COURT OF APPEALS
DECISION
DATED AND FILED

June 7, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1344 **Cir. Ct. No. 2007CV2811**

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

GARY PAHL AND JUDITH PAHL,

PLAINTIFFS-APPELLANTS,

V.

AMERICAN TRANSMISSION COMPANY AND ATC MANAGEMENT, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Brown County: JOHN D MCKAY, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Gary and Judith Pahl appeal a summary judgment dismissing their claims against American Transmission Company and ATC Management, Inc. (collectively, ATC). They contend that: (1) a 1964 easement granted to the utility is void as unconscionable and against public policy; (2) ATC

abandoned the easement or the easement was extinguished through adverse possession; (3) ATC violated the terms of the easement agreement and is required to condemn and compensate the Pahls for the use of their land; and (4) ATC was negligent in not providing the Pahls with information about the condemnation process. We affirm.[1]

BACKGROUND

¶2 In 1964, Sylvia and Erwin Pahl, Gary Pahl's parents, sold to the Wisconsin Electric Power Company (WEPCO) an easement for the construction of two electric transmission lines on their property. The easement consists of a 220-foot-wide strip of land running east to west across the southern portion of the Pahl property, far from any road or dwelling. Gary and Judith Pahl later inherited the property.

¶3 The easement agreement permitted WEPCO to construct two "[p]ole transmission line structures … together with the necessary footings, stub supports, and underground accessories … in such locations as may be from time to time

[1] This case provides an excellent opportunity to discuss some fundamentals of persuasive brief writing. The Pahls' brief begins with a statement of the issues presented. The first issue, as stated by the Pahls, consists of a single page-long sentence that includes four different acronyms, three different dates, and such an extensive mix of legal and factual content that the sentence becomes nonsense, the equivalent of Jabberwocky. *See* LEWIS CARROLL, THROUGH THE LOOKING GLASS 136-38 (Signet Classic ed., New American Library 2000) (1871). The Pahls' statement of the second issue is not even a complete sentence.

The Pahls' statement of facts consists of seven pages containing thirty-nine one- and two-sentence paragraphs. The statement of facts is so difficult to follow that it does little to assist the reader in understanding the importance of events or the issues presented by the case.

As Judge Brown has pointed out, good appellate attorneys will make it as easy as possible for the court to rule in their favor. *See* ***State v. Bons***, 2007 WI App 124, ¶28, 301 Wis. 2d 227, 731 N.W.2d 367 (Brown, J., concurring). Thoughtful organization and recitation of the issues and facts in the case go a long way toward building the credibility of the legal analysis.

selected by [WEPCO] ….” However, WEPCO agreed not to construct both transmission lines simultaneously. Instead, the agreement states that “the construction of the second line may occur some years after the first line.” WEPCO constructed the first transmission line in the late 1960s. ATC purchased transmission assets from WEPCO in 2001, including the easement and transmission line across the Pahls’ property.[2]

¶4 In 2002, ATC obtained a ‘Certificate of Public Convenience and Necessity’ from the Public Service Commission of Wisconsin authorizing it to construct a second transmission line within the easement. The line was constructed in 2005, further to the north than was initially intended but still completely within the easement, even under maximum calculated blowout conditions.[3] The Pahls, who between construction of the first and second lines had used the northern portion of the easement as an auto salvage yard and a tree nursery, were required to discontinue those uses.

¶5 During construction, ATC attempted to purchase an additional twenty-foot-wide easement north of the 1964 easement area. The Pahls’ neighbors agreed to sell ATC an additional right-of-way, but the Pahls did not.

¶6 The Pahls subsequently brought suit against ATC. They argued that the 1964 easement was void as unconscionable and against public policy; that the easement was extinguished either through abandonment or by adverse possession;

[2] For purposes of our analysis, there is no further need to distinguish between WEPCO and ATC. Therefore, we will simply use ATC to refer to both it and its predecessor in interest.

[3] Blowout calculations are standard calculations performed by transmission line engineers to determine the maximum amount of movement expected in certain wind conditions.

that ATC violated the terms of the easement and was required to compensate the Pahls for the use of their land; and that ATC was negligent in not providing the Pahls with information about the condemnation process pursuant to WIS. ADMIN. CODE § PSC 113.0509 (Apr. 2007). The circuit court granted ATC summary judgment on all the Pahls' claims. They now appeal.

DISCUSSION

¶7 The standards and methodology governing review of a summary judgment are well known and need not be restated here, except to say that summary judgment is appropriate only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).[4]

¶8 The Pahls first argue the circuit court improperly dismissed their unconscionability claim. Generally, unconscionability means the absence of a meaningful choice on the part of one party (procedural unconscionability), together with contract terms that unreasonably favor the other party (substantive unconscionability). ***Leasefirst v. Hartford Rexall Drugs, Inc.***, 168 Wis. 2d 83, 89-90, 483 N.W.2d 585 (Ct. App. 1992). The Pahls argue the original easement granted by the elder Pahls is procedurally unconscionable because ATC possessed an overwhelming bargaining advantage by virtue of its condemnation power. They argue the same agreement is substantively unconscionable because ATC contracted for the right to use land over which it wielded no condemnation power.

[4] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶9 The Pahls' procedural unconscionability claim rests on the notion that the elder Pahls had no choice but to sign the easement agreement, because the utility would have condemned the property if they refused. This contention is without merit. The Pahls' argument overlooks, and if accepted would invalidate, an important statutory protection for property owners: a condemnor is required to negotiate in good faith with the property owner before initiating condemnation proceedings. *See* WIS. STAT. § 32.06(2a) (1963). The statute establishes a legislative preference for voluntary resolution of the dispute, but does not compel the parties to reach an agreement. Indeed, the property owner may reject the condemnor's overtures and commence an action to contest the right of condemnation. *See* WIS. STAT. § 32.06(5) (1963). The statutory negotiation process does not deprive the property owner of a meaningful choice.

¶10 The Pahls' substantive unconscionability argument is equally meritless. The Pahls claim that the agreement is substantively unconscionable because it granted ATC the right to use property that it allegedly could not condemn. This argument conflates condemnation law with contract law. The utility purchased the right to use the property regardless of whether it was susceptible to condemnation. In their five-page discussion of the matter, the Pahls do not once mention the easement agreement, let alone describe how the contract unreasonably favors the utility.

¶11 The Pahls next claim that, because the northern portion of the easement was not immediately needed for public purposes, the easement agreement is void as against public policy. The Pahls rely on the following quote from ***Czarnik v. Sampson Enterprises, Inc.***, 46 Wis. 2d 541, 547, 175 N.W.2d 487 (1970):

> [W]ith respect to eminent domain, the general rule is that only such an estate in the property sought to be acquired may be taken as is reasonably necessary for the accomplishment of the purpose for which the proceeding is brought. Because eminent domain involves the element of compulsion, that construction must be adopted which, in the event of uncertainty, indefiniteness or ambiguity, leaves the owner with the greatest possible estate.

However, this is not an eminent domain case, and the Pahls' brief conveniently omits the next sentence in ***Czarnik***, which is directly applicable: "This is in contrast to a voluntary conveyance between individuals where the rule of construction in determining the extent of interest conveyed is to *allow the greatest possible interest to the grantee*." ***Id.*** at 547-48 (emphasis added). The circuit court correctly concluded that the easement agreement is not contrary to public policy simply because ATC did not immediately exercise its rights.

¶12 Next, the Pahls argue that ATC abandoned the northern portion of the easement area. Citing WIS. STAT. § 32.16, the Pahls claim that a public purpose easement's nonuse for twenty years demonstrates abandonment. The Pahls misread the statute. Section 32.16 establishes a twenty-year grace period within which an easement for public use *cannot* be deemed abandoned for nonuse. It does not establish a presumption that the easement has been abandoned after that time.

¶13 Instead, abandonment must be evinced by an affirmative act. ***Spencer v. Kosir***, 2007 WI App 135, ¶8, 301 Wis. 2d 521, 733 N.W.2d 921. Nonuse does not itself produce an abandonment, no matter how long continued.[5]

[5] Evidence of nonuse may, however, be considered by the fact finder in determining whether the owner of the dominant estate had the requisite intent to abandon. ***Spencer v. Kosir***, 2007 WI App 135, ¶8, 301 Wis. 2d 521, 733 N.W.2d 921.

Id. ***Spencer*** is informative in its application of abandonment principles. There, the dominant estate benefitted from a right-of-way that was recorded in 1936 but never used. ***Id.***, ¶3. In 2004, the owner of the dominant estate filed suit after the owner of the servient estate refused to allow a logging road on the burdened property. ***Id.***, ¶4. We quoted with approval the circuit court's resolution of the case:

> It is of no legal consequence that the easement road has not been constructed and used in all the years from 1936 to present. [The owner of the dominant estate was] under no affirmative legal obligation to construct the road when the easement was first created. … The reservation of easement in 1936 was in contemplation of a future need for legal access from the parcel to the town road. That need did not ripen until the mid-to-late 1990's ….

Id., ¶9. Here, ATC had no affirmative legal obligation to construct the second transmission line, and the easement agreement contemplated that the need for such construction might not arise for years. ATC built the second line relatively quickly after the Public Service Commission authorized it to do so. Under these circumstances, ***Spencer*** compels the conclusion that the easement has not been abandoned.

¶14 The Pahls also argued in their brief-in-chief that the northern portion of the easement should be deemed abandoned pursuant to ***Pollnow v. DNR***, 88 Wis. 2d 350, 276 N.W.2d 738 (1979). ATC distinguishes that case because the issue there was not what actions constituted abandonment, but whether a railroad acquired a fee simple or an easement by virtue of its adverse possession. *See* ***id.*** at 355-56. The Pahls have not responded to ATC's argument, and we therefore deem the issue conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979).

¶15 In a related argument, the Pahls argue that they have adversely possessed the easement rights back from ATC. However, an easement cannot be extinguished by prescription when the owner of the servient estate recognizes the easement's existence: "It is elementary that possession of land in subordination to the rights of others therein for any length of time will not affect such rights." ***Hensel v. Witt***, 134 Wis. 55, 113 N.W. 1093 (1907). The Pahls have no claim for adverse possession because they have continually recognized ATC's right to use the easement.

¶16 Next, the Pahls claim ATC violated the terms of the easement agreement by placing the transmission line too close to the northern boundary of the right-of-way. This argument is foreclosed by an unambiguous term in the agreement which states that the transmission lines may be erected "in such locations as may be from time to time selected by [ATC] upon, along, over and across the hereinafter described strip of land …." The Pahls also argue that the transmission line's placement "does not conform to the power line location sketches shared with the elder Pahls when [ATC] was acquiring the easement." The sketch to which the Pahls refer was not part of the easement and, in any event, conspicuously states, "All Dimensions Are Approximate" and "NOTE! NOT TO SCALE[.]"

¶17 The Pahls, in yet another convoluted argument, next claim that the court improperly granted summary judgment on their inverse condemnation claim. The crux of their argument seems to be that, because ATC purchased additional easement area from the Pahls' neighbors, and attempted to purchase the same from the Pahls, ATC has somehow conceded that the existing easement must be enlarged and that the Pahls are entitled to compensation. Because of this

purported concession, the Pahls argue that ATC was required, but failed, to follow the condemnation procedure set forth in WIS. STAT. § 32.06.

¶18 The Pahls are wrong. A property owner has no claim for inverse condemnation if "a person possessing the power of condemnation" has exercised that power. *See* WIS. STAT. § 32.10. It is precisely *because* the condemning authority has not instituted condemnation proceedings that the property owners must bring suit for a taking of their property. Therefore, the success of the Pahls' inverse condemnation claim is not predicated on whether ATC properly followed the condemnation procedure set forth in WIS. STAT. § 32.06. Instead, the Pahls must show either "an actual physical occupation" of their property or "a restriction that deprive[d them] 'of all, or substantially all, of the beneficial use of [their] property.'" ***E-L Enters., Inc. v. Milwaukee Metro. Sewerage Dist.***, 2010 WI 58, ¶¶22, 37, 326 Wis. 2d 82, 785 N.W.2d 409 (quoting ***Howell Plaza, Inc. v. State Hwy. Comm'n***, 66 Wis. 2d 720, 726, 226 N.W.2d 185 (1975)). They have not done so.

¶19 Finally, the Pahls assert the circuit court erred by concluding that there is no private claim for violations of WIS. ADMIN. CODE § PSC 113.0509, which requires that utilities provide landowners with materials describing their rights.[6] We disagree. WISCONSIN ADMIN. CODE § PSC 113.01(4) provides, "The

[6] WISCONSIN ADMIN. CODE § PSC 113.0509 (Apr. 2007), provides:

> **(1)** When approaching a landowner in the course of negotiating new easements or renegotiating existing easements, the utility shall provide the landowner with materials approved or prepared by the commission describing the landowner's rights and options in the easement negotiation process. The landowner shall have, unless voluntarily waived by the landowner, a minimum period of five days to examine these materials before signing any new or revised easement agreement.

manner of enforcing the rules in ch. PSC 113 is prescribed in s. 196.66, Stats. and such other means as provided in statutory sections administered by the public service commission." WISCONSIN STAT. § 196.66, in turn, subjects a negligent or disobedient public utility to a forfeiture. It does not create a private cause of action to enforce the administrative provision.

¶20 WISCONSIN ADMIN. CODE § PSC 113.01(4) does leave open the possibility that a private remedy might be found in "statutory sections administered by the public service commission." In support of its claim that a private right of action exists for a WIS. ADMIN. CODE ch. PSC 113 violation, the Pahls cite WIS. STAT. § 196.64. Section 196.64 is not, however, a section administered by the public service commission. Instead, it provides that an agent of a public utility who willfully, wantonly or recklessly acts or fails to act in violation of WIS. STAT. chs. 196 or 197 is liable for treble damages to the person injured. The statute does not require any act on the part of the public service commission to be effective. It therefore does not create a private remedy for a violation of WIS. ADMIN. CODE ch. PSC 113.

By the Court.—Judgment affirmed.

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