COURT OF APPEALS
DECISION
DATED AND RELEASED

JANUARY 29, 1997

No. 95-3299

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

DUSAN JANKOVIC and
ZORICA JANKOVIC,

Plaintiff-Appellants,

v.

ROGER P. PETERSEN and
ROXANE D. PETERSEN,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Kenosha County: MICHAEL FISHER, Judge. *Reversed*.

Before Brown, Nettesheim and Anderson, JJ.

ANDERSON, J. This is a dispute over a 2.9-foot strip of land that runs along the property line between the parties' homes. In response to the defendants, Roger P. and Roxane D. Petersen (the Petersens), erecting a fence, the plaintiffs, Dusan and Zorica Jankovic (the Jankovics), filed this action

under § 893.28, STATS., to establish their right to a prescriptive easement over this strip of land, which was used as a driveway by the Jankovics' tenants, but is owned by the Petersens. The Jankovics also sought an injunction barring the Petersens from interfering with the Jankovics' use of the strip of land. The trial court found that the Jankovics had not established that they, or previous owners, had continuously and without interruption parked on the Petersens' property for twenty years and therefore dismissed the Jankovics' complaint. The Jankovics appeal that determination.

The residential lot owned by the Jankovics is neighbored to the east by a lot owned by the Petersens. Both lots are improved with homes. The distance between the two homes is an eight-foot, one-inch strip of land, of which two feet, nine inches are on the Petersens' property. According to Mr. Jankovic, the strip of land consists largely of gravel and dirt. Since acquiring the property, the Jankovics or their tenants have used this strip as a driveway. Mr. Jankovic testified that he would park his vehicle "up to [the Petersens'] house by the door, as you open the door, so you don't bump into the house, all the way up to the house. … [F]rom wall to wall to [the Petersens'] property."

The previous owners of the Jankovics' lot, dating back to 1947, also testified that they parked their vehicles within the entire area between the two homes. First, Joseph Williams, the Jankovics' predecessor in title, testified that he always used the driveway and that people could get out on the passenger side. Second, Charlotte Beam, a woman who as a child lived at what is now the Jankovics' property, testified that from 1947 until it was sold to Williams, the

whole property between the two houses was used as a driveway. She testified that a person could park a car without the wheels going up on the sidewalk and people could get out on the passenger side.

The Petersens' testimony differed. Mr. Petersen testified that when they first moved in, around October 1993, "there was garbage and weeds; and there was a little bit of grass over there, about a foot or so of grass," which they cleaned up. Mrs. Petersen testified that they continued to clean up the area until they finally put up the fence. The fence was erected to prevent further damage from car doors to the siding of the house and to the water spigot, which was knocked off the house.

The previous owner, Michael Morelli, similarly maintained the 2.9-foot strip of land. He "raked it, the leaves and stuff." He also recalled a strip of grass along the house that he mowed and he mended the fence that runs north/south between the backyards of the two properties. Morelli also needed to replace the siding because of damage from car doors slamming into the house.

On appeal, the Jankovics contend that they have established all the elements necessary to sustain their claim to a prescriptive easement over the east 2.9 feet of the Petersens' property. There are four elements of a prescriptive easement: (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. ***County of Langlade v. Kaster***, 202 Wis.2d 449, 458, 550 N.W.2d 722, 726 (Ct.

App. 1996). The user must present positive evidence to establish a prescriptive easement, and every reasonable presumption must be made in favor of the landowner. ***Id.***

The existence of a prescriptive easement is a mixed question of law and fact. ***Perpignani v. Vonasek***, 139 Wis.2d 695, 728, 408 N.W.2d 1, 14 (1987). We apply different standards of review to the factual and legal determinations. This court must affirm the trial court's findings of fact unless they are clearly erroneous. Section 805.17(2), STATS. If more than one reasonable inference can be drawn from the evidence, this court must accept the inference drawn by the trial court. ***Cogswell v. Robertshaw Controls Co.***, 87 Wis.2d 243, 250, 274 N.W.2d 647, 650 (1979). We owe no deference to the legal conclusions of the trial court. ***Klinefelter v. Dutch***, 161 Wis.2d 28, 33, 467 N.W.2d 192, 194 (Ct. App. 1991).

The Jankovics argue that the trial court's finding that they did not park on the Petersens' property for twenty years is clearly erroneous. In their view, the evidence consists of "uncontroverted testimony from Jankovic and his predecessors in title as to their use of the East 2.9' of Petersen's property [which] requires a reversal of the Judgment."

We agree. The trial court's only finding was that "[w]hile vehicles parked between the houses, the evidence did not establish they parked *on* the defendants' property for 20 years." (Emphasis added.) This finding is clearly erroneous; it is neither supported by the uncontradicted testimony nor reasonable inferences. Mr. Jankovic testified that he used the entire area wall to

wall, but in such a way as to avoid hitting the Petersens' home. Williams, who sold the house to the Jankovics, testified that they used the total area between the two houses. Beam, who grew up in the Jankovics' home, testified that she would drive straight up into the driveway to "make sure you didn't hit either house." This uncontradicted testimony does not support the trial court's findings.

Adverse possession and prescriptive easement share the same elements. *See* ***Shellow v. Hagen,*** 9 Wis.2d 506, 511, 101 N.W.2d 694, 697 (1960). But the difference is that a person seeking a prescriptive easement merely wants to "use" the property in conjunction with the owner; ownership is not being sought. ***Id.*** The use need not be exclusive of or inconsistent with the rights of the owner as long as the particular use is made in disregard or nonrecognition of the true ownership. ***Id***. Thus, claim of title is not necessary and the use need not be to the exclusion of, or inconsistent with, the owners.

The uncontradicted evidence cannot support a reasonable inference that the use of the driveway was *not* visible, open, notorious, continuous and uninterrupted. There is ample evidence that, before the fence was erected, passengers could open the passenger side door and exit. Now it is not possible. Surely, the only reasonable inference is that the passenger side door was opened over the 2.9 feet of space and that passengers used that space for ingress and egress to the parked vehicle. Whether or not the wheels of the vehicle overlapped onto the 2.9 feet of land is not relevant.

The trial court noted the damage to the side of the Petersens' house by passengers banging the door against the siding. This evidence supports only one reasonable inference, that the passengers were using the strip of land to enter and exit vehicles. The activities of those using the driveway from 1947 to the time the fence was erected were not consistent with sporadic, trivial and benign trespass. Rather, the use of the driveway for ingress and egress of both drivers and passengers was visible, open, notorious, continuous and uninterrupted. It is the unambiguous *use* to which the driveway was put that is important.

Finally, the fact that the Petersens and their predecessor in title maintained the 2.9-foot strip of land cannot be used to defeat the Jankovics' claim of a prescriptive easement. The Jankovics seek to use the strip of land in conjunction with the Petersens. The maintenance of the strip at the same time it is being used for ingress and egress from a vehicle is consistent with a prescriptive easement.

By the Court.—Judgment reversed.

Not recommended for publication in the official reports.

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BROWN, J. (*concurring*). I use the method of a concurrence to add that from a law and economics standpoint, the trial court's determination does not maximize the values of these properties. The photographs in the record show that the fence is located right in the driveway separating the two houses. It is a spite fence and looks it. Surely, the home values of both houses are lowered as a result. And while it is true that a car can still get up the driveway, it is no longer an efficient driveway because the driver must drive on the sidewalk and the passenger may not alight from the car. This case would be better resolved by a fence, paid for by the Jankovics, that goes right along the Petersen's house plus enough damages to convince the Jankovics to take better control of their tenants. In my view, this result can be accomplished through a private nuisance action.