COURT OF APPEALS
DECISION
DATED AND FILED

May 31, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-3363-FT

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

ROBERT M. FAHSER,

PLAINTIFF-APPELLANT,

DUANE KLAWITTER,

INVOLUNTARY-PLAINTIFF-
(IN T.CT.),

V.

WESLEY C. HILGART AND DONNA J. HILGART,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment and an order of the circuit court for Waushara County: LEWIS MURACH, Judge. *Reversed and cause remanded with directions.*

Before Roggensack, Deininger and Lundsten, JJ.

¶1 PER CURIAM. Robert Fahser appeals an order, which denied his motions for a new trial or judgment notwithstanding the verdict, and the judgment in favor of Wesley and Donna Hilgart on Fahser's and Duane Klawitter's claims for adverse possession and prescriptive easement. Fahser claims the trial court erred by instructing the jury that the mere use of a way over unenclosed land is presumed to be permissive and not adverse. We agree that the instruction was an incorrect statement of the law given the facts of this case and therefore reverse the judgment and the order and remand for a new trial on the claim of prescriptive easement.

BACKGROUND

¶2 The parties' dispute centers on a dirt track which runs across the Hilgarts' land and provides access from Highway 49 to a parcel owned by Klawitter and leased by Fahser.[1] Klawitter bought his parcel in 1964, and he and Fahser and their guests have seasonally used the track to get to the northern portion of the parcel for hunting and gathering firewood and sand ever since. Klawitter testified the track was already in existence when he bought his parcel and that he has added sand as necessary to maintain it.

¶3 When Klawitter first bought his parcel, the land over which the track crosses was part of a set-aside program in which the owners were being paid not to work the land. After Stanish Disterhaft bought the land, in approximately 1976, he cultivated a garden and planted crops. There have been crops such as corn and beans planted on either side of the track since Disterhaft's ownership began. The

[1] The track also provides access to another other parcel of land whose owner has a recorded easement.

Hilgarts, who bought the land from Disterhaft in 1996, added a swimming pool, set up a campsite and planted pine trees on another portion of the land.

¶4 The jury found that Fahser and his predecessors in interest had openly used the track over the Hilgarts' land for over twenty years under a claim of right, but had failed to show that their use of the track was adverse to the rights of the Hilgarts and their predecessors. Fahser claims the trial court erred in instructing the jury that the use of a way over unenclosed land is presumed to be permissive and not adverse, and that there is a reasonable probability that the jury would have found in his favor if it had been instructed to presume his use of the track was adverse rather than permissive.

STANDARD OF REVIEW

¶5 We will reverse and order a new trial if jury instructions, taken as a whole, communicated an incorrect statement of the law or otherwise probably misled the jury. ***Miller v. Kim***, 191 Wis. 2d 187, 194, 528 N.W.2d 72 (Ct. App. 1995). We will consider whether a particular set of facts qualifies for a statutory presumption of permissive use as a question of law subject to *de novo* review. ***County of Langlade v. Kaster***, 202 Wis. 2d 448, 453, 550 N.W.2d 722 (Ct. App. 1996).

ANALYSIS

¶6 A prescriptive easement is created by: "(1) adverse use that is hostile and inconsistent with the exercise of the titleholder's possessive rights (2) that is visible, open and notorious (3) under an open claim of right (4) and is continuous and uninterrupted for twenty years." ***Id.*** at 457. A use of land is not adverse if it is carried out with the owner's permission. ***Id***. Rather, adverse use

should be of such a nature as to give notice that the use is being made under a claim of right. 25 AM. JUR. 2D *Easements and Licenses* § 62 (1996).

¶7 Because the unavailability of predecessors in interest often makes the history of adverse or permissive use difficult to trace, courts have developed presumptions to deal with the issue. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.16 cmt. g (1998). Under the common law of this state, the general rule is:

> When it is shown that there has been the use of an easement for twenty years, unexplained, it will be presumed to have been under a claim of right and adverse, and will be sufficient to establish a right by prescription, and to authorize the presumption of a grant, unless contradicted or explained. In such a case the owner of the land has the burden of proving that the use of the easement was under some license, indulgence, or special contract inconsistent with the claim of right by the other party.

Carmody v. Mulrooney, 87 Wis. 552, 554, 58 N.W. 1109 (1894); *see also* 25 AM. JUR. 2D *Easements and Licenses* § 67 (1996). The ***Carmody*** presumption of adverse use is derived from the English lost-grant theory, under which a court would enforce the fiction that the exercise of a right over land for many years with the owner's acquiescence was made pursuant to a deed which had become lost. ***Shellow v. Hagen***, 9 Wis. 2d 506, 511, 101 N.W.2d 694 (1960). The presumption of adverse use, which a majority of the states have adopted in some form, "gives effect to the idea that long-continued uses create expectations of entitlement and favors existing users over newcomers who would disrupt established neighborhood patterns of land use and access." RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.16 cmt. g (1998).

¶8 An exception to the general rule was set forth in ***Bassett v. Soelle***, 186 Wis. 53, 202 N.W. 164 (1925). ***Bassett*** created a contrary presumption of

permissive use for "a track or way over uninclosed lands, and especially woodlands." ***Id.*** at 57. The rationale given for the exception was that public policy supported allowing landowners to permit people to cross wild lands without risk of thereby losing their property rights if they later wished to cultivate or improve the land. ***Id.*** In ***Shepard v. Gilbert***, 212 Wis. 1, 249 N.W. 54 (1933), after discussing the insufficiency of a mere distinction between enclosed and unenclosed land, the Wisconsin Supreme Court concluded that the presumption of permissive use should be applied to "unimproved property largely in a state of nature" or lands which were "wild, unoccupied, or of so little present use as to lead legitimately to the inference that an owner would have no motive in excluding persons from passing over the land." ***Id.*** at 6.

¶9 In 1941, the legislature enacted a provision stating, "The mere use of a way over uninclosed land shall be presumed to be permissive and not adverse." WIS. STAT. § 330.12(2) (1941). The statutory term "uninclosed" was interpreted according to case law to apply "only to unenclosed land which [is] … wild and unimproved." ***Shellow***, 9 Wis. 2d. at 513-14. The statutory presumption of permissive use was repealed and reenacted in nearly identical form in 1979, pursuant to a reorganization of the chapter of the statues dealing with limitations. 1979 Wis. Act 323 § 28. WIS. STAT. § 893.28(3) (1999-2000) now provides, "The mere use of a way over unenclosed land is presumed to be permissive and not adverse."

¶10 The Hilgarts argue, and the trial court held, that WIS. STAT. § 893.28(3) (1999-2000) superseded ***Bassett*** and any case law interpreting WIS. STAT. § 330.12(2) (1941), such that the presumption of permissive use should be applied to all unenclosed land regardless of the nature of the land. We disagree. When the legislature enacts a provision using an expression which has previously

been interpreted by the court, the legislature is presumed to have intended that the judicial interpretation continues to apply. Norman J. Singer, 2B SUTHERLAND STATUTORY CONSTRUCTION § 49.09 (6th ed. 2000). Thus, whether a particular use is adverse or permissive still depends upon the character of the land during the period at issue, and not merely upon whether the land is enclosed or unenclosed. ***Bino v. City of Hurley***, 14 Wis. 2d 101, 108, 109 N.W.2d 544 (1961). ***Bino*** framed the test as whether the land at issue is "uninclosed, unimproved, and unoccupied." ***Id.***

¶11 This leads us to consideration of the nature of land involved here. The question we must answer in order to determine which jury instruction should have been given is whether a parcel of land which is partially wooded but is being used, at least in part, to grow crops qualifies for the presumption of permissive use.

¶12 The most factually similar Wisconsin case is ***Carlson v. Craig***, 264 Wis. 632, 60 N.W.2d 395 (1953). In ***Carlson***, the court applied the general ***Carmody*** presumption of adverse use, rather than the statutory presumption of permissive use, to unenclosed wooded land which had been partially cleared and planted with fruit trees and grain.[2] We believe that ***Carlson*** controls the situation here. Because there were crops planted on either side of the track, the jury should

[2] The presumption of adverse use has also been applied to unenclosed lots which were in the process of being developed for housing in ***Shepard v. Gilbert***, 212 Wis. 1, 249 N.W. 54 (1933); to residential lots in ***Christenson v. Wikan***, 254 Wis. 141, 35 N.W.2d 329 (1948); and to unenclosed lakeshore property that was "occupied" by swimmers and piers in ***Shellow v. Hagen***, 9 Wis. 2d 506, 101 N.W.2d 694 (1960). Conversely, the presumption of permissive use has been applied to wooded land in ***Bassett***; to "cutover land grown up to brush and small trees" used for horse and cow pasture in ***Bino v. City of Hurley***, 14 Wis. 2d 101, 109 N.W.2d 544 (1961); to unenclosed wildlands leading to a lake in ***Mushel v. Town of Molitor***, 123 Wis. 2d 136, 365 N.W.2d 622 (Ct. App. 1985); and to wooded land used by snowmobilers in ***County of Langlade v. Kaster***, 202 Wis. 2d 448, 550 N.W.2d 722 (1996).

have been instructed that an unexplained use of land for twenty years is presumed to be adverse, and that the Hilgarts had the burden to overcome the presumption with proof that the use was permissive. We therefore remand for a new trial on the prescriptive easement claim.

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

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5. (1999-2000)