COURT OF APPEALS
DECISION
DATED AND FILED

March 5, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2581-FT **Cir. Ct. No. 98-CV-666**

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

JOSEPHINE ECKENDORF, F/K/A JOSEPHINE BUCKI,

PLAINTIFF-APPELLANT,

V.

RICHARD AUSTIN AND SUSAN AUSTIN,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Marathon County: RAYMOND F. THUMS, Judge. *Reversed and cause remanded with directions.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Josephine Eckendorf appeals a judgment that declares the interest of herself and her neighbors in an easement.[1] This matter returns to this court following a reversal and remand. *See* ***Eckendorf v. Austin***,

[1] This is an expedited appeal under WIS. STAT. RULE 809.17.

2000 WI App 219, 239 Wis. 2d 69, 619 N.W.2d 129. Eckendorf argues that (1) there is no language in the easement that it was intended exclusively for the Austins; (2) the court improperly took no evidence regarding a destroyed maple tree; and (3) the court erred when it refused to incorporate into the judgment the use conditions never addressed in the prior appeal. We agree. Therefore, we reverse and remand for further proceedings consistent with this opinion.

BACKGROUND

¶2 This dispute concerns an easement for a driveway that the Austins have used since 1987 as access to their property in Wausau.[2] Because the facts of the dispute have been set out in ***Eckendorf***, we do not repeat them at length. The Austins improved the driveway over the years by removing the blacktop, resurfacing part of the area with cement, and adding rotten granite in places. They also removed the maple tree when they widened the driveway to twenty-four feet. After the Austins cut down the tree, Eckendorf filed this action for a declaration of interests regarding the easement.

¶3 After a trial to the court, the court granted judgment in favor of Eckendorf. It ordered the Austins to remove that portion of the driveway that extended beyond twelve feet and to restore grass to the area the court allocated for water and sewer mains. "Finally, the court ordered the Austins to pay Eckendorf $500 for the maple tree and to pay her costs." ***Id.*** at ¶6.

[2] The deed specifically describes the 30-foot easement area in metes and bounds and adds this explanation: "Said easement … shall be for the purposes of a driveway for ingress and egress to premises owned by grantee and for a[n] easement for laying of water and sewer mains for repair and maintenance of water and sewer mains to premises owned by grantee ...."

¶4 On appeal, this court concluded that Eckendorf had not demonstrated that the Austins unreasonably burdened her estate and, therefore, the Austins were entitled to improve the driveway as they had. We also concluded that the court did not make findings on the tree's location and relative impediment, so we remanded this issue to the trial court. If the tree wrongfully blocked the use of the easement, then the Austins were entitled to remove it and Eckendorf would not be entitled to damages. ***Id.*** at ¶14.

¶5 On remand, the trial court found that the Austins were entitled to the exclusive use of the easement. It received no additional evidence regarding the tree, but concluded that because it grew within the surveyed boundaries of the easement, the Austins were entitled to cut it down. Therefore, it denied Eckendorf damages for the tree. Finally, it re-visited the "use conditions" ordered by the original judgment, and concluded that they should be eliminated.[3] Eckendorf appeals.

DISCUSSION

1. Exclusivity

¶6 Eckendorf argues that the trial court erred when it ruled that the easement was for the exclusive use by the Austins. She argues that the scope of the easement is limited to the language of the grant and unless expressly agreed to the contrary, she may use her property in any way consistent with the Austins' use

[3] These are that the Austins should not park on the easement or deposit oil or other automotive fluids.

of the easement. *See* ***Hunter v. Keys***, 229 Wis. 2d 710, 600 N.W.2d 269 (Ct. App. 1999). We agree.

¶7 The court must look to the instrument creating the easement in construing the relative rights of the landowners. ***Id.*** at 714. "The use of the easement must be in accordance with and confined to the terms and purposes of the grant." ***Id.*** (citation omitted).

¶8 An easement is a permanent interest in another's land, with a right to enjoy it fully and without obstruction. ***Id.*** at 715. "While the owner of property subject to an easement may make all proper use of his land including the right to make changes in or upon it, nevertheless such owner may not unreasonably interfere with the use by the easement holder." ***Hunter v. McDonald***, 78 Wis. 2d 338, 343, 254 N.W.2d 282 (1977). "This oft-repeated statement of the servient owner's rights and duties virtually always phrases his duty in terms of protecting the easement holder's right to use the easement for the purpose for which it is created." ***Id.*** at 343-44.

¶9 The easement holder's interest is not an estate in land, but rather a right to use the land of another for a special purpose not inconsistent with the general rights of the owner. ***Id.*** "Title to the land does not pass but only the right to pass over it." ***Id.***

¶10 With these principles in mind, we conclude that the easement's language fails to encompass exclusive use of the easement by either party. According to the grant, the Austins have the right to pass over the land and use it for utilities while Eckendorf maintains the right to use it in ways not inconsistent with the Austins' rights. As a result, the easement language does not support the ruling that the Austins are entitled to exclusive use.

2. Evidence Concerning the Tree

¶11 Next, Eckendorf argues that the trial court erroneously refused to take any additional evidence to determine whether the maple tree constituted an obstruction and unreasonable interference with the Austins' use of the easement. Whether to receive additional evidence is an issue addressed to trial court discretion. ***Lacey v. Lacey***, 61 Wis. 2d 604, 613, 213 N.W.2d 80 (1973).

¶12 We sustain discretionary decisions if the trial court examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. ***Loy v. Bunderson,*** 107 Wis. 2d 400, 414-15, 320 N.W. 2d 175 (1982).

> It is recognized that a trial court in an exercise of its discretion may reasonably reach a conclusion which another judge or another court may not reach, but it must be a decision which a reasonable judge or court could arrive at by the consideration of the relevant law, the facts, and a process of logical reasoning.

Hartung v. Hartung, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981).

¶13 Eckendorf claims that the tree existed for forty years without a problem and the Austins could have driven around the tree, making it unnecessary to cut it down. The trial court, however, refused to take evidence because it concluded, in effect, that the tree's location within the surveyed easement area constituted an obstruction as a matter of law.

¶14 The question before the court was whether the tree interfered with the Austins' reasonable use of the easement. The property owner may not intrude into the easement in such a way as to interfere with the rights of the easement holder. ***Keys***, 229 Wis. 2d at 716. "An obstruction or disturbance of an easement

is anything which wrongfully interferes with the privilege to which the owner of the easement is entitled by making its use less convenient and beneficial than before. Obstructions or disturbances are unauthorized and constitute nuisances." ***McDonald***, 78 Wis. 2d at 342-43 (citation omitted).

¶15 We conclude that whether the tree interfered with the use of the easement presents a question of fact. That the tree was located within the confines of the surveyed easement is one factor to be considered in deciding whether it was an obstruction. ***Id.*** We disagree that the trial court was entitled to conclude that because the tree was located within the confines of the thirty-foot-wide driveway easement, it constituted an obstruction as a matter of law. Because the trial court's rationale was based upon an incorrect interpretation of law, the court erroneously exercised its discretion by rejecting evidence on this issue.

3. Use Conditions

¶16 Finally, Eckendorf claims that the trial court erred when it refused to order that the previous judgment's rulings, which were not reversed in the previous appeal, remained in effect. We agree. When an appellate court reverses a decree and remands the case for further proceedings, the circuit court may make any order "not inconsistent with the decision of the appellate court, as to any question not presented or settled by such decision." ***Fullerton Lumber Co. v. Torborg***, 274 Wis. 478, 483-84, 80 N.W.2d 461 (1957).

¶17 The original judgment provided that the Austins had no right to park or deposit oil or other automotive fluids on the easement. This ruling was not appealed. We conclude that because it was not appealed, it was not reversed in the previous appeal and, consequently, should have been incorporated in the judgment entered on remand.

CONCLUSION

¶18 We conclude, therefore, that the court erroneously determined that the intent of the easement was to exclude Eckendorf. We further conclude that it erroneously exercised its discretion when it refused to hear evidence on the issue whether the tree was an obstruction to the Austins' use of the easement. In addition, we determine that the original judgment's conditions regarding parking and deposit of oil or automotive fluids remain in effect. Therefore, we reverse the judgment and remand for proceedings consistent with our opinion.

By the Court.—Judgment reversed and cause remanded with directions.[4]

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

[4] The Austins' motion for frivolous appeal costs and fees is denied.