

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 2, 2004

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. 03-0999

Cir. Ct. No. 01CV000918

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**WISCONSIN PUBLIC SERVICE CORPORATION, A
WISCONSIN PUBLIC UTILITY CORPORATION,**

PLAINTIFF-RESPONDENT,

v.

TERRY L. BOHM AND SUSAN BOHM, HUSBAND AND WIFE,

**DEFENDANTS-THIRD-
PARTY PLAINTIFFS-APPELLANTS,**

v.

**SCOTT DURAND AND JUDITH DURAND, HUSBAND AND
WIFE,**

**THIRD-PARTY DEFENDANTS-
RESPONDENTS.**

APPEAL from a judgment of the circuit court for Marathon County:

DOROTHY L. BAIN, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Terry and Susan Bohm appeal a summary judgment concluding that Wisconsin Public Service Corporation has a prescriptive easement across their property to provide electrical service to Scott and Judith Durand. The judgment also enjoined the Bohms from interfering with the utility easement, dismissed their trespass counterclaim against WPSC and dismissed and found frivolous their third-party action against the Durands for trespass. The Bohms argue that a prescriptive easement should not result from intentional trespass and that a finding of frivolousness should not result merely from the failure to prove their case. We reject these arguments and affirm the judgment.

¶2 The Bohms and Durands own adjacent property. In 1988, at the Durands' request, WPSC provided electrical service to a shed on the Durands' property. At that time, WPSC's vehicles and personnel traversed the Bohms' property. Terry Bohm asked the constable to bring criminal trespass charges, but no action was taken. The Bohms did not act on the alleged trespass until December 2001, when they allegedly cut the line, leading to WPSC's action for an injunction.

¶3 We review summary judgments independently, applying the same standards as the trial court. See *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 314-15, 401 N.W.2d 816 (1987). Summary judgment is appropriate where there is no issue of material fact and the moving party is entitled to judgment as a matter of law. See *Cody v. Dane County*, 2001 WI App 60, ¶11, 242 Wis. 2d 173, 625 N.W.2d 630. We view the facts in the light most favorable to the non-moving party. *Id.* at ¶2.

¶4 The trial court correctly concluded that WPSC was entitled to a prescriptive easement under WIS. STAT. § 893.28(2).¹ Ten years' continuous use of real estate by a utility creates a prescriptive right to continue that use. *Id.* There is no issue of material fact. The Bohms do not dispute that WPSC has used their property for thirteen years. The Bohms' argument that a trespasser should not be allowed to gain prescriptive rights has no basis in law. Non-permissive use is an element of common law prescriptive easement. See *Ludke v. Egan*, 87 Wis. 2d 221, 230, 274 N.W.2d 641 (1979). Intentional trespass can ripen into a prescriptive right to continue the trespass. See *Jacque v. Steenberg Homes*, 209 Wis. 2d 605, 619, 563 N.W.2d 154 (1997). As the trial court noted, § 893.28 would be "absolutely ineffective" if the Bohms' argument were adopted.

¶5 The Bohms also argue that WPSC's appropriation of their land constitutes a taking. That argument is raised for the first time on appeal and was not properly preserved. See *Gruber v. North Fond du Lac*, 2003 WI App 217 ¶¶27, 267 Wis. 2d 368, 384, 671 N.W.2d 692. In addition, WIS. STAT. § 32.10 sets out the procedure for a property owner who alleges that his property is occupied by an entity possessing the power of condemnation. The statute of limitations for commencing such an action is six years after the claim accrues. See WIS. STAT. § 893.93(1)(a). Any action against the WPSC for taking the Bohms' property is barred by the statute of limitations.

¶6 We also affirm the trial court's conclusion that the third-party trespass action against the Durands was frivolous. The Bohms admitted that

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

decisions regarding the manner of providing service and the location and placement of wires, poles and other facilities were made by WPSC, not the Durands. The Bohms provided no evidence that the Durands ever entered their property or asked WPSC to do so. The only affidavit submitted in opposition to the motion for summary judgment does not even mention the Durands except to say that there is no dedicated road between their properties. The trial court correctly concluded that the Bohms should have known that their third party action was without any reasonable basis in fact, law or equity and could not be supported by a good-faith argument for an extension, modification or reversal of existing law. Therefore, it is frivolous. *See* WIS. STAT. § 814.025(3)(b).

¶7 The Bohms' appeal is frivolous for the same reason. Their brief identifies no act of trespass by the Durands, and no basis for challenging the trial court's ruling on their alleged trespass. In addition, the appeal is *per se* frivolous because we affirm the trial court's finding of frivolousness. *See Riley v. Isaacson*, 156 Wis. 2d 249, 262, 456 N.W.2d 619 (Ct. App. 1990). The Durands' motion for frivolousness costs on appeal requests \$5,086.33 attorney fees and they argue the issue in their brief. The Bohms did not respond to the motion and did not file a reply brief. Therefore, we accept the calculation of the attorney fee for this appeal. Upon remittitur, we direct the clerk of the trial court to enter an additional judgment pursuant to WIS. STAT. § 806.16 in favor of Scott and Judith Durand and against Terry and Susan Bohm and Attorney Ryan Lister jointly for \$5,086.33.

By the Court.— Judgment affirmed.

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

