

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 14, 2011

A. John Voelker
Acting 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. 2011AP423-FT

Cir. Ct. No. 2007CV568

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

ESTATE OF RICK WILLIAM ZORMAN,

PLAINTIFF-RESPONDENT,

V.

LHM REAL ESTATE, LLC,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Wood County:
GREGORY J. POTTER, Judge. *Reversed and cause remanded.*

Before Lundsten, Higginbotham and Sherman, JJ.

¶1 PER CURIAM. LHM Real Estate, LLC, appeals an order granting summary judgment to Rick Zorman¹ as to Zorman's claim for a prescriptive easement on LHM's property. LHM argues that there are disputed issues of material fact, necessitating trial. We agree, and reverse.

Background

¶2 Zorman brought this action against LHM for preventing him from crossing LHM's driveway to reach his property. LHM answered the complaint, denying that it had any obligation to allow Zorman use of its driveway.

¶3 Zorman moved for summary judgment recognizing an easement by deed or granting an easement by necessity to allow Zorman ingress and egress over LHM's driveway. Zorman submitted a supporting affidavit and LHM submitted an opposing affidavit. Zorman then submitted an amended motion for summary judgment, asserting an easement by prescription.

¶4 After a hearing, the circuit court granted summary judgment to Zorman on his claim for a prescriptive easement. LHM appeals.

Discussion

¶5 The issue in this case is whether Zorman is entitled to summary judgment on his claim for a prescriptive easement on LHM's property. LHM contends that Zorman is not entitled to summary judgment because there are

¹ After the circuit court granted summary judgment, Rick Zorman passed away. The Estate of Rick Zorman and Connie Zorman have been substituted as plaintiffs. The Estate of Rick Zorman is the only named respondent on appeal. For ease of reading, we refer to the respondent as "Zorman."

disputed issues of material fact as to whether the criteria for a prescriptive easement have been met. Specifically, LHM asserts that the summary judgment materials reveal a disputed issue of whether Zorman's use of LHM's property was permissive rather than adverse.² We agree.

¶6 We review summary judgments de novo, applying the same methodology as the circuit court. *Toyota Motor Credit Corp. v. North Shore Collision, LLC*, 2011 WI App 38, ¶8, 332 Wis.2d 201, 796 N.W.2d 832. Summary judgment is properly granted only “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” WIS. STAT. § 802.08(2).

¶7 Ordinarily,

[w]e first examine the complaint to determine whether it states a claim and then review the answer to determine whether it joins a material issue of fact or law. If we conclude that the complaint and answer are sufficient to join issue, we examine the moving party's affidavits to determine whether they establish a prima facie case for summary judgment. If they do, we look to the opposing party's affidavits to determine whether there are any

² LHM also contends that Zorman is not entitled to summary judgment on his claim for a prescriptive easement because he did not satisfy the requirement of recording an interest within thirty years of acquisition under WIS. STAT. § 893.33(2) (barring claim to an interest in land based on event more than thirty years prior to action absent recording of interest in register of deeds). We note that the relief LHM seeks on appeal is reversal and remand for trial; that is, LHM does not contend that it is entitled to summary judgment on this ground. Because we conclude that there are disputed issues of material fact as to the elements for a prescriptive easement, and thus reverse and remand for trial, we do not reach LHM's other argument.

LHM also argues that Zorman's use of the property was not visible and open because there was no physical alteration of the property indicating Zorman's use, and thus LHM and its predecessors may not have ever noticed that use. LHM does not point to any record material supporting this claim.

material facts in dispute that entitle the opposing party to a trial.

Servais v. Kraft Foods, Inc., 2001 WI App 165, ¶5, 246 Wis. 2d 920, 631 N.W.2d 629 (citations omitted). Here, however, LHM does not challenge the sufficiency of Zorman’s complaint. Thus, we begin by examining whether LHM’s answer joins a material issue of fact or law raised in the complaint.

¶8 Zorman’s complaint alleges the following: Zorman owns property located at 908 South Central Avenue, Marshfield, Wisconsin. Zorman’s deed to his property includes a “driveway easement” that encompasses use of a sixteen-foot alley to reach public streets. However,

since the construction of [a] building in 1941 or 1942, the north end of the alley has been blocked for usage as an alley as platted and laid out, and ... the previous owners of the property now owned by [Zorman] used a portion of alley for ingress and egress and then crossed a parking lot for access onto West Ninth Street in the City of Marshfield.

¶9 LHM owns the property including the parking lot used by Zorman to access West Ninth Street. In Spring 2007, LHM paved its parking lot and marked off vehicle parking spots, blocking Zorman’s use of his driveway. LHM also notified Zorman that it was revoking its permission for Zorman to use the parking lot for parking or ingress and egress. The complaint asserts

[t]hat the previous use of the alley over the past 60 years by the previous and present owners of the property at 908 South Central Avenue, and the use of the parking lot for access [on to] West Ninth Street, is a practical necessity and failure by [LHM] to allow its usage is unjust and [LHM] should be enjoined and estopped from such actions.

¶10 LHM answered the complaint. It alleged, among other things, that any use of its parking lot was with permission, thereby joining a material fact at issue. The pleadings established that there was a dispute regarding whether

Zorman's use of LHM's driveway was permissive and, accordingly, not adverse. *See Ludke v. Egan*, 87 Wis. 2d 221, 230, 274 N.W.2d 641 (1979) (permissive use cannot form the basis for prescriptive easement).

¶11 We turn, then, to the next step in our summary judgment methodology, which is to determine whether Zorman's affidavit establishes a prima facie case for summary judgment.

¶12 Zorman's affidavit asserts that: (1) Zorman and his predecessors in title had used LHM's driveway for ingress and egress; (2) it is physically impossible for Zorman to use his driveway without crossing over the new designated parking spots in LHM's parking lot; (3) since 1941, the deeds transferring the property now owned by Zorman have contained an access easement; (4) when Zorman purchased the property, the easement was used for garage access;³ and (5) in 2006, LHM first notified Zorman that Zorman's access to the parking lot would be discontinued.

¶13 We conclude that Zorman's affidavit does not establish a prima facie case for summary judgment. Zorman's affidavit does not set forth any facts to establish that his and his predecessor's use of the driveway was adverse—that is, without permission—and thus does not establish a prima facie case for summary judgment on his claim for a prescriptive easement.

¶14 Accordingly, we reverse and remand for further proceedings.

³ In its answer, LHM asserted that the 1941 deed created a permissive right of way for ingress and egress, varying with future development at the election of the grantor, rather than an easement. In any event, on appeal, the parties agree that the path for ingress and egress set forth in the 1941 deed has not been followed, and that Zorman and his predecessors have used an alternate route over LHM's property for ingress and egress.

By the Court.—Order reversed and cause remanded.

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

