**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

June 23, 1998

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**

**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* § 808.10 and RULE 809.62, STATS.**

**No. 97-3835-FT**

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

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**CHARLES R. LUTZ AND BETTY M. LUTZ,**

**PLAINTIFFS-RESPONDENTS,**

**V.**

**WASHBURN COUNTY,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Burnett County: JAMES H. TAYLOR, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

PER CURIAM. Washburn County appeals a judgment declaring that Charles and Betty Lutz have an easement over a lot the County owns in the City of Shell Lake.[1] Washburn County argues that (1) the Lutzs failed to establish

[1] This is an expedited appeal under RULE 809.17, STATS.

a legal basis for claiming a prescriptive easement; and (2) the Lutzs failed to establish the prescriptive easement includes the right to park vehicles. We affirm the judgment.

This case involves a dispute over a twenty-foot-wide strip of land running along the west side of the County's city lot. The lot in question was owned by a series of private parties until 1959, when it was acquired by Shell Lake, which conveyed it to the County in 1992. Charles Lutz testified that his family started using the disputed strip as a driveway in 1936, when his family purchased a home on the adjoining lot. He testified as follows:

> THE COURT: You used it continuously without any problems from 1936 up to the present time?
>
> THE WITNESS: Right.
>
> ….
>
> THE COURT: And you used it for an entrance to your property and sometimes you would park your car there.
>
> THE WITNESS: Park it overnight many, many times and yes, yes.

Lutz further testified:

> Sherm Eswin stayed with us. He was a buttermaker. He lived with us as a convenience. He parked his car there all the time so -- he was always there. We just felt it was our property.

Lutz testified that his family shoveled the driveway and hauled away the snow. He testified that they used the driveway to access a small garage. Lutz also testified that when his family was in the coal business, "we always parked our coal truck in there because we'd be delivering coal late at night, and we parked it there for many, many years …." When relatives from out of state would come to stay, they would park their car in the driveway. Lutz testified further that his

family could use the driveway without interfering with the neighbor's use, because there was room for two cars to get through. His wife, however, would occasionally call the neighboring owner as a courtesy when they would park a relative's camper there, because a camper blocks everyone else's use of the driveway.

The court found that the Lutzs' requests to park a camper in the driveway was not inconsistent with their claimed prescriptive easement rights, because "permission to park a camper there is something different from going ahead and using the property in the ordinary sense. They used it apparently for their automobile, didn't ask anybody permission to park cars there." The court found that the Lutzs' use of the disputed strip continued without challenge from 1936 until the County purchased the property in 1992. It also determined that the Lutzs' use was adverse, hostile, open and inconsistent with the owner's rights. As a result, it conclude that the Lutzs were entitled to a prescriptive easement.

"An easement by prescription requires the following elements: (1) adverse use that is hostile and inconsistent with the exercise of the titleholder's possessive rights; (2) which is visible, open, and notorious; (3) under an open claim of right; (4) and is continuous and uninterrupted for twenty years." ***Mushel v. Town of Molitor,*** 123 Wis.2d 136, 144, 365 N.W.2d 622, 626 (Ct. App. 1985). The determination whether a party has met his burden of proof is a question of law that we review de novo. ***Becker v. State Farm Mutual Auto. Ins. Co.,*** 141 Wis.2d 804, 811, 416 N.W.2d 906, 909 (Ct. App. 1987).

The County contends the Lutzs' use of the driveway was not continuous and uninterrupted during the prescriptive period. It argues that the record fails to establish with specificity the continuity of the Lutzs' use and it

shows only sporadic use. We are unpersuaded. "Continuity depends on the nature and the character of the right claimed. Such acts need not be constant, daily, or weekly." ***Shellow v. Hagen,*** 9 Wis.2d 506, 512, 101 N.W.2d 694, 697 (1960).

> "One of the essentials to an easement by prescription is that the use and enjoyment must be continuous and uninterrupted. By 'continuous and uninterrupted use' is meant use that is not interrupted by the act of the owner of the land, or by voluntary abandonment by the party claiming the easement. If the use of a way is interrupted, prescription is annihilated and must begin again, and any unambiguous act by the owner, such as closing the way at night or erecting gates or bars, which evinces his intention to exclude others from its uninterrupted use destroys the prescriptive right."

***Red Star Yeast & Prods. Co. v. Merchandising Corp.,*** 4 Wis.2d 327, 335, 90 N.W.2d 777, 781 (1958) (quoting 17A AM. JUR. *Easements* § 80 at 694).

Here there was no unambiguous act of the owner showing an intention to exclude the Lutzs from the area until 1992. There was nothing in the evidence to compel the trial court to conclude that plaintiffs were ever excluded from the area. It is undisputed that the Lutzs had used the driveway since 1936 for access to their residence and to a small garage. They shoveled and hauled away snow from the driveway in the winter. The Lutzs and their guests parked vehicles in the driveway as necessary. Their needs determined their use, which was continuous in light of their periodic needs throughout the prescriptive period. There is no evidence that the Lutzs did not use the driveway when the need arose. *See* ***id.*** Although Lutz did not cite specific dates and times when the driveway was in use during the prescriptive period, his testimony was essentially that his family had been using it as their own since 1936. We conclude the record is sufficiently definite to constitute a basis for an easement by prescription.

Next, the County argues that the record fails to support the determination that the easement included the right to park vehicles. They contend that the easement should be limited to "the things the doing of which resulted in the creation of the easement -- no more and no less," citing ***Red Star Yeast.*** They claim that because the Lutzs failed to established they parked their vehicles on more than a sporadic basis, their easement does not include parking. We disagree.

"The extent of an easement is commensurate with and determined by its use." ***Niedfeldt v. Evans,*** 272 Wis. 362, 365, 75 N.W.2d 307, 309 (1956). Here, the trial court was entitled to believe Lutz's testimony that his family treated the driveway as their own since 1936 and used it to park a variety of vehicles as the need arose, but did not block other vehicles' use. This testimony is sufficient to support the trial court's determination that the prescriptive easement included the right to park vehicles in the disputed area as long as the vehicles did not completely obstruct the entire drive so as to deny access to other vehicles.

*By the Court.*—Judgment affirmed.

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