COURT OF APPEALS DECISION DATED AND FILED

February 17, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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Appeal No. 2009AP2308 **Cir. Ct. No. 2004CV408**

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

SWS, LLC,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

STEVEN F. WEYNAND,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from a judgment and orders of the circuit court for Sauk County: GUY D. REYNOLDS, Judge. *Affirmed.*

Before Vergeront, P.J., Sherman and Blanchard, JJ.

¶1 BLANCHARD, J. SWS, LLC appeals from a judgment, following a jury trial, granting a prescriptive easement to Steven Weynand over property owned by SWS, and from orders denying SWS's postverdict motions. Steven cross-appeals the judgment, challenging the circuit court's rulings (1) imposing a

seasonal limitation on his use of the prescriptive easement and (2) allowing SWS the option of removing an electrical box in the proposed location of the easement, or in the alternative allowing SWS to grant Steven an easement west of the box, maintaining a minimum fourteen-foot width, but curving around the box.

¶2 We conclude that the trial court properly denied SWS's motions for postverdict relief. We affirm the denial of: (1) the motion for judgment notwithstanding the verdict, because we conclude that the evidence presented at trial is not sufficiently clear and convincing to establish an agency relationship between Steven and his father during the relevant time period that would defeat Steven's prescriptive easement claim; (2) the motion to change the jury's answer on special verdict, because we conclude that there was sufficient evidence to find the prescriptive easement; and (3) the motion for a new trial based on newly discovered evidence, because we conclude that SWS was not diligent in finding the evidence.

¶3 We also affirm the trial court's rulings challenged by Steven on cross-appeal. We affirm the trial court's imposition of seasonal limitations on the prescriptive easement because the court reasonably concluded that winter use would unreasonably burden SWS's property. We affirm the court's decisions regarding the electrical box because they are supported by a reasonable factual basis under the correct legal standard.

BACKGROUND

¶4 In 1962, Arnold Weynand purchased a large piece of property near Lake Wisconsin. In 1967, Arnold deeded four noncontiguous lakefront lots within the larger piece to his son, Steven. Arnold's lots bordered Steven's lots on the east

and west sides, and one of Arnold's lots was located between each of Steven's lots.

¶5 Arnold started renting his lots as early as 1964. Steven started renting his properties in 1975. Both rented their individual lots on a seasonal basis, from April to September, as recreational sites for people with their own mobile homes. Steven ran his own rental business and also worked on and off for his father's rental business over the years.

¶6 After Arnold's death in 1999, SWS, a development company, purchased Arnold's property, surrounding Steven's lots, and declared its land as a condominium.

¶7 SWS filed an action against Steven shortly after purchasing the property to enforce the terms of a warranty deed on a parcel that is not at issue in this appeal. Steven made several counterclaims, including a claim that, from 1975 to 2005, his tenants renting the westernmost of his four lots, Mr. and Mrs. Hefty, created a prescriptive easement over a gravel road. This road is called Old Farm Road, running generally from west to east through several of the lakefront lots and bordered on the north by Lake Wisconsin and on the south by Bay Road. Steven asserted that the easement ran over the three contiguous lots, now owned by SWS, adjacent to and immediately to the west of the Heftys' rented lot.

¶8 At a jury trial, the jury found that Steven had established a prescriptive easement over Old Farm Road. The parties stipulated that, if the jury found in favor of Steven, the court would determine the extent of the prescriptive easement based on the evidence presented at trial. The court defined the location of the easement, limited the prescriptive right to annual use from April 15 to September 15, and provided SWS with the option of either removing an electrical

box from the proposed location of the easement or granting to Steven an easement on land west of the electrical box so that the proposed easement curves around the box. SWS chose to grant an easement curving around the box.

¶9 SWS filed a motion seeking three alternative forms of postverdict relief: (1) judgment notwithstanding the verdict pursuant to WIS. STAT. § 805.14(5)(b) (2009-10);[1] (2) changing the jury's answers to the special verdict pursuant to § 805.14(5)(c); or (3) a new trial in the interest of justice pursuant to WIS. STAT. § 805.15. After discovering that the Hefty lot is titled in the name of a revocable trust in which Arnold was the beneficiary and Steven was the trustee, SWS filed a motion for a new trial under § 805.15(3) based on newly discovered evidence. The court denied all of SWS's motions.

¶10 Additional facts relevant to the issues raised on appeal are discussed as necessary below.

DISCUSSION

Appeal of SWS

¶11 On appeal, SWS argues that the trial court improperly denied its postverdict motions. We begin by addressing SWS's motion for judgment notwithstanding the verdict, then its motion to change the jury's answer, and finally its motion for a new trial. The first two motions focus on theories of agency, and the third on the potential use of evidence of a revocable trust at a new trial.

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

A. Motion for Judgment Notwithstanding the Verdict: Agency

¶12 SWS argues that the trial court erred in denying SWS's motion for judgment notwithstanding the verdict. SWS asserts that, as a matter of law, the jury's finding of prescriptive easement cannot stand because Steven acted as an agent of Arnold's on the property and therefore cannot claim a prescriptive easement adversely against his principal. We affirm because the evidence presented at trial fails to establish an agency relationship between Steven and Arnold during the time period establishing the prescriptive easement.

¶13 A motion for judgment notwithstanding the verdict "does not challenge the sufficiency of the evidence to support the verdict, but rather whether the facts found are sufficient to permit recovery as a matter of law." ***Logterman v. Dawson***, 190 Wis. 2d 90, 101, 526 N.W.2d 768 (Ct. App. 1994). "'A motion notwithstanding the verdict amounts to a post-verdict motion for a directed verdict .... It admits the facts found but contends that as a matter of law those facts are insufficient, though admitted, to constitute a cause of action.'" ***Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Boeck***, 127 Wis. 2d 127, 137-38, 377 N.W.2d 605 (1985) (citations omitted). A case may be taken from the jury and decided as a matter of law: "'only when the evidence gives rise to no dispute as to the material issues or only when the evidence is so clear and convincing as reasonably to permit unbiased and impartial minds to come to but one conclusion.'" ***Pamperin v. Milwaukee Mut. Ins. Co.***, 55 Wis. 2d 27, 33, 197 N.W.2d 783 (1972) (citations omitted).

¶14 We review de novo the trial court's decision on a motion for judgment notwithstanding the verdict because it presents a question of law,

although we benefit from the trial court's analysis. ***Danner v. Auto-Owners Ins.***, 2001 WI 90, ¶41, 245 Wis. 2d 49, 629 N.W.2d 159.

¶15 Turning from our standard of review to the substantive law, a party asserting the existence of an agency relationship has the burden of proving the existence and nature of the agency. ***Felland v. Sauey***, 2001 WI App 257, ¶29, 248 Wis. 2d 963, 979, 637 N.W.2d 403. To prove an agency relationship, the proponent must show that the relationship is based on an agreement between the parties that embodies three factual elements: (1) "conduct of the principal showing that the agent is to act for him or her"; (2) "conduct of the agent showing that he or she accepts the undertaking"; and (3) "understanding of the parties that the principal is to control the undertaking." WIS JI—CIVIL 4000.

¶16 SWS asserts that Steven's testimony establishes that Steven was an agent for his father during the period of alleged prescriptive use. SWS relies on the general principle that a possessor who has entered as an agent of the property owner cannot claim adversely against the owner during the agency relationship, and argues that therefore Steven cannot claim adverse use against his father's property. *See* ***Peabody v. Leach***, 18 Wis. 688 [*657], 698 [*667] (1864); *see also* 2 C.J.S. *Adverse Possession* § 122 (2010).

¶17 A prescriptive easement is established by adverse use of the property that is uninterrupted for a continuous twenty years. WIS. STAT. § 893.28(1); ***Mushel v. Town of Molitor***, 123 Wis. 2d 136, 144, 365 N.W.2d 622 (Ct. App. 1985). Therefore, the alleged agency relationship will defeat the jury's finding of prescriptive easement only if the relationship occurs during the twenty-year period of adverse use necessary to establish the easement. Here, the Heftys testified to using Old Farm Road adversely to the interest of the owner of land now owned by

SWS from 1975 to 2005. Consequently, if Steven acted as his father's agent only until 1983, the alleged agency would not interfere with the period needed to create the prescriptive easement because adverse use would be continuous for twenty-one years (1984 to 2005). However, if the alleged agency continued until 1993, the agency relationship could potentially defeat Steven's claim for a prescriptive easement, because the adverse use after the alleged agency relationship would be for only eleven years (1994 to 2005).

¶18 At trial, Steven testified to the following regarding his work for his father and mother's rental business. Steven first worked for the rental business for six months during 1973. During that time, Steven learned the bookkeeping system, checked the rents, paid the property taxes, and "basically learned how they were doing their business." In 1976, Steven came back to work for both of his parents until 1978. After his parents' divorce, Steven worked for his father from 1978 to 1983. Steven's job duties from 1978 to 1983 were to:

> do the typing and writing and answering of the calls, negotiate the leases, collecting the rents and depositing them into my dad's account, meeting with the assessor trying to get the assessment reduced when the assessor raised the assessment, meet with the plumber to put in the new septic tanks, meeting with Sauk County Planning and Zoning to get the permits to where we could put in the septic tanks, helping my dad file his federal and Wisconsin income tax returns, all the jobs that are involved in the rental business.

Steven testified that his father made all of the decisions regarding the property, including how much to charge for rent and the types of improvements to make on the property. After ending full-time employment with his father, Steven continued to work for his father until 1993. From 1983 to 1993, Steven testified that he worked "[v]ery sporadically, not full-time, not even part-time. [My father] wanted

me to help renovate this farmhouse here, so I tried to do that." Steven did not testify to any other details regarding his work from 1983 to 1993.

¶19 Our review of the evidence reveals that the evidence was not so clear and convincing as to have permitted impartial minds to have come to only one conclusion on this issue: that Steven was an agent for his father during the relevant period of time sufficient to defeat the prescriptive easement.

¶20 The evidence presented at trial does not clearly establish how long the alleged agency relationship lasted. Even if the work responsibilities that Steven testified to qualified him to be an agent of his father from 1978 to 1983, there is insufficient evidence to establish whether such an agency relationship terminated in 1983, establishing twenty-one years of adverse use, or whether such agency relationship continued until 1993, establishing only eleven years of adverse use and defeating the prescriptive easement. The only record fact regarding Steven's work duties for his father from 1983 to 1993 was that he worked "[v]ery sporadically" and that he helped his father renovate a farmhouse. This does not establish as a matter of law that he was his father's agent after 1983.

¶21 SWS argues that, even if the agency relationship ended in 1983, the period of the alleged prescriptive use would be shorter than the minimum required twenty years, because adverse use ended in 2003, not 2005. SWS alleges that the adverse use ended in 2003 because that is when the approximately three-and-one-half-foot-wide electrical box was installed in the middle of Old Farm Road. SWS asserts that "Steven admitted during trial that the utility boxes prevent and 'impede' people from using the farm road." Contrary to SWS's assertion, Steven did not admit that the electrical boxes *prevent* people from using the road. Steven testified that the electrical boxes "impede" and "discourage" the use of the road,

but said that the road can still be passed "with difficulty." SWS does not reference any other record evidence to support its assertion that the electrical boxes ended adverse use of Old Farm Road. Moreover, the Heftys testified that they used Old Farm Road until 2005. Therefore, we conclude that there is not clear and convincing evidence to prove that the time period establishing the prescriptive easement over Old Farm Road ended in 2003 when the electrical box was installed instead of 2005 as the Heftys testified.

¶22 In sum, SWS has failed to prove that an agency relationship occurred during the time period required to establish the prescriptive easement. The evidence showed that the Heftys used the Old Farm Road continuously from 1975 to 2005. At most, the evidence presented at trial may be sufficient to show that Steven had a relevant agency relationship that existed from 1978 to 1983. Therefore, the twenty-one year period of use from 1984 to 2005 is sufficient time to establish the necessary twenty years of use to establish prescriptive rights.

¶23 Because there is not clear and convincing evidence to establish an agency relationship between Steven and Arnold during the time period establishing the prescriptive easement, we conclude that the trial court properly denied SWS' motion for judgment notwithstanding the verdict.

B. Motion to Change Jury's Answer: Agency

¶24 SWS challenges the sufficiency of the evidence to support the jury's "yes" answer to the following question on the special verdict: "Has Steven F. Weynand established a prescriptive easement, in favor of Weynand Lot 1, over SWS L[imited] C[ommon] E[lement areas] 2, 3, and 4?" SWS argues that the undisputed evidence at trial established that Steven was an agent of Arnold, and therefore there is not sufficient evidence to find a prescriptive easement. We

conclude that, in context of the jury instructions as given, there was sufficient evidence to find the prescriptive easement.

¶25 A motion to change the jury's answer to a special verdict challenges the sufficiency of the evidence to support the verdict and must be considered in context with instructions given to the jury. ***Kovalic v. DEC Intern., Inc.***, 161 Wis. 2d 863, 873 n.7, 469 N.W.2d 224 (Ct. App. 1991). Our review of a jury's verdict is narrow; we will sustain a verdict if there is any credible evidence to support it. ***Kuklinski v. Rodriguez***, 203 Wis. 2d 324, 331, 552 N.W.2d 869 (Ct. App. 1996); WIS. STAT. § 805.14(1). Here, our scope of review is further limited because the trial court upheld the verdict after denying postverdict motions. ***Weber v. White***, 2004 WI 63, ¶17, 272 Wis. 2d 121, 681 N.W.2d 137 (when a verdict survives post-trial motions, it should not to be upset unless "'there is such a complete failure of proof that the verdict must be based on speculation.'" (citation omitted)).

¶26 The jury was instructed that Steven must prove three elements to establish a prescriptive easement: hostile use; visible, open, and notorious use; and continuous and open use for at least twenty years. The jury was also instructed that "[a] tenant's use of claimed property in relation to his tenancy is considered use by the landlord." The court did not give the jury an instruction on agency.[2]

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[2] In its brief in chief, SWS suggests that the trial court erroneously denied its request for a jury instruction on agency. However, SWS fails to develop an argument citing a standard of review and applying it to the facts of this case. We therefore decline to address this issue. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633.

¶27 After reviewing the record, we conclude that there was not "such a complete failure of proof that the verdict must be based on speculation" that the use of Old Farm Road was hostile, visible, open, and notorious, and was continuous and open for at least twenty years. Instead, there was credible evidence to support these findings.

¶28 That proof included the following. The frequency of the Heftys' use of Old Farm Road between 1975 and 2005 when they rented one of Steven's lots was constant throughout the thirty years: they used the road nearly every weekend that they were there, usually from April to September. Mr. Hefty did not remember a time during the thirty years that he did not use the road. The Heftys did not ask Arnold or Steven for permission to use the road, nor did they try to hide their use of the road. The Heftys used the road to put in and take out boats and personal watercraft and to haul gas to the boats. The renters of Steven's other three lots also used Old Farm Road for similar purposes.

¶29 Further, as discussed above at ¶¶19-22, there is not clear and convincing evidence to establish that an agency relationship existed between Arnold and Steven during the time period necessary to create the prescriptive easement. Because the evidence did not clearly demonstrate an agency relationship, we are not persuaded by SWS's argument that the evidence presented was insufficient to support the jury's verdict. The jury's verdict is supported by credible evidence in the record and not based on "speculation." Therefore, we do not disturb the jury's answer.

C. Motion for a New Trial: Revocable Trust

¶30 After trial, SWS discovered that the Hefty lot is titled in the name of a revocable trust in which Arnold was the beneficiary and Steven the trustee.

SWS asserts that the trial court erred in denying its motion for a new trial based on this newly discovered evidence because a trustee cannot gain a prescriptive easement over land owned by the trust's beneficiary. As discussed below, we affirm. We conclude that the trial court properly exercised its discretion in concluding that SWS was not diligent because it failed to conduct a title search that would have revealed this information in advance of trial.

¶31 Before granting a motion for a new trial on the ground of newly discovered evidence, the trial court must find that: (1) "the evidence has come to the moving party's notice after trial"; (2) "the moving party's failure to discover the evidence earlier did not arise from lack of diligence in seeking to discover it"; (3) "the evidence is material and not cumulative; and" (4) "the new evidence would probably change the result." WIS. STAT. § 805.15(3).

¶32 Whether to grant a motion for a new trial based on newly discovered evidence is within the trial court's discretion. ***Naden v. Johnson***, 61 Wis. 2d 375, 385, 212 N.W.2d 585 (1973). "'A proper exercise of discretion requires that the trial court rely on facts of record, the applicable law, and, using a demonstrable rational process, reach a reasonable decision.'" ***City of Milwaukee v. Washington***, 2007 WI 104, ¶26, 304 Wis. 2d 98, 735 N.W.2d 111 (citation omitted). If the movant fails to fulfill any of the elements required for a new trial based on newly discovered evidence, the court does not erroneously exercise its discretion in denying the motion. ***Naden***, 61 Wis. 2d at 385.

¶33 The trial court denied SWS's motion on two grounds: that SWS was not sufficiently diligent in discovering the evidence, and that the evidence probably would not have changed the result. Because we conclude that the court properly exercised its discretion when it denied the motion based on SWS's lack

of diligence, we do not reach the question whether introduction of the new evidence at trial would probably have changed the result.

¶34 SWS acknowledges that it did not take the basic step of conducting a title search of the property to verify the ownership. The trial court relied upon that fact to apply the principle set forth in ***Bear v. Kenosha County***, 22 Wis. 2d 92, 125 N.W.2d 375 (1963), that the discovery after trial of a record is generally not a ground for a new trial unless a diligent search in the proper office before trial would have failed to disclose it. *See* ***Bear***, 22 Wis. 2d at 99 (affirming denial of motion for new trial based on discovery after trial of municipal ordinance). The trial court in this case reached the reasonable conclusion that SWS's failure to conduct any title search, "let alone a diligent title search … based on records in the Register of Deeds office," of "easily searchable, readily available land records" in order to verify ownership information in a dispute involving property did not constitute due diligence on the part of SWS.

¶35 SWS briefly also suggests that under the same revocable trust theory this court should grant a new trial in the interest of justice. However, for the same reasons given above we cannot conclude that the court in failing to grant a new trial on these grounds erroneously exercised its discretion resulting in "a probable miscarriage of justice." *See* ***Lambrecht v. State Highway Comm'n***, 34 Wis. 2d 218, 225, 148 N.W.2d 732 (1967) (erroneous exercise of discretion standard); ***Besnah v. City of Fond du Lac***, 35 Wis. 2d 755, 763, 151 N.W.2d 725 (1967) ("probable miscarriage of justice" standard).

Cross-Appeal of Steven

¶36 On cross-appeal, Steven challenges the trial court's decisions regarding the scope of the prescriptive easement, namely the seasonal limitations

on the easement and granting SWS the option of either removing the electrical box or consenting to easement rights around the box so that the proposed easement would be redrawn to curve around the box. We address each issue in turn.

A. Seasonal Limitations

¶37 Steven contends that the trial court erred when it limited use of the prescriptive easement by season of the year because the court failed to make an adequate finding that winter use would be unreasonable. We therefore address whether the pattern of seasonal use of the road, from April 15 to November 15 each year, justifies the trial court's corresponding limitation on the prescriptive easement to these dates. Because the record supports the trial court's determination that winter use would unreasonably burden SWS's property, we conclude that the trial court properly imposed the time-based restriction.

¶38 A trial court may impose time-based seasonal limitations on prescriptive easements if the court finds that a variation in use would unreasonably burden a servient estate due to use that is inconsistent with the use that gave rise to the easement. ***Widell v. Tollefson***, 158 Wis. 2d 674, 686-88, 462 N.W.2d 910 (Ct. App. 1990).

¶39 The question of whether a use unreasonably burdens the servient estate is a mixed question of law and fact. *See* ***Figliuzzi v. Carcajou Shooting Club of Lake Koshkonong***, 184 Wis. 2d 572, 588, 516 N.W.2d 410 (1994). The trial court must make a factual determination as to the general pattern of use that gave rise to the easement and a legal determination of whether the variation creates an unreasonable burden on the servient estate. ***Id.*** at 589.

¶40 We will uphold the trial court's factual findings underlying its legal conclusion unless they are clearly erroneous. ***Id.*** If there is credible evidence to support the trial court's findings, it is not clearly erroneous. ***Holt v. Ellsworth Farmers Union Co-op.***, 118 Wis. 2d 335, 337-38, 347 N.W.2d 612 (Ct. App. 1984). Because a trial court's conclusion on reasonableness is a question of law intertwined with the factual findings supporting that conclusion, we give weight to a trial court's finding of reasonableness. ***Figliuzzi***, 184 Wis. 2d at 590.

¶41 We first review the court's factual finding regarding the general pattern of use that gave rise to the easement. The trial court found that Steven's tenants established a pattern of use for the Old Farm Road from April 15th to October 15th for ingress and egress "to facilitate the launching of watercraft from [the Hefty lot] and to remove watercraft, to fuel and repair watercraft, and to do servicing of the septic system."

¶42 This finding is supported by credible evidence in the record. Steven testified that his tenants used the property during their leases, April 15 to November 15, and they were not there in the winter. The Heftys testified that they used the road nearly every weekend from April to October to put boats and personal watercraft into the water and to haul gas to the boats. The record indicates that the renters of Steven's other three lots also used Old Farm Road for similar purposes. Mr. Hefty also testified that trucks used the road to service the septic system. There was no testimony that Steven's tenants maintained the road during the winter months for its use.

¶43 Steven argues that the court's finding that there was no pattern of winter use is erroneous in light of the testimony of the Heftys that they would take their children ice skating at the property during the winter. The testimony does

not indicate how often they went skating. We will not disturb the court's finding based on this general testimony that the Heftys "used to take the kids up ice skating" during the winter because there is credible evidence to support the court's finding. Accordingly, we affirm this aspect of the court's judgment imposing the time limitation.

¶44 Next, we examine the court's legal determination of whether the variation creates an unreasonable burden on the servient estate. We sustain the trial court's legal conclusion that the use of Old Farm Road during the winter would unreasonably burden SWS's property, the servient estate, because it would be inconsistent with the general pattern of use that created the easement. The trial court concluded that the winter use would put an unreasonable burden on SWS's property because winter snowfall necessarily requires winter road maintenance, such as snow plowing, salting, and sanding. The court found that these activities related to snow were never part of the use that established the easement and would be a new and different use that would unreasonably burden SWS's property, in part because plowing would create snow banks that obstruct use of the road and/or view toward the cove.

¶45 Steven does not challenge the court's findings that winter *maintenance* of the easement, namely the use of plowing, sand, and salt, puts an unreasonable burden on SWS's property. Rather, Steven argues that the trial court's seasonal limitation is improper because the court did not find that the actual *use* of the easement by Steven and his tenants during the winter, such as by simply traveling over the road, would burden SWS's property. Steven argues that in the event that there is little snow, the servient estate would not be burdened by mere use. We conclude, however, that the trial court reasonably determined that the maintenance and the use cannot be separated in this way, and that actual use

during the winter would unreasonably burden SWS's property because of the fact that any such use would necessarily be accompanied by at least intermittent plowing, salting, and sanding.

¶46 In conclusion, we affirm the seasonal limitation on the prescriptive easement because the trial court's finding that the general pattern of use that created the easement was seasonal is not clearly erroneous and the court reasonably concluded that winter use would unreasonably burden the servient estate.

B. Electrical Box

¶47 Finally, Steven argues that the trial court erred in providing SWS the option of either moving the electrical box or consenting to easement rights around the box so that the proposed location of the easement would be redrawn to curve around the box. We conclude that the court properly exercised its discretion because it applied the correct law and the record shows that there is a reasonable factual basis for its decision. Accordingly, we affirm.

¶48 Steven first argues that the trial court's decision to allow SWS to redraw the proposed location of the easement is prohibited under ***AKG Real Estate, LLC v. Kosterman***, 2006 WI 106, 296 Wis. 2d 1, 717 N.W.2d 835. We disagree because that case involved an express private easement, not as here a prescriptive easement defined by the court based on relevant testimony.

¶49 In ***AKG Real Estate***, a developer purchased real estate subject to an express private easement in the deed. ***Id.***, ¶¶4-8. The developer wanted to improve lots over the existing express right-of-way easement and create a substitute for the easement by building an alternative road at a different location

from the existing express easement. ***Id.***, ¶10. The developer argued that a servient estate could unilaterally terminate an express right-of-way easement once the servient estate provided an alternative route of ingress and egress to the dominant estate. ***Id.***, ¶17. Our supreme court disagreed, holding that "the owner of a servient estate cannot unilaterally relocate or terminate an express easement." ***Id.***, ¶1.

¶50 In contrast, in this case the trial court did not terminate or modify an existing express easement recorded in a deed. Instead, the trial court defined the specific scope of a prescriptive easement within the bounds of the testimony. A prescriptive easement, unlike the express easement in ***AKG Real Estate***, is not defined by a deed.

¶51 When the specific location of an easement is not defined, "the court has the inherent power to affirmatively and specifically determine its location, after considering the rights and interests of both parties." ***Spencer v. Kosir***, 2007 WI App 135, ¶13, 301 Wis. 2d 521, 733 N.W.2d 921. "We review equitable remedies for erroneous exercise of discretion." ***Id.*** Therefore, we will uphold the court's exercise of discretion defining an easement's location "if it applies the appropriate law and the record shows there is a reasonable factual basis for its decision." ***Id.***

¶52 The scope of a prescriptive easement is determined by the scope of the use giving rise to the easement. ***Red Star Yeast & Prod. Co. v. Merchandising Corp.***, 4 Wis. 2d 327, 339, 90 N.W.2d 777 (1958). "However, because no use can ever be exactly duplicated, the use giving rise to a prescriptive easement determines only the general outlines of the easement, rather than the minute details of the interest." ***Widell***, 158 Wis. 2d at 686. Therefore, in

determining the scope of a prescriptive easement, the trial court may consider the past and current use of the property in determining the placement and scope of a prescriptive easement. ***Id.*** at 686-87 (easement rights confined to a reasonable use of the way in which person had acquired rights by prescription, "'in view of all the circumstances of the case and the use then and theretofore made of the premises affected by it.'" (citation omitted)).

¶53 The trial court properly considered the record facts regarding a pattern of use giving rise to the easement and the present condition of the property when determining the scope of the prescriptive easement. The court considered the past pattern of use, which the jury determined was generally along Old Farm Road. The court also considered the present condition of the property. This included the approximately three-and-one-half-foot-wide electrical box installed in 2003 that obstructs the use of the prescriptive easement in the proposed location.

¶54 Based on these record facts, the court reasonably determined that the scope of the prescriptive easement could be defined as either the proposed location of the easement (requiring SWS to move the box) or an easement that curved around the box (requiring SWS to grant an easement west of the box). In support of the finding for the scope that included the later option, the court determined that redrawing the proposed easement would "accomplish what the Court has already ordered, that is, a fourteen foot wide easement" and the redrawing "does not exceed the bounds of the testimony concerning this prescriptive easement, or if it does it is nominal."

¶55 Steven argues that the court's decision to give SWS the option of redrawing the proposed easement around the box is unreasonable because it is not consistent with the testimony. Steven asserts the trial testimony clearly

established the location of the easement as running exactly where the box stands, and therefore SWS must relocate it to a place that does not interfere with the use of Steven's easement.

¶56 However, Steven does not point to testimony that defines the easement through past use so narrowly. Moreover, even if Steven were able to identify from the testimony such a precise past pattern of use, the court may consider the present condition of the property when defining the scope of the easement and the court properly did so here.

¶57 In sum, we conclude that the court properly exercised its discretion and correctly applied the law to the facts in fashioning a resolution consisting of two reasonable options.

CONCLUSION

¶58 We conclude that the trial court properly denied SWS's motions for postverdict relief and properly defined the scope of the prescriptive easement. Accordingly, we affirm the circuit court's denial of SWS's motions for judgment notwithstanding the verdict, to change the jury's answer, and for a new trial challenged on appeal. We also affirm the seasonal limitation on Steven's prescriptive easement and the court's decisions regarding the electrical box challenged on cross-appeal.

By the Court.—Judgment and orders affirmed.

Not recommended for publication in the official reports.