COURT OF APPEALS
DECISION
DATED AND FILED

August 24, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1693 **Cir. Ct. No. 2015CV702**

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

KENNETH S. WADE,

PLAINTIFF-APPELLANT,

V.

ALEXA A. PFISTER A/K/A ALEXA BEVERS,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: PETER ANDERSON, Judge. *Affirmed*.

Before Lundsten, P.J., Blanchard and Kloppenburg, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Kenneth Wade owns property abutting Alexa Pfister's property. In March 2015, Wade filed a complaint seeking a declaration,

pursuant to WIS. STAT. § 893.28 (2015-16), that he had established prescriptive easements over five paths on Pfister's property, which he used since March 1991, "for a period greater than 20 years," to "mov[e] equipment necessary to the management of his land."[1] The circuit court granted Pfister's motion for summary judgment and dismissed Wade's complaint. Wade appeals. We conclude that Pfister is entitled to summary judgment because the undisputed facts establish that Wade failed to prove at least one of the elements of a prescriptive easement claim, as applied to the undisputed facts here: that since 2001 Wade's use of Pfister's "unenclosed land" was hostile or adverse to Pfister, contrary to the presumption under WIS. STAT. § 893.28(3)[2] that Wade's use was permissive. Accordingly, we affirm.

BACKGROUND

¶2 On March 15, 1991, Wade purchased approximately 225 acres of property in the Town of Vermont, Dane County, which on its eastern edge abuts approximately 52 acres of property that was then owned by Pfister's father. Pfister was gifted part of her father's property in 1995 and purchased the remaining property from her father's estate in 2000.

[1] Under WIS. STAT. § 893.28(1), "Continuous adverse use of rights in real estate of another for at least 20 years, except as provided in s. 893.29 establishes the prescriptive right to continue the use."

All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] Under WIS. STAT. § 893.28(3), "The mere use of a way over unenclosed land is presumed to be permissive and not adverse."

¶3 Pfister's property was farmed until 2000, when Pfister placed the property in the Conservation Reserve Program. Since 2001, the property has been unfenced and unfarmed, and Pfister has managed it to allow its return to natural prairie. She first planted native prairie grasses and flowering forbs. Thereafter, her management of the property as a natural prairie was limited to semi-annual burning of old vegetation and invasive plant species.

¶4 Since Wade purchased his property in 1991, he has used five paths on Pfister's property in order to develop and maintain trails, restore prairies, and engage in recreational activities on his property. Four of the paths are small loops that begin and end on the eastern edge of Wade's property, crossing onto the western edge of Pfister's property to go around gullies on Wade's property. The remaining path, path five, crosses the northern part of Pfister's property from Highway F on the eastern edge of Pfister's property to the eastern edge of Wade's property.

¶5 Wade testified that he used the paths as follows. Between 1991 and 2014, he regularly hiked and skied over one of the four looped paths. Between 1991 and 2000, Wade mowed or drove over all of the looped paths up to six times each year. It took him "a couple minutes" to mow each loop. From 2001 to 2014, Wade mowed or drove over the looped paths twice each year, and drove crew and equipment over the looped paths one or two additional times each year to burn old vegetation and invasive plant species in the prairie field on his property. Between 1991 and 2014, Wade drove over path five at least two times each year, taking about fifteen minutes each way, plus an unknown additional number of times to conduct routine vegetation burns in the prairie field on his property, including spring burns in cooperation with Pfister's nephew.

¶6 In 2014, Wade offered to purchase Pfister's property. Until Pfister received Wade's offer to purchase her property, Pfister was not aware of Wade's use of the paths, other than his permissive use of path five to cross her property for burning on Wade's property for "a short period in spring" since 2005 and an incident in which a contractor hired by Wade accidentally killed forty-six trees on Pfister's property along one of the looped paths in 2013. Pfister declined Wade's offer and informed Wade that she understood that his use of her property for access to his property "has been, and is, permissive," and that the permission would be revoked if he did not acknowledge that his use was permissive. Wade then filed this action seeking a declaration that he had established prescriptive easements over the five paths.

¶7 Pfister moved for summary judgment dismissing Wade's complaint on several grounds, including that Wade's use since at least 2001, when Pfister began to manage the return of her property to natural prairie, was presumed permissive because Pfister's property was from that point forward "unenclosed land," under WIS. STAT. § 893.28, and Wade failed to present evidence sufficient to rebut the presumption that his use was permissive. The circuit court granted Pfister's motion.

DISCUSSION

¶8 We review a circuit court's grant of summary judgment de novo. ***Chapman v. B.C. Ziegler and Co.***, 2013 WI App 127, ¶2, 351 Wis. 2d 123, 839 N.W.2d 425. Summary judgment "shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2). In

reviewing a summary judgment order, "we search the [r]ecord to see if the evidentiary material that the parties set out in support or in opposition to summary judgment supports reasonable inferences that require the grant or denial of summary judgment, giving every reasonable inference to the party opposing summary judgment." ***Chapman***, 351 Wis. 2d 123, ¶2.

¶9 Subject to an exception not relevant here, WIS. STAT. § 893.28(1) provides that "[c]ontinuous adverse use of rights in real estate of another for at least 20 years ... establishes the prescriptive right to continue the use." Case law clarifies that a prescriptive easement claim requires proof of four elements: "(1) adverse use hostile and inconsistent with the exercise of the titleholder's rights; (2) which is visible, open and notorious; (3) under an open claim of right; (4) and is continuous and uninterrupted for twenty years." ***Ludke v. Egan***, 87 Wis. 2d 221, 230, 274 N.W.2d 641 (1979); *see also* ***County of Langlade v. Kaster***, 202 Wis. 2d 448, 457, 550 N.W.2d 722 (Ct. App. 1996). "A user must present positive evidence to establish a prescriptive easement, and every reasonable presumption must be made in favor of the landowner." ***Kaster***, 202 Wis. 2d at 457. A prescriptive easement presents analogous issues to adverse possession, ***Ludke***, 87 Wis. 2d at 230-31, and, as with adverse possession, whether the facts fulfill the legal standard of prescriptive use is a question of law we review de novo. ***Perpignani v. Vonasek***, 139 Wis. 2d 695, 728, 408 N.W.2d 1 (1987). Without deference to the circuit court, we look to see whether Wade has presented evidence to establish a prescriptive easement over Pfister's property.

¶10 We focus here on the first element of a prescriptive easement—that the use must be adverse such that it is hostile and inconsistent with the exercise of the titleholder's rights. ***Ludke***, 87 Wis. 2d at 230. "An act is hostile when it is inconsistent with the right of the owner and not done in subordination to it."

Id. (emphasis omitted). The element of hostility does not exist if the land is used with permission by the true owner. *See* ***Northwoods Dev. Corp. v. Klement***, 24 Wis. 2d 387, 392, 129 N.W.2d 121 (1964).

¶11 Generally, unexplained use of another's land for twenty years creates a presumption that the use was hostile or adverse. ***Bino v. City of Hurley***, 14 Wis. 2d 101, 108, 109 N.W.2d 544 (1961). However, an exception to this rule exists with respect to unenclosed, unimproved, and unoccupied lands. ***Id.*** In ***Bassett v. Soelle***, 186 Wis. 53, 202 N.W. 164 (1925), our supreme court created a presumption of permissive use for "a track or way over un[e]nclosed lands, and especially woodlands." ***Id.*** at 57. The court reasoned that public policy supported allowing landowners to permit people to cross wild lands without risking losing their property rights. ***Id.*** In ***Shepard v. Gilbert***, 212 Wis. 1, 249 N.W. 54 (1933), the court clarified that the presumption of permissive use should be applied to "unimproved property largely in a state of nature" or lands which were "wild, unoccupied, or of so little present use as to lead legitimately to the inference that an owner would have no motive in excluding persons from passing over the land." ***Id.*** at 6.

¶12 In 1941, the legislature codified this presumption when it enacted a statute stating, "[t]he mere use of a way over un[e]nclosed land shall be presumed to be permissive and not adverse." WIS. STAT. § 330.12(2) (1941). The statute was repealed and reenacted in nearly identical form in 1979, 1979 Wis. Act 323 § 28, and now provides, "[t]he mere use of a way over unenclosed land is presumed to be permissive and not adverse." WIS. STAT. § 893.28(3). Wisconsin courts have cited approvingly to pre-1979 cases interpreting the identical statute after its reenactment in 1979. *See* ***Mushel v. Town of Molitor***, 123 Wis. 2d 136, 145, 365 N.W.2d 622 (Ct. App. 1985).

¶13 The following cases are informative. In ***Shellow v. Hagen***, 9 Wis. 2d 506, 513-514, 101 N.W.2d 694 (1960), our supreme court interpreted the statutory term "un[e]nclosed" to apply "only to un[e]nclosed land which [is] ... wild and unimproved." In ***Bino***, 14 Wis. 2d at 108, the court clarified that whether a particular use is permissive depends on the character of the land during the period at issue, not merely on whether the land is enclosed or unenclosed. The land must also be unimproved and unoccupied to create a presumption of permissive use. ***Id.*** at 108-109. "Public policy favors open use of wild lands by the public," and protects public use and enjoyment of wild lands by ensuring that landowners are not at risk of losing their rights to exclusive use of those lands. ***Pierz v. Gorski***, 88 Wis. 2d 131, 139, 276 N.W.2d 352 (Ct. App. 1979).

¶14 For example, the presumption of permissive use over unenclosed lands has been found not to apply to unenclosed lots that were in the process of being developed for housing in ***Shepard***, 212 Wis. 1; to developed urban residential lots in ***Christenson v. Wikan***, 254 Wis. 141, 35 N.W.2d 329 (1948); to wooded land that had been partially cleared and planted with fruit trees and grain in ***Carlson v. Craig***, 264 Wis. 632, 60 N.W.2d 395 (1953); and to unenclosed lakeshore property on which piers had been installed and a parking lot for cars and boat storage had been maintained and continuously used in ***Shellow***, 9 Wis. 2d 506. On the other hand, the presumption of permissive use over unenclosed lands has been found to apply to solely wooded land in ***Bassett***, 186 Wis. 53; to "cutover land grown up to brush and small trees" used for horse and cow pasture in ***Bino***, 14 Wis. 2d at 109; and to unenclosed wild lands leading to a lake in ***Mushel***, 123 Wis. 2d 136.

¶15 As we explain, we conclude that Wade has failed to present evidence that Pfister's property was not "un[e]nclosed, unimproved, and unoccupied"

during the pertinent twenty-year time period.[3] ***Bino***, 14 Wis. 2d at 108. We address each element of the "un[e]nclosed, unimproved, and unoccupied" test in turn.

Unenclosed

¶16 Wade concedes that Pfister presented undisputed evidence that her property was unenclosed during the pertinent twenty-year time period.

Unimproved

¶17 Wade argues that it is disputed that, in Wade's words, "pursuant to ***Shepard,***" Pfister's "management of the land to return it to its natural prairie state constitutes improvements such that the WIS. STAT. § 893.28(3) presumption does not apply." However, Wade does not provide any citation to ***Shepard*** beyond invoking its name. We reject Wade's argument as undeveloped. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (stating that we may decline to review arguments "supported by only general statements" but not "reflecting any legal reasoning").

¶18 Moreover, we observe that in ***Shepard*** our supreme court held that the presumption cannot be applied to "property which is either improved or in the process of being improved, whether for use as agricultural lands or as city property." 212 Wis. at 6. It is undisputed that since 2001, Pfister's property has

[3] Because Wade has failed to demonstrate that his use of Pfister's property was not hostile or adverse, we need not consider whether Wade established the other elements of a prescriptive easement claim. If a decision on one issue disposes of an appeal, we will not generally decide the other issues raised. ***Turner v. Taylor***, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716.

not been used as agricultural lands. Rather, Pfister has taken deliberate action to return the property to natural prairie by placing the property in the Conservation Reserve Program, reintroducing native prairie grasses and flowering forbs, and conducting semi-annual burning of old vegetation and invasive species. Pfister's managing her property that once was farmed so that it returns to natural prairie means that the property was returned precisely to the "state of nature" that our supreme court equated with unimproved property in ***Shepard***, 212 Wis. at 6. And, the "natural prairie" character of Pfister's property since 2001 is akin to the wooded land in ***Bassett***, 186 Wis. 53, and the land converted from "cutover land grown up to brush and small trees" in ***Bino***, 14 Wis. 2d at 109, which were found to be unimproved lands subject to the presumption of permissive use.

¶19 Wade also argues that "his own maintenance efforts" on the paths on Pfister's property should be considered "improvements" that defeat the presumption. Wade, however, presents no legal support, direct or indirect, for the questionable proposition that a person can obtain a prescriptive easement over property, unimproved by the owner, by pointing to unauthorized improvements by a non-owner. The complete absence of legal support means that Wade has not presented a developed argument and we reject it on that basis. *See* ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82 ("Arguments unsupported by legal authority will not be considered, and we will not abandon our neutrality to develop arguments." (citations omitted)).

¶20 Moreover, although we need not resolve Wade's I-improved-Pfister's-property argument on the merits, we observe that in ***Bino***, our supreme court found that land traversed by a roadway and regularly used by the public to access a lake did not change the unimproved nature of the "cutover land grown up

to brush and small trees like so much of the cutover land in northern Wisconsin." 14 Wis. 2d at 103-104, 109. If regular use by traffic, effectively creating a roadway, does not qualify as an improvement for purposes of a prescriptive easement, it is difficult to understand why Wade's much more limited activity on Pfister's property would qualify.

Unoccupied

¶21 As stated, it is undisputed that the Pfister property has since 2001 been managed to return the property to natural prairie. In one conclusory sentence, Wade asserts that Pfister never provided evidence that her property was "unoccupied." Wade appears to suggest that there is a factual dispute as to whether Pfister's property was unoccupied. However, Wade does not explain what he means by "unoccupied" or why the record suggests that there is a factual dispute on this topic. Because his argument is undeveloped, we decline to consider it further. *See* ***Pettit***, 171 Wis. 2d at 646.

¶22 Nevertheless, we do note that in ***Bino***, our supreme court found that regular use by the public in crossing unimproved land to access a lake did not change the "unoccupied" nature of the land. 14 Wis. 2d at 103-104, 109. Nor did the return of that land, from "cutover land" to "brush and small trees" render the land no longer "unoccupied." ***Id.*** at 109. So here, Wade's much more limited and sporadic crossing of the Pfister property, and the return of the property to natural prairie, could not have rendered Pfister's property no longer unoccupied.

CONCLUSION

¶23 For the reasons stated, we conclude that Pfister is entitled to summary judgment because the undisputed facts establish that Wade failed to

prove at least one of the elements of a prescriptive easement claim: that since 2001 Wade's use of Pfister's "unenclosed land" was hostile or adverse to Pfister, contrary to the statutory presumption that Wade's use was permissive. Accordingly, we affirm.

By the Court.—Order affirmed.

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