COURT OF APPEALS
DECISION
DATED AND FILED

December 6, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP276 **Cir. Ct. No. 2003CV348**

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

JEFFREY F. SNYDER,

PLAINTIFF-RESPONDENT,

V.

ERIC EBERTS, DEBORAH EBERTS, ERNST C. HANSCH AND AUDREY E. HANSCH,

DEFENDANTS-APPELLANTS.

APPEAL from judgments and an order of the circuit court for Winnebago County: SCOTT C. WOLDT, Judge. *Affirmed in part; reversed in part.*

Before Snyder, P.J., Brown and Anderson, JJ.

¶1 ANDERSON, J. This case presents us with an easement dispute between adjoining property owners. In 1988, Jeffrey F. Snyder granted the

Eberts' predecessor in interest an ingress and egress easement over his property. The trial court determined that the language in the easement evidenced an intent to limit ingress and egress to the paved surface located within the property. We agree with Eric and Deborah Eberts and their successors, Ernst C. and Audrey E. Hansch, that the easement did not restrict ingress and egress to the paved roadway. The easement permits ingress and egress over the entire property, including the paved surface and the grassy area falling in between the paved surface and the Ebert/Hansch lot line. We also conclude that the maintenance of the grassy area and the placement of a mailbox and refuse bins in the easement area are contemplated by the language of the creating instrument. These activities are related to the proper use of the easement and do not unduly or unreasonably burden the servient estate. We hold that the survey markers Snyder placed above ground in the grassy area interfered with the Eberts' ability to ensure safe ingress to and egress from their property over the grassy area, and the Eberts did not trespass when they pounded them down to ground level or removed them. Finally, we reject the Eberts' and the Hansches' request for frivolous attorney fees.

Facts

¶2 In 1962, Richard and Erma Mae Sawtell purchased the parcel of property the Hanches now own and built a home on the property. The Sawtells obtained an easement adjacent to their property running across what are now parcels A, B and C. The easement granted them the "right of ingress and egress to and from the public highway … commonly known as 'Bay View Road' over and on the private road." The easement was subject to certain restrictions and conditions contained in a document entitled "Protective Covenants." Rather than access Bay View Road, the Sawtells drove across a paved portion of parcel A to Limekiln Drive to access their property.

¶3 In 1988, Snyder sought to purchase parcels A, B and C. Snyder wanted to terminate the easement leading to Bay View Road. He was apparently concerned that it would be an impediment to the sale and use of his properties. Snyder and Erma Mae Sawtell Dean, who by that time had sole ownership of the property, entered into an agreement "Terminating Prior Easement and Establishing an Easement for Purposes of Ingress and Egress and for a Private Roadway." This agreement recognized that Sawtell Dean had not used the Bay View Road easement for access to her property since the development of Limekiln Drive: "Limekiln [Drive] is contiguous with the Northerly end of Parcel 'A', and Limekiln [Drive] and Parcel 'A' together constitute the means of vehicular access and travel to and from the parcel[] owned by Sawtell Dean." The agreement terminated Sawtell Dean's right to the easement leading to Bay View Road and granted her "a perpetual easement … for ingress to and egress from such land[], over and across Parcel 'A.'" The agreement obligated Sawtell Dean and a neighbor who was also a party to the easement to contribute to the cost of maintaining the existing road surface on parcel A "in good condition for travel by vehicles." In 1989 the Sawtells' son, William Sawtell, purchased the property from his mother's estate.

¶4 During the time the Sawtell family owned and lived on the property, they maintained a grassy area that existed between the paved portion of parcel A and their own property line. The Sawtells mowed, watered and fertilized the grassy area. They also placed their mailbox in the area between their property line and the pavement on parcel A and placed their trash containers at the base of their driveway on pick up day.

¶5 In August 2002, the Eberts purchased the property from William Sawtell. On August 9, prior to the August 30 closing of the purchase of the

property, the Eberts submitted an offer to purchase parcel C from Snyder for $300,000. Snyder counterofferred for $369,999. The Eberts rejected Snyder's counteroffer. At this point, the relationship between the neighbors deteriorated.

¶6 On August 18, Snyder hired a surveyor to delineate the curved lot line falling in the grassy area between the paved road on parcel A and the Eberts' front lawn. The surveyor, at Snyder's behest, placed nine one-inch diameter iron survey pipes, or monuments, three inches above ground along the lot line. Because surveyors generally consider the center of the monument to be the precise location of the boundary line, a portion of each monument fell on both Snyder's and the Eberts' properties. The surveyor also placed painted lathes next to each iron monument. According to the surveyor, these lathes are not considered to be permanent markers and often the property owner will remove the lathes. Eric Ebert, concerned that the raised monuments would pose a danger to his young children and interfere with his ability to maintain the grassy area, attempted to pound all of the monuments flat with the ground. He succeeded with all but one of the monuments, which he was able to pull out of the ground. The Eberts also removed the lathe stakes.

¶7 On September 16, Snyder engaged a surveyor to examine Eric Ebert's work. Snyder instructed the surveyor to mark the pipes that had been pounded into the ground with "less obstructive 12-to-16 inch lathing" and to reinstall the iron pipe that had been removed. He sent the Eberts a letter in which he asked them to cease mowing the grass between the paved road and their property line, move their mailbox from its current location and refrain from placing lawn clippings and brush cuttings in the ditch. He also reminded the Eberts, "The access road to your new home is <u>not</u> a public road. The road belongs to me." According to Deborah Ebert, she and her husband moved the mailbox

onto their property and stopped placing the garbage cans at the foot of the driveway.

¶8 In March 2003, Snyder filed a lawsuit against the Eberts. He asked that the court eject the Eberts' mailbox from his property. Snyder requested a declaratory judgment determining the rights to his property. He asked the court to affirm, among other things, that the Eberts' easement only permitted ingress to and egress from their property on Limekiln Road. Snyder also requested an order stating that the Eberts trespassed on his property and prohibiting the Eberts from interfering with the iron monuments on either property. Snyder sought compensatory damages, including the cost of the surveyor and reinstallation of the survey markers.

¶9 The Eberts counterclaimed. The Eberts alleged that Snyder had trespassed on their property by placing the survey markers partially on their property. The Eberts sought an order requiring Snyder to remove all the survey markers from their property, to cease trespassing on their property and to compensate them for damages sustained due to his past trespasses. They also sought an order determining their rights, including those acquired by virtue of adverse possession.

¶10 The Hansches purchased the property from the Eberts on May 8, 2003. The Hansches were added to the lawsuit and Snyder sought a declaratory judgment ruling that the Hansches, like the Eberts, have no right or interest in his property. The Hanches and Eberts sought a declaratory judgment granting them the right to maintain the grassy area in conjunction with the rights of ingress and egress, to abate the private nuisance Snyder created and to trespass, interference and nuisance damages.

¶11 Snyder filed a motion for summary judgment. The court issued a partial summary judgment, essentially dismissing the Eberts' and Hanches' adverse possession and prescriptive easement claims and ordering them to exercise only the rights granted to them in the 1988 agreement. The court reserved jurisdiction to delineate further the Eberts' and Hanches' easement rights.

¶12 The court conducted a one-day trial on the matter in March 2005. After trial, the parties filed additional briefs and motions for frivolous and statutory attorney fees and costs. The court's December written order establishes the following findings.

¶13 The language of the 1988 easement evidenced an intent to limit the use of the easement to the roadway and road surface solely for ingress to and egress from the dominant estate. While the mailbox was not located within the easement area at the time, if the postal service required the easement holders to move the mailbox, they could do so without unduly and unreasonably burdening the servient estate. It would not unduly or unreasonably burden the servient estate for the dominant estate to place refuse containers within the easement area as long as they did not do so any sooner than eighteen hours prior to refuse pickup and any longer than 6:00 p.m. on refuse pick up day. In the interest of safety, the dominant estate could mow the grass within the easement area between the dominant estate property line and the paved road surface, limited, however to the twenty feet to the north and twenty feet to the south of the current driveway. The Eberts trespassed on Snyder's property when they drove down or removed the survey markers and Snyder was entitled to damages reflecting the costs of reestablishing the survey markers. The Eberts and the Hansches failed to prove their claim for nuisance. Finally, the court denied both motions for frivolous attorney fees, but awarded statutory costs and attorney fees to Snyder.

Nature of Easement for Ingress and Egress

¶14 "An easement is an interest in land which is in the possession of another." ***Eckendorf v. Austin***, 2000 WI App 219, ¶7, 239 Wis. 2d 69, 619 N.W.2d 129 (citation omitted). The land subject to the easement is the servient estate, and the land benefited by the easement is the dominant estate. ***New Dells Lumber Co. v. Chicago, St. P., M & O. Ry. Co.***, 226 Wis. 614, 619, 276 N.W. 673 (1937).

¶15 An easement does not convey title to the land, but only the right to use the land of another in a certain limited manner. ***Polebitzke v. John Week Lumber Co.***, 157 Wis. 377, 381, 147 N.W. 703 (1914). The deed granting the easement defines the relative rights of the landowners. ***Eckendorf***, 239 Wis. 2d 69, ¶7. The use of the easement must be in accordance with and confined to the terms and purposes of the grant. ***Id.***, ¶12. The precise meaning of the language in a deed is reviewed de novo. ***Id.***

¶16 The owner of the dominant estate has the right to enjoy the easement fully and without obstruction of the use for which it was created. ***Hunter v. McDonald***, 78 Wis. 2d 338, 343-44, 254 N.W.2d 282 (1977). The possessor of the servient estate may not interfere with, and is obligated to protect, this right. ***Id.*** The possessor, however, retains the right to make use of the burdened property, including changing its use, provided that the use does not interfere with the easement. ***Id.*** at 343. Likewise, the easement holder is entitled to make reasonable improvements or repairs to allow full and reasonable use of the easement. ***Scheeler v. Dewerd***, 256 Wis. 428, 432, 41 N.W.2d 635 (1950); ***Bino v. City of Hurley***, 14 Wis. 2d 101, 106, 109 N.W.2d 544 (1961). However, the use of the easement is strictly confined to the purpose for which it was created,

and the easement holder may not unreasonably burden on the servient estate. ***Widell v. Tollefson***, 158 Wis. 2d 674, 687, 462 N.W. 2d 910 (Ct. App. 1990).

1988 Easement

Ingress and Egress

¶17 The Eberts and the Hansches contend that the trial court misconstrued the language of the easement by holding that it limited their use to passage over only the paved roadway. They contend that the language of the ingress and egress easement allows travel not only over the paved surfaces, but also the grassy area in between the roadway and their front lawn. We agree with the Eberts and the Hansches. The plain language of the creating instrument supports their position and the trial court should have enforced the instrument as written.

¶18 Neither the creating instrument language nor the attached map in any way purport to limit the easement to the paved surface. The instrument does not draw a distinction between parcel A's grassy area and paved surface. Rather, it creates a general right of passage across all of parcel A: "a perpetual easement which shall run with the lands … for ingress to and egress from such lands, over and across Parcel 'A.'" Snyder suggests that the inclusion of the provision imposing an obligation on the dominant estate to maintain the road surface demonstrates an intent to limit the easement's scope to the paved road. This provision clarifies the parties' obligations as to the roadway, but does not speak to the inclusion or exclusion of the adjacent grassy area.

¶19 Attached to the instrument is a map providing a metes and bounds description of parcel A—an approximately sixty-foot wide strip of land. The map

also does not depict a paved and grassy surface or otherwise indicate an easement over only a portion of parcel A. Instead, the plot of land depicted as parcel A is completely shaded in, indicating that the easement concerns the entire parcel.

¶20 Snyder maintains that the parties intended for the legal description and survey map to identify the encumbered parcel, not to specify the dimensions of the easement. We are not persuaded.

¶21 In ***Eckendorf***, the deed granting an easement for ingress and egress and for laying water and sewer lines described the thirty-foot easement area by metes and bounds. ***Eckendorf***, 239 Wis. 2d 69, ¶2. Originally, the actual portion of the easement area improved as a driveway was something less than twenty-four feet. *See* ***id.***, ¶3. When the dominant owner widened the driveway to twenty-four feet, removing a tree in the process, the servient owner brought an action for declaration of interests in real property. ***Id.***, ¶¶3-5. The trial court determined the easement to be imprecisely described because the grant did not allocate specific space for the allowed uses. ***Id.***, ¶6. The court ordered that the easement's width be divided according to the uses described in the grant: twelve feet for the driveway and eighteen feet for water and sewer mains. ***Id.*** We reversed. We noted that the parties were not disputing the metes and bounds description; rather, they were disagreeing over the apportionment of use. ***Id.***, ¶10. We then held that the legal description identifying the easement's location in metes and bounds precisely defined the location of the easement and that, absent any restrictive language, the easement holders were entitled to "determine how to use the land rights granted to them. They have the right to put the land to either use, or to both." ***Id.***, ¶¶10, 12.

¶22 Similarly, here, there is no dispute concerning the metes and bounds description of parcel A; the disagreement concerns only the apportionment of parcel A for purposes of the easement. As ***Eckendorf*** teaches, without any language restricting the use of the metes and bounds description, the easement holders, now the Hansches, have the right to use the entire parcel for the stated purpose of ingress to and egress from their property.

¶23 An unrestricted grant of an easement gives the grantee all rights that are incident or necessary to the reasonable and proper enjoyment of the easement. ***Hunter v. Keys***, 229 Wis. 2d 710, 715, 600 N.W.2d 269 (Ct. App. 1999) (hereinafter ***Keys***). An easement for ingress and egress is intended for passage. *See* ***Crew's Die Casting Corp. v. Davidow***, 120 N.W.2d 238, 241 (Mich. 1963). Therefore, the ingress and egress easement over and across parcel A, necessarily includes the right to walk across the grassy portion of parcel A for purposes of accessing the dominant estate.

Maintenance of the Grassy Area

¶24 The Eberts and the Hansches submit that they have the right to maintain the grassy area between the paved roadway and their lot line. The trial court permitted them to maintain only the twenty feet to the north and the twenty feet to the south of the current driveway.

¶25 As a general rule, easement holders are entitled to make reasonable improvements or repairs to allow full and reasonable use of the easement. *See* ***Scheeler***, 256 Wis. at 432; ***Bino***, 14 Wis. 2d at 106. Thus, to the extent that the maintenance of the grassy area is required for the reasonable use and enjoyment of the entire easement and does not unduly burden Snyder's estate, it is contemplated by the instrument's plain language.

¶26 As we have explained, the Eberts and the Hansches can exercise the right of ingress to and egress from their property over the metes and bounds description of parcel A and this includes the grassy area. The grant of an ingress and egress easement necessarily implies to the right to create and maintain a suitable access way. ***Keys***, 229 Wis. 2d at 719. A mowed and properly maintained surface is reasonably necessary for safe pedestrian passage over the grassy area. Further, as the trial court recognized, keeping the grassy area mowed and maintained promotes safe vehicular traffic over the paved surface because it ensures a clear line of vision for drivers entering and exiting the Ebert/Hansch driveway. Finally, we fail to see how a well-kept parcel of land would unduly burden Snyder's property.[1] We therefore conclude that the trial court erred in restricting the dimensions of the grassy area the easement holders can maintain.

Mailbox and Refuse Bins

¶27 The Eberts and the Hansches further maintain that their easement interest permits them to place their mailbox and refuse bins in the easement area. Again, to the extent that these activities are related to the proper use of the easement and do not unduly or unreasonably burden the servient estate, they are contemplated by the language of the creating instrument.

[1] The Eberts and Hansches rely on the 1962 protective covenants as an alternative justification for granting them the right to maintain the grassy area within the easement. Because we conclude that the maintenance of the grassy area is contemplated by the law of easements, we need not address the applicability of the covenants. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (stating that if a decision on one point disposes of the appeal, we need not address the other issues raised); *see also* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) ("[C]ases should be decided on the narrowest possible ground.").

¶28 The trial court permitted the easement holders to place the mailbox in the easement area, but only if required for postal delivery. The court permitted the easement holders to place the refuse bins in the easement area, but only during certain restrictive hours. As we have explained, the granting instrument gives the easement holders the right of passage over the grassy area and the paved surface. Placement of the mailbox and trash receptacles in the easement area facilitates ingress to and egress from the dominant estate for purposes of postal delivery and trash pick up. It will ensure that the postal workers and refuse collectors can perform their necessary functions safely and conveniently. A mailbox and trash receptacles in the easement area will not unduly burden Snyder's estate. The trial court erred in imposing restrictions on the easement holder's placement of the mailbox and trash receptacles.

Pounding Down and Removal of Iron Monuments

¶29 The Eberts and the Hansches challenge the trial court's determination that Eric Ebert trespassed on Snyder's property when he pounded down to ground level or removed the iron monuments and that Snyder was entitled to damages reflecting the costs of reestablishing the removed monument.[2] They contend that the above-ground iron monuments unreasonably interfered with their interests in the easement and therefore they were well within their rights to take action.

[2] On appeal, Snyder states that his trespass claim was based only on "Eric Ebert's actions in pounding down several survey stakes along the property line, and removal and disposal of one survey stake."

¶30 Our discussion of the granting instrument demonstrates that the easement holders have every right to make full use of the entire easement area for purposes of traveling to and from their property. This includes the grassy area. Snyder, as possessor of the servient estate, may not interfere with, and is obligated to protect, this right. *See* ***Hunter***, 78 Wis. 2d at 343-44. "An obstruction or disturbance of an easement is anything which wrongfully interferes with the privilege to which the owner of the easement is entitled by making its use less convenient and beneficial than before." ***Eckendorf***, 239 Wis. 2d 69, ¶14 (citation omitted).

¶31 The iron monuments, placed above ground every twenty feet in the grassy area, interfered with the Eberts' ability to ensure safe ingress to and egress from their property over the grassy area. The surveyor noted that the easement corners had already been marked with monuments. He commented that it was not his normal practice to place the monuments above ground and over such a short distance. He explained, "somebody could hit [the marker] with a lawn mower, it could be tripped over …. I mean it's not really a … safe practice." The presence of iron monuments, therefore, made the use of the easement less convenient and beneficial than before and Snyder's placement of them in the easement area constitutes wrongful interference.

¶32 The Eberts, as easement holders, had the right to enjoy the easement without obstruction and to make improvements or repairs to allow full and reasonable use of the easement, including the right to create and maintain a suitable access way. *See* ***Hunter***, 78 Wis. 2d at 343-44; ***Scheeler***, 256 Wis. at 432; ***Keys***, 229 Wis. 2d at 719. They did not trespass when they pounded the iron monuments down to the ground and removed the one monument that could not be driven down. We reverse the portion of the trial court's judgment finding that the

Eberts trespassed onto Snyder's property and requiring them to reimburse Snyder for his costs.[3]

Attorney Fees

¶33 The Eberts and the Hansches appeal the trial court's denial of their motion for frivolous attorney fees under WIS. STAT. § 814.025 (2003-04).[4] They contend that § 814.025 applies because Snyder commenced the action in bad faith solely for the purposes of harassing the parties and because he knew or should have known that his action lacked any reasonable basis in law or equity and could not have been supported by a good faith argument for an extension, modification or reversal of existing law. Section 814.025 claims raise questions of both fact and law. We will uphold the trial court's factual determinations unless clearly erroneous, but we will review the questions of law de novo. *See* ***Osman v.***

[3] The Eberts also maintain that the above-ground iron monuments were a nuisance and they had a right to abate such nuisance by pounding the monuments down to ground level and removing the one monument that could not be pounded down. Because we decide that the law of easements permitted the Eberts' actions, we need not turn to their alternative justification under nuisance law. *See* ***Gross***, 227 Wis. at 300; *see also* ***Blalock***, 150 Wis. 2d at 703.

The Eberts and the Hansches also suggest that Snyder trespassed onto their property when he placed on their property one-half of each of the survey markers. However, they cite to no legal authority for that proposition and, beyond a sentence or two in their brief-in-chief and reply brief, do not develop their theory. Undeveloped arguments asserted without supporting legal authority are inadequate, and we will not consider them. ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987) (citing ***State v. Shaffer***, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370 (Ct. App. 1980)).

[4] Effective July 1, 2005, the former WIS. STAT. §§ 802.05 and 814.025 were repealed and a revised § 802.05 was created. *See* S. Ct. Order 03-06, 2005 WI 38, 278 Wis. 2d xiii, xiv (eff. Mar. 31, 2005). The statutory changes do not alter our decision in this case. Recreated § 802.05 also denounces actions brought for improper purposes, such as harassment, and actions based on legal and factual contentions not supported by existing law or the evidentiary record. *See* S. Ct. Order 03-06, 278 Wis. 2d at xiv, xv.

All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

Phipps, 2002 WI App 170, ¶16, 256 Wis. 2d 589, 649 N.W.2d 701. We agree with the trial court that Snyder's action was not frivolous. The record does not show that Snyder brought this action with the intent to harass the Eberts and the Hansches. The action concerns some obviously disputed property interests between the parties. Snyder simply sought guidance from the court on how to resolve those disputes within well-settled contours of Wisconsin easement law. The Eberts' and the Hansches' prayer for frivolous attorney fees fails.[5]

Conclusion

¶34 We reverse the trial court's judgments and order to the extent that they hold that the easement is restricted to the paved surface and prevents the disputed conduct. The ingress and egress easement permits passage across both the paved surface and the grassy area of parcel A. The easement holder may maintain the grassy area in between the lot line and the paved surface and place the mailbox and refuse bins in the easement area. The Eberts did not trespass on Snyder's property when they addressed the iron monuments, and the trial court erred when it awarded Snyder damages for the alleged trespass. We uphold the trial court's denial of the Eberts' and the Hansches' motion for frivolous attorney fees.

¶35 No costs to either party on appeal.

By the Court.—Judgments and order affirmed in part; reversed in part.

[5] Snyder also brought a motion for WIS. STAT. § 814.025 attorney fees. He does not challenge the trial court's denial of this motion on appeal.

Not recommended for publication in the official reports.