COURT OF APPEALS
DECISION
DATED AND FILED

April 26, 2016

Diane M. Fremgen
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. 2014AP2886 **Cir. Ct. No. 2013CV346**

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

PAUL R. BERTHEAUME AND LAURA A. BERTHEAUME,

PLAINTIFFS-RESPONDENTS,

V.

FLOYD HOWARD OLSEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Oneida County: MICHAEL H. BLOOM, Judge. *Affirmed in part; reversed in part and cause remanded for further proceedings*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Floyd Olsen appeals a judgment declaring that Paul and Laura Bertheaume enjoy a thirty-foot wide, non-exclusive easement for ingress and egress over an existing roadway located on Olsen's property. The

circuit court found that this roadway consists of both a gravel road as well as the grassy areas on its sides. Olsen argues the easement should be twelve feet wide, encompassing only the width of the gravel road. We affirm the circuit court's findings regarding the area subject to the easement.

¶2 Olsen also argues the circuit court erred by refusing to award compensatory and nominal damages for the Bertheaumes' trespasses upon his land. We agree with the circuit court that Olsen is not entitled to recover his costs for either constructing a fence and gate on his property—ostensibly to keep the Bertheaumes from further trespassing—or for his excavation efforts on his property the day before trial to locate remnants of the Bertheaumes' septic system on his property; as a matter of law, these costs do not constitute compensatory damages for trespass. However, we conclude Olsen was entitled to nominal damages for the trespasses found by the circuit court. Accordingly, we reverse on that issue and remand for the circuit court to determine the appropriate amount of nominal damages.

BACKGROUND

¶3 The Bertheaumes and Olsen own adjoining parcels of land on Oneida Lake in the town of Woodboro, Wisconsin. The Bertheaumes do not have public road access to and from their parcel. To get to the nearest public road, the Bertheaumes must cross Olsen's parcel, which they are able to do by virtue of an

express easement in the Bertheaumes' deeds.[1] The deeds grant access over an "existing traveled roadway," which undisputedly includes an unpaved gravel road that traverses the parcels.

¶4 In 2004, the Bertheaumes razed an old log cabin on their property and built a new home. The Bertheaumes installed a new well and septic system as part of the project. During the home construction, the builder cleared land to construct approximately thirty-five feet of septic line. Olsen refers to this clearing as a "second access road," but this "access road" was never located nor identified as such by Michael Oestreich, a surveyor Olsen hired to survey his property. It is undisputed the Bertheaumes' septic system encroached on Olsen's property. After the Bertheaumes were notified of the encroachment in 2009, they contacted their builder and had the septic system relocated.

¶5 In 2013, Olsen constructed a fence along the property line. The fence was secured by concrete footings in the gravel road that, together with a gate, prevented vehicles of a width greater than eleven feet from traversing the gravel road. In November 2013, the Bertheaumes filed the instant action against Olsen alleging the structures interfered with the Bertheaumes' use of the express easement.

¶6 Olsen answered and filed numerous counterclaims. He alleged the Bertheaumes trespassed on his property by (1) installing the encroaching septic

[1] The Bertheaumes and Olsen trace their titles back to a common grantor, Carmel Kovarik, Olsen's mother. Olsen received title to his property by probate assignment in 2003 upon his mother's passing. The Bertheaumes received title to their parcel from the Jablonowskis, who had purchased the property from Kovarik in 1994. The conveyances from Kovarik to the Jablonowskis, and from the Jablonowskis to the Bertheaumes, all contain the same easement language. *See infra* ¶13.

system, (2) clearing the area for the "access road," and (3) parking boat trailers and other items of personal property on Olsen's land. Olsen also demanded a declaration of interest as to the Bertheaumes' easement rights. *See* WIS. STAT. § 841.01(1).[2] The Bertheaumes denied the trespasses and the matters proceeded to trial.

¶7 After hearing the evidence and conducting a site visit, the circuit court rejected Olsen's argument that the Bertheaumes' easement rights were strictly limited to the gravel road. The court observed that there was no dispute that the gravel road was included as part of the "existing traveled roadway" referred to in the deeds and that there was "no language in the grant that sets a particular width" for the easement. The court concluded it would be unreasonable to confine the easement area to the edges of the gravel road because of the manner in which the road had been used for the past twenty years: "When you go out and drive on a road, there's elbow room to the extent necessary to do the things that people need to do going in and out of their land."

¶8 Accordingly, the circuit court held the Bertheaumes could also use, to the extent reasonably necessary for ingress and egress, the grassy areas "on the side of the road in[-]between the edge[s] of the gravel and the beginning of the woods." The court identified the area subject to the easement as "approximately 30 feet wide between areas of woods on each side." The court ordered Olsen to remove the gate and any fence footings from within the easement area, but permitted other portions of the fence to remain.

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶9 The circuit court also found in Olsen's favor on his three trespass claims. It found one instance of trespass in 2012 when the Bertheaumes parked their boat trailer on Olsen's property. The court also found that the Bertheaumes' septic system undisputedly encroached on Olsen's property and that the evidence suggested there were still portions of the septic system buried on Olsen's land.[3] Finally, the court determined there was "sufficient evidence to infer that there was activity that occurred" on Olsen's land on or near the "access road."

¶10 Despite finding several instances of trespass, the circuit court declined to award Olsen any monetary damages. The court concluded he had not presented proof of any actual damages sufficient to attach a monetary value to the trespasses. However, the court determined that any continuing encroachments, particularly with respect to the septic system, must be removed by the Bertheaumes at their expense within a reasonable time. The court also rejected Olsen's assertion that he was entitled to the cost of erecting the gate.

¶11 Olsen appeals, challenging the circuit court's determinations regarding the easement's width and trespass damages.

DISCUSSION

I. Easement location

¶12 An easement is an interest in land that is in the possession of another. ***Atkinson v. Mentzel***, 211 Wis. 2d 628, 637, 566 N.W.2d 158 (Ct. App. 1997). "An easement creates two distinct property interests: the dominant estate,

[3] The day prior to trial, Olsen excavated portions of his property near the former septic line and discovered some piping and other remnants of the septic system still in place.

which enjoys the privileges granted by an easement; and the servient estate, which permits the exercise of those privileges." ***Id.*** Where the easement in question is created by deed, as in this case, the court will look to that instrument in construing the relative rights of the landowners because the words used in the deed are the primary source of the parties' intent. *See* ***Rikkers v. Ryan***, 76 Wis. 2d 185, 188, 251 N.W.2d 25 (1977); ***Hunter v. McDonald***, 78 Wis. 2d 338, 342-43, 254 N.W.2d 282 (1977). If the language of the deed is unambiguous, its meaning is a question of law. ***Rikkers***, 76 Wis. 2d at 188. In addition, whether ambiguity exists is a question of law. ***Gilbert v. Geiger***, 2008 WI App 29, ¶10, 307 Wis. 2d 463, 747 N.W.2d 188.

¶13 Here, the parties agree there is ambiguity in the easement grant contained in the various deeds related to the Bertheaumes' property. The pertinent language in each deed reads:

> Together with a non-Exclusive easement for ingress and egress over the existing traveled roadway located on the grantor's land to the West extending Southerly to a point approximately 102 feet from the high water mark of Oneida Lake and then extending Easterly to the West line of the above described premises.

We agree with the parties that the easement grant is ambiguous as to its scope. Although ambiguity is a question of law, we observe that at trial, Michael Oestreich, Olsen's surveyor, agreed the description of the easement area was "pretty lousy," and he testified the description was vague, particularly as to width.[4] Indeed, Oestreich directly stated, both at trial and privately to Olsen, that the easement was ambiguous.

[4] Oestreich testified the language referring to a point "approximately 102 feet from the high water mark of Oneida Lake" described a terminus that was also unclear.

¶14 The Bertheaumes cite numerous cases for the principle that if the location of an easement for ingress and egress "is not defined by the grant, a reasonably convenient and suitable way is presumed to be intended." ***Atkinson***, 211 Wis. 2d at 641 (citing ***Werkowski v. Waterford Homes, Inc.***, 30 Wis. 2d 410, 417, 141 N.W.2d 306 (1966)). In such situations, the circuit court has the equitable authority to "affirmatively and specifically … define the location of the servitude." ***Werkowski***, 30 Wis. 2d at 417. In this case, however, the parties *did* define the location of the servitude as "the existing traveled roadway located on the grantor's land." As such, it was not necessary for the circuit court to affix a reasonably convenient and suitable location for the easement, at least not in the sense that ***Atkinson*** and ***Werkowski*** discussed.

¶15 Rather, in this case the issue is the intended scope of the phrase "the existing traveled roadway." Olsen argues this court should declare, as a matter of law, that the easement is only twelve feet wide, which is apparently the width of the widest sections of the road on Olsen's property as measured from its gravel edges. The Bertheaumes, on the other hand, contend the circuit court correctly determined they are entitled to use not only the gravel portion, but the grassy areas on either side of it, for a total easement width of thirty feet.

¶16 We initially observe that Olsen's legal argument is incompatible with our standard of review. Olsen not only concedes there is ambiguity in the deed, he affirmatively *argues* the deed is ambiguous because it is silent as to the width of the road. Citing ***Konneker v. Romano***, 2010 WI 65, 326 Wis. 2d 268, 785 N.W.2d 432, Olsen argues this silence "certainly creates ambiguity." However, if the language of the deed is ambiguous, "the sense in which the words therein are used presents a question of fact." ***Rikkers***, 76 Wis. 2d at 188. This

involves an inquiry into "the intent behind the language," which is also a question of fact. ***Konneker***, 326 Wis. 2d 268, ¶23.

¶17 Thus, we cannot declare as a matter of law that the circuit court improperly determined the easement width as extending beyond the gravel edges of the road. This is a finding of fact, which we must uphold unless it is clearly erroneous. ***Phelps v. Physicians Ins. Co. of Wis.***, 2009 WI 74, ¶34, 319 Wis. 2d 1, 768 N.W.2d 615. A finding of fact is clearly erroneous if it is unsupported by the record or is against the great weight and clear preponderance of the evidence. ***Roster-Clark, Inc. v. Olsen's Mill, Inc.***, 2006 WI 46, ¶¶11-12, 290 Wis. 2d 264, 714 N.W.2d 530. We search the record for evidence supporting the circuit court's decision. ***Id.***, ¶12.

¶18 Here, there was ample evidence supporting the circuit court's decision to set the easement width at thirty feet, encompassing the gravel road and the grassy areas on either side. Paul Bertheaume testified that from the time he began using his parcel, around 1989, until the time Olsen constructed the fence and gate, the area he considered the "road" was at least thirty feet wide. Paul acknowledged the "road itself was a little smaller," but the area which was maintained on either side extended "at least 30 feet." After Olsen constructed the fence and gate, the Bertheaumes' propane deliveries were delayed because the opening was not wide enough for the delivery trucks. Additionally, the town stopped plowing the road because of the fence, and there have been instances in which the Bertheaumes could not reach their home because of insufficient snow removal.[5]

[5] The Bertheaumes eventually hired a private contractor to plow the road.

¶19 Olsen readily acknowledges there was conflicting evidence at trial regarding what constitutes the "traveled" portion of the roadway, and he predominantly relies on Oestreich's testimony regarding the width of the gravel road only. However, even Oestreich's testimony does not clearly support Olsen's position. Although Oestreich did testify the roadway was in some places only nine feet wide, he stated there "could be some subjectivity as to where it traveled." Oestreich endeavored to measure "gravel to gravel," but he acknowledged ambulances, propane trucks, fire trucks, UPS trucks, and certain trailers would require widths greater than the widths he measured to make use of the roadway. In addition, Oestreich testified that when he first viewed the fence and gate Olsen had constructed, he was "shocked" by their location and told Olsen that he was interfering with the easement and the Bertheaumes' ability to access their parcel.

¶20 The trial evidence, taken in totality, raises the inference that the twelve-foot width Olsen proposes is insufficient for the Bertheaumes to make reasonable use of the easement for ingress and egress. "Every easement carries with it by implication the right of doing whatever is reasonably necessary for the full enjoyment of the easement itself." ***Scheeler v. Dewerd***, 256 Wis. 428, 432, 41 N.W.2d 635 (1950) (quoted source omitted). The circuit court could properly conclude from the evidence that the deed's use of the phrase "existing traveled roadway" did not strictly limit the easement to the gravel areas but included the unobstructed, grassy areas flanking the gravel road up to the woods on each side.

¶21 Olsen also argues the circuit court's ruling cannot stand because there is "nothing at all in the evidence about woods on either [side] of this driveway." However, we cannot conclude the circuit court's factual findings are clearly erroneous for this reason. As Olsen acknowledges, the circuit court conducted a site visit and had a firsthand opportunity to view the road and the

surrounding conditions. Olsen does not claim that the road and its surrounding area are not, in fact, bounded by woods. Accordingly, we reject Olsen's arguments challenging the circuit court's finding as to the easement width.

II. Trespass damages

¶22 Olsen prevailed, at least in part, on all his trespass counterclaims at trial. However, the circuit court declined to award any monetary damages for the trespasses, concluding there had "not been sufficient evidence presented … that [Olsen] suffered any actual damages as a result of these things." Olsen asserts the circuit court erroneously concluded he was not entitled to any damages and requests that we remand to the circuit court for a damages determination. "The proper measure of damages applicable to a specific claim presents a question of law." ***Schrubbe v. Peninsula Veterinary Serv., Inc.***, 204 Wis. 2d 37, 41, 552 N.W.2d 634 (Ct. App. 1996).

¶23 Olsen primarily argues he is entitled to at least nominal damages for each of the Bertheaumes' trespasses. We agree it was error for the circuit court not to award at least nominal damages incidental to the various trespasses. Nominal damages are "always appropriate for a trespass." ***Grygiel v. Monches Fish & Game Club, Inc.***, 2010 WI 93, ¶44, 328 Wis. 2d 436, 787 N.W.2d 6 (quoting ***Jacobs v. Major***, 139 Wis. 2d 492, 530, 407 N.W.2d 832 (1987)). We therefore remand for the circuit court to award an appropriate amount of nominal damages for the trespasses.

¶24 The Bertheaumes argue the circuit court's order requiring them to remove any currently encroaching portion of their former septic system was a finding of damages "in the form of the need for restoration." The Bertheaumes are correct that a landowner may choose to receive compensatory damages equivalent

to the costs necessary to restore the land to its state prior to the trespass. *See* ***Threlfall v. Town of Muscoda***, 190 Wis. 2d 121, 136, 527 N.W.2d 367 (Ct. App. 1994). However, this does not adequately address Olsen's argument, which is supported by legal authority, that nominal damages are appropriate in every instance of trespass. As an initial matter, the Bertheaumes' argument ignores the two other trespasses the circuit court found that were unrelated to the septic system. Further, the remnants of the septic system remaining on Olsen's property constitute a continuing trespass, such that the order for their removal is more akin to injunctive relief necessary to abate the continuing trespass rather than an award of compensatory damages for the prior trespasses from having the septic system on Olsen's property over time.

¶25 Olsen appears to argue that, on remand, the circuit court should also consider awarding him compensatory damages for the costs he incurred to construct the fence and gate and to excavate areas of his property near the Bertheaumes' former septic line. Compensatory damages, if proved, may be awarded in a trespass case. ***Grygiel***, 328 Wis. 2d 436, ¶44. At trial, Olsen testified he spent $6,159 to install the fence and gate. He testified the excavation work on the day before trial cost approximately $2,000.

¶26 We conclude Olsen is not entitled to compensatory damages for the matters he testified to at trial. Olsen cites no authority supporting his assertion that the proper measure of damages in a trespass case includes costs incurred to confirm a suspected continuing trespass or to enclose one's land to protect against future trespasses. Accordingly, we deem Olsen's argument on this point inadequately developed. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). In any event, the traditional rule of damages for trespass permits compensatory damages for:

- The difference between the value of land before the trespass and the value after the trespass, or, in the appropriate case and at the plaintiff's election, reasonable restoration costs;
- Loss of use of the land; and
- Discomfort and annoyance to the plaintiff as an occupant.

RESTATEMENT (SECOND) OF TORTS § 929 (1979) (cited with approval in ***Threlfall***, 190 Wis. 2d at 136). Thus, Olsen's request for "compensatory" damages for costs he incurred in investigating one of the Bertheaumes' trespasses or in constructing obstacles to future trespasses are not available, as a matter of law. Moreover, he did not present evidence of, or argue for, any damages falling within the traditional rule.

¶27 No WIS. STAT. RULE 809.25 costs allowed on appeal.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded for further proceedings.

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