COURT OF APPEALS
DECISION
DATED AND FILED

September 23, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2606 **Cir. Ct. No. 92-CV-014038**

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

THE FALK CORPORATION,

PLAINTIFF,

HANSON ENTERPRISES OF ARIZONA, LLC,

RESPONDENT,

V.

BASIL E. RYAN, JR., D/B/A
VEHICLE TOWING COMPANY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DOMINIC S. AMATO, Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Basil E. Ryan, Jr., d/b/a Vehicle Towing Company (Ryan) appeals from an order modifying and confirming an arbitration award entered in favor of Hanson Enterprises of Arizona, LLC (Hanson).

¶2 Ryan asserts three claims: (1) that Hanson lacked standing to seek enforcement of a previously entered amended judgment interpreting the nature and scope of an easement, thus depriving the arbitrator of jurisdiction to act; (2) the arbitration award should be vacated for four reasons; and (3) the judgment of contempt was improperly granted.

¶3 Because an earlier amended judgment interpreting the nature and scope of the easement was "*in rem*" in nature and provided Hanson with standing, because we reject Ryan's four reasons for requesting vacatur, and because the judgment of contempt was properly granted, we affirm.

BACKGROUND

¶4 This appeal represents another chapter in the continuing saga of the nature and extent of a non-exclusive easement for ingress and egress originally obtained by The Falk Corporation in 1966 when it acquired land which abuts the north side of property presently owned by Ryan. Ryan acquired his land in 1987. The non-exclusive easement for ingress and egress is a permanent right to use the land owned by Ryan. It consists of a roadway between the two properties. A complete historical and legal background can be reviewed in our prior decision, ***Falk Corp. v. Basil Ryan***, No. 94-3034, unpublished slip op. (Wis. Ct. App. Oct. 24, 1995). Suffice it to say, our decision affirmed a trial court judgment in a declaratory judgment action, which defined Falk's rights with respect to the easement across Ryan's property.

¶5 On June 4, 2001, Hanson purchased the subject real estate from Falk. Two days later, Hanson, as successor in interest, sought remedial sanctions pursuant to WIS. STAT. § 785.01(1) (2001-02),[1] because Ryan engaged in certain acts in violation of the amended judgment relative to the enforcement of the easement. On July 8, 2001, Ryan filed a demand for binding arbitration and a motion to appoint an arbitrator. Hanson joined in the motion to appoint an arbitrator.

¶6 For the purposes of arbitration, the following claims were asserted by the respective parties. Ryan claimed: (1) Hanson had dumped construction materials in the easement on the roadway owned by him; (2) Hanson had smashed and damaged a fence belonging to him; (3) Hanson had installed metal on the side of its building that encroaches on property owned by him; (4) Hanson had parked dumpsters and vehicles on his property, blocking a private road to his premises; (5) this conduct violates the easement that Hanson possesses; and (6) this conduct on the part of Hanson caused him damages for which he is entitled to compensation.

¶7 Hanson, for his part, claimed: (1) Ryan barricaded the roadway existing between the two properties and allowed numerous vehicles to remain

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[1] WISCONSIN STAT. § 785.01(1)(b) provides:

> **(1)** "Contempt of court" means intentional:
>
> ….
>
> (b) Disobedience, resistance or obstruction of the authority, process or order of a court[.]

All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

parked thereon for extended periods of time, which violated the court interpreted provisions of the easement; and (2) Ryan threatened and harassed workers hired by Hanson to install siding on its building, claiming that the siding encroached upon his property.

¶8 After a hearing, the arbitrator made the following findings and rulings relative to this appeal, which we summarize as follows:

> (a) The abandoned vehicles about which Hanson complained were controlled by Ryan; therefore, by allowing the vehicles to remain in the roadway, Ryan is in contempt of the amended judgment of the trial court and is ordered to remove the vehicles and truck caps;
>
> (b) The use of the easement for the purposes of remodeling Hanson's building was reasonable and permitted;
>
> (c) Ryan is not to interfere with the continued construction and remodeling of the building owned by Hanson provided, however, that if any damage is done to the easement by construction equipment or dumpsters, repair is the sole responsibility of Hanson;
>
> (d) Ryan's claim that one of Hanson's buildings encroached upon his land was without merit and frivolous, entitling Hanson to actual costs and attorney's fees for defending against this claim;
>
> (e) Ryan's claim for damages to his fence fails for lack of proof;
>
> (f) Ryan's claim that dumpsters provided by Hanson damaged the surface of the easement roadway fails for lack of proof;
>
> (g) Ryan's claim that certain landscaping work performed by Hanson increased the water drainage to his property thereby causing damage, fails for lack of proof;
>
> (h) Ryan is responsible for gravel that was dumped in the roadway and is ordered to remove it and repair any damage to the roadway;

> (i) Ryan had no basis for placing a gate at the eastern end of the easement. His defense to this claim is frivolous. Hanson is awarded actual fees and costs in pursuing this claim; and
>
> (j) Ryan's actions in ordering the employees of Wall System, Inc., off the easement while in the process of remodeling Hanson's building was not reasonable and caused damages to Hanson in the amount of $2250. An award in that amount is made to Hanson.

¶9 In sum, the arbitrator denied all of Ryan's claims, held him in contempt, and ruled that certain of his defenses were frivolous. The arbitrator further ordered Ryan to remove certain obstructions from the easement. After the circuit court reviewed the matter, it entered judgment confirming the arbitration award, but modifying the judgment for remedial contempt sanctions. Ryan now appeals.

ANALYSIS

A. Lack of Standing and Jurisdiction

¶10 Ryan's first claim is that the arbitrator lacked jurisdiction to hear any of the issues before it because Hanson lacked standing. Ryan bases this contention on the assertion that an amended judgment of Judge Michael Skwierawski interpreting an easement held over the lands of Falk and Ryan affected only those two parties. He contends that because the judgment was "*in personam*" in nature, Hanson had no standing to challenge any violation of the judgment and, as a result, the arbitrator had no jurisdiction to act. Accordingly, Ryan argues the arbitration award was a nullity. We reject this contention for several reasons.

¶11 Whether a judgment is "*in personam*" or "*in rem*" is a question of law, which we review independently; whether a person has standing is a question of law. ***Polan v. DOR***, 147 Wis. 2d 648, 658, 433 N.W.2d 640 (Ct. App. 1988).

¶12 As noted, this matter began when Hanson sought a contempt order to enforce various provisions of an amended judgment ordered by Judge Skwierawski dated November 2, 1995. The amended judgment declared the rights of the parties, interpreted the status and scope of the easement, and provided that any disputes affecting the same were to be submitted to one of the alternate dispute resolution mechanisms contained in WIS. STAT. § 802.12. In response, Ryan demanded binding arbitration, which was acceptable to Hanson. After the arbitration award was forwarded to the circuit court, it confirmed the award with some modifications. We now continue in our analysis with a brief review of the applicable parts of the law of easement, and analyze how that affects whether Hanson had standing.

¶13 A non-exclusive easement for ingress and egress, which is what is before us, creates a permanent right to use the land of another to obtain access to the benefited land; i.e., a right of passage over another's land. ***Hunter v. McDonald***, 78 Wis. 2d 338, 343-44, 254 N.W.2d 282 (1977). The easement attaches to the land and runs with it. *See* ***id.*** The land subject to the easement is the serviant estate, and the land benefited by the easement is the dominant estate. ***New Dells Lumber Co. v. Chicago, St. P., M.&O. Ry.***, 226 Wis. 614, 619, 276 N.W. 632, 277 N.W. 673 (1937). 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***, 78 Wis. 2d at 343. The possessor of the serviant estate may not interfere with, and is obligated to protect, this right. 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. ***Wisconsin Tel. Co. v. Reynolds***, 2 Wis. 2d 649, 652, 87 N.W.2d 285 (1958). Likewise, the easement holder is entitled to adopt technological changes or modify facilities to allow full

and reasonable use of the easement. ***Scheeler v. Dewerd***, 256 Wis. 428, 432, 41 N.W.2d 635 (1950). An easement passes by a subsequent conveyance of dominant estate without express mention in the conveyance. ***In re Land on Geneva Lake***, 165 Wis. 2d 235, 245, 477 N.W.2d 333 (Ct. App. 1991).

¶14 The easement in the instant case preceded the purchase by either Falk or Ryan of their property. It was not personal to either party. There can be no gainsaid, then, that the easement ran with the land. In June 2001, Falk sold its property to Hanson.

¶15 The amended judgment entered by Judge Skwierawski declared the nature and scope of the easement. It clarified its effect, declaring what it is. The declaration is "binding upon the world" not just the parties of record. ***Delta Fish & Fur Farms v. Pierce***, 203 Wis. 519, 531, 234 N.W. 881 (1931) (citation omitted). The arbitrator concluded that because the original easement was clarified and modified by the amended judgment, it was an "*in rem*" judgment. The trial court concurred; their conclusions were correct.

¶16 The easement was not personal to either of the parties; it will not disappear if one or both of the parties sells their land. The amended judgment pronounced the status of some particular thing or subject matter, rather than a judgment against a particular individual. Accordingly, we agree with the arbitrator and the circuit court that the amended judgment was an action "*in rem*" rather than "*in personam*." Therefore, Hanson did have proper standing, and that arbitrator had jurisdiction. There was no error.

B. Vacation of the Award

¶17 Ryan's second claim is that the arbitration decision should be vacated for the following reasons: (1) the arbitrator manifestly disregarded the law; (2) the decision was illegal or violated public policy; (3) the arbitrator exceeded his powers; and (4) the arbitrator imperfectly executed his powers resulting in a lack of finality. We shall examine each assertion in turn.

¶18 A court must grant a party's application for confirmation of an arbitration award unless the award is vacated, modified, or corrected under WIS. STAT. §§ 788.10 or 788.11. WIS. STAT. § 788.09. Ordinarily, the award of an arbitrator is subject to only limited judicial review. *See* ***McKenzie v. Warmka***, 81 Wis. 2d 591, 598, 260 N.W.2d 752 (1978). An arbitrator's award will be set aside only when its invalidity is demonstrated by clear and convincing evidence. ***Dane County v. Dane County Union Local 65***, 210 Wis. 2d 267, 275, 565 N.W.2d 540 (Ct. App. 1997).

¶19 WISCONSIN STAT. § 788.10(1)(d) permits vacatur when the arbitrator "exceeded [its] powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made."

Did the arbitrator manifestly disregard the law? The answer is no for two reasons.

¶20 First, under the provisions of WIS. STAT. § 806.07, a trial court has broad discretion to modify its own judgments or orders. *See* ***In re Konicki***, 186 Wis. 2d 140, 151-52, 519 N.W.2d 723 (Ct. App. 1994). Here, contrary to Ryan's suggestive argument, the arbitrator did not modify the amended judgment of Judge Skwierawski. Rather, he rendered an award that was subject to confirmation by

the circuit court. It was the circuit court itself (a successor judge), which modified its own judgment. In precise terms the circuit court ordered:

> This Judgment modifies the Amended Judgment entered by the Hon. Michael J. Skwierawski dated November 2, 1995, *nunc pro tunc* October 19, 1994, and this Judgment shall be deemed *in rem*, shall run with the dominant and servient estates in the Easement identified in the Amended Judgment and may be recorded with the Register of Deeds for Milwaukee County by any interested party.

¶21 Second, "[t]he holder of the easement possesses all rights necessary to the reasonable and proper enjoyment of the easement." ***Hunter v. Keys***, 229 Wis. 2d 710, 716, 600 N.W.2d 269 (Ct. App. 1999). Every easement "carries with it by implication the right to do what is reasonably necessary for the full enjoyment of the easement in light of the purpose for which it was granted." ***Gallagher v. Grant-Lafayette Elec. Co-op***, 2001 WI App 276, ¶17, 249 Wis. 2d 115, 637 N.W.2d 80. "The owner of an easement may make changes in the easement for the purpose specified in the grant as long as the changes are reasonably related to the easement holder's right and do not unreasonably burden the serviant estate." ***Hunter***, 229 Wis. 2d at 715.

¶22 From our review of the record, particularly the logical comments in the arbitrator's decision, and the law of easements, we find no basis to conclude that the decision of the arbitrator unreasonably burdens the serviant estate of Ryan, nor has the applicable law of easements been manifestly disregarded.

Was the arbitrator's decision illegal or did it violate public policy?

¶23 Ryan's claim of illegality and violation of public policy consists of two parts: the drainage of surface water over the easement into a storm drain

owned by him, and the responsibility for the removal of abandoned vehicles left in the easement area. We shall examine these claims separately.

¶24 Surface Water Drainage: This claim was not included in either of the two submissions filed by Ryan. It arose during the course of the two hearings because the arbitrator did address the issue of "water drainage" in its written decision.

¶25 Ryan claims that the arbitrator's decision allowing Hanson to drain his parking lot rainwater onto Ryan's property and into the private storm drain not only violates the terms of the easement, but also violates a provision of a city ordinance. On this basis, Ryan argues that the arbitrator exceeded his authority by illegally allowing Hanson to expand the use of its ingress and egress easement to include drainage rights.

¶26 The arbitration decision, which examined this issue, states:

> This claim is based solely on the testimony of Basil Ryan, Jr., whose credibility is in question, and once again no damages or other proof was offered. This arbitrator's inspection of the premises shed no light on this question but it should be noted the berms are aesthetically pleasing and don't appear to cause drainage problems since the slope of the land goes to the south toward a drain located in the middle of the easement. Ryan has failed to meet his burden with respect to this particular claim, and it is, therefore, denied.

¶27 From this portion of the total decision, it is obvious, Ryan's claim notwithstanding, that the arbitrator never ruled that Hanson could "expand his use of the easement to include drainage rights." Furthermore, the violation of City of Milwaukee Ordinance 252-71.2.b is being raised for the first time and consequently will not be reviewed on appeal. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433,

443-44, 287 N.W.2d 140 (1980). Here, there was no error on the arbitrator's part. Consequently, we reject this claim.

¶28 Responsibility for abandoned vehicles in the easement: Ryan cites WIS. STAT. §§ 342.40(3)(b) and 943.23(3) to support his claim that the arbitrator erred in making him responsible for the removal of the abandoned vehicles from the easement.[2] Once again, Ryan raises issues for the first time which were not presented for review to the arbitrator or the circuit court. Because we shall not review these newly raised issues, this claim is rejected. ***Wirth***, 93 Wis. 2d at 443-44.

Did the arbitrator exceed his powers?

¶29 Ryan bases this claim on the contention that the arbitrator improperly redrew certain property lines. The record, however, belies this assertion. In the context of this case, taking into account the submissions of the parties, the arbitrator was given broad authority to resolve the disputes of the parties. Ryan sought to demonstrate that one of Hanson's buildings encroached

[2] WISCONSIN STAT. §§ 342.40(3)(b) and 943.23(3) provide:

> 342.40(3)(b) The owner of any abandoned vehicle except a stolen vehicle is responsible for the abandonment and all costs of impounding and disposing of the vehicle. Costs not recovered from the sale of the vehicle may be recovered in a civil action by the municipality against the owner. Whether or not the municipality recovers the cost of towing and enforcement, the municipality shall be responsible to the towing service for requisitional towing service and reasonable charges for impoundment.
>
> 943.23(3) Except as provided in sub. (3m), whoever intentionally drives or operates any vehicle without the consent of the owner is guilty of a Class I felony.

upon the easement and any continued remodeling of the building would encroach upon his land.

¶30 To support his argument, Ryan placed into evidence his own recently ordered certified survey which, contrary to his expectations, proved the opposite of his allegations. He then attempted to show that his own new survey was inaccurate. This turn of evidentiary events severely damaged his credibility. Furthermore, it formed the basis for one of two findings of frivolousness, which are not a subject of this appeal.

¶31 It was Ryan who advanced the boundary dispute for arbitration. Due to the inconsistencies in the evidence, the arbitrator made a finding of fact based upon credibility. The arbitrator is afforded the discretion to make credibility determinations. From this we conclude that the arbitrator did not exceed his powers. *See* ***Putterman v. Schmidt***, 209 Wis. 442, 447, 245 N.W. 78 (1932).

Did the arbitrator imperfectly execute its powers such that no final and definite award was made?

¶32 In asserting this claim, Ryan places specific emphasis on the arbitrator's use of the phrase "reasonable limits to the use of the easement" in its decision. Because "reasonableness" affects access, use and time limits, Ryan argues, so much uncertainty has been introduced to the scope of the easement as to precipitate endless visits to the courthouse for judicial rulings. We are not convinced.

¶33 As noted above, the law of easement is ripe with the application of the rule of reason. We know of no authority, nor has any been cited, that renders

an award concerning the scope of an easement impermissibly indefinite by the application of the rule of reason.

C. Propriety of Judgment of Contempt

¶34 Lastly, Ryan claims that the judgment of contempt was not properly made and ought to be vacated. Ryan essentially posits two reasons in support of this claim of trial court error: (1) Hanson had no standing to bring the motion because it was not privy to the "*in personam*" judgment; and (2) the absence of a notice and hearing deprived him of his right to due process.

¶35 Earlier in this opinion we concluded that the amended judgment of Judge Skwierawski affecting the scope of the easement over the dominant and serviant estates of Falk and Ryan, respectively, ran with the land and was "*in rem*" in nature. Because Hanson, by purchasing the land from Falk, stepped into the shoes of Falk, it acquired the "*in rem*" rights of Falk as determined by the amended judgment. For this reason, Ryan's continuing claim of lack of standing on Hanson's part fails.

¶36 Ryan's due process claim presents an incomplete procedural picture of the contempt process that has transpired. We explain.

¶37 On September 16, 2002, the award of the arbitrator was before the trial court for consideration of confirmation or vacation. For reasons not revealed in the record, Ryan was not present. During the trial court's oral comments, it ruled that under Chapter 785 the power to find contempt only existed in the court. It therefore struck the findings of contempt but otherwise confirmed the award. In view of its ruling, it interpreted the arbitrator's finding as a certification to it recommending contempt for failure to comply with previous court orders and

judgments implementing the scope of the easement. On its own motion, the court continued the matter and set the next hearing for September 27, 2002. It ordered that Ryan be present along with a representative on Hanson's behalf. The court further ordered simultaneous briefing.

¶38 On September 27, 2002, both parties appeared with counsel. After a brief colloquy between the court and counsel, the court orally reviewed the entire record regarding the scope of the easement and the actions of Ryan affecting the same. Pertinent to this issue, the court ruled:

> [T]here's no question that based upon the history of this case, which has occurred since I have been assigned to it, along with its prior history, it's sort of like Other Acts under the Rules of Evidence that show motive, intent, plan, scheme, operation, you just refuse to follow the orders of the Court in the past, and it looks like you're trying to do that now, and the evidence is overwhelming to find you in contempt, and I do hereby so find you in contempt based upon all the moving papers.

¶39 The court delayed imposing sanctions and adjourned the matter until September 30 for further consideration. On September 30, all parties again appeared. After both parties had reported that there was substantial compliance, the court stated: "I am going to continue to adjourn this contempt hearing and withhold any sanctions, because it looks like you two would rather cooperate between yourselves …."

¶40 From this recitation, it is quite clear that Ryan knew precisely the purpose of the contempt hearings. He submitted a brief of his own choosing and was accompanied by competent counsel. He neither objected to the manner in which the court conducted the hearing nor asked for the opportunity to be further heard. He fully participated and, from our review of the record, he has no grounds to complain that his due process rights were violated.

By the Court.—Order affirmed.

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