

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 26, 2003

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. 02-0617

Cir. Ct. No. 00-CV-47

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

WAYNE J. HOUP AND JOAN M. HOUP,

PLAINTIFFS-APPELLANTS,

v.

**ROGER C. CHASE AND PHYLLIS T. CHASE, D/B/A
GHOST TOWN TAVERN AND RESTAURANT,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Ozaukee County:
THOMAS R. WOLFGRAM, Judge. *Affirmed.*

Before Brown, Anderson and Snyder, JJ.

¶1 PER CURIAM. Wayne J. Houpt and Joan M. Houpt appeal from the judgment entered against them which granted summary judgment to Roger C. Chase and Phyllis T. Chase. The issue on appeal is whether the circuit court properly determined that the Chases had a prescriptive easement over a piece of

the Houpts' property. Because we conclude that summary judgment was appropriate, we affirm.

¶2 The dispute involves a strip of land on the Houpts' property. In 1976, the then-owner of the Chases' property began using the strip as a driveway to benefit the operation of his restaurant. There was apparently an agreement between the two property owners for this use. The strip of land was used for, among other things, deliveries for the business. The strip was eventually paved to benefit the restaurant owner's use of the property. This use continued by the successors in interest. The successive owners of the land on which the strip was located allowed the use up until the Houpts purchased the property.

¶3 The Houpts brought this action against the Chases claiming ownership of the strip of land and demanding payment for the continued use. They then moved for summary judgment, and the Chases responded asking for summary judgment in their favor. The circuit court entered judgment for the Chases finding that they had demonstrated a prescriptive easement or adverse possession. The Houpts appeal.

¶4 Our review of the circuit court's grant of summary judgment is de novo, and we use the same methodology as the circuit court. *M & I First Nat'l Bank v. Episcopal Homes Mgmt., Inc.*, 195 Wis. 2d 485, 496, 536 N.W.2d 175 (Ct. App. 1995). That methodology is well known, and we need not repeat it here. Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 496-97.

¶5 The Houpts argue that the Chases did not establish a prescriptive easement, that the court erred when it found an easement by adverse possession,

and that the Chases have waived an easement by their conduct. We conclude that the court properly determined that there was a prescriptive easement.¹

An easement by prescription requires the following elements, (1) adverse use hostile and inconsistent with the exercise of the titleholder's rights; (2) which is visible, open and notorious; (3) under an open claim of right; (4) and is continuous and uninterrupted for twenty years. An act is hostile when it is inconsistent with the right of the owner and not done in subordination to it. A use which is permissive is subservient and not adverse. A use of an easement for twenty years, unexplained, is presumed to be adverse and under a claim of right, unless contradicted or explained.

Ludke v. Egan, 87 Wis. 2d 221, 230-31, 274 N.W.2d 641 (1979) (citations and emphasis omitted).

¶6 The circuit found that the strip of land had been used continually since 1976 to facilitate the operations of the restaurant. The initial use was allowed through some sort of agreement between the property owners. The land was ultimately paved to further enhance the use by the restaurant owner. This improvement was permanent. The successive owners of the land allowed the use to continue until the current owners brought suit. The court further found that the easement was noted on a certified survey map.

¶7 The court concluded that the acts of paving the driveway and its continual use for deliveries to the restaurant were adverse to the interests of the property owners. The court further concluded that the open use was hostile

¹ Since we have concluded that the circuit court properly determined there was a prescriptive easement, we need not address the other issues.

because it was inconsistent with the property owner's interests. The court found that the Chases had established a prescriptive easement.

¶8 The Houpts argue that the use was not hostile, was not under a claim of right, and was permissive. We disagree. This case is similar to *Draeger v. Gutzdorf*, 159 Wis. 2d 596, 465 N.W.2d 204 (Ct. App. 1990). In *Draeger*, the parties were neighbors. *Id.* at 597-98. A driveway ran from the street back on one property and then split to go to the adjoining property's garage. *Id.* The neighbor on whose property the driveway began placed railroad ties on the property line blocking the other property owner's access to her garage. *Id.* at 598. The property owner then brought suit to enforce a prescriptive easement. *Id.* The trial court ruled in her favor and the other property owner appealed asserting that the use was permissive. *Id.* at 598-99. This court concluded that the use of a driveway by the adjacent landowner and her predecessors in interest "could not help but bring home that they were asserting a right to use the driveway," and that the interest was adverse. *Id.* at 600.

¶9 Similarly in this case, the continual use for more than twenty years by the restaurant owners of the driveway and the permanent improvement made to the driveway when it was paved, established that a right to use was being asserted. Further, this use was inconsistent with the property owner's rights and, therefore, was hostile. We agree with the circuit court's conclusion that the Chases established the existence of a prescriptive easement. Consequently, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

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

