COURT OF APPEALS
DECISION
DATED AND FILED

November 22, 2000

Cornelia G. Clark
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* WIS. STAT. § 808.10 and RULE 809.62.

No. 00-0674

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

CHARLES J. ELLSWORTH AND MARY ANN ELLSWORTH,

PLAINTIFFS-RESPONDENTS,

V.

MARK SMITH, DANIEL T. RIGNEY, ROBERT J. SMITH, AND MARY E. SMITH,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Adams County: DUANE H. POLIVKA, Judge. *Affirmed.*

Before Vergeront, Deininger and Hue, JJ.[1]

[1] Circuit Judge William F. Hue is sitting by special assignment pursuant to the Judicial Exchange Program.

¶1 PER CURIAM. Mark Smith, Daniel Rigney, Robert Smith and Mary Smith (the Smiths) appeal a judgment resolving a property dispute in favor of Charles and Mary Ann Ellsworth (the Ellsworths). The litigation concerns the nature and scope of easement rights over a lot to which the Smiths hold title. The trial court granted summary judgment to the Ellsworths. The issues are whether a material fact dispute exists, whether the trial court's judgment conforms to its oral decision, and whether the trial court erred in determining that the Ellsworths' easement extends to the entire Smith lot. We affirm.

¶2 Since 1970 the Ellsworths and their predecessors in interest have had an easement over a lakeside lot giving them access to Lake Jordan in Adams County. The lot is sixty-six feet wide. The title describes the easement as extending over a "sixty-six foot strip of land for road purpose…." In 1996 the Smiths purchased the lot together with some nearby acreage.

¶3 Over the years the easement holders typically used a seven- to fifteen-foot wide gravel drive on the lot to reach the lake. They also maintained a pier extending out from the lot, parked on it, and used its shoreline for swimming and recreation. The Smiths acknowledged the Ellsworths' access right over the gravel drive, but objected to their other uses. The Ellsworths, in turn, objected to the Smiths placing a camper on the lot, claiming it interfered with their easement rights.

¶4 The Ellsworths commenced this action and the Smiths counterclaimed, both seeking a declaration of interests and injunctive relief against the other side. The Ellsworths moved for summary judgment, asserting their right to an easement over the entire lot, and an easement by prescription for their other uses of the property, above and beyond mere access.

¶5 The trial court ruled from the bench that the Ellsworths had established a prescriptive easement by undisputed facts. The court noted that there was no dispute that "[f]or more than twenty years they've had cars on there, they've boated on there, they've had picnic tables. They kind of used [the lot] as a public property…." The court added that summary judgment was denied as to all other matters.

¶6 Counsel for the Ellsworths subsequently prepared an order confirming a prescriptive easement "to park their automobiles and boat trailers on the … lot, install and maintain a boat pier … and recreate along the beach and shoreline of the … lot." The proposed order also provided that the easement extended over the entire lot and that "no permanent structures may be placed on the … lot that would interfere with the Plaintiff's easement." The Smiths objected to the proposed order on the grounds that it did not conform to, and went beyond, the trial court's decision from the bench. The court denied the objection and signed the proposed order with one minor amendment, not relevant to this appeal.[2]

¶7 Easements for a specified purpose may be prescriptively enlarged by additional uses of the property over time. ***S.S. Kresge Co. v. Winkelman Realty Co.***, 260 Wis. 372, 377, 50 N.W.2d 920 (1952). A prescriptive easement is created by use that is adverse, hostile and inconsistent with the exercise of the title holder's rights, is visible, open and notorious, is under an open claim of right, and is continuous and uninterrupted for twenty years. ***Ludke v. Egan***, 87 Wis. 2d 221, 230, 274 N.W.2d 641 (1979). Friendship and close personal relationships are not sufficient to rebut the presumption of hostility and adverseness created by twenty

[2] The order identifies itself as a partial summary judgment. However, neither side identifies any issues that it leaves unresolved. None appear from the record.

years of unexplained use. ***Widell v. Tollefson***, 158 Wis. 2d 674, 685, 462 N.W.2d 910 (Ct. App. 1990). Hostility merely requires that the use be inconsistent with the title owner's rights. ***Id.***

¶8 Summary judgment is appropriate only if material facts are undisputed, only one reasonable inference is available from those facts, and that inference requires judgment for one of the parties as a matter of law. ***Wagner v. Dissing***, 141 Wis. 2d 931, 939-40, 416 N.W.2d 655 (Ct. App. 1987). We independently review summary judgments without deference to the trial court's decision. ***Schaller v. Marine Nat'l Bank***, 131 Wis. 2d 389, 394, 388 N.W.2d 645 (Ct. App. 1986).

¶9 We conclude that the Ellsworths are entitled to summary judgment on their claim for a prescriptive easement. The Smiths never disputed the Ellsworths' proof that they used the property for various purposes over twenty years, in an open and continuous manner. Instead, they argue that the fact that the previous owners knew of and tolerated those uses creates an inference that they were permissive. As noted, hostility is presumed and not rebutted by friendship or close personal relationships. ***Widell***, 158 Wis. 2d at 685. The fact that the previous owners knew the Ellsworths, knew of their use, and tolerated it, is not sufficient to rebut the presumption of hostility. Direct proof of permissive use was necessary, and none was offered.

¶10 Additionally, the Smiths contend that the Ellsworths cannot claim a right to maintain a pier by prescriptive easement, because placement of the pier violates WIS. STAT. ch. 30 (1997-98).[3] However, the legality of the pier is a

[3] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

separate issue. It is irrelevant to determining the right to use the lot as between the parties.

¶11 The trial court's order is not subject to attack because it differs from the court's oral decision. The Smiths rely on cases holding that the trial court may not increase a sentence pronounced orally from the bench. *See* ***State v. Perry***, 136 Wis. 2d 92, 113, 401 N.W.2d 748 (1987). However, the same rule does not apply in civil cases. WISCONSIN STAT. § 805.17(3) provides that the court may reconsider a decision after entry of the judgment. If the court may do so after the judgment is entered, it certainly may modify the judgment before its entry as well, and that, in effect, is what occurred here. The Smiths made the court fully aware of the discrepancy between the oral decision and the proposed order, and the court expressly ratified the latter as its ruling. It therefore stands as the trial court's decision regardless of earlier pronouncements.

¶12 The trial court properly determined that the Ellsworths easement extended to the entire lot, and that the Smiths could not interfere with the easement by placing permanent structures on the lot. The Ellsworths' deed grants them an easement over "a sixty-six foot strip of land.…" The grant is plain, unambiguous and not subject to dispute as to its meaning. An owner of property may not interfere with the privilege to which the owner of an easement over the property is entitled by making its use less convenient and beneficial than before. ***Hunter v. McDonald***, 78 Wis. 2d 338, 344, 254 N.W.2d 282 (1977).

By the Court.—Judgment affirmed.

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