COURT OF APPEALS
DECISION
DATED AND FILED

June 3, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2565 **Cir. Ct. No. 2006CV219**

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

DENNIS DESBROW,

PLAINTIFF-RESPONDENT,

V.

RAYMOND PORTER AND DOROTHY PORTER,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Langlade County: JAY R. TLUSTY, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Raymond and Dorothy Porter appeal a judgment awarding Dennis Desbrow a prescriptive easement across their property. They contend the court erred in finding a prescriptive easement and by concluding it did not have the power to equitably relocate the easement. We affirm the judgment.

BACKGROUND

¶2 The Porters and Desbrow own adjacent lots on Greater Bass Lake in Langlade County. The lots formerly constituted a single lot, but are now two narrow lots, each ranging from approximately forty to sixty feet wide at different points. A house and garage sit on Desbrow's lot, while no structures currently exist on the Porters' lot. However, the Porters recently obtained zoning approval for a building site.

¶3 Since acquiring his lot in 1975, Desbrow has used and maintained a driveway on the Porter lot. From the Desbrow lot, this driveway crosses to the far side of the Porter lot and then travels toward the lake, where it eventually turns back toward the Desbrow lot and terminates at a parking area on the Porter lot near Desbrow's house.

¶4 In 2006, Desbrow filed this action claiming a prescriptive easement in the driveway. On the morning of the trial, the court viewed the parties' lots. The parties stipulated that there were "cottages along the whole shore line," and there was testimony the area had been that way since 1975.

¶5 At trial, the Porters contended that Desbrow was given permission to use the driveway when he purchased his lot. Specifically, they asserted a real estate broker gave Desbrow permission. They relied upon Desbrow's deposition testimony, where he stated, in reference to his meeting with the real estate broker, "I don't remember us being told anything except that we could use the driveway to get to our place." At trial, Desbrow testified that the real estate broker did not expressly tell him he could use the driveway, but instead that the real estate broker simply used the driveway when taking Desbrow to see the property.

¶6 Regarding equitable alternatives to the current driveway, the Porters relied primarily on testimony from Jack Kautza, a septic installer and excavator. The general locations of three alternative driveways were proposed. Two of these driveways were primarily on Desbrow's lot, going around each side of his garage, which sits between the road and his house. Kautza testified that there was approximately eight feet of space on one side of Desbrow's garage and ten to eleven feet on the other side where a driveway could go. The third proposed driveway would branch off the Porters' new driveway and then cross onto Desbrow's lot between his house and garage. While Kautza referred to maps of the property when stating where the proposed driveways could go, there was no evidence demonstrating the specific paths, dimensions, or specifications of the proposed alternative driveways.

¶7 The circuit court found that Desbrow's use of the driveway was not permissive and that he proved the elements of a prescriptive easement. Regarding equitably relocating the easement, the court concluded it did not have the power to do so, relying upon our supreme court's decision in ***AKG Real Estate, LLC v. Kosterman***, 2006 WI 106, 296 Wis. 2d 1, 717 N.W.2d 835. Additionally, the court stated, "Even if the Court felt it could do so, I'm not certain I could do that because I've been presented with three possible alternatives of roads. I'm not certain where those roads exactly would be, how they would be graded, how they would be constructed, whether they would be wide enough for vehicles to get past buildings, get past corners, turnarounds, all of those types of issues."

DISCUSSION

¶8 To establish a prescriptive easement, Desbrow had to prove (1) an adverse use that is hostile and inconsistent with the exercise of the titleholder's rights; (2) that is visible, open, and notorious; (3) under an open claim of right; and (4) is continuous and uninterrupted for twenty years. *See* ***Ludke v. Egan***, 87 Wis. 2d 221, 230, 274 N.W.2d 641 (1979). A use that is permissive is subservient and not adverse. *See* ***id.***

¶9 Like adverse possession, prescriptive easement issues involve questions of both law and fact. *See* ***Perpignani v. Vonasek***, 139 Wis. 2d 695, 728, 408 N.W.2d 1 (1987); *see also* ***Ludke***, 87 Wis. 2d at 228-31. The facts determined by the circuit court will not be overturned unless clearly erroneous. WIS. STAT. § 805.17(2).[1] The fact finder, not a reviewing court, determines the credibility of witnesses and the weight to be given to their testimony. ***Lellman v. Mott***, 204 Wis. 2d 166, 172, 554 N.W.2d 525 (Ct. App. 1996). We review de novo whether the facts fulfill the legal standards necessary to establish a prescriptive easement. *See* ***Perpignani***, 139 Wis. 2d at 728.

¶10 The Porters contend the court erroneously failed to apply a presumption of permissive use. They also contend Desbrow actually had permission to use the driveway when he purchased the property in 1975.

¶11 We first reject the Porters' argument that they were entitled to a presumption of permissive use. The unexplained use of an easement for twenty

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

years is presumed to be adverse and under a claim of right, unless contradicted or explained. ***Shellow v. Hagen***, 9 Wis. 2d 506, 510, 101 N.W.2d 694 (1960). However, the mere use of a way over unenclosed land is presumed to be permissive. WIS. STAT. § 893.28(3). The presumption of permissive use applies to unimproved property largely in a state of nature or lands which are wild, unoccupied, or of so little present use such that an owner would have no motive in excluding persons from passing over the land. ***Shepard v. Gilbert***, 212 Wis. 1, 6, 249 N.W. 54 (1933).

¶12 The circuit court found the Porters' property was an improved lot in a residential area, and that this was true since 1975. The court also found that while the Porters' lot was not yet developed, it was situated between developed property in an area of significant development. Based on these factual findings, we agree with the court's conclusion that the Porters' lot was not unimproved property largely in a state of nature or lands which are wild, unoccupied, or of so little present use such that an owner would have no motive in excluding persons from passing it. *See* ***id.*** Therefore, the court was correct not to apply a presumption of permissive use. ***Id.***

¶13 We also reject the Porters' argument that Desbrow had permission to use the driveway from the time he purchased the property. If Desbrow's use was permissive from the beginning, he could only convert it to an adverse use by unequivocal conduct. *See* ***Lindokken v. Paulson***, 224 Wis. 470, 475, 272 N.W. 453 (1937). The Porters rely upon Desbrow's deposition testimony regarding his meeting with the real estate broker, where Desbrow stated, "I don't remember us being told anything except that we could use the driveway to get to our place." However, Desbrow testified at trial that the real estate broker did not tell him he had permission to use the driveway. Given the circuit court's role in assessing the

credibility of witnesses and weighing evidence, we cannot overturn the court's finding that Desbrow was not given permission to use the driveway. *See* ***Lellman***, 204 Wis. 2d at 172.

¶14 We next address the Porters' claim that the court erred when determining it could not equitably relocate Desbrow's easement. The circuit court relied upon ***AKG Real Estate v. Kosterman***, 296 Wis. 2d 1. In ***Kosterman***, our supreme court held that the owner of a servient estate cannot unilaterally relocate or terminate an express easement.[2] ***Id.***, ¶1.

¶15 The Porters attempt to distinguish ***Kosterman*** on the ground that the easement here is a prescriptive easement. For prescriptive easements, the Porters ask us to adopt the position of the RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 4.8(3) (2000), which states:

> Unless expressly denied by the terms of an easement, as defined in § 1.2, the owner of the servient estate is entitled to make reasonable changes in the location or dimensions of an easement, at the servient owner's expense, to permit normal use or development of the servient estate, but only if the changes do not
>
> (a) significantly lessen the utility of the easement,
>
> (b) increase the burdens on the owner of the easement in its use and enjoyment, or
>
> (c) frustrate the purpose for which the easement was created.

[2] While the ***Kosterman*** court referred to "unilaterally" modifying or terminating an easement, the servient estate holder in ***Kosterman*** actually sought modification of the easement through the court. *See* ***AKG Real Estate, LLC v. Kosterman***, 2006 WI 106, 296 Wis. 2d 1, ¶¶1, 12, 717 N.W.2d 935.

The Porters also rely upon a number of cases from other jurisdictions predating RESTATEMENT § 4.8(3).[3] *See* ***Soderberg v. Weisel***, 687 A.2d 839 (Pa. Super. 1997); ***Sedillo Title Guaranty, Inc. v. Wagner***, 457 P.2d 361 (N.M. 1969); ***Brown v. Bradbury***, 135 P.2d 1013 (Colo. 1943).

¶16 In ***Kosterman***, the court addressed RESTATEMENT § 4.8(3). ***Kosterman***, 296 Wis. 2d 1, ¶¶30-39. The court noted that only a minority of jurisdictions have adopted the RESTATEMENT position. ***Id.***, ¶36. The court seemed to align itself with the majority view, stating "We agree with the Kostermans and the courts that have rejected the RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES []§ 4.8(3) … in favor of preventing the owners of servient estates from unilaterally relocating or terminating express easements." ***Id.***, ¶35.

¶17 While the ***Kosterman*** court referenced express easements, we read the decision as more broadly rejecting the RESTATEMENT position. First, we note that RESTATEMENT § 4.8(3) makes no distinction between express and prescriptive easements. Further, the ***Kosterman*** court stated, "Moreover, the position articulated in RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES []§ 4.8(3) … is inconsistent with longstanding precedent that *Wisconsin courts do not balance the equities of adverse property owners when determining whether to grant or modify an easement*." ***Id.***, ¶37 (emphasis added). The court also discussed the policy

[3] The Porters also attempt to rely upon ***Werkowski v. Waterford Homes, Inc.***, 30 Wis. 2d 410, 141 N.W.2d 306 (1966). ***Werkowski*** states that courts may equitably determine an easement's location where its location is otherwise uncertain and undefined. ***Id.*** at 417. Because the parties stipulated to the driveway's location here, ***Werkowski*** is clearly inapplicable.

debate surrounding the RESTATEMENT, concluding the policy arguments supporting it were unpersuasive. *See* ***id.***, ¶¶38-39.

¶18 We also note that, when aligning itself with courts that have rejected the RESTATEMENT, the ***Kosterman*** court cited ***MacMeekin v. Low Income Housing Institute, Inc.***, 45 P.3d 570 (Wash. App. 2002), which involved a prescriptive easement. ***Kosterman***, 296 Wis. 2d 1, ¶35. In ***MacMeekin***, the court held that, "Washington adheres to the traditional rule that easements, however created, are property rights, and as such are not subject to relocation absent the consent of both parties." ***MacMeekin***, 45 P.3d at 579.[4] Our supreme court's discussion of the RESTATEMENT in ***Kosterman*** suggests that Wisconsin follows this same rule.

¶19 Thus, we reject the Porters argument that the court was free to relocate Desbrow's prescriptive easement. The RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 4.8(3), which the Porters rely upon to support their argument, was rejected in ***Kosterman***.[5]

[4] It also appears the ***Kosterman*** court relied heavily on the ***MacMeekin*** court's discussion of the policy debate surrounding the RESTATEMENT. *See* ***Kosterman***, 296 Wis. 2d 1, ¶38; ***MacMeekin***, 45 P.3d 570, 578-79 (Wash. App. 2002).

[5] The Porters also fail to address the circuit court's statement about the deficiencies of their trial evidence regarding equitable alternatives. Because we conclude the court did not have power to equitably relocate the easement, we need not also address this issue.

By the Court.—Judgment affirmed.

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