COURT OF APPEALS
DECISION
DATED AND RELEASED

October 24, 1995

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-3034

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

THE FALK CORPORATION,
a Delaware corporation,

Plaintiff-Respondent,

v.

BASIL RYAN, d/b/a
VEHICLE TOWING COMPANY,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL J. SKWIERAWSKI, Judge. *Affirmed and cause remanded with directions*.

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

PER CURIAM. Basil Ryan, d/b/a Vehicle Towing Company, appeals from a judgment declaring rights in an easement across his property. The easement provided ingress and egress to property owned by the Falk Corporation. Ryan contends that the trial court expanded Falk's limited

easement rights by allowing Falk to block the easement. He also challenges the trial court's prohibition on the installation of any gates or additional fencing along the roadway and the trial court's order that maintenance costs, except for snow removal, be shared equally. Additionally, Ryan contends that the trial court erroneously limited his use of the easement. Finally, Ryan contends that Falk is not a prevailing party entitled to costs in the action. We reject Ryan's claims and affirm the judgment. For reasons explained in the opinion, however, we remand the case to the trial court for entry of a *nunc pro tunc* order correcting the judgment.

NATURE OF EASEMENT FOR INGRESS AND EGRESS

A non-exclusive easement for ingress and egress creates a permanent right to use the land of another to obtain access to the benefitted land; i.e., a right of passage over another's land. *See* ***Hunter v. McDonald***, 78 Wis.2d 338, 344, 254 N.W.2d 282, 285 (1977). The land subject to the easement is the servient 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, 634, 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, 254 N.W.2d at 285. The possessor of the servient estate may not interfere with, and is obligated to protect, this right. ***Id.*** The possessor, however, retains the right to make any use of the burdened property, including changing its use, provided that the use does not interfere with the easement. ***Wisconsin Telephone Co. v. Reynolds***, 2 Wis.2d 649, 652, 87 N.W.2d 285, 287 (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, 637 (1950). The easement holder's rights are not unlimited, however. The use of the easement is strictly confined to the purpose for which it was created, and the easement holder may not materially increase the burden on the servient estate or impose a new or additional burden. *See* ***Widell v. Tollefson***, 158 Wis.2d 674, 687, 462 N.W.2d 910, 914 (Ct. App. 1990).

An easement for ingress and egress is intended for passage. ***Crew's Die Casting Corp. v. Davidow***, 120 N.W.2d 238, 241 (Mich. 1963). If not specifically restricted, ingress and egress includes the reasonable opportunity to stop vehicles to load or unload passengers or personal property. ***Tehan v. Security Nat'l Bank,*** 163 N.E.2d 646, 653 (Mass. 1959); ***Keeler v. Haky***, 325 P.2d 648, 650 (Cal. Ct. App. 1958). Unless the easement is exclusive, the easement owner may not unreasonably block the passageway and interrupt the movement of traffic. ***Sampson v. Grooms***, 748 P.2d 960, 963-64 (1988).

The question of whether the owner of the easement or the possessor of the servient estate is unreasonably interfering with the other's right involves determinations of both fact and law. ***Figliuzzi v. Carcajou Shooting Club***, 184 Wis.2d 572, 588, 516 N.W.2d 410, 417 (1994). When reviewing the trial court's findings of fact, this court will not set them aside unless they are clearly erroneous. ***Id.*** at 589, 516 N.W.2d at 417. The conclusion of whether the facts constitute an unreasonable interference is a legal determination, which this court reviews *de novo* while giving weight to the trial court's conclusion. ***Id.*** at 590, 516 N.W.2d at 417 (appellate court gives weight to trial court's conclusion on reasonableness when conclusion is intertwined with factual findings).

FACTS

Falk owns land that abuts Ryan's land on the north. In 1966 when Falk acquired its land, it also obtained a "non-exclusive right of way to be used as a private roadway, for ingress and egress" to its property. The private roadway is thirty feet wide and runs across the northern edge of Ryan's land. The east end of the roadway apparently intersects another private road. The west end intersects North Twelfth Street. The Valley Business Center is located between North Twelfth Street and Falk's property.

Falk uses its property for a warehouse, a research and development lab, and a parking lot. The warehouse and lab are not set back from the north line of the easement. The buildings have a loading dock, which is accessed via the private roadway.

Ryan's property, primarily unimproved land, is used for several purposes, including a storage lot for his vehicle towing business. A fence, which encircles his land, runs along the south line of the easement. Ryan acquired his property in 1987.

In an earlier case, Falk sued for an injunction to prevent Ryan from interfering with Falk's free and unrestricted use of the private roadway. Pursuant to the parties' settlement agreement, the trial court entered an order substantially granting Falk the relief it sought. The settlement also clarified the responsibility for snow removal.

Falk filed the present action to enforce the earlier settlement. Ryan counterclaimed for a declaration of the respective rights and obligations of the parties regarding the easement. In connection with the latter, Ryan alleged that Falk parked excessively long trucks at the loading dock for periods up to ninety minutes. He alleged that the vehicles blocked half of the private roadway and hindered traffic while they were loaded and unloaded. Additionally, Ryan sought the right to install gates at each end of the roadway in order to better secure his property. Ryan also alleged that Falk had failed to maintain the roadway.

TRIAL COURT'S DECISION

In its bench decision, the trial court noted that generally the facts were not in dispute and that the uses to which both properties were being put inevitably involve some impediments. The court commented that "[i]f you sat out there long enough, you could get pictures of obstruction and blockages, temporary obstruction and blockages by both sides, by both parties, of various portions of the roadway. There isn't any question in my mind but that could happen and that it has happened from time to time during the past seven years [that Ryan owned his property]."

Addressing Falk's use of trucks that blocked part of the roadway, the court stated that it was completely unreasonable to require Falk to first download the contents to smaller trucks at another location. The court stated

that blocking the roadway while loading or unloading the trucks for up to an hour was not unreasonable.

Addressing Ryan's request for permission to place gates at each end of the roadway, the court concluded that the installation of gates or a fence anywhere along the roadway would have only negligible utility. They would not achieve Ryan's goal of securing the perimeter of his land, which was already surrounded by an eight-foot high fence with barbed wire. Trespassers could enter the roadway from Falk's parking lot. Any benefit to Ryan was outweighed by the inconvenience to Falk. Gates would interfere with Falk's use of the easement, especially after hours.

The court also addressed Ryan's use of part of the roadway for parking. Ryan parked employees' vehicles and other vehicles along the northern edge of the roadway adjacent to the Valley Business Center. Although the parking restricted the easement to less than thirty feet, the court did not prohibit it. Rather, the court limited the parking to temporary parking, i.e., limited to ordinary business hours during a single day. The court also prohibited parking within a specified distance of the west end of the roadway in order to provide more clearance for large trucks turning onto the roadway from North Twelfth Street.

On the issue of maintenance, the court found that both companies used the roadway almost daily, but that it could not determine the exact proportions of each party's actual usage. Therefore, the court ordered that the maintenance costs should be split equally, with snow removal governed by the earlier stipulation.

FALK'S RIGHT TO OBSTRUCT ROADWAY

As previously noted, the Falk buildings are built on the property line. A loading dock is recessed into the building approximately forty feet. Falk regularly used tractor-trailers measuring approximately fifty-five feet in length. Falk's dispatcher testified that Falk's long tractor-trailers averaged two trips to the warehouse per day, Monday through Friday. Ryan also testified that some of Falk's vendors used similar length tractor-trailers. When parked in the loading dock, these long tractor-trailers block approximately half the roadway. Ryan sought to have the long tractor-trailers barred from the roadway because they interfered with his use of the roadway. He testified that his towing business frequently towed vehicles that required more than fifteen feet for clearance. If a long tractor-trailer was parked in the loading dock, drivers towing wider vehicles were forced to wait until the tractor-trailer left the loading dock.

The trial court's decision balanced the parties' competing interests in the use of the easement. The court concluded that obstruction of half the roadway for periods of up to one hour was not unreasonable compared to the alternative of requiring Falk to transfer supplies to smaller vehicles at another location. Implicit in the court's decision is a finding that Falk did not frequently obstruct Ryan's actual use of the roadway. The court indicated it believed obstructions had occurred from "time to time." Because an owner of an easement for ingress and egress has a reasonable opportunity to stop vehicles on the easement to load or unload personal property, the trial court's ruling on this issue did not grant Falk additional rights in the easement.

The written findings of fact and conclusions of law, which incorporated the trial court's findings from the bench decision, did not include the time limitation for parking long trucks in the loading dock. A time limit is an essential component of the trial court's determination that the limited obstruction of the roadway was temporary and not unreasonable. Therefore, we remand the case to the trial court to enter an order *nunc pro tunc* correcting the judgment to add the limitation. *See* ***Gibson v. Madison Bank & Trust Co.***, 7 Wis.2d 506, 515, 96 N.W.2d 859, 864 (1959) (trial court retains power to add omitted portion of the judgment to make it conform to what court actually adjudged).

RYAN'S PROPOSAL TO INSTALL GATES

Prior to the initiation of this litigation, Ryan sought Falk's approval for the installation of gates across the east and west ends of the private roadway. Ryan claims that the fence surrounding his lot is insufficient to keep trespassers and vandals off his property and that the installation of gates would enhance security.

The existence of an easement for ingress and egress does not *per se* preclude the possessor of the servient estate from installing gates across the easement. ***Dyer v. Walker***, 99 Wis. 404, 408, 75 N.W. 79, 80 (1898). The right of way may be enclosed if gates are necessary to the full enjoyment of the servient estate and if they will not unreasonably interfere with the use of the easement. *See* ***id.*** The determination of whether Ryan can install gates or fences anywhere along the private roadway requires a balancing of the interests of the parties.

Here, the trial court determined that gates would only negligibly enhance security. Trespassers and vandals could still enter the roadway after crossing Falk's parking lot from the north. Ryan's property, excluding the easement, was already surrounded by a security fence. Those determined enough to breach the fence would hardly be deterred by the installation of gates.

The potential inconvenience to Falk if gates were installed was limited. Falk's witness testified that it considered the east exit of the roadway to be only an emergency route that would be blocked by a locked gate. The proposed west gate would be open during Falk's normal business hours, but drivers making occasional deliveries at other hours would have the inconvenience of having to unlock and re-lock the gate. The trial court correctly concluded that while the inconvenience may be limited, it outweighed the *de minimus*, if any, value of the proposed gates.

Ryan also contends that the trial court's prohibition was overly broad because it not only prohibited the proposed gates, it also prohibited any gates or fencing along the northern edge of the roadway. Photographs of the roadway suggest that the only other open access to the roadway was from

Falk's parking lot. Installing any fencing or gates between the parking lot and Falk's easement would improperly interfere with Falk's access to and use of the easement.

SHARING OF MAINTENANCE COSTS

The parties had previously agreed on the responsibility for snow removal. Other maintenance obligations regarding the roadway had not been addressed and were presented to the court for determination. The trial court found that both parties used the roadway, but that it could not determine the exact percentages of use. The Court ordered an equal sharing of maintenance and repair expenses, other than snow removal. Ryan contends that this division is contrary to Wisconsin law.

Generally, the owner of an easement is responsible for making repairs to the easement and may enter the property at any time for that purpose. ***Koch v. Hustis***, 113 Wis. 599, 604, 87 N.W. 834, 835-36 (1901). The easement owner's responsibility regarding repairs has been characterized as a "*duty* to make such repairs as are necessary to permit the servient owner to have reasonable use of his tenement, and to have the privilege of making such repairs as are necessary to effectuate the purposes for which the easement was created." 3 R. POWELL & P. ROHAN, POWELL ON REAL PROPERTY § 34.12[2], at 34-192-34-193 (1994) (footnotes omitted). *See also* RESTATEMENT OF PROPERTY § 485 cmt. b & c (1944). The owner of the servient estate has no obligation to repair the easement unless he or she has agreed to do so. ***Koch***, 113 Wis. at 604, 87 N.W. at 836.

This general rule was applied in ***Shanak v. City of Waupaca***, 185 Wis.2d 568, 518 N.W.2d 310 (Ct. App. 1994). The City of Waupaca, which had a public roadway across a stone arch, was required to pay for repairs to the arch. ***Id.*** at 585, 518 N.W.2d at 316. The arch bridged a mill pond and was used by the owner of the servient estate to support a dam. ***Id.*** at 577, 518 N.W.2d at 312-13. The court concluded that the arch was necessary to the City's easement and that, absent an agreement to the contrary, the City had a duty to repair the arch. ***Id.*** at 584, 518 N.W.2d at 315-16. Without addressing the use the landowner made of the arch, the court concluded that the easement holder's

duty to repair improvements to the easement allowed the landowner to recover the cost of the repairs from the City. ***Id.*** at 585-86, 518 N.W.2d at 316.

The duty of the easement owner to maintain and repair the easement, even when the easement is used for the benefit of the servient estate, is not unlimited, however. The general principal assumes that the servient estate's use of the easement does not increase the burden of maintenance. ***Sellers v. Powell***, 815 P.2d 448, 449 (Idaho 1991). Where as here, the easement is used equally for the benefit of both estates, equity allows the cost of maintenance of a right of way to be apportioned between the owners of the two estates. ***Bina v. Bina***, 239 N.W. 68, 71 (Iowa 1931).

RYAN'S USE OF EASEMENT FOR PARKING

Ryan testified that he and his employees parked on the roadway along the Valley Business Center. Falk objected to this because it interfered with delivery trucks turning onto the easement from North Twelfth Street. The trial court did not prohibit Ryan from using part of the roadway for parking; however, it limited the parking to normal business hours. The trial court also prohibited parking within a specified distance of the west end of the easement, and Ryan does not challenge this part of the judgment.

Ryan challenges the time limitation, asserting that there was no testimony to support the limitation and that he needs the area for parking twenty-four hours a day because of the towing operations. We have reviewed the testimony Ryan references regarding his need to use the property for parking. Essentially, we understand the testimony to be that Ryan's usage of the roadway for parking varied depending upon the size of his office staff. He has not directed this court's attention to any testimony supporting a need for twenty-four hour parking. Absent such testimony, we cannot conclude that the trial court erred in giving Ryan what he appears to have asked for, i.e., the right to primarily use the roadway for temporary parking for employees.

AWARD OF COSTS TO FALK

Finally, Ryan contends that the trial court erred in awarding Falk costs under § 814.01, STATS. (costs to plaintiff), because the trial court dismissed Falk's claims for contempt and injunctive relief. We note that the trial court did not indicate the statute upon which it relied to awards costs. Therefore, we view the issue as whether Falk may recover costs under any statute.

By counterclaim, Ryan sought a declaration of rights in the easement. On all issues except Ryan's use of part of the roadway for parking, the trial court declared the rights as requested by Falk and rejected Ryan's claims. Costs are awarded to a "successful" party. *See* ***DeGroff v. Schmude***, 71 Wis.2d 554, 568, 238 N.W.2d 730, 737 (1976). The final judgment declared the rights in the easement in Falk's favor, and it was the successful party. *See* §§ 814.035(1), STATS. (costs allowed on counterclaims as if separate action brought) and 814.03(3), STATS. (defendant allowed costs if plaintiff not entitled to recover).

By the Court.—Judgment affirmed and cause remanded with directions.

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