COURT OF APPEALS
DECISION
DATED AND RELEASED

JULY 29, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

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No. 96-3465

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

JOHN L. BURNS AND H. PAULINE BURNS,

PLAINTIFFS-APPELLANTS,

v.

DOUGLAS M. SCHEEL AND SALLY J. SCHEEL,

DEFENDANTS-RESPONDENTS,

HARVEY L. BRANDNER AND ARLENE A. BRANDNER,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Lincoln County: MICHAEL NOLAN, Judge. *Reversed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. John and Pauline Burns appeal a judgment denying their claim for a prescriptive easement over adjoining property belonging

to Douglas and Sally Scheel. They argue that the trial court erroneously concluded that they had no rights to a prescriptive easement. We agree and reverse the judgment.

The Burns brought this action seeking a declaration of their rights to a prescriptive easement across the lands belonging to two neighbors, the Scheels and Harvey and Arlene Brandner. In 1993, the Scheels erected fences obstructing the Burns' use of the driveway. The Burns claimed that they were entitled to an easement based upon their use of the driveway since 1963. The Scheels defended on the grounds that the Burns' use was permissive, and therefore no prescriptive easement arose. The Brandners did not defend this action and do not appear in this appeal.

In 1963, the Burns bought landlocked cottage property (lot one) from Harold Selmer on the shores of Deer Lake. This lot has no direct access to the town road, which lies to the north of the neighbors' properties. Before the Burns purchased lot one, they had rented the property now occupied by the Scheels (lot two) for several years and were familiar with the access to lot one across the neighboring lots.

Selmer originally owned all three parcels. In the 1950s, Selmer built cottages on lots one and two and established a driveway, now the subject of this action, to permit access to lot one. This driveway was used by Selmer, his renters, guests and tradespersons. In 1963, Selmer platted Deer Lake Subdivision to facilitate the sale of lots one and two. In 1963, lot two was sold to his son, and in 1989, sold to the Scheels. The subdivision plat showed a fifty-foot-long strip west of lots one and two connecting to the town road. It was never constructed or used

as a road and was later sold to the Brandners' predecessor in title. It is now occupied by the Brandners.

Lot two lies to the north of the Burns' property; its eastern border is the lake, and its northwest border is the town road. The Brandners' lot lies to the northwest of the Burns'. The town road forms the Brandners' northerly border.

The single lane driveway to which the Burns claim prescriptive easement rights extends southeasterly from the town road over the Brandners' property, extending east across the Burns' property to the Burns' cottage, where it turns back to the north. The driveway proceeds northerly across the Scheels' property and exits on the town road, making a loop. There is no dispute that both parties and their predecessors have used this driveway since 1963 until this dispute with the Scheels arose. Until the present dispute, there is no evidence anyone ever objected to the use by the other of the driveway.

From the bench, the trial court concluded that the Burns' use of the driveway was adverse to the Scheels' predecessor in title and granted a prescriptive easement. It later issued a written decision, reversing itself, finding: "It is clear from the testimony, and the Court finds, that no one ever asked permission to do so. It was just assumed that this was the way that persons would gain access off of Selmer Road to and from both Lots 1 and 2." Nonetheless, the court found that the Burns failed to place anyone on notice that they were claiming prescriptive rights to the driveway and failed to carry their burden of proof. It denied them a prescriptive easement over the Scheels' lot. The court ruled that the Burns had a

way of necessity over the Brandners' lot, against whom the Burns obtained a default judgment.[1]

We conclude that the trial court's first result was correct. The record demonstrates that this is a case of unexplained use of the driveway by the Burns for more than twenty years. "Generally, unexplained use of an easement over enclosed, improved or occupied lands for 20 years is presumed to be adverse." ***County of Langlade v. Kaster,*** 202 Wis.2d 448, 454, 550 N.W.2d 722, 725 (Ct. App. 1996) (quoting ***Ruchti v. Monroe,*** 83 Wis.2d 551, 556-57, 266 N.W.2d 309, 313 (1978)). The land in question consists of improved and occupied lands. As a result, upon a showing by Burns of use for more than twenty years, "the landowner has the burden of proving permissive use under some license indulgence or special contract." ***Id.*** Because the Scheels have not demonstrated permissive use, we conclude a right to a prescriptive easement vested in the Burns after twenty years.[2]

The Scheels argue that it is clear that the original use of the roads in question was permissive and "[e]veryone who used the road had permission to use the loop." They contend that a use that is permissive in the beginning can only be changed into one that is hostile by the most unequivocal conduct on the part of the

[1] The Burns' complaint alleged a claim for a prescriptive easement across both the Scheels' and the Brandners' lots. The court granted a way of necessity over the Brandners' lot and the Burns do not appeal that ruling. *See* ***Ludke v. Egan,*** 87 Wis.2d 221, 229-30, 274 N.W.2d 641, 645 (1979) (Courts of equity may find an easement by prescription provided they first rule out the existence of an easement of necessity.).

[2] The Scheels do not rely on the presumption that the use of a way over unenclosed land is presumed to be permissive and not adverse. Section 893.28(3), STATS. Land is unenclosed within the meaning of § 893.28(3) when it is unimproved, unoccupied and largely in its natural state. ***Shellow v. Hagen,*** 9 Wis.2d 506, 513-14, 101 N.W.2d 694, 698 (1960). Here, the record establishes the lots were improved and occupied.

user. *See* ***id.*** at 455, 550 N.W.2d at 725. The Scheels, however, fail to point to any direct evidence to show that the Burns' use was permissive. Their suggestion that we draw this inference must be declined in light of the trial court's factual finding that "It is clear from the testimony, and the Court finds, that no one ever asked permission" to use the driveway, and the lack of any proof that permission was ever in fact given.

The Scheels concede that a friendly relationship alone cannot imply permission. *See* ***Shepard v. Gilbert,*** 212 Wis. 1, 11, 249 N.W. 54, 58 (1933). Nonetheless, they rely on the parties' friendly relationships and that the Burns never undertook unequivocal action that told they were claiming a prescriptive easement. For instance, they never changed or expanded their use in any way. "Possession, or an intention to possess as one's own, is not a prerequisite to the creation of an easement. Claim of title is not necessary, and the use need not be to the exclusion of the owners. Hostile use is not an unfriendly intent and does not mean a controversy or a manifestation of ill will." ***Shellow v. Hagen,*** 9 Wis.2d 506, 511, 101 N.W.2d 694, 697 (1960). We conclude the lack of permission or other explanation, coupled with the Burns' longstanding use of the improved and occupied property, satisfies the criteria from which to obtain prescriptive easement rights. *See* ***Ludke v. Egan***, 87 Wis.2d 221, 230-31, 274 N.W.2d 641, 646 (1979); ***Carlson v. Craig,*** 264 Wis. 632, 636, 60 N.W.2d 395, 397 (1953)*;* ***Christenson v. Wikan,*** 254 Wis. 141, 144, 35 N.W.2d 329, 330 (1948).

We decline the Scheels' suggestion that we adopt the trial court's analysis in its written decision that analogized this case to ***Ludke***. ***Ludke*** held upon the sale of a landlocked parcel, a way of necessity arose. "The principal difference between the two is that a prescriptive easement is permanent, whereas a way of necessity will continue as long as the necessity exists and until another

lawful way has been acquired." ***Id.*** at 228, 274 N.W.2d at 645. "The use of a way of necessity is permissive and not adverse, and cannot constitute the foundation of a prescriptive easement." ***Id.*** at 229, 274 N.W.2d at 645. "Such a right-of-way was permissive … and absent any evidence showing a denial of such permission at the commencement of the use it cannot be considered a foundation upon which to establish such adverse use as is required to create an easement by prescription. To hold otherwise would result in a way of necessity becoming a prescriptive easement after twenty years of continued use." ***Id.*** at 231-32, 274 N.W.2d at 646. ***Ludke*** held that a way of necessity and not a prescriptive easement was shown.

We conclude that ***Ludke*** does not control. In ***Ludke***, "[t]he trial court found that the road was the only feasible access to the Ludke property." ***Id.*** at 231, 274 N.W.2d at 646. This established a way of necessity. At common law, a way of necessity is created when an owner of land severs a landlocked portion of his land by conveying it to another. ***Id.*** at 229-30, 274 N.W.2d at 645. A way of access is then implied over the land retained by the grantor. ***Id.*** Landlocked generally means that a piece of land is surrounded by land belonging to other persons so that it cannot be reached by a public roadway. ***Id.***

The opposite was found in the case before us. The trial court found that the Burns had a way of necessity over what is now the Brandners' lot that provided access to the town road. The record supports this determination. In 1963, Selmer sold lots one and two. He retained what is now the Brandners' lot, thus creating a way of necessity for egress from the landlocked lot one. Because a way of necessity arose over Brandners' lot, lot one had road access. Consequently, the way over lot two was not by necessity. No way of necessity was implied by crossing the Scheels' lot.

The Scheels contend that because the driveway is a one-way track, a way of necessity across their lot was implied. This argument is self-defeating. If indeed the way of necessity across the Brandners' lot is insufficient to provide the Burns ingress from and egress to the town road, then the judgment should be reversed on that ground. Rather than denying the Burns any easement rights, a way of necessity would be required over the Scheels' lot along with one over the Brandners' lot also.

Instead, we will accept the trial court's findings of fact that a way of necessity over the Brandners' lot provides the Burns with adequate access to and from the town road. This finding is supported by the record. As a result, we conclude that the Burns' use of the easement across the Scheels' lot was not one of necessity and was not permissive. Consequently, a prescriptive easement arose after twenty years of use.[3]

By the Court.—Judgment reversed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

[3] Due to our disposition of this appeal, it is unnecessary to address the Burns' contention that the trial court erroneously denied summary judgment and was without authority to reverse its oral ruling.