial court [citation], and the findings of the court will not be disturbed where there is substantial evidence to support them." (Warsaw, supra, 35 Cal.3d at p. 570.)

Here, the trial court found that the Gabrieles' "use of the driveway for ingress and egress has been open and notorious, continuous and uninterrupted, hostile to the true owner, and under a claim of right, for more than five years before the suit was instituted against them."

The record supports the court's findings. It is undisputed that the driveway encroached on Cobb's property. Cobb knew about the recorded easement and had constructive knowledge of its boundaries. (See Gates Rubber Co. v. Ulman (1989) 214 Cal.App.3d 356, 364 ["act of recording creates a conclusive presumption that a subsequent purchaser has constructive notice of the contents of the previously recorded document"]; see Civ.Code, 1213.) Moreover, Cobb knew exactly where the driveway was constructed and saw the Gabrieles continuously use it for more than the prescriptive period. Finally, there is no evidence that Cobb expressly permitted plaintiffs to use any area outside the easement, and her lawsuit implies that she would never have granted such permission. There is also no evidence that the Gabrieles intended to stop using the entire driveway and/or remove part of it if they had known that part of it was outside the easement.

The circumstances here are essentially the same as those in Miller v. Johnston (1969) 270 Cal.App.2d 289. There, the plaintiffs acquired property with a paved driveway that led to a public street. The driveway stayed within the boundaries of a recorded easement except in two places, where it encroached on two triangular pieces of the defendant's property (triangles A and B). (Id. at pp. 292-293.)

*5 The court found a prescriptive easement over triangle A based on evidence that the plaintiffs had openly used it for over 15 years, and the defendants were aware of that use and had never given permission. The court explained, " 'It is true that title to an easement for the use of a private roadway must be established by clear and satisfactory evidence that it was used for more than the statutory period of five years openly, notoriously, visibly, continuously and without protest, opposition or denial of right to do so. But clear and satisfactory evidence of the use of the road in that manner creates a prima facie title to the easement by prescription. Such evidence raises a presumption that the road is used with an adverse claim of right to do so, and in the absence of evidence of mere permissive use of the road, it will be sufficient upon which to sustain a judgment quieting title to the easement therein.' [Citations.] The fact that the pavement was placed on the property ultimately acquired by defendants, and that it was subsequently utilized as a right of way under the mistaken belief that it lay within the recorded easement, does not defeat the rights acquired by the use adverse to the rights of the true owners.FN4 (Miller v. Johnston, supra, 270 Cal.App.2d at p. 294, italics added.)

FN4. The court found that there was no prescriptive easement over triangle B because the plaintiffs had expressly relinquished any prescriptive rights they may have acquired in exchange for permission to use it. (Miller v. Johnston, supra, 270 Cal.App.2d at pp. 295-300; see Case v. Uridge (1960) 180 Cal.App .2d 1, 7 [permissive use cannot establish prescriptive rights].)

Cobb claims the Gabrieles failed to establish the open-and-notorious element because Gabriele concealed the fact that the driveway encroached on her property. She notes evidence that Gabriele

assured her that the driveway would be inside the easement and gave her a diagram to that effect. Given the concealment, Cobb argues that she did not have knowledge or constructive notice that the driveway constituted an encroachment. She claims that without such knowledge or notice, the Gabrieles cannot establish that their use was open and notorious.

Cobb's contention rests on two premises, one factual-that the Gabrieles concealed the encroachment from her-and one legal-that the open-and-notorious element required proof that she had knowledge or constructive notice of the encroachment. We find both premises to be faulty.

The court's finding that the Gabrieles' adverse use was open and notorious implies a finding that they did not conceal anything from Cobb.

However, Cobb claims that we may not imply a finding of no concealment. Indeed, she contends that the trial court's failure to make express findings concerning concealment and other issues in its statement of decision compels reversal. We disagree.

Code of Civil Procedure section 632 requires the court to issue a statement of decision "explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial" upon a timely request. (See also Cal. Rules of Ct., rule 3.1590(e), formerly rule 232(d),) The failure to do so is reversible error. (Gruendl v. Oewel Partnership, Inc. (1997) 55 Cal.App.4th 654, 659-660; Miramar Hotel Corp. v. Frank B. Hall & Co. (1985) 163 Cal.App.3d 1126, 1127.)

*6 Here, Cobb requested a statement of decision, and the court filed one. That statement fairly reveals the factual findings on the elements of a prescriptive easement and legal bases for its ruling, and it disposes of all the basic material issues in the case. The trial court had no duty to make findings as to every disputed matter for which evidence was presented at trial. (Placentia Fire Fighters v. City of Placentia (1976) 57 Cal.App.3d 9, 27.)

Cobb's complaint is really, that without a finding concerning concealment, the court's statement of decision is deficient, inadequate, or ambiguous.

We recognize that when a statement fails to resolve controverted issue, "and the record shows that the omission or ambiguity was brought to the attention of the trial court," an appellate court may not infer "that the trial court decided in favor of the prevailing party as to those facts or on that issue." (Code of Civ. Proc., 634.) However, if the party fails to object below, he or she waives any claim on appeal that the statement is deficient, and the reviewing court may infer implied findings. (In re Marriage of Arceneaux (1990) 51 Cal.3d 1130, 1133-1134; McBride v. Board of Accountancy of State of California (2005) 130 Cal.App.4th 518, 527 .)

Here, the court filed a statement of decision, in which it found that the Gabriele's use of the driveway was open and notorious. Thereafter, Cobb did not file objections or raise the statement's alleged deficiencies in her motion for a new trial. Thus, we may properly infer an implied finding no concealment.

Cobb argues that she preserved her claim. She notes that in connection with the proceedings on her quiet title claim, she submitted a request for a statement of decision, which sought findings on numerous factual issues including whether the Gabrieles concealed their use of the property. At a hearing, Cobb argued the concealment issue. At the close of the hearing, the court indicated that it would reiterate previously issued tentative findings, in which it had found that the adverse use was open and notorious. Without specifying, Cobb generally asserted that the tentative ruling did not address some of the issues on which she now sought findings. After reviewing the request, the court opined that it was not necessary to address some of the issues raised. Thereafter, the court filed its statement of decision, which incorporated its tentative findings.

In Golden Eagle Ins. Co. v. Foremost Ins. Co. (1993) 20 Cal.App.4th 1372, 1380, a party submitted a proposed statement of decision before the court formally filed its own. The appellate court opined that a party must file objections to the court's statement that pinpoint the alleged deficiencies and allow the court to focus on facts or issues that the party believes were not properly addressed. The court found that a proposed statement of decision was not sufficient.

We similarly find that Cobb's request for a statement and her brief and general remarks at the hearing before the court issued its statement of decision were not sufficient to preserve her challenge to the court's statement.

*7 Returning to the court's implied finding of no concealment, we find that it is supported by the record. Before the driveway was actually constructed, Gabriele gave Cobb a sketch showing

that it would be within the easement. Thus, it represented his understanding of where the driveway would be located. It was not, and could not have been, an accurate depiction of where the finished driveway had actually been constructed. Moreover, there is no evidence that when Gabriele gave Cobb the sketch, he knew the driveway would be constructed outside the easement; nor is there evidence that after it was built, the Gabrieles knew it encroached on Cobb's property. Gabriele testified that he did not discover the encroachment until after Cobb had filed her lawsuit.

In this regard, we point out that at trial, Cobb conceded that the Gabrieles did not know about the encroachment until Geotz conducted his survey. In her trial brief she argued, "The Gabrieles cannot claim that their use of Cobb's property outside the easement block was adverse and hostile to Cobb's rights as owner, because the Gabrieles believed that the driveway was inside the boundaries of the easement, although it was not." (Italics in original.) During argument below, Cobb asserted that she "had no clue whatsoever that [the Gabrieles] were encroaching on her property outside the granted easement. Nor did anyone else know, according to the evidence. The Gabrieles said they didn't know, Roger Grimsley didn't know, the county officials didn't know, the person that constructed the driveway didn't know."

On appeal, Cobb again asserts, "The Gabrieles, their engineer Roger Grimsley, their contractor Pat Christensen, and the County Building and Planning Department inspector all testified that they had no knowledge of the encroachment before the Goetz survey." Cobb further asserts that "[i]n the lower court's findings on the issue of the prescriptive easement, the court found an encroachment and also found that no one knew of the encroachment."

We find that because the fact of the encroachment was unknown to everyone until 2003, it is neither fair nor reasonable to accuse the Gabrieles of "concealing" it. Rather, the evidence, at most, indicates that before the driveway was built, everyone thought it would be constructed within the easement; and thereafter, everyone mistakenly believed that such was the case.

Cobb's reliance on the first definition of "concealment" in Black's Law Dictionary does not support her claim. That definition reads: "The act of refraining from disclosure; esp. an act by which one prevents or hinders the discovery of something; a cover-up." (Black's Law Dictionary (8th ed.2004) p. 306.)

There is no evidence that after the driveway was built, the Gabrieles assured Cobb that it was built within easement or that they covered up that fact. Nor is there evidence that they attempted to dissuade Cobb from checking or prevented or hindered her from doing so. On the contrary, immediately after construction, Cobb had all the information necessary to determine whether there was an encroachment. She knew about the easement and its specific boundaries, she could see the driveway, and she had complete access to it.

*8 Cobb argues that she could not "be expected to raise the question of encroachment when literally no one else-not the engineer who designed the easement and driveway, not the contractor who built the driveway, and not the County which approved the plans for the driveway-had any idea about a possible encroachment." However, unlike the engineer, the contractor, and the county, Cobb owned the property burdened by the driveway. The consequences of an error in constructing it provided her with a compelling incentive to be vigilant and protective of her property interests. This is especially so because the record reveals that Cobb never thought that a driveway would, or could, be built. She was very unhappy about not being informed about the Gabriele's plans before construction commenced. And said Gabriele threatened to have her arrested if she interfered with construction. Moreover, throughout the construction, Cobb indicated her concern about the driveway and damage to her property and frustration that someone would be using her property. Finally, before she filed this action, someone told her that the driveway was not in the right location.

Under the circumstances, Cobb reasonably could have been expected to monitor the construction to make sure that the driveway remained, as Gabriele's sketch represented, within the easement. She also could have been expected to check it later, when the Gabrieles rendered the driveway even more permanent by paving it or later when someone alerted her that the driveway might not be in the right location.

Cobb's legal premise is also flawed. As the Gabrieles correctly point out, a prescriptive easement simply requires proof that an adverse use was open and notorious; it does not require proof that the property owner knew or had constructive notice that an open and notorious adverse use constituted an

encroachment or a trespass. (See Warsaw v. Chicago Metallic Ceilings, Inc., supra, 35 Cal.3d at p. 570 [adverse use must be open and notorious]; Gilardi v. Hallam, supra, 30 Cal.3d at pp. 321-322; see 12 Witkin, Summary of Cal. Law (10th ed. 2005) Real Property, 401, p. 469 [same]; 4 Powell on Real Property (1977) Easements and Licenses, ch. 34, 34.10[2][f], pp. 100-101 [same]; 6 Miller Starr, Cal. Real Estate, supra, Easements, 15.29, pp. 110-113 [same].)

This point was made clear in Dooley's Hardware Mart v. Trigg (1969) 270 Cal.App.2d 337, another case with similar facts. There, the plaintiff put a fence around his parking lot and along what he thought was the border with the defendant's adjacent property. Believing that the fence marked the border, the defendant installed a driveway parallel to and abutting it and thereafter continuously used it for over five years. Later, the plaintiff conducted a survey and learned that that true property line lay one foot beyond the fence and inside the defendant's driveway. When the plaintiff sought to relocate the fence along the true border, the defendant claimed a prescriptive easement over the strip of the plaintiff's land. (Id. at pp. 338-341.)

*9 The trial court concluded there was no prescriptive easement because the defendant's adverse use had not been open and notorious. (Dooley's Hardware Mart v. Trigg, supra, 270 Cal.App.2d at p. 341.) On appeal, the court disagreed, explaining that the trial court's finding "was based on a misconception of law as to what must be open and notorious. It is undisputed that [the defendant's] use of the strip as a driveway was open and notorious, but the trial court assumed that [the plaintiff's] ownership of the strip and the fact of [the defendant's trespass must also be open and notorious. We do not believe this is required for the creation of an easement. We think the fact of use and not the fact of trespass is the significant element in the establishment of an easement by prescription. [Citation.]" (Ibid., italics added.)

Cobb's view that a property owner must have knowledge or constructive notice of both the adverse use and the fact that it constitutes an encroachment is also inconsistent with the settled principle that prescriptive easement rights can arise even when the adverse use occurred by mistake. (Gilardi v. Hallam, supra, 30 Cal.3d at p. 322; Sorensen v. Costa, supra, 32 Cal.2d at pp. 459-460.)

In Sorensen v. Costa, supra, 32 Cal.2d 453, three parcels were misdescribed in the deeds, and therefore the owners unknowingly occupied land belonging to their neighbors. The appellant claimed that the parties' mutual mistake precluded them from establishing title by adverse possession because they could not show that occupation of the land had been hostile or adverse to the rights of the record owner. (Id. at pp. 455-459.) FN5

FN5. Cases involving adverse possession are relevant to our discussion because "[t]he elements necessary to establish a prescriptive easement are, with the exception of the requirement that taxes be paid, identical with those required to prove acquisition of title by adverse possession...." (Taormino v. Denny (1970) 1 Cal.3d 679, 686, fn. omitted; Gilardi v. Hallam, supra, 30 Cal.3d at pp. 321-322.)

The Supreme Court first noted that "[s]ince [Woodward v. Faris (1895) 109 Cal. 12], it has been an established rule in this state that 'Title by adverse possession may be acquired through the possession or use commenced under mistake.' [Citations.]" (Sorensen v. Costa, supra, 32 Cal.2d at p. 460.) In rejecting the appellant's claim, the court explained that a person claiming title by adverse possession need not show that the record owner knew of his own rights in the land in question. "All that the claimant must show ... is that his occupation was such as to constitute reasonable notice to the true owner that he claimed the land as his own. The fact that the record owner was unaware of his own rights in the land is immaterial." (Id at p. 461, italics added.)

In support of her claim, Cobb relies on Thompson v. Pioche (1872) 44 Cal. 508 (Thompson); Field-Escandon v. Demann (1988) 204 Cal.App.3d 228 (Field-Escandon); Connolly v. McDermott, supra, 162 Cal.App.3d 973; Twin Peaks Land Co. v. Briggs, supra, 130 Cal.App.3d 587; Berry v. Sbragia (1978) 76 Cal.App.3d 876, disapproved in part in Gilardi v. Hallam, supra, 30 Cal.3d at p. 326; Zimmer v. Dykstra (1974) 39 Cal.App.3d 422; and Costello v. Sharp, supra, 65 Cal.App.152. However, these cases do not support either the factual or legal premise of her claim.

*10 Only Thompson, supra, 44 Cal. 508, Field-Escandon, supra, 204 Cal.App.3d 228; Connolly v. McDermott, supra, 162 Cal.App.3d 973 involved the concealment of something.FN6

FN6. Twin Peaks land Co. v. Briggs, supra, 130 Cal.App.3d 587, Zimmer v. Dykstra, supra, 39 Cal.App.3d 422, and Costello v. Sharp, supra, 65 Cal.App.152 involved the open use of another's property for ingress and egress. Berry v. Sbragia, supra, 76 Cal.App.3d 876 involved a fence openly, but mistakenly, built on another's land.

In Thompson, supra, 44 Cal. 508, the plaintiff leased certain property to Osborne, who agreed to deliver possession back to the plaintiff on request. Thereafter, the defendants established clear title to the property and leased it to Osborne. When the lease expired, Osborne surrendered possession to the plaintiff, who then claimed title by adverse possession based upon Osborne's tenancy and possession during the prescriptive period. (Id. at pp. 513-514.)

The Supreme Court rejected the claim, finding that the plaintiff's occupation of the property was not open and notorious. In particular, the defendants never knew that the plaintiff had or claimed possession of the property. They did not know that the plaintiff had leased the property to Osborne. Osborne's actual possession did not, by itself, provide constructive notice of the plaintiff's occupancy. And although Osborne's possession put the defendants on inquiry concerning its basis, the defendants duly pursued that inquiry, which did not reveal the plaintiff's claim to the property. Thus, because the plaintiff's occupancy has been hidden, he could establish title by adverse possession. (Thompson, supra, 44 Cal. at pp. 517-518.)

In Field-Escandon, supra, 204 Cal.App.3d 228, a sewer line connecting the defendant's house to the main line traversed the plaintiff's property. (Id. at pp. 231-232.) The trial court found a prescriptive easement. Although the sewer line was buried several feet underground and the plaintiff did not have actual knowledge of its existence, the trial court concluded that the sewer permit and a WYE map, which were on file in the city engineer's office, provided constructive notice of the sewer line. (Id. at pp. 231-232, 235-236.) On appeal, the court disagreed. The court noted that although the permit and map were public records, they did not have the same presumptive effect that recorded documents have concerning their contents. Moreover, the sewer line was not visible, and therefore, there was nothing that could have put the plaintiff's on inquiry concerning its existence. (Id. at pp. 236-237.)

In Connolly, supra, 162 Cal.App.3d 973, a road crossed the defendant's property connecting two pieces of the plaintiffs' property. Because the plaintiff had herded cattle over the road several times a year for many years, he sought a prescriptive easement for use of the road by wranglers, horses, cattle, and motor vehicles. (Id. at pp. 975-976.) The trial court granted the easement but not for use by motor vehicles. In affirming, the appellate court noted evidence that the plaintiff's use of motor vehicles on the road had been clandestine. The plaintiff had purposefully tried to avoid discovery of that use, and the defendants had not seen motor vehicles use the road. (Id. at p. 977.)

*11 These three cases involved concealment of an adverse use, not concealment of the fact that the adverse use constituted an encroachment or trespass. Moreover, unlike Thompson, where the plaintiff's occupancy or was hidden; Field-Escandon, where the sewer line was concealed underground; and Connolly, where vehicular use was clandestine, this case involved an adverse use that was not hidden, concealed, or clandestine: Cobb was aware of the driveway, the boundaries of the easement, and the Gabrieles' continuous, adverse use.

We further observe that each of the cases cited by Cobb articulates the open-and-notorious element in terms of an open and notorious use. (Thompson, supra, 44 Cal. at p. 511 [“occupation” must be open and notorious]; Field-Escandon, supra, 204 Cal.App.3d at p. 235 [“ ‘use’ “]; Connolly, supra, 162 Cal.App.3d at p. 976 [“ ‘use’ “]; Twin Peaks land Co. v. Briggs, supra, 130 Cal.App.3d at p. 593 [“use”]; Berry v. Sbragia, supra, 76 Cal.App.3d at p. 880 [“use”]; Zimmer v. Dykstra, supra, 39 Cal.App.3d at p. 430 [“use”]; Costello v. Sharp, supra, 65 Cal.App. at p. 157 [“occupation, ... possession [or] use”].) None suggests that the fact of encroachment must also be open and notorious or that a property owner must have knowledge or constructive notice that an adverse use constitutes an encroachment.

Cobb urges us to adopt such a strict interpretation of the open-and-notorious element because the five-year prescriptive period is short compared with that in other states. However, if Cobb finds the prescriptive period too short, her remedy is not to ask this court to tinker with this element. Rather she should seek to have the Legislature lengthen the prescriptive period.

Next, Cobb argues that “the justification of prescriptive rights in modern society has been

question in recent case law." She cites Warsaw, supra, 35 Cal.3d 564, where the majority cited the observation in Finley v. Yuba County Water Dist. (1979) 99 Cal.App.3d 691, 696-697, that adverse possession is " 'now largely justified on the theory that the intent is not to reward the taker or punish the person dispossessed, but to reduce litigation and preserve the peace by protecting a possession that has been maintained for a statutorily deemed sufficient period of time.... [∂] Quite naturally, however, dispossessing a person of his property is not easy under this theory, and it may even be asked whether the concept of adverse possession is as viable as it once was, or whether the concept always squares with modern ideals in a sophisticated, congested, peaceful society.... [∂] Yet this method of obtaining land remains on the books, and if a party proves all five of the [requisite] elements [citation], he can claim title to another's land....' " (Warsaw, supra, 35 Cal.3d at p. 575.) The majority in Warsaw then stated, "Similarly, the system of acquiring an interest in land by prescription 'remains on the books,' and any decision to alter that system by requiring the payment of compensation clearly would be a matter for the Legislature." (Ibid.)

*12 Although Chief Justice Bird and Justice Grodin concurred in the judgment, they agreed with the policy criticism outlined by Justice Reynoso in his dissent to the effect that the rationale for recognizing prescriptive easements does not justify denying a court the equitable power to require the user to pay the property owner fair market value for the easement. (Warsaw, supra, 35 Cal.3d at pp. 591 [concurring opn. Grodin, J., joined by Bird, C.J.], 593-594 [dissenting opn. by Reynoso, J.].)

Even assuming for purposes of argument that we agreed with this criticism of prescriptive rights, we fail to see how or why it warrants a judicial modification of the open-and-notorious element so as to make it harder to establish an easement. In our view, the criticism more reasonably suggests a modification that gives courts the power to make those who obtain prescriptive easements pay for them.

Last, Cobb argues that the open-and-notorious element must be made stricter because courts have weakened the adverse-and-hostile use element "to the point of being almost meaningless...." To show such a disturbing trend, Cobb cites Myran v. Smith (1931) 117 Cal.App. 355, 362, where the court colorfully stated that an adverse user " " 'he must unfurl his flag on the land, and keep it flying, so that the owner may see, if he will, that an enemy has invaded his domains, and planted the standard of conquest.' " " Cobb also cites Jones v. Tierney-Sinclair (1945) 71 Cal.App.2d 366, 369, where the court stated that adverse use requires "a claim of right expressly communicated, or under such circumstances that knowledge of the claim of right ... must be imputed to the owner of the servient tenement."

Cobb asserts that the formerly stringent requirements reflected in Myran v. Smith, supra, 117 Cal.App. 355 and Jones v. Tierney-Sinclair, supra, 71 Cal.App.2d 366 were diluted by Warsaw, supra, 35 Cal.3d 564, where, according to Cobb, the majority held that an adverse user does not even have to know that he or she is using another person's property.

First, the Warsaw majority made no such holding. In that case, the defendant knew it was using another's property and tried, unsuccessfully, to secure an easement from the owner. (Warsaw, supra, 35 Cal.3d at p. 570.) Although the majority stated that continuous use over a long period of time constitutes communication of the claim of right, that view simply recognizes that continuous use can provide constructive notice that the use is adverse. (Id. at pp. 571-572.)

Perhaps Cobb is thinking of Gilardi v. Hallam, supra, 30 Cal.3d 317, which was cited in Warsaw, and which recognized that "the requisite hostile possession and claim of right may be established when the occupancy or use occurred through mistake." (Gilardi v. Hallam, supra, 30 Cal.3d at p. 322.) However, this rule does not represent a recent dilution or weakening of any element of a prescriptive easement because the rule dates back to 1895 and the case of Woodward v. Faris, supra, 109 Cal. 12.

*13 Finally, even if it we agreed that the burden of establishing an adverse and hostile use is less onerous than it may have been, it does not follow that some sort of judicial response is warranted, let alone that we should increase the burden of proving a wholly different element.

In sum, therefore, Cobb has failed to convince us that judicial intervention and modification of the open and notorious element is necessary, proper, or appropriate.

Injunctive Relief

Cobb notes that the court found that no one knew about the encroachment until it was revealed by the survey. She asserts that this finding implies that the Gabrieles were innocent trespassers. Cobb contends that having made that implied finding, the court was required to balance the equities between the parties in determining whether to grant or deny an injunction to remove the driveway. She claims the court erred in failing to do so. She argues that if the court had done so, it would have granted injunctive relief.

Cobb's claim invokes an equitable doctrine variously referred to as the doctrine of relative hardship, balancing of equities, balancing conveniences, and comparative injury. (Hirschfield v. Schwartz (2001) 91 Cal.App.4th 749, 754, fn. 1 (Hirshfield).)

In Christensen v. Tucker (1952) 114 Cal.App.2d 554 (Christensen), the court authoritatively articulated the doctrine. There, the issue was whether a court, in exercising its equitable power, has discretion to deny a mandatory injunction for the removal of encroachments where it was established that they constituted a trespass. In recognizing the discretion to deny injunctive relief, the court stated that "certain factors must be present: 1. Defendants must be innocent-the encroachment must not be the result of defendant's willful act, and perhaps not the result of defendant's negligence. In this same connection the court should weigh plaintiff's conduct to ascertain if he is in any way responsible for the situation. 2. If plaintiff will suffer irreparable injury by the encroachment, the injunction should be granted regardless of the injury to defendant, except, perhaps, where the rights of the public will be adversely affected. 3. The hardship to defendant by the granting of the injunction must be greatly disproportionate to the hardship caused plaintiff by the continuance of the encroachment and this fact must clearly appear in the evidence and must be proved by the defendant. But where these factors exist, the injunction should be denied, otherwise, the court would lend itself to what practically amounts to extortion." (Id . at pp. 562-563.) The court further opined that since the trespasser is the wrongdoer, doubtful cases should be decided in favor of granting injunctive relief. (Ibid.)

The doctrine of relative hardship is, therefore, designed to provide ancillary guidance when the trial court exercises its equitable power to issue an injunction. Moreover, the doctrine can provide a trespasser with an equitable defense against injunctive relief and protect an otherwise unlawful encroachment of another's property.

*14 For example, in Hirshfield, supra, 91 Cal.App.4th 749, on which Cobb relies on, the plaintiffs sought a mandatory injunction to have the defendants remove several improvements that unlawfully encroached on the plaintiffs' property. (Id. at pp. 755-757.) Under the Christensen test, the trial court found that the defendants were innocent trespassers. It then weighed the relative hardships and concluded that the balance favored the defendants. Accordingly, it denied injunctive relief. In a further exercise of its equitable power, the trial court granted the defendants an exclusive equitable easement, which legitimized the encroachments but required the defendants to pay for it and specified that it terminated when the property was sold or the defendants moved. (Id. at p. 757.)

On appeal, the court explained that "once the court determines that a trespass has occurred, the court conducts an equitable balancing to determine whether to grant an injunction prohibiting the trespass, or whether to award damages instead." (Hirshfield, supra, 91 Cal.App.4th at p. 759.) The court then upheld the trial court's equitable easement. (Id. at pp. 764-767.) In that regard, the court explained that although a court may not grant an exclusive prescriptive easement or require its holder to pay for it, a court may do so in the exercise of its power to fashion an appropriate equitable easement. (Id. at p. 767.)

As noted, Cobb claims the trial court's implicit finding that the Gabrieles were innocent trespassers triggered a duty to apply the doctrine. Certainly the Gabrieles' innocence would be relevant in applying the doctrine. However, the court's implied finding did not make the doctrine applicable. Rather, the doctrine applies only when the court is properly exercising its equitable power to grant or deny an injunction.

An injunction is an equitable remedy that is available to a person who is aggrieved by the tort and some other wrongful act of another. (Connerly v. Schwarzenegger (2007) 146 Cal.App.4th 739, 748; Arciero Ranches v. Meza (1993) 17 Cal.App.4th 114, 124; see generally 3 Witkin, Cal. Procedure, supra, Actions, 743, p. 932; 5 Witkin, Cal. Procedure, supra, Pleading, 778, p. 235; 6 Witkin, Cal. Procedure, supra, Provisional Remedies, 276, pp. 219-220; 13 Witkin, Summary of Cal. Law (10th ed. 2005) Equity, 71, pp. 365-366.) As Christensen and Hirshfield demonstrate, a

trespass based on an unlawful encroachment is a tort, for which one may seek an injunction. (See Intel Corp. v. Hamidi (2003) 30 Cal.4th 1342, 1351-1352 [injunction to prevent trespass to ripen into prescriptive rights].) However, to obtain such relief, a property owner must first establish a trespass-i.e., an unlawful interference with possession. (See Art Movers v. Ni West (1992) 3 Cal.App.4th 640, 646 [injunction awarded where the plaintiff has prevailed on the merits on a cause of action and equitable relief is appropriate]; see also Girard v. Ball (1981) 125 Cal.App.3d 772, 788 [defining trespass].)

*15 Here, Cobb's causes of action for trespass, nuisance, and negligence were based on allegations that the driveway encroached on her property. She asserted a separate cause of action for injunctive relief to have the encroachment removed. That so-called cause of action simply represented a request for injunctive relief as an equitable remedy for the alleged torts. (See Shell Oil Co. v.. Richter (1942) 52 Cal.App.2d 164, 168["[i]njunctive relief is a remedy and not, in itself, a cause of action"].)

However, in connection with Cobb's claim to quiet title, the court found a prescriptive easement, which meant that the driveway did not currently encroach on Cobb's property. In other words, the driveway did not now constitute a trespass or nuisance. Accordingly, Cobb's request for injunctive relief was moot and the ancillary doctrine of relative hardship became inapplicable. FN7 Indeed, far from being vulnerable to an injunction, the Gabrieles' prescriptive rights were entitled to protection. (Cf., e.g., Keith v. Superior Court for Los Angeles County (1972) 26 Cal.App .3d 521 [preliminary injunction to protect against loss of easement]; Frabotta v. Alenastre (1960) 182 Cal.App.2d 679 [injunction to remove obstruction of recorded easement].) And the court lacked equitable power to order the removal of the driveway, which would, in effect, extinguish the Gabrieles' prescriptive rights. (Cf. Warsaw, supra, 35 Cal.3d at 564, 574 [where plaintiffs established a prescriptive easement, court lacked equitable power to make them pay for it].)

FN7. The finding of a prescriptive easement did not, however, foreclose an award of damages for trespass based on an unlawful encroachment during the five-year prescriptive period.

Finally, we observe that the doctrine of relative hardship has only been invoked as a shield to defend against an injunction requiring the removal of an unlawful encroachment.FN8 Cobb cites no authority suggesting that a property owner may wield the doctrine as a sword to cut off prescriptive rights.

FN8. See, e.g., McKean v. Alliance Land Co. (1927) 200 Cal. 396; Faurrington v. Dyke Water Company (1958) 50 Cal.2d 198; Dolske v. Gormley (1962) 58 Cal.2d 513; Brown Derby Hollywood Corporation v. Hatton (1964) 61 Cal.2d 855; Rothaermel v. Amerige (1921) 55 Cal.App. 273; Blackfield v. Thomas Allec Corp. (1932) 128 Cal.App. 348; Baldocchi v. Four Fifty Sutter Corp. (1933) 129 Cal.App. 383; Ukhtomski v. Tioga Mutual Water Co. (1936) 12 Cal.App.2d 726; Nebel v. Guyer (1950) 99 Cal.App .2d 30; Oertel v. Copley (1957) 152 Cal.App.2d 287; Baglione v. Leue (1958) 160 Cal.App.2d 731; Schofield v. Bany (1960) 175 Cal.App.2d 534; Pahl v. Ribero (1961) 193 Cal.App.2d 154; Scheble v. Nell (1962) 200 Cal.App.2d 435; D'Andrea v. Pringle (1966) 243 Cal.App.2d 689; Miller v. Johnston, supra, 270 Cal.App.2d 289; Donnell v. Bisso Brothers (1970) 10 Cal.App.3d 38; Field-Escadon, supra, 204 Cal.App.3d 228; see also Wright v. Best (1942) 19 Cal.2d 368; Posey v. Leavitt (1991) 229 Cal.App.3d 1236; Woodridge Escondido Property Owners Assn. v. Nielsen (2005) 130 Cal.App.4th 559.

Our observation is reflected in Miller v. Johnston, supra, 270 Cal.App.2d 289. There, the defendant sought an injunction to have the plaintiffs remove parts of their driveway that encroached on the defendant's property in two different areas. Concerning one area, the court found that the plaintiffs had a prescriptive easement, and the court did not consider injunctive relief. (Id. at pp. 294.) Concerning the second area, however, the court found no prescriptive easement and considered injunctive relief. (Id. at pp. 295-300.) Citing Christensen, the court balanced the equities and thereafter denied injunctive relief. (Id. at pp. 305-307; see also Harrison v. Welch (2004) 116 Cal.App.4th 1084 [doctrine applicable where party is unable to establish rights under adverse possess or prescriptive easement].)

In sum, we conclude that the doctrine of relative hardship was inapplicable here because injunctive relief was not available. Therefore, the trial court did not err in failing to balance the equities.

Nonsuit

Cobb contends that the court erred in granting nonsuit on her cause of action for breach of contract. That cause of action was based on allegations that in exchange for the easement, the Gabrieles agreed to build a county-approved access road, and they failed to do so.

*16 "A motion for nonsuit is a procedural device which allows a defendant to challenge the sufficiency of plaintiff's evidence to submit the case to the jury. [Citation.] Because a grant of the motion serves to take a case from the jury's consideration, courts traditionally have taken a very restrictive view of the circumstances under which nonsuit is proper. The rule is that a trial court may not grant a defendant's motion for nonsuit if plaintiff's evidence would support a jury verdict in plaintiff's favor." (Campbell v. General Motors Corp. (1982) 32 Cal.3d 112, 117-118.) "In evaluating a nonsuit motion, the trial court may not weigh the evidence or consider the credibility of witnesses, but must accept as true the evidence most favorable to the plaintiff, indulging every legitimate inference in the plaintiff's favor. [Citation.]" (Lockheed Corp. v. Continental Ins. Co. (2005) 134 Cal.App.4th 187, 212.)

In reviewing the grant of nonsuit, we are "guided by the same rule requiring evaluation of the evidence in the light most favorable to the plaintiff." (Carson v. Facilities Development Co. (1984) 36 Cal.3d 830, 839.) Thus, as a reviewing court we are required to resolve " 'all presumptions, inferences and doubts' " favorably to the plaintiff. (Nally v. Grace Community Church (1988) 47 Cal.3d 278, 291.) However, "[o]n review, a judgment of nonsuit is not reversible if the plaintiff's proof raises nothing more than speculation, suspicion, or conjecture. Reversal is warranted only if there is some substance to the plaintiff's evidence upon which reasonable minds could differ. [Citations.]" (Lockheed Corp. v. Continental Ins. Co., supra, 134 Cal.App.4th at p. 212.)

In granting nonsuit on the contract claim, the court found no evidence that Hoehne and the Gabrieles intended the 10-foot access road to be a county-approved road. The court further found that even if the contract contemplated a county-approved road, the agreement was fatally uncertain concerning who had the duty to obtain the necessary county permits.

As noted, the easement called for the Gabrieles to built a "10 wide [sic] access road...." Concerning the parties' intentions for the road, Gabriele testified that when he and Grimsley approached Hoehne about the easement, she indicated that she wanted "some kind of fire exit road from their house...." Gabriele said that Grimsley explained to her that "it was going to be a 10-foot-wide access road, non-County approved." He said that the road "was supposed to be a cattle-type access-actually it's an exit road"-i.e., "an exit road from her present house to have an alternative to exit in case of an emergency or in case of a fire." Gabriele further testified that both he and Hoehne intended for there to be simply an exit road. He said that at all times, he planned to build an exit road, he still intended to build it, and he was ready, willing, and able to do so.FN9

FN9. Hoehne did not testify.

*17 Gabriele also testified that he told Cobb that his "obligation for the easement agreement is to put an access road or fire exit road from [her] house to the turn." He testified that initially he thought he would put in the access road after he finished the driveway, but he did not actually make any plans to do so. His plan was to have the road staked out and then cleared with a bulldozer. However, when he explained to Cobb where the access road would be, she told him she did not want it.

Grimsley testified that the access road was a graded "access road" for "secondary or emergency access." He did not know whether at that time, the emergency road as contemplated would have had to go the county approval process. He testified that Hoehne wanted the access road "for emergency, to get out of [the] home site in case there as a fire and it blocked the primary access." FN10

FN10. In his deposition, Grimsley said did not recall whether Hoehne had ever specified that she wanted the road as an exit during fires.

Cobb presented David Beck, an expert concerning road construction. He testified that because the access road would have required the removal of over 50 yards of soil, the county would have required a grading permit. He also testified that a road would have necessitated the removal of some trees and a wall system. He opined that such a road would take over two weeks to build. He did not think it feasible to build a road by simply "blading" the ground with a bulldozer because it would wash away in the rain.

Cobb also presented the testimony of Michael Machado, the chief building official for the county. He testified that a simple ranch road that is strictly for agricultural purposes does not require county approval. However, a driveway or a road serving a home site must be county-approved, even if it is a secondary access road, and a grading permit is needed if building it requires grading more than 50 cubic yards of soil.

Cobb claims the testimony of Beck and Machado was sufficient to support a finding that Gabriele and Hoehne intended for the access road to be county-approved. We disagree.

Neither witness was present when the agreement was made, and neither had any direct discussions with Gabriele, Grimsley, or Hoehne about the nature of the road. Moreover, there is no evidence that Hoehne and Gabriele were aware of the county requirements for the construction of roads when they made their agreement. And although perhaps Grimsley may have been aware of those requirements, there is no evidence that he related them to Hoehne or Gabriele.

Moreover, evidence summarized above supports the trial court's finding that the parties envisioned a "10-foot cut by a bulldozer, chopping through the underbrush to allow emergency exit, which is substantially different from what would be approved by the County under the current administration." We agree with the trial court's ruling that that Cobb did not present substantial evidence that the parties intended and agreed that the access road would be a county-approved road. In our view, such a finding based on the testimony of Beck and Machado would be sheer speculation and conjecture. Accordingly, the trial court properly granted nonsuit. (See Carson v. Facilities Development, supra, 36 Cal.3d at p. 839 [a judgment of nonsuit must not affirmed where plaintiff's proof raises nothing more than speculation, suspicion, or conjecture].)

*18 Cobb asserts that even if the parties did not intend a county-approved road, the evidence showed that permits would have been required to build the access road envisioned by the parties. Citing Civil Code section 3399, she argues that the court erred in failing to reform the agreement to require a proper, count-approved road.

Civil Code section 3399 provides, "When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value."

Under this section, a court of equity may revise a written instrument to make it conform to the real agreement, but it has no power to make a new contract for the parties, no matter whether the mistake is mutual or unilateral. (Lemoge Electric v. County of San Mateo (1956) 46 Cal.2d 659, 663-664.)

We find Civil Code section 3399 inapplicable because there is no evidence of fraud, mutual mistake, or mistake of one party known to the other. Moreover, as discussed above, there is no evidence that the true intention of the parties was for a county-approved access road.FN11

FN11. On the other hand, the court implicitly reformed the agreement, which called for a "10 wide [sic] access road" to mean a 10-foot wide access road, as opposed to a 10-meter or yard wide road, implicitly finding the omission of "foot" to be a clerical mistake. (See Mills v. Shulba (1950) 95 Cal.App.2d 559, 561 [mistake of a draftsman is a good ground for reformation of an instrument which does not truly express the intention of the parties].

Cobb correctly notes that "the remedy of reformation is equitable in nature and not restricted to the exact situations stated in [Civil Code] section 3399." (Jones v. First American Title Ins. Co. (2003) 107 Cal.App.4th 381, 388.) However, even under the court's non-statutory equitable power to reform a contract, the court may not create a new contract and must hew to the intentions of the parties at the time they entered the agreement. (E.g., Merkle v. Merkle (1927) 85 Cal.App. 87 [reforming deed to correctly describe the property that decedent intended to convey] .) As the court in Hess v. Ford Motor Co. (2002) 27 Cal.4th 516 explained, "In reforming the written agreement, a court may 'transpose[ ], reject[ ], or suppl [y]" words [citation], but has ' "no power to make new contracts for the parties" ' [Citatons.] Rather, the court may only reform the writing to conform with the mutual understanding of the parties at the time they entered into it, if such an understanding exists. [Citation.]" (Id. at p. 524.)

We review an exercise of equitable power concerning whether to reform an agreement for abuse of discretion. (See Wm. R. Clarke Corp. v. Safeco Ins. Co. of America (2000) 78 Cal.App.4th 355, 359 [issues within court's equitable jurisdiction for reviewed for abuse of discretion]; e.g., Stangvik v. Shiley, Inc. (1991) 54 Cal.3d 744, 751 [declining jurisdiction].) "Where the issue on appeal is whether the trial court has abused its discretion, the showing necessary to reverse the trial court is insufficient if it presents facts which merely afford an opportunity for a different opinion: ' An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge. To be entitled to relief on appeal from the result of an alleged abuse of discretion it must clearly appear that the injury resulting from such a wrong is sufficiently grave to amount to a manifest miscarriage of justice; ...' [Citation.]" (Winick Corp. v. County Sanitation Dist. No. 2 (1986) 185 Cal.App.3d 1170, 1176, quoting Brown v. Newby (1940) 39 Cal.App.2d 615,618, italics in Winick.)

*19 Here, there was no evidence that the agreement obligated the Gabrieles to build a county-approved road or that such an obligation was what the parties intended. Moreover, there was evidence that the difference in the cost and amount of time it would take to build a simple bladed road and a county-approved road was substantial. Under the circumstances, Cobb has not demonstrated that the court abused its discretion in declining to reform the contract so that it supported her claim for breach of contract.

Cobb's reliance on Rivers v. Beadle (1960) 183 Cal.App.2d 691 is misplaced. There, the court held that the term "speculative home" in an agreement between a real estate broker and a builder was not indefinite or vague for purposes of the statute of frauds because extrinsic evidence established that term had a known and definite meaning to both parties. (Id. at p. 697.)

Here, there was no evidence that Hoehne and Gabriele used the term "access road" to refer to a county-approved road as opposed to simply a bladed road. Beck's and Machado's testimony to the effect that a simple road would require permits and might erode does not tend to establish the parties' mutual intent; nor does it establish that "access road" had an established and definite meaning known to the parties at the time they made their agreement.

In sum, we conclude that the court properly granted the Gabrieles' motion for nonsuit on the contract cause of action.FN12

FN12. Given our analysis and conclusion, we need not address the propriety of the court's alternative finding that, even if the parties had contemplated a county-approved road, the agreement was uncertain because it did not specify which party had the burden to obtain the necessary permits.

Summary Adjudication

Cobb contends that the court erred in granting the Gabrieles' motion for summary adjudication on her causes of action for trespass, nuisance, negligence, and fraud.

Summary judgment or adjudication is granted when a moving party establishes the right to entry of judgment as a matter of law. (Code Civ. Proc., 437c, subd. (c).) "The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 843.)

A defendant moving for summary judgment bears the initial burden of proving that there is no merit to a cause of action by showing that one or more elements of the cause of action cannot be established or that there is a complete defense to that cause of action, such as the statute of limitations. (Code Civ. Proc., 437c, subd. (p)(2); Cucuzza v. City of Santa Clara (2002) 104 Cal.App.4th 1031, 1037.) "Once the defendant does so, the burden shifts back to the plaintiff to show that a triable issue of one or more material facts exists as to that cause of action or to a defense to the cause of action. In doing so, the plaintiff cannot rely on the mere allegations or denial of his pleadings, 'but, instead, shall set forth the specific facts showing that a triable issue of material fact exists....' [Citations.]" (Cochran v. Cochran (2001) 89 Cal.App.4th 283, 287.)

*20 On appeal from a summary judgment, an appellate court makes "an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law." (Iverson v. Muroc

Unified School Dist. (1995) 32 Cal.App .4th 218, 222; Weiner v. Southcoast childcare Ctrs., Inc. (2004) 32 Cal.4th 1138, 1142.) In doing so, we "consider[ ] all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained. [Citation.]" (Guz v. Bechtel National, Inc. (2000) 24 Cal.4th 317, 334.)

In their motion, the Gabrieles asserted that construction of the driveway, on which the claims of trespass, nuisance, and negligence were based, commenced in October 1995 and took about three weeks to complete. In 1997, they decided to pave it with concrete, and the paving was completed in November 1998. In support of their factual assertions, they submitted Gabriele's declaration and deposition testimony; a grading inspection permit, dated October 30, 1995; and cancelled checks for the concrete, dated 1997. The Gabrieles argued that these undisputed facts plus the filing of this action in April 2003, established that the causes of action were barred by the three year statute of limitations. (Code Civ. Proc., 338, subd. (b).) FN13

FN13. Code of Civil Procedure section 338, subdivision (b) provides a three year statute of limitations for "[a]n action for trespass upon or injury to real property."

This period applies to a nuisance claim alleging damage to property (Shamsian v. Atlantic Richfield Co. (2003) 107 Cal.App.4th 967, 979); a trespass claim not involving the taking or damaging of private property for a public use (Frustuck v. City of Fairfax (1963) 212 Cal.App.2d 345, 374); and a negligence claim alleging damage to real property (Angeles Chemical Co. v. Spencer & Jones (1996) 44 Cal.App.4th 112, 119).

Cobb's fraud claim was based on allegations that the Gabrieles induced Hoehne to grant the easement but at the time knowingly and willfully intended not to comply with the terms of the easement or construct a county-approved access road as required. In their motion, the Gabrieles again noted that the driveway was constructed in 1995, and Cobb had actual or constructive notice of the recorded easement. Moreover, they submitted Cobb's letter of 1998, in which she complained that the access road had not yet been built. The Gabrieles argued these facts plus the filing of the action in 2003 established that Cobb knew or should have known the facts supporting her fraud claim, and therefore it too was barred by the three-year statute of limitations. (Code Civ. Proc., 338, subd. (d).) FN14

FN14. Code of Civil Procedure section 338, subdivision (d) provides a three-year statute of limitations for actions "for relief on the ground of fraud or mistake. The cause of action in that case is not deemed to have accrued until the discovery, by the aggrieved party, of facts constituted the fraud or mistake."

In opposition to the motion, Cobb did not dispute that construction on the driveway started in October 1995 or that parts of it were paved in between 1997 and 1998. She disputed that the driveway was completed in three weeks. She claimed it was not completed until 2001, when the county gave final approval. In support, she cited the county's final approval, dated August 13, 2001, and the deposition testimony of Gabriele, Pat Christianson, and Grimsley. Accordingly, she argued that the three-year limitations period did not commence until 2001.

Cobb also claimed that the three-year limitations period for a permanent nuisance and trespass was inapplicable because there was a triable issue of fact concerning whether the driveway constituted a permanent or continuing nuisance and trespass.

*21 Concerning her fraud claim, Cobb claimed the discovery rule tolled the statute until she discovered that the driveway was outside the easement. She argued that she could not have been expected to discover the alleged fraud any sooner.

The trial court concluded that all of these claims were barred. The court found that they accrued in 1995, when the driveway was constructed and encroached upon Cobb's property outside the written easement. The court further opined, "And in 1997 the concrete was put on part of the driveway, which makes it even more a permanent improvement, gives even greater notice that the Gabrieles are asserting a right in that driveway in that location and in that condition. And after that point in time, the Gabrieles continued to use the property, and Ms. Cobb did nothing about the injury committed to her property or the damage she suffered by reason of the conduct of the Gabrieles until the year 2003, in April, when she files the litigation."

Cobb contends that the "delayed discovery rule" applies and postponed the accrual of her claims for nuisance, trespass, negligence, and fraud. She asserts that she did not have reason to know that the driveway encroached on her property until 2002, when her expert opined that the driveway was not properly located; and she did not have actual knowledge of that fact until she received the results of the survey in 2003.FN15

FN15. Cobb appears to have abandoned her claim that her causes of action did not accrue until 2001, when the driveway received final county approval.

"The orthodox rule in tort actions is that the applicable limitation period will run from accrual of the action 'upon the occurrence of the last element essential to the cause of action.' [Citation.] In the case of injury to real property, the orthodox rule would dictate that 'if the defendant's act causes immediate and permanent injury' to the property the statute would run from the date of the act. [Citation.] If the defendant has caused injury by a series of acts, the orthodox rule suggests an action could be brought within the limitation period running from the last act. [Citation.]" (CAMSI IV v. Hunter Technology Corp. (1991) 230 Cal.App.3d 1525, 1534, original italics.)

In actions based on the construction of an improvement that causes injury to real property, the cause of action accrues when the improvement is constructed, unless accrual is forestalled by the discovery rule. (CAMSI IV v. Hunter Technology Corp., supra, 230 Cal.App.3d at p. 1535.)

"The 'discovery rule' assumes that all conditions of accrual of the action-including harm-exist, but nevertheless postpones commencement of the limitation period until 'the plaintiff discovers or should have discovered all facts essential to his cause of action [citations],' which is to say 'when "plaintiff either (1) actually discovered his injury and its negligent cause or (2) could have discovered injury and cause through the exercise of reasonable diligence [italics added]." [Citations.]' [Citations.] The rule is 'based on the notion that statutes of limitations are intended to run against those who fail to exercise reasonable care in the protection and enforcement of their rights; therefore, those statutes should not be interpreted so as to bar a victim of wrongful conduct from asserting a cause of action before he could reasonably be expected to discover its existence. [Citations.]' [Citation.]" (CAMSI IV v. Hunter Technology Corp., supra, 230 Cal.App.3d at p. 1536, original italics.)

*22 In Norgart v. Upjohn Co. (1999) 21 Cal.4th 383, cited by Cobb, the court stated that the discovery rule "postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action. [Citations.]" (Id. at p. 397.) The court explained that "the plaintiff discovers the cause of action when he at least suspects a factual basis, as opposed to a legal theory, for its elements, even if he lacks knowledge thereof-when, simply put, he at least 'suspects ... that someone has done something wrong' to him [citation] 'wrong' being used, not in any technical sense, but rather in accordance with its 'lay understanding' [citation]. He has reason to discover the cause of action when he has reason at least to suspect a factual basis for its elements. [Citation.] He has reason to suspect when he has ' " ' "notice or information of circumstances to put a reasonable person on inquiry " ' " ' [citation]; he need not know the 'specific "facts" necessary to establish' the cause of action; rather, he may seek to learn such facts through the 'process contemplated by pretrial discovery'; but, within the applicable limitations period, he must indeed seek to learn the facts necessary to bring the cause of action in the first place-he 'cannot wait for' them 'to find' him and 'sit on' his 'rights'; he 'must go find' them himself if he can and 'file suit' if he does [citation]." (Id. at pp. 397-398, fns. omitted.)

Here, the undisputed evidence shows that in 1995, Cobb knew about the Gabrieles' easement and had at least constructive knowledge of the easement's boundaries. She knew where the driveway was constructed and by 1998 knew it had been paved. It is also undisputed that (1) Cobb was not happy about the easement or the driveway; and (2) more than three years before she commenced her action, someone told her that the driveway had not been built in the proper location; and (3) her lawyer later wrote to the Gabrieles, claiming that the driveway was outside the designated easement.

In our view, these facts establish that Cobb had reason to suspect that the driveway encroached on her property and sufficient knowledge about the easement that she could have discovered both her injury and its cause through the exercise of reasonable diligence. (Cf. Miller v. Bechtel Corp. (1983) 33 Cal.3d 868, 874-875 [summary judgment affirmed; action barred where wife suspected husband might be concealing assets but failed to

investigate with reasonable diligence].) Accordingly, the trial court properly concluded that Cobb's claims accrued more than three years before Cobb filed her action.

Cobb argues that when her attorney wrote the letter, she "did not know that there was an encroachment on her property," and but included that accusation only to "protect her future rights." However, actual knowledge of the encroachment was not essential to the accrual of a claim. Rather, Cobb's claims accrued if and when she was aware of facts and circumstances sufficient to put her on notice of inquiry. The facts and circumstances noted above, including the accusation by her attorney, were sufficient to put Cobb on notice of inquiry concerning a possible encroachment.

*23 Furthermore, Cobb presented no evidence that after her attorney wrote the letter, she learned additional facts about the location of the driveway which then caused her to hire an expert to investigate and later to have a survey conducted. Thus, the fact she investigated the driveway without any additional reason for doing so indicates that she not only had knowledge sufficient to put her on notice of inquiry during the limitations period but also could have discovered the encroachment if she had exercised reasonable diligence during that period.

Citing Community Case v. Boatwright (1981) 124 Cal.App.3d 888, Cobb argues that the accrual of her claims was delayed because the Gabrieles fraudulently concealed facts that would have led her to discover the encroachment.

In Boatwright, the court explained that "the fraudulent concealment by the defendant of a cause of action tolls the relevant statute of limitations, which does not begin to run until the aggrieved party discovers the existence of the cause of action." (Community Case v. Boatwright, supra, 124 Cal.App.3d at p. 899.) The rationale is that a defendant "should be estopped from taking advantage of his own wrong by asserting the statute of limitations." (Ibid.) However, "[w]hen a plaintiff alleges the fraudulent concealment of a cause of action, the same pleading and proof is required as in fraud cases: the plaintiff must show (1) the substantive elements of fraud, and (2) an excuse for late discovery of the facts. [Citation.]" (Id. at p. 900.)

"The elements of fraud are ' "(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." ' [Citations.]" (Charnay v. Cobert (2006) 145 Cal.App.4th 170, 184.) And "[a]s for the belated discovery, the complaint must allege (1) when the fraud was discovered; (2) the circumstances under which it was discovered; and (3) that the plaintiff was not at fault for failing to discover it or had no actual or presumptive knowledge of facts sufficient to put him on inquiry. [Citation.]" (Community Case v. Boatwright, supra, 124 Cal.App.3d at p. 900.)

Here, Cobb argues that the "undisputed evidence showed that the Gabrieles concealed from [her] their unlawful use of her property by giving false assurances and presenting her with a false and misleading diagram showing only lawful use."

However, evidence of the assurances and diagram is not enough to postpone the accrual of Cobb's claims. Rather, the same facts and circumstances that provided Cobb with sufficient notice that the driveway might be encroaching on her property was also sufficient to put her on notice that the Gabrieles' assurances and diagram might be false. Indeed, the alleged fraudulent concealment occurred before construction of the driveway was completed. Thus, just as a reasonably diligent inquiry would have revealed the encroachment, so too it would have revealed the alleged fraud. (Cf. Miller v. Bechtel Corp., supra, 33 Cal.3d at p. 875 [although husband concealed true value of stock, wife nevertheless knew how to determine value of stock, she could have ascertained its value by reasonably diligent inquiry and thereby discovered the alleged wrongdoing].)

*24 Last, Cobb reiterates her claim that the three-year statute of limitation was inapplicable because the driveway constituted a continuing and not a permanent nuisance. We disagree.

It is settled that if an encroaching improvement is permanent, then ordinarily one must bring an action for past, present, and future damage within three years after the improvement is constructed. (Baker v. Burbank-Glendale-Pasadena Airport Authority (1985) 39 Cal.3d 862, 869; Capogeannis v. Superior Court (Spence) (1993) 12 Cal.App.4th 668, 676 (Capogeannis); Polin v. Chung Cho (1970) 8 Cal.App.3d 673, 677-678.) "If, on the other hand, the nuisance is continuing, then '[e]very repetition of [the] continuing nuisance is a separate wrong,' subject to a new and separate limitation period, 'for which the person injured may bring successive

actions for damages until the nuisance is abated, even though an action based on the original wrong may be barred' [citation]...." (Capogeannis, supra, 12 Cal.App.4th at p. 676, quoting Phillips v. City of Pasadena (1945) 27 Cal.2d 104, 107-108, italics in Capogeannis.)

" 'A permanent nuisance is generally of a type where a single occurrence causes permanent injury.... [Citation.].... [∂] But where the nuisance involves a use which may be discontinued at any time, it is characterized as a continuing nuisance.... [Citation.] The crucial test of a continuing nuisance is whether the offensive condition can be discontinued or abated at any time. [Citations.] (Shamsian v. Atlantic Richfield Co. (2003) 107 Cal.App.4th 967, 978, quoting Wilshire Westwood Associates v. Atlantic Richfield Co. (1993) 20 Cal.App.4th 732, 744; see, Mangini v. Aerojet-General Corporation (1996) 12 Cal.4th 1087, 1093 [" 'crucial distinction' "].)

Cobb asserts that the driveway could have been removed. Thus, she argues that it constituted a continuing nuisance or at least there was a triable issue of fact concerning whether it was a permanent or continuing nuisance. In support of her claim, Cobb cites the deposition testimony of Grimsley and Machado, which indicated that recently, the Gabrieles discussed with the county the possibility of constructing a driveway that was completely on their own land and based on one of Grimsley's original designs.FN16

FN16. At his deposition, Grimsley testified that he and Gabriele recently met with a county planning official to discuss the possibility of a driveway completely on the Gabrieles' property based on one of Grimsely's original designs. However, the county official saw no reason to alter the county's original view that the driveway would conflict with the policies in county's general plan. Machado similarly testified that Grimsley met with his boss "trying to come up with a way to put the Gabrieles' driveway in without using an easement." He understood that any future application for a driveway would be assessed at that time.

Even assuming that the driveway could be removed, we reject Cobb's claim because she relies on an overly literal application of the test for a continuing nuisance: Since it was possible to remove the road, it necessarily constituted a continuing nuisance.

In Capogeannis, supra, 12 Cal.App.4th at page 678, this court opined that "the discontinued-or-abated rubric cannot be mechanically applied. It may be assumed that if it can reasonably be foreseen that a nuisance cannot in any event be abated, the nuisance must be regarded as permanent. But it would be a rare case in which an alleged nuisance could not be abated were countervailing considerations (such as expense, time, and legitimate competing interests) disregarded. Thus, for example, in a strictly literal sense even a nuisance represented by an encroaching building or an underlying public utility pipeline might be discontinued or abated, 'at any time,' by tearing down the building or digging up the pipeline. But ... it was for just such situations that the concept of permanent nuisance, as an exception to the preexisting rule that all nuisances should be treated as abatable and thus continuing, was developed: Regardless of literal abatability, where as a practical matter either abatement or successive lawsuits would be inappropriate or unfair then the nuisance may be regarded as permanent and the plaintiff relegated to a single lawsuit, subject to a single limitation period, for all past and anticipated future harms." (Italics in Capogeannis; accord, Mangini v. Aerojet-General Corporation, supra, 12 Cal.4th at p. 1000.)

*25 In Baker v. Burbank-Glendale-Pasadena Airport Authority, supra, 39 Cal.3d 862, the issue was whether noise, vibration, and smoke from planes constituted a continuing nuisance to the property owners near an airport. The court distinguished between injury to land that is complete when the offending act is committed, and injury that is attributable to continuing activities, the discontinuance of which would terminate the injury. In finding that the noise, vibration, and smoke constituted a continuing nuisance, the court emphasized that the plaintiffs were not complaining of the location of the airport structures (an encroachment); they were complaining of activities at the neighboring airport (a continuing use). (Id. at pp. 868-870.)

In particular, the court observed that "[t]he cases finding the nuisance complained of to be unquestionably permanent in nature have involved solid structures, such as a building encroaching upon the plaintiff's land [citation], a steam railroad operating over plaintiff's land [citation], or regrade of a street for a rail system [citation]. In such cases, plaintiffs ordinarily are required to bring one action for all past, present and future damage within three years after the permanent nuisance is erected. (Baker v. Burbank-Glendale-Pasadena Airport Authority,

supra, 39 Cal.3d 862 at p. 869, fns. omitted; see Spar v. Pacific Bell (1991) 235 Cal.App.3d 1480, 1484, and cases cited there.)

As classic examples of a continuing nuisance the court noted cases where there was an ongoing or repeated disturbance caused by noise, vibration, foul odors, deflection of rain water, and noxious fumes. (Baker v. Burbank-Glendale-Pasadena Airport Authority, supra, 39 Cal.3d at p. 869.) "[T]he distinction to be drawn is between encroachments of a permanent nature erected upon one's lands, and a complaint made, not of the location of the offending structures, but of the continuing use of such structures. [Citation.] The former are permanent, the latter is not." (Id. at pp. 869-870, fn. omitted; see Spar v. Pacific Bell, supra, 235 Cal.App.3d at p. 1485, and cases cited there.)

In Spar v. Pacific Bell, supra, 235 Cal.App.3d 1480, the defendant voluntarily removed underground telephone conduits, lines, and manholes before trial. Nevertheless, the court concluded that they had constituted a permanent nuisance because they had the characteristics of a permanent nuisance. They were intentionally placed to provide service to the public indefinitely, it required considerable effort and heavy equipment to install and remove them, and the public entity might have been able to keep the facilities there by paying fair compensation. (Id. at pp. 1486-1488.)

In Field-Escandon, supra, 204 Cal.App.3d 228, the issue was whether underground sewer line constituted a permanent or continuing nuisance. The trial court found that it was a permanent nuisance. In affirming, the appellate court rejected a claim that the sewer was a continuing nuisance because it could be removed at any time. (Id. at p. 233.) The court noted that "[t]he evidence submitted on the motion for summary judgment established that the sewer pipe was intended to be a permanent structure for sewage disposal from the [defendants'] house to the city sewer drain. The building department recommended to the [prior owners of the defendants' property], that they replace their problematic septic tank and cesspool with a permanent sewer across [the plaintiff's] property to connect with the city sewer drain.... The [prior owners] believed they were lawfully allowed to pass the line across this adjoining property. Construction of the system required excavation to a depth of at least eight feet across [the plaintiff's] lot. The excavation was filled with tightly compacted fill." (Id. at p. 234.)

*26 The court considered the sewer line "similar to other structures which the courts have determined are permanent for the purpose of the running of the three year statute of limitation for trespass," such as buildings or railroads tortiously placed on a plaintiff's land. (Field-Escandon, supra, 204 Cal.App.3d at p. 234.) "The salient feature of a continuing trespass or nuisance is that its impact may vary over time. The sewer line is not a continuing or recurring trespass or nuisance, which repeatedly disturbs the property, as in the case of the nuisance caused by the operation of an airport ... [citation] or by the operation of a cotton gin [citation] or the operation of a slant oil drill which removed minerals from the plaintiff's adjacent property [citation]. Nor does its impact on [the plaintiff's] property gradually increase over time, such as in the case of encroachment by a building progressively leaning over the property line of the adjacent property. [Citation.]." (Ibid.) Under the circumstances, therefore, the court held that the trial court was correct in finding the sewer line to be permanent and granting summary judgment based on the statute of limitations. (Ibid.)

Here, it is undisputed that the Gabrieles employed heavy equipment to clear and then grade Cobb's land for their driveway. They used the driveway continuously for a few years and then employed additional equipment to have it paved with concrete. Thereafter, the Gabrieles continued to use the driveway as a permanent structure on Cobb's land. Moreover, we note that Cobb primarily complains about the driveway itself-i.e., the encroachment-and not the Gabrieles' continued use of it.FN17

FN17. Because the Gabrieles have established prescriptive easement, it cannot now be considered an unlawful encroachment or a permanent or continuing nuisance or trespass.

In our view, the driveway is more akin to the types of structures that have been deemed permanent nuisances than to the types of uses that have been considered continuing nuisances. Therefore, we conclude that the trial court properly determined as a matter of law that that the driveway was permanent and that claims based on its construction were subject to the three-year statute of limitations. (See Adams v. Paul (1995) 11 Cal.4th 583, 592 ["if the facts are undisputed, the court can resolve the question as a matter of law in accordance with

general summary judgment principles"]; e.g., O'Toole v. Superior Court (2006). 140 Cal.App.4th 488 [reasonable cause for arrest]; Field-Escandon, supra, 204 Cal.App.3d at p. 234 [finding nuisance was permanent and granting summary judgment].)

We recognize that in doubtful cases, a plaintiff's election to treat a nuisance or trespass as continuous rather than permanent is entitled to deference. (See Baker v. Burbank-Glendale-Pasadena Airport Authority, supra, 39 Cal.3d at p. 870 ["In case of doubt as to the permanency of the injury the plaintiff may elect whether to treat a particular nuisance as permanent or continuing"]." However, "that choice must nevertheless be supported by evidence that makes it reasonable under the circumstances. [Citations.] A plaintiff cannot simply allege that a nuisance is continuing in order to avoid the bar of the statute of limitations, but must present evidence that under the circumstances the nuisance may properly be considered continuing rather than permanent. [Citation.] It is only where the evidence would reasonably support either classification that the plaintiff may choose which course to pursue. [Citation.]." (Beck Development Co. v. Southern Pacific Transportation Co. (1996) 44 Cal.App.4th 1160, 1217.)

*27 Here, the evidence cited by Cobb does not reasonably support a finding that the driveway was a continuing nuisance; nor does it raise a triable issue concerning the proper characterization of the driveway.

In sum, therefore, we conclude that the court properly granted summary adjudication on Cobb's claims for nuisance, trespass, negligence, and fraud.

Disposition

The judgment is affirmed. The Gabrieles are entitled to their costs on appeal. (Cal. Rules of Court, rule 8.276(a)(2).)