COURT OF APPEALS
DECISION
DATED AND FILED

September 12, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-3313

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

WILLIAM B. ROWE, JR.,

PLAINTIFF-RESPONDENT,

v.

GERTRUDE A. SCHNITTKA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Washburn County: EUGENE D. HARRINGTON, Judge. *Reversed and cause remanded with directions.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Gertrude Schnittka appeals a judgment and orders granting her neighbor, William Rowe, Jr., a parking easement on her land. She argues that the trial court erroneously granted a prescriptive easement when the

parties had tried the case as one for adverse possession, and the jury's verdict found that Rowe had failed to prove the elements of adverse possession. Because the real issue in controversy was not fully tried, we reverse the judgment and orders and remand for a new trial in the interest of justice. *See* WIS. STAT. § 757.35.[1]

¶2 The underlying facts and issue presented to the jury were straightforward. At opening statements, Rowe's counsel explained: "[T]he issue in dispute is basically the parking area for these people." Rowe and Schnittka own adjacent lake properties. For many years, when visiting his lake cabin, Rowe would park on Schnittka's property. He built a retaining wall that extended partially onto Schnittka's property. He testified that he maintained the parking area by adding fill, removing debris and cutting weeds.

¶3 Schnittka testified that she gave Rowe permission to park on her land. She testified that she maintained the parking area by grading it "quite often," adding gravel, fixing ruts, cutting grass and weeds. She never saw Rowe performing any maintenance. She testified that she also used the area for parking when Rowe was not using it. She testified that the two had a good relationship and that she had no idea he claimed any rights in her land until the present dispute arose.

¶4 Rowe's complaint sought a declaration of rights establishing his right to "[u]se of the parking area adjacent to his property … which has been used openly, notoriously and adversely for more than 20 years." The complaint also

[1] Because we reverse based on WIS. STAT. § 757.35, we do not address Schnittka's nondispositive issues. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

sought use of an access road as set forth in Rowe's deed. Although the use of the access road is not a disputed issue on appeal, we include it in our discussion to the extent that it bears on procedural history.

¶5 Although the complaint sought the right to *use* the parking area, the parties submitted a special verdict posing a single question to the jury concerning the elements of adverse possession.[2] The jury answered "No." After receiving the verdict, the trial court ruled that the second part of the dispute, concerning the use of the access road as described in the deed, presented solely a question for the court to decide and was not a jury matter. The court adjourned to permit the parties to attempt to negotiate settlement. The court also indicated that it would accept additional proof on the access road issue.

¶6 From here, the procedural history becomes more complicated. After the one-day jury trial ended May 13, 1999, the parties filed post-judgment motions that ultimately resulted in this appeal. On May 26, Rowe filed his motion for judgment notwithstanding the verdict. At the June 17 motion hearing, the trial court stated that the adverse possession issue was "clearly a case for the jury to decide." The court pointed out that the jury is the "sole determiner of the facts where there is a jury question." It noted that the jury decides credibility of witnesses.

¶7 The court also observed that it was a close case and was happy that it did not have to decide the adverse possession issue. The court ruled that "[the jury] decided and the court's not going to overturn that verdict, primarily because

[2] The verdict read: "Did the plaintiff, William Rowe, openly, notoriously, exclusively, continuously and with hostility possess the defendant, Gertrude A. Schnittka's land for a period of twenty (20) years?" Neither party objected to the form of the verdict.

the court does believe that there was an issue for the jury to decide and there is evidence to support the jury's verdict." Accordingly, the court denied Rowe's motion for judgment notwithstanding the verdict.

¶8 The following hearing on August 16, 1999, dealt with the access road issue, and on August 31, the court entered its decision defining Rowe's road access rights. On September 27, the court entered judgment dismissing Rowe's adverse possession claim and defining Rowe's road access rights. In addition, the judgment contained a third paragraph that stated:

> That the plaintiff, William B. Rowe, Jr., be and hereby is granted a permanent parking easement for up to three vehicles in front of the rock wall located near his cabin. He shall also be granted a permanent easement for service vehicles to use the easement driveway for parking when providing services to his cabin.

¶9 On October 12, Schnittka filed a motion for reconsideration, objecting to the grant of parking easement and seeking to have the judgment conform to the verdict. On October 22, Rowe filed his motion for reconsideration, asking the court to include the objected-to parking easement in the judgment.[3]

¶10 On October 27, the court held a telephone conference on the reconsideration motions. It stated that although the jury found no adverse possession, no jury question was submitted concerning "easement rights for parking." It ruled: "The court granted that motion because the evidence at trial clearly was sufficient to prove that [Rowe] had used [the area in question] for parking." It stated that the reason that there were no findings of fact made with

[3] The record reflects that Rowe's reconsideration motion proposed language intended to clarify the parking easement previously granted in the judgment.

respect to the parking easement was "because no one raised that as an issue until the post-judgment motion."[4] It ruled: "The court makes those specific findings now. There is adequate evidence in the record that Mr. Rowe used the premises for parking."

¶11 The court denied Schnittka's motion for reconsideration. It granted Rowe's motion and amended the judgment to provide:

> Both the plaintiff and defendant have come to the Circuit Court as a court of equity and requesting equitable relief. Given the fact that the plaintiff no longer has the right of ingress and egress over the north/south resort road but still needs the right to park his vehicles, the plaintiff, William B. Rowe, Jr., be and hereby is granted a permanent parking easement for up to three vehicles in front of the rock wall located near his cabin.

¶12 We conclude that because the complaint sought the *use* of the parking area while the verdict asked the jury to determine the elements of adverse possession, the real controversy has not been fully tried. The two concepts, while similar, are not the same. An easement consists of "the right to use or control the land, or an area above or below it, for a specific limited purpose …." BLACK'S LAW DICTIONARY 527 (7th ed. 1999). Unlike adverse possession, under which the adverse user gains title, the adverse user of a prescriptive easement acquires only an easement. *See* ***Ludke v. Egan***, 87 Wis. 2d 221, 231, 274 N.W.2d 641 (1979). Therefore, a finding of a prescriptive easement does not determine ownership of the property.

[4] The record fails to reveal any motion for a parking easement until after judgment granting the parking easement was entered.

¶13 The method by which a prescriptive easement is acquired is analogous to the method by which title is obtained by adverse possession. *See* ***Shellow v. Hagen***, 9 Wis. 2d 506, 511, 101 N.W.2d 694 (1960). The two methods are not, however, identical. "An easement by prescription requires the following elements: (1) adverse use that is hostile and inconsistent with the exercise of the titleholder's possessive rights; (2) which is visible, open and notorious; (3) under an open claim of right; and (4) is continuous and uninterrupted for twenty years." ***Mushel v. Town of Molitor***, 123 Wis. 2d 136, 144-45, 365 N.W.2d 622 (Ct. App. 1985).

¶14 Adverse possession, on the other hand, is proven by showing that the claimants and their predecessors-in-title have used the disputed property in a "hostile, open and notorious, exclusive and continuous manner" for at least twenty years. *See* ***Keller v. Morfeld***, 222 Wis. 2d 413, 416-17, 588 N.W.2d 79 (Ct. App. 1998) (citing ***Leciejewski v. Sedlak***, 110 Wis. 2d 337, 343, 329 N.W.2d 233 (Ct. App. 1982)); *see also* WIS. STAT. § 893.25. Accordingly, an essential element of adverse possession is the exclusivity of the occupation or possession. *See* WIS. STAT. § 893.25(2)(a). A prescriptive easement, however, has no such requirement. A claimed easement, therefore, lies in the use made, not the adverse possession of, the property in question. *See* ***Shellow***, 9 Wis. 2d at 510. "Possession, or an intention to possess as one's own, is not a prerequisite to the creation of an easement." ***Id.***

¶15 For both a claim of a prescriptive easement and adverse possession, hostile use is not an unfriendly intent and does not mean a manifestation of ill will. *See* ***id.***

> An act is hostile when it is inconsistent with the right of the owner and not done in subordination thereto. The analogy

> to adverse and hostile possession does not mean the acts of the claimant must be identical in both adverse possession and easements by prescription but must be similar, taking into account the difference in the physical nature of the acts of possession and use.

Id. at 511-12.

¶16 A use of an easement for twenty years, unexplained, is presumed to be adverse and under a claim of right, unless contradicted or explained. *See* ***id.*** at 510. However, the presumption may be rebutted by proof that the use was under license, indulgence or special contract inconsistent with a claim of right. *See* ***id.*** A use that is permissive is subservient and not adverse. *See* ***Ludke***, 87 Wis. 2d at 230.

¶17 Schnittka argues that the jury's adverse possession determination disposes of any prescriptive easement claim.[5] We disagree. Because the two concepts require different, though overlapping elements of proof, a verdict determining the absence of adverse possession does not necessarily rule out a prescriptive easement. If the jury had found that Rowe used the parking area with Schnittka's permission, its finding would dispose of both an adverse possession claim and a prescriptive easement claim. On the other hand, if the jury had found that Rowe merely failed to prove exclusive possession, its finding would not preclude a prescriptive easement.

[5] Schnittka relies on language in ***Ludke v. Egan***, 87 Wis. 2d 221, 231, 274 N.W.2d 641 (1979), to the effect that the evidence necessary to establish an easement by prescription is the same as that which is necessary to establish title by adverse possession. This is true with respect to certain elements, such as hostile use. *See* ***Tarman v. Birchbauer***, 257 Wis. 1, 5, 42 N.W.2d 158 (1950). It is not true, however, with respect to exclusive possession. *See* ***Shellow v. Hagen***, 9 Wis. 2d 506, 511, 101 N.W.2d 694 (1960). Schnittka interprets ***Ludke*** too broadly.

¶18 As the trial court noted, the jury was not presented with the issue of an easement. We may not speculate on what the jury would have done with that issue. While the complaint sought the use of the parking area, thereby seeking an easement, the verdict did not reflect this issue. Therefore, the real controversy was not fully tried.

¶19 In an appeal to this court, if it appears from the record that the real controversy has not been fully tried or that it is probable that justice has for any reason miscarried, we may reverse the judgment or order appealed from, regardless whether the proper motion or objection appears in the record, and we may remand the case to the trial court for a new trial. *See* WIS. STAT. § 752.35; *see also* ***Vollmer v. Luety***, 156 Wis. 2d 1, 17, 456 N.W.2d 797 (1990). We may exercise our power of discretionary reversal under § 752.35 without deciding the probability of a different result on retrial if we conclude that the real controversy has not been fully tried. *See* ***id.***

¶20 Contrary to Rowe's contentions, the trial court's post-judgment "fact-finding" did not alleviate the harmful effect of the improperly formed verdict. First, the trial court incorrectly applied the elements necessary to find a prescriptive easement. The court essentially ruled that Rowe showed a need for parking and had used the area for the requisite time frame. This analysis erroneously focused on need, when a way of necessity had not been requested.[6] Also, the court's analysis failed to take into account Schnittka's testimony that Rowe's use had been permissive. More significantly, Schnittka had requested a

[6] Easements in the land of another, with the exception of rights of way by necessity, can only be created by grant or prescription. Rowe does not claim that he is granted an easement or entitled to a way of necessity, leaving only the theory of an easement by prescription. *See* ***Tarman v. Birchbauer***, 257 Wis. 1, 4-5, 42 N.W.2d 158 (1950).

jury trial, and was granted one. The trial court's post-judgment procedure improperly usurped the jury's fact-finding role.

¶21 Rowe argues that the court was entitled to find facts because the jury was merely performing an advisory function. This claim finds no support in the record. Under WIS. STAT. § 805.02, in actions not triable as of right by a jury, the court may try any issue with an advisory jury.[7] Here, Schnittka's request for a jury trial had been granted, and the court indicated on the record that the jury's role with respect to the parking area was to determine credibility and to find facts. No objection was made to the court's characterization of the jury's function as trier of fact. Under the circumstances presented, we conclude that the jury was not merely advisory.

¶22 Rowe further claims that the fact that the court "left open the record" for the parties to submit additional documents indicated that the court intended to decide the parking area dispute irrespective of the jury's verdict. We are unpersuaded. The trial court left the record open merely on the access road issue, which it characterized as one of law for the court to decide. We conclude that under WIS. STAT. § 802.05, any intention to use the jury as advisory instead of as the trier of fact must be expressly stated on the record. Here, there was no such statement. Rowe's contention fails.

[7] Section 805.02 reads:

> Advisory jury and trial by consent. (1) In all actions not triable of right by a jury, the court upon motion or on its own initiative may try any issue with an advisory jury.
>
> (2) With the consent of both parties, the court may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

¶23 We are also convinced that the court was not empowered to decide the prescriptive easement issue solely as one of law. An easement by prescription is sufficiently similar to adverse possession to present the analogous issues. *See* ***Ludke***, 87 Wis. 2d at 231. Adverse possession issues are usually mixed questions of law and fact. *See* ***Perpignani v. Vonasek***, 139 Wis. 2d 695, 728, 408 N.W.2d 1 (1987). Whether the proven facts fulfill the legal standard of prescriptive use is a question of law. *See* ***id.*** Here, there were disputed facts, particularly concerning permissive use, so the issues presented were not solely ones of law.

¶24 Rowe further argues that because the court was acting as a court of equity, it had the power to fashion its own remedy to the particular facts of the case. Schnittka responds that Rowe's adverse possession claim is an action at law governed by WIS. STAT. § 893.25. Here, as we discussed, the court erroneously applied the law concerning prescriptive easements and improperly usurped the jury's function. We conclude, therefore, that their debate is not dispositive because in either case an error of law is grounds for reversal.[8] We do not reach nondispositive issues. *See* ***Norwest Bank Wisconsin Eau Claire, N.A., v. Plourde***, 185 Wis. 2d 377, 383 n.1, 518 N.W.2d 265 (Ct. App. 1994).[9]

[8] "The basis of all equitable rules is the principle of discretionary application." ***Mulder v. Mittelstadt***, 120 Wis. 2d 103, 115, 352 N.W.2d 223 (Ct. App. 1984). We affirm equitable decisions unless the trial court erroneously exercised its discretion. *See* ***Lueck's Home Improv., Inc. v. Seal Tite Nat'l, Inc.,*** 142 Wis. 2d 843, 847, 419 N.W.2d 340 (Ct. App. 1987). Because an appropriate exercise of discretion requires the application of correct legal principles to the facts of record, a trial court erroneously exercises its discretion when its decision is based on a misapplication or erroneous view of the law. *See* ***Allstate Ins. Co. v. Konicki***, 186 Wis. 2d 140, 150, 519 N.W.2d 723 (Ct. App. 1994).

[9] The parties failed to raise at trial the issue whether a claim for a prescriptive easement entitles one to a jury as a matter of right. We do not therefore address it on appeal. *See* ***State v. Huebner***, 2000 WI 59, ¶14, 235 Wis. 2d 486, 611 N.W.2d 727.

¶25 Based on the record, we conclude that the issue in controversy concerned the use of the parking area, not its possession or ownership. Because the verdict inquired only as to adverse possession, the real controversy was not fully tried. We therefore reverse and remand for a new trial in the interest of justice. *See* WIS. STAT. § 767.35. According to the judgment, Rowe's use of the access road is related to the parking easement. Therefore, on remand, the court may in its discretion also consider the access road issue.

By the Court.—Judgment and orders reversed and cause remanded with directions.

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