COURT OF APPEALS DECISION DATED AND FILED

June 11, 2003

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. 02-0202

Cir. Ct. No. 98-CV-579

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

JOHN P. PAPPAS, PAUL S. PAPPAS, PETER J. PAPPAS AND JOANNE SMALE,

PLAINTIFFS-RESPONDENTS-CROSS-RESPONDENTS,

V.

ANGELINE PAPPAS PETROS,

DEFENDANT-APPELLANT-CROSS-RESPONDENT,

PETER N. PAPPAS,

DEFENDANT-RESPONDENT-CROSS-APPELLANT,

MARY C. PATERSON, INDIVIDUALLY AND AS TRUSTEE OF THE MARY C. PATERSON REVOCABLE TRUST,

DEFENDANT-RESPONDENT-CROSS-RESPONDENT,

CITY OF LAKE GENEVA, A MUNICIPAL CORPORATION,

DEFENDANT,

NICHOLAS E. PETROS, SHERIE PETROS SHANAHAN, NICK S. PETROS AND MELRU CORPORATION,

DEFENDANTS-APPELLANTS-CROSS-RESPONDENTS,

JOHN REGESTER, D/B/A CHICAGO STYLE PIZZA CO. AND FIRST BANKING CENTER,

DEFENDANTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed*.

Before Brown, Anderson and Snyder, JJ.

¶1 PER CURIAM. Angeline Pappas Petros (Petros) appeals from a judgment granting to the public and certain neighboring properties a perpetual right to use a ten-foot-wide alley behind her property for pedestrian and motor vehicle traffic and requiring the alley to be cleared of all obstructions. Peter N. Pappas cross-appeals, challenging the circuit court's dismissal of his adverse possession claim over the area of the alley adjacent to his property. Because the circuit court's findings of fact are not clearly erroneous and its legal conclusions are supported by the facts, we affirm on the appeal and the cross-appeal.

¶2 Petros, John Pappas and Peter N. Pappas all own parts of Lot One, Block 30 of the City of Lake Geneva. Petros has a life estate in the property described as Parcel 1, including the ten-foot-wide alley behind the property. In 1998, Petros constructed a deck and ramp which obstructed vehicular use of the

alley, and Peter N. Pappas, owner of neighboring Parcel 3, placed an air conditioner in the alley and otherwise blocked the alley with refuse and equipment. John Pappas, owner of Parcel 2, and others sued Petros and other property owners abutting the alley (including Mary C. Paterson, who owns property in Lot 2, Block 30 which abuts the other side of the alley) to gain access to the alley. In his amended complaint, Pappas claimed that the alley has been continuously and adversely used by the parties and their predecessors in interest for ingress and egress to their buildings for more than twenty years, giving Pappas and others prescriptive rights in the alley pursuant to WIS. STAT. § 893.28(1) (2001-02).[1]

¶3 Among other relief, Pappas sought a declaratory judgment that he and his successors in interest have the right to travel the alley to obtain access to a public alley to the south and to Main Street to the north, and to require Petros and Peter Pappas to remove the obstructions they placed in the alley. In a second amended complaint, Pappas alleged in the alternative that if the court found that the disputed alley was private, then the court should declare the alley public because it has been used by the public for a period in excess of 100 years.

¶4 The court decided the case after an evidentiary hearing. The circuit court found that the properties owned by John Pappas, Mary Paterson and Peter N. Pappas abut the alley and have a recorded easement giving a privilege to use the alley. The easement is appurtenant to and runs with the abutting properties. The court further declared that the abutting property owners have a

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

prescriptive easement to use the alley to travel to and from Main Street to the north and a public alley running to the south as well as to gain access to their own properties. The prescriptive easement is appurtenant to and runs with the abutting properties. The court also declared that the public has a perpetual right to use the alley for pedestrian and motor vehicle travel. The court ordered the alley cleared of all obstructions[2] and permanently enjoined all property owners from obstructing the alley. The court concluded that Petros did not establish permissive use or otherwise contradict the use of the alley by other property owners for the fifty-seven years preceding Petros' obstruction of the alley. Petros appeals.

¶5 An easement, "an interest in land which is in the possession of another," can be created by a written grant or by prescription—i.e., "adverse use of another's property that meets certain criteria." ***Gallagher v. Grant-Lafayette Elec. Coop.***, 2001 WI App 276, ¶16, 249 Wis. 2d 115, 637 N.W.2d 80.

> A prescriptive easement requires the following elements: (1) adverse use that is hostile and inconsistent with the exercise of the titleholder's possessive rights (2) that is visible, open and notorious (3) under an open claim of right (4) and is continuous and uninterrupted for twenty years. Hostile intent does not exist if the use is pursuant to the permission of the true owner. Pursuant to § 893.28(3), STATS., the use of a way over unenclosed land is presumed to be permissive and not adverse. A user must present positive evidence to establish a prescriptive easement, and every reasonable presumption must be made in favor of the landowner.

County of Langlade v. Kaster, 202 Wis. 2d 448, 457, 550 N.W.2d 722 (Ct. App. 1996) (citations omitted). Use of an easement for twenty years, if unexplained or

[2] The court permitted an abandoned underground coal bunker on Peter N. Pappas' property to remain in place under the alley as long as it does not interfere with travel through the alley.

uncontradicted, is presumed to be adverse and under a claim of right. ***Ludke v. Egan***, 87 Wis. 2d 221, 230-31, 274 N.W.2d 641 (1979).

¶6 As the finder of fact, it was the circuit court's province to assess the credibility of the witnesses and weigh the evidence. ***Micro-Managers, Inc. v. Gregory***, 147 Wis. 2d 500, 512, 434 N.W.2d 97 (Ct. App. 1988). We will not overturn the court's findings unless they are clearly erroneous. *See* ***id***. We agree with the circuit court that Pappas met his burden to show a recorded easement and a prescriptive easement. The court's findings are not clearly erroneous.

¶7 The court found the testimony of John Pappas convincing. Pappas testified that he has lived in the Lake Geneva area since 1930. Since the 1950s, the alley has been open and used by the public. All of the buildings abutting the alley were built so as to leave a ten-foot-wide alley. The alley has been used for deliveries and garbage removal, and it has been plowed by city workers. Pappas testified that he, his predecessors in title and the public have consistently used Parcel 2, whether a building stood on the site or not, and have consistently made use of the alley for vehicular and pedestrian travel, deliveries and access to parking on the site during a period when the site was empty. The deck and ramp Petros installed in 1998 impeded traffic in the alley. Pappas never asked Petros or her predecessors in title for permission to use the full length of the alley.

¶8 Mary Paterson testified that she purchased her property in 1980. Since that time, she has used the alley for passage and deliveries and never sought permission to use the alley. Other witnesses testified that the public and prior property owners used the alley for many years.

¶9 James Toller, a title examiner, testified that there was evidence in the conveyance history that the deeds for Parcels 1, 2 and 3 set forth a recorded right to use the alley.

¶10 In her deposition, Angeline Petros conceded that the alley was unobstructed until 1998 when she installed the deck and ramp. While she never objected to anyone using the alley, she never gave permission to Pappas, Paterson or others to use the alley. At trial, Petros testified that the alley has been used by the public, property owners, and tenants and that Petros' parents, her predecessors in title, never objected to this use of the alley.

¶11 The court determined that the title for Petros' parcel contained easements running in favor of the other properties abutting the alley. Additionally, the court relied upon John Pappas' testimony to find that the entire alley has been used by vehicles and pedestrians for at least fifty-seven years. The evidence established that the public's and abutting property owners' use of the entire alley was open, notorious, hostile to and inconsistent with Petros' alleged private ownership of the alley and that such use continued for a period of at least fifty-seven years until Petros obstructed the alley in 1998. Petros failed to contradict proof of such use of the alley for fifty-seven years or to prove that the use of the alley by the public and abutting property owners in the twenty years preceding the obstruction occurred by permission.

¶12 The court concluded that public and abutting owners' use of the alley satisfied the requirements for a prescriptive easement because the use was open and continuous (until Petros obstructed the alley in 1998) and contrary to private ownership. Therefore, the public and abutting property owners had a right

to use the alley, and the alley had to be cleared of obstructions, including dumpsters, ramps and air conditioners.

¶13 On appeal, Petros argues that the circuit court erred in not applying the WIS. STAT. § 893.28(3) presumption that use of a way over unenclosed land is presumed to be permissive and not adverse. The evidence before the circuit court was sufficient to demonstrate that permission was never given. Therefore, the presumption was rebutted.

¶14 Petros' appellate argument is permeated by her claim that Pappas' use of the alley was not exclusive. However, the law does not predicate a grant of a prescriptive easement on exclusive use by the easement claimant. *Cf.* ***County of Langlade***, 202 Wis. 2d at 457 (exclusive use is not an element of a prescriptive easement). Furthermore, Pappas did not claim exclusive use of the alley. His testimony is replete with references to the fact that all abutting property owners and the public freely used the alley.

¶15 Petros argues that Pappas did not establish the elements of a prescriptive easement. We disagree. It was for the circuit court to evaluate the credibility and weight of the evidence. *See* ***Micro-Managers***, 147 Wis. 2d at 512. The circuit court found Pappas' testimony convincing. Within that testimony are the facts necessary to sustain a claim to a prescriptive easement.

¶16 Pappas' testimony establishes that use of the alley was hostile and inconsistent with Petros' rights and openly and notoriously occurred for more than twenty years under a claim of right. Pappas testified that he never sought or received permission to use the alley. "Hostile use is not an unfriendly intent and does not mean a controversy or a manifestation of ill will. An act is hostile when it is inconsistent with the right of the owner and not done in subordination

thereto." ***Shellow v. Hagen***, 9 Wis. 2d 506, 511, 101 N.W.2d 694 (1960). Pappas' use of the alley was hostile to Petros' ownership rights.

¶17 Petros argues that the evidence does not support that Pappas had a deed-based claim to the alley. We disagree. The testimony of James Toller, a title examiner, supports the circuit court's finding that the deeds for Parcels 1, 2 and 3 establish a right to use the alley. The court's finding is not clearly erroneous.

¶18 Petros argues that the evidence does not support granting Mary Paterson a prescriptive easement over the alley. Paterson acquired her property in June 1980. William Baughm, a relative of her predecessor in title, testified that his family owned Paterson's property and that from the late 1950s to 1974, his father used the alley in the course of his business. Thereafter, the building was occupied by a music business until Paterson purchased the property. Paterson testified that although Petros' mother, Petros' predecessor in title, told Paterson that she could use the alley, Paterson never sought such permission and always believed that the full length of the alley was available for her use to reach her business, and she used the alley consistent with that belief. We do not agree with Petros that Paterson's conversation with Petros' mother defeats Paterson's claim of a prescriptive easement. Paterson used the alley without regard to whether she had permission to do so.

¶19 To the extent the court did not make adequate findings relating to Paterson's claim of a prescriptive easement, we may search the record for evidence supporting such findings. *See* ***State v. Margaret H.***, 2000 WI 42, ¶37, 234 Wis. 2d 606, 610 N.W.2d 475. We conclude that the record supports the grant of a prescriptive easement to Paterson.

¶20 The court could infer from the other testimony that all businesses abutting the alley used the alley for ingress, egress and deliveries. The Paterson property was continuously occupied and used for business since the late 1950s. Petros stated that she never gave anyone permission to use the alley. The court could infer that the elements of a prescriptive easement in favor of Paterson's property were satisfied.

¶21 Petros claims that the evidence does not support a prescriptive easement in favor of Peter N. Pappas, owner of Parcel 3. We disagree and determine that the evidence was sufficient for the same reasons as the evidence was sufficient for the Paterson easement.

¶22 Petros argues that the public may not acquire an easement by prescription. The court found a prescriptive easement in favor of the public. Petros failed to contradict proof of use of the alley by the public for fifty-seven years or to prove that the use of the alley by the public ever occurred by permission. Petros admitted that she knew the public used the alley in the twenty-year period preceding her obstruction of the alley, and that such use was not pursuant to her permission or that of her predecessors in title.

¶23 Petros argues that the court did not rule on her request for a determination that she owns the alley. We are uncertain why Petros believes the court did not rule regarding ownership of the alley. The judgment states that Petros has a life estate in Parcel 1 which the court describes as the main portion of the parcel and the alley. The court determined that the other parcels abutting the alley have a recorded easement in the alley, which is less than an ownership interest. Petros' ownership of the alley was affirmed by the circuit court.

However, as a result of this case, Petros' ownership is subject to easements in favor of other property owners and the public.

¶24 In his cross-appeal, Peter N. Pappas argues that the circuit court erred in dismissing his adverse possession claim over that portion of the alley immediately adjacent to his Parcel 3 property.[3] For an adverse possession claim to succeed, the disputed property must be used in a "hostile, open and notorious, exclusive and continuous manner" for at least twenty years. ***Leciejewski v. Sedlak***, 110 Wis. 2d 337, 343, 329 N.W.2d 233 (Ct. App. 1982), *aff'd*, 116 Wis. 2d 629, 342 N.W.2d 734 (1984).

> [A]n act is hostile in the context of an adverse-possession claim, when it is "inconsistent with the right of the owner and not done in subordination thereto." It is an intention to "usurp the possession"—to claim exclusive right to property which one possesses physically, but not by record title. To evince hostility in this sense, an adverse claimant must only do something which "clearly brings home to his [or her] neighbor the fact that he [or she] intends to claim the property against his [or her] neighbor and the world." "If the elements of open, notorious, continuous, and exclusive possession are satisfied, the law presumes the element of hostile intent."

Keller v. Morfeld, 222 Wis. 2d 413, 420 n.3, 588 N.W.2d 79 (Ct. App. 1998) (citations and quoted sources omitted).

¶25 The circuit court found that the coal bunker underneath the alley behind Parcel 3 had a concrete slab built over it which did not impede traffic because the slab was approximately even with the ground on either side. The court also found that while there was evidence of an air conditioner on a raised

[3] In his reply brief, Pappas clarifies that he claims adverse possession over all concrete-covered portions of the alley adjacent to his parcel.

slab in the alley behind Parcel 3, there was no evidence that the air conditioner was maintained in the alley for a continuous period of twenty years or more.

¶26 These findings are not clearly erroneous. On appeal, Peter N. Pappas concedes that direct proof of the air conditioner was lacking, but that the court could have inferred that any business on Parcel 3 would have had an air conditioner. The court was not required to make such an inference. Furthermore, we are not convinced that the presence of a concrete slab which does not impede traffic demonstrates a claim of exclusive right to the property or is an open and notorious use as required to demonstrate adverse possession.

¶27 No costs to any party on the appeal or the cross-appeal.

By the Court.—Judgment affirmed.

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