COURT OF APPEALS DECISION DATED AND FILED

January 9, 2007

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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

Appeal No. 2006AP98

Cir. Ct. No. 2003CV46

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

MICHAEL KOSSORIS AND BARBARA J. KOSSORIS,

PLAINTIFFS-RESPONDENTS,

JOHN KABLITZ,

PLAINTIFF,

V.

ORPHA B. ZEITELHACK AND ROBERT L. ZEITELHACK,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Lincoln County: GLENN H. HARTLEY, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

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

¶1 PER CURIAM. Orpha and Robert Zeitelhack ("Zeitelhack") appeal a judgment concerning an easement providing access to property owned by Michael and Barbara Kossoris ("Kossoris"). Zeitelhack contends the easement was abandoned or lost by adverse possession. Zeitelhack also disputes the width of the easement and insists the easement is overbroad because only Kossoris is entitled to an easement over the property. We agree with the circuit court that the easement was not abandoned or lost by adverse possession. We also affirm the circuit court's finding as to the width of the easement. However, we conclude the circuit court erred by awarding judgment to "the Plaintiffs" when only Kossoris claimed an easement over the Zeitelhack property. We therefore affirm in part and reverse in part.

¶2 This action concerns forty acres held by Florence Kablitz until 1950, at which time it was divided among her four children into tracts of ten acres each. Kossoris is Florence's grandson and now owns property to the south of Zeitelhack.[1] John Kablitz owns property to the north of Zeitelhack. Zeitelhack accesses his property by virtue of an easement over the Kablitz property. The primary issue at trial was Kossoris's right of access across the Zeitelhack property. Kossoris relied upon the 1950 deeds that granted the acreage "together with the right of ingress and egress" over parcels to their north and "approximately along the line of the private roadway as now constituted and used." Also reserved from each parcel was "an easement for private thoroughfare for ingress and egress from the main highway" to the parcels of land lying to the south.

[1] Michael Kossoris is also the nephew of Orpha Zeitelhack, one of Florence Kablitz's daughters. Kossoris obtained his parcel from his mother, Shirley, another of Florence's children.

¶3 At the close of evidence, the circuit court concluded there was no abandonment of the easement, "nor do I believe there was any adverse possession." The court also indicated "[t]he width of the easement shall be equal to the widest point of the easement utilized by the Defendant [Zeitelhack] north from their property to the public highway excluding the circular drive. However, it shall be no less than fourteen feet." Finally, the court concluded that "Plaintiffs have a valid easement over the Defendant's property.…" John Kablitz made no claim to an easement beyond the south boundary of his property. Zeitelhack now appeals.

¶4 Zeitelhack's first contention is the easement was adandoned. Whether an easement has been abandoned is ordinarily a question of fact. ***Pollnow v. DNR***, 88 Wis. 2d 350, 362, 276 N.W.2d 738 (1979). Here, the circuit court found no intention to abandon the easement. At trial, Kossoris specifically testified that he had no intention to abandon the easement, stating "that's why I acquired the land." The record also supports the conclusion that the evidence was insufficient to establish the fact of abandonment. Kossoris testified that he started hunting on the property at least fifteen years previously and he accessed his property by walking "on the deeded road." Zeitelhack's contention that the easement was "out of use" for fifty years improperly equates the lack of vehicular traffic with abandonment. The court's finding that the easement was not abandoned is not clearly erroneous. *See* WIS. STAT. § 805.17(2). [2]

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

¶5 We also agree with the circuit court that the easement was not lost by adverse possession. Adverse possession not founded on the written instrument requires proof of twenty years of uninterrupted possession of the disputed property to the extent the property is actually occupied and usually cultivated or improved. WIS. STAT. § 893.25. The party asserting adverse possession bears the burden of proof. ***Allie v. Russo***, 88 Wis. 2d 334, 343, 276 N.W.2d 730 (1979). The burden includes a showing that the disputed property was used for the requisite period of time and in an open, notorious, visible, exclusive, hostile, and continuous manner that would apprise a reasonably diligent landowner and the public that the possessor claimed the land as his or her own. ***Pierz v. Gorski***, 88 Wis. 2d 131, 136-37, 276 N.W.2d 352 (Ct. App. 1979). Whether the facts as found by the trial court establish adverse possession is a question of law. *See* ***Klinefelter v. Dutch***, 161 Wis. 2d 28, 33, 467 N.W.2d 192 (Ct. App. 1991).

¶6 Again, Zeitelhack's argument is incorrectly based to a large extent upon the absence of vehicular traffic. Zeitelhack also insists that he treated a portion of the easement through his yard as his own. Zeitelhack testified that he mowed and raked the area and extended a septic drainfield into the easement area. We do not consider these activities such as to give notice of exclusion to the true owner of the easement. *See* ***Pierz***, 88 Wis. 2d at 137.[3] Zeitelhack further contends that "[n]o one has ever attempted to use or actually used that easement for well over 20 years." However, the record demonstrates Kossoris's use of the easement,

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[3] S*ee also* ***Hunter v. Keys***, 229 Wis. 2d 710, 600 N.W.2d 269 (Ct. App. 1999). In that case, a portion of a septic system extended within the easement road. We affirmed the circuit court's ruling that if the septic system's encroachment was incompatible with the easement holder's improvements to the roadway, the septic system would have to be removed. "The owner of the subservient estate may not intrude into the easement in such a way as to interfere with the dominant estate's easement rights." ***Id.*** at 716-17.

including the improved portion, consistent with his activities for hunting and recreation. Moreover, Kossoris testified that nobody ever told him he could not use the easement road and there was never any indication from Zeitelhack that he did not want him to use the easement road until the present lawsuit was commenced.

¶7 Zeitelhack next disputes the width of the easement road. Zeitelhack claims the circuit court, "without any supporting evidence, found that the appropriate width for the easement road over the Zeitelhack land was 14 feet." Zeitelhack insists the maximum width of the easement right-of-way is 11 ½ feet. Zeitelhack contends he produced evidence at trial that the "common width" of the right-of-way of the easement to the north was 11 ½ feet, and the "road bed had a common width of 8 ½ feet."[4] Zeitelhack argues "the only contradictory evidence offered at trial to rebut those measurements was undocumented testimony of an average road width of 12-15 feet."

¶8 In this regard, Zeitelhack cites to the testimony of John Kablitz, the present owner of the property to the north of Zeitelhack. The record reveals that John Kablitz gave the following testimony at trial in response to questions from the court:

> Q: The roadway that runs from Kablitz Road down to the Zeitelhacks, can you tell me the history of that, that's been there as long as you can remember?
>
> A: As long as I can remember.
>
> Q: Has it always been a gravel road, is it an ungraveled road, what is the character of this road?

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[4] Zeitelhack also contends in his brief to this court that the road bed was eight feet.

> A: It would perhaps be one step above of just a pure sand, dirt road. There's been some culvert placements to improve some drainage.
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> Q: How wide is it?
>
> A: It averages 12 to 15 feet wide.

¶9 There were no objections at trial to Kablitz's testimony in this regard and thus Zeitelhack waived any issue on appeal as to its admissibility. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980). Zeitelhack also asserts in his brief that Kablitz "admits to not using the easement." However, this assertion is unsupported by reference to the record on appeal and we will therefore not consider it. *See* ***Grothe v. Valley Coatings, Inc.***, 2000 WI App 240, ¶6, 239 Wis. 2d 406, 620 N.W.2d 463 ("We decline to embark on our own search of the record, unguided by references and citations to specific testimony, to look for evidence to support Grothe's argument.").

¶10 We have been provided no citation to authority precluding as a matter of law the consideration of the testimony of a person as to the width of a road on his own property. In determining the width of the easement road over Zeitelhack's parcel, the circuit court looked to Zeitelhack's easement. As the court stated: "What should this easement look like? It is the exact same easement that Mr. and Mrs. Zeitelhack have to the north. They got the same easement." The circuit court therefore determined that the easement road should be "equal to the widest point of the easement utilized by the Defendant [Zeitelhack] north from their property to the public highway excluding the circular drive. However, it shall be no less than fourteen feet." There is no contention that the court erred in considering as a guide the easement to the north of Zeitelhack's, and Zeitelhack concedes the terms of the easements are identical. Fourteen feet was within the range of the testimony at trial as to the width of the easement used by Zeitelhack.

We discern no error in the court's determination concerning the width of the easement road at issue.

¶11 Finally, Zeitelhack contends "[t]he only plaintiff entitled to the easement over the Zeitelhack lands is Kossoris.…" We need not determine whether on the merits the only plaintiff entitled to the easement is Kossoris. Procedurally, however, Zeitelhack is correct to the extent he is contending that the judgment improperly extends the easement to "Plaintiffs." In the circuit court, only Kossoris requested a declaration of interest in the easement over the Zeitelhack parcel and John Kablitz is not a party to this appeal at any rate. To the extent the judgment extends to "Plaintiffs," the judgment is reversed and remanded with instructions to modify the judgment.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions. No costs awarded on appeal.

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