COURT OF APPEALS
DECISION
DATED AND FILED

May 14, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2415 **Cir. Ct. No. 2011CV439**

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

BRADLEY E. ALLEN,

PLAINTIFF-APPELLANT,

V.

WOELFEL FAMILY REVOCABLE TRUST, CHRISTIAN G. WOELFEL AND MARY G. WOELFEL, CO-TRUSTEES OF THE WOELFEL FAMILY REVOCABLE TRUST,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Oneida County: PATRICK F. O'MELIA, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Bradley Allen appeals a summary judgment dismissing his prescriptive easement claim against the Woelfel Family Revocable Trust and its co-trustees, Christian and Mary Woelfel. Under WIS. STAT.

§ 893.28(1),[1] a prescriptive easement comes into being after twenty years of "[c]ontinuous adverse use of rights in real estate of another[.]" The circuit court concluded that Allen's predecessors in title had permission to use the Woelfels' property, and, as a result, the use was not adverse. Citing § 2.16 of the RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES (2000), Allen argues that permissive use may qualify as adverse use, if the use is made pursuant to an oral grant of irrevocable permission. He also contends that genuine issues of material fact preclude summary judgment. We reject Allen's arguments and affirm.

BACKGROUND

¶2 Christian Woelfel's mother, Mary Woelfel,[2] owned a large tract of land on Upper Kaubashine Lake in Oneida County. The property included a cabin, which was accessed by a driveway that intersected East Kaubashine Road near the property's northeast corner. In 1977, Mary sold the southernmost five acres of the property, including the cabin, to Donald and Lucille Neuman. Mary retained ownership of the land immediately north of the five-acre parcel, and she and her husband ultimately built a home there. The driveway providing access to the Neumans' property crossed the parcel of land that Mary retained.

¶3 When the Neumans purchased the five-acre parcel, they intended to subdivide it into three smaller lots. They planned to keep the northernmost lot, where the cabin was located, and sell the two southern lots to third parties. To

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] We note at the outset that this case involves two individuals named Mary Woelfel—Christian Woelfel's wife, who is a defendant-respondent, and his mother, who is not. For the remainder of the opinion, when we refer to Mary Woelfel, we mean Christian's mother.

facilitate the planned subdivision, Mary granted the Neumans an easement over a sixty-six-foot-wide strip of land next to the eastern border of the five-acre parcel. This easement provided each of the Neumans' three proposed lots with access to East Kaubashine Road. A warranty deed conveying the five-acre parcel and the sixty-six-foot-wide easement to the Neumans was recorded on August 2, 1977.

¶4 The warranty deed did not grant the Neumans an easement over that portion of the driveway that crossed Mary Woelfel's property. However, Lucille Neuman testified that, around the time of closing, Mary and her husband, Oscar, gave the Neumans oral permission to use the driveway. Lucille stated, "Both Oscar and Mary told us, they said, 'You can just continue using the driveway that we have used for years to go down to the cabin.'" When asked why she and her husband believed they could use the driveway, Lucille reiterated, "[Mary and Oscar] told us to. … They said use it; we used it." Lucille stated the Neumans had a "handshake agreement" with Mary and Oscar regarding use of the driveway. Lucille's testimony was confirmed by Christian Woelfel, who testified that Oscar told him Oscar and Mary gave the Neumans verbal permission to use the driveway. Christian characterized the arrangement between his parents and the Neumans as a "gentleman's agreement."

¶5 Soon after closing, the Neumans subdivided the five-acre parcel as planned and sold the two southern lots. They retained the northernmost lot and built a home there in 1978. The Neumans always used the driveway crossing the Woelfels' property to access their land. They never built a new driveway connecting their residence to the sixty-six-foot-wide access easement granted by the August 2, 1977 deed.

¶6 In 1992, Mary Woelfel deeded her property to Christian and his wife. The Neumans continued to use the driveway crossing the Woelfels' property. This use was not discussed with Christian, and he never objected to the Neumans using the driveway across his property. He testified he knew that his parents had given the Neumans oral permission to use the driveway, and he decided to "honor" that permission out of respect for his parents.

¶7 In 2010, the Neumans listed their property for sale. Shortly thereafter, they accepted Allen's offer to purchase the property. Allen spoke to Lucille Neuman about the driveway across the Woelfels' property on at least one occasion before closing. Allen testified that Lucille specifically told him she had an easement granting her the right to use the driveway. In contrast, Lucille denied telling Allen that she had "any kind of a legal right to go over the Woelfel property[.]" Instead, she told him that if he wanted to use the driveway, he would have to discuss it with Christian Woelfel.

¶8 A title search completed before closing confirmed that the Neumans did not have a recorded easement over the driveway. Consequently, Allen and Lucille Neuman signed an Amendment to Offer to Purchase, which provided:

> Buyer understands that the seller[']s current driveway does not have a written perpetual ingress and egress access. Seller will credit buyer $3000.00 at closing for the construction of a new driveway, bid from Furman Excavating enclosed. This to cover driveway permits and all possible cost's [sic] associated with the new road.

¶9 The transaction closed in July 2010. Allen continued using the driveway that crossed the Woelfels' property. Consequently, in 2011, Christian Woelfel installed a gate across one end of the driveway and placed spikes across the other end to prevent Allen from using it. In response, Allen filed this lawsuit,

alleging that a prescriptive easement over the driveway came into being in 1997 after "20 years of actual, open, notorious, hostile and adverse use" by the Neumans.[3]

¶10 The parties filed cross-motions for summary judgment. The Woelfels argued Allen was not entitled to a prescriptive easement because the undisputed facts showed that the Neumans had permission to use the driveway. The Woelfels contended that a use of land cannot be adverse if it is carried out with the owner's permission. In reply, Allen cited the RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.16 cmt. a (2000), which states that a prescriptive easement can arise absent adverse use if the parties "try to create a servitude but fail, initially because they do not fully articulate their intent or reduce their agreement to writing … [and] proceed to act as though they have been successful in creating the servitude, and continue to do so for the prescriptive period[.]" Allen contended the undisputed facts showed that the Woelfels orally granted the Neumans irrevocable permission to use the driveway. He therefore argued that, under § 2.16, the Neumans' use could give rise to a prescriptive easement.

¶11 The circuit court concluded the undisputed facts established that the Neumans' use of the Woelfels' driveway was permissive, and consequently not adverse. The court agreed with the Woelfels that, under Wisconsin law, permissive use cannot give rise to a prescriptive easement. The court declined Allen's request to apply § 2.16 of the RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES, noting that § 2.16 is "not controlling law in Wisconsin[.]" The court

[3] WISCONSIN STAT. § 893.28(1) allows a claimant seeking a prescriptive easement to rely on use carried out by his or her predecessors in interest.

therefore granted summary judgment in favor of the Woelfels, and this appeal follows.

DISCUSSION

¶12 Allen argues the circuit court erred by granting the Woelfels summary judgment on his prescriptive easement claim. We independently review a grant of summary judgment, using the same methodology as the circuit court. ***Hardy v. Hoefferle***, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. Summary judgment is appropriate where "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).

¶13 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). Here, only the first element is in dispute—that is, whether the Neumans' use of the driveway across the Woelfels' property was adverse.

¶14 Allen contends that use made pursuant to an oral grant of irrevocable permission qualifies as adverse use. We disagree. It is well-established that a use of land is not adverse if it is carried out with the owner's permission. *See* ***Ludke***,

87 Wis. 2d at 230 ("A use which is permissive is subservient and not adverse."); ***County of Langlade***, 202 Wis. 2d at 457 ("Hostile intent does not exist if the use is pursuant to the permission of the true owner."); *see also* ***McCormick v. Schubring***, 2003 WI 149, ¶20 n.5, 267 Wis. 2d 141, 672 N.W.2d 63 (noting that, because the plaintiff and his predecessors used a road with the owner's permission, the plaintiff could not establish the elements for a prescriptive easement). Thus, if the Neumans had permission to use the Woelfels' driveway, the use was not adverse, and it could not give rise to a prescriptive easement.

¶15 Allen's argument to the contrary is based on § 2.16 of the RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES. Section 2.16 states that a prescriptive easement can be created in two ways: (1) by a "use that is adverse to the owner of the land or the interest in land against which the servitude is claimed[;]" or (2) by a "use that is made pursuant to the terms of an intended but imperfectly created servitude[.]" Comment a explains that the second situation applies when parties attempt to create a servitude, fail to do so because of a technical defect, but nevertheless act as though they have created the servitude for the relevant prescriptive period. Allen essentially asserts that is what happened in this case: Oscar and Mary Woelfel intended to create an easement over the driveway; the easement failed because they did not make a written grant; and the parties subsequently behaved for twenty years as though an easement had been created. Allen therefore contends a prescriptive easement arose, even though the Neumans had permission to use the driveway.

¶16 There are four problems with Allen's argument. First, Wisconsin has not adopted § 2.16 of the RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES. Thus, we are not bound by the standards set forth in § 2.16. Second, to the extent § 2.16 provides that prescriptive easements can be based on permissive use, it

directly conflicts with Wisconsin law. *See, e.g.*, ***Ludke***, 87 Wis. 2d at 230. We therefore decline Allen's request to apply § 2.16. Third, while Allen asserts there is a difference between merely granting permission to use land and orally granting *irrevocable* permission, we fail to see how an oral grant of irrevocable permission to use the driveway would have been legally possible. "An oral contract for the conveyance of an interest in land is void[.]" *See* ***Trimble v. Wisconsin Builders, Inc.***, 72 Wis. 2d 435, 441, 241 N.W.2d 409 (1976); *see also* WIS. STAT. § 706.02. Thus, to convey irrevocable permission to use the driveway, the Woelfels would have had to use a written conveyance.

¶17 Fourth, even if we were to apply § 2.16, there are significant problems with Allen's claim that Oscar and Mary Woelfel intended to create an easement over the driveway, but failed to do so because of a technical error. The Woelfels successfully conveyed an easement to the Neumans over a sixty-six-foot-wide strip of property as part of the 1977 real estate transaction. Thus, the Woelfels knew how to create a legally valid easement. This undercuts Allen's claim that the Woelfels intended, but failed, to create an easement over the driveway.

¶18 Allen next contends that genuine issues of material fact preclude summary judgment. Specifically, he asserts there is a dispute of fact as to whether the Neumans' use of the driveway was actually permissive. Again, we disagree with Allen's position. The undisputed facts establish that the Neumans had permission to use the driveway. Lucille Neuman—the only party to the 1977 real estate transaction who is still living—repeatedly testified that the Neumans used the driveway with Oscar and Mary Woelfel's permission. Christian Woelfel confirmed Lucille's account, testifying that Oscar told him the Neumans had permission to use the driveway. After the property was transferred to Christian, he

continued to "honor" the permission given by his parents. Allen has not presented anything to contradict this evidence. The undisputed facts therefore show that the Neumans' use of the driveway was permissive, and consequently not adverse.

¶19 Allen points out that, under Wisconsin law, "use of an easement for twenty years, unexplained, is presumed to be adverse and under a claim of right, unless contradicted or explained." ***Ludke***, 87 Wis. 2d at 230-31. While Allen's argument on this point is not entirely clear, he seems to suggest that we should simply presume the Neumans' use was adverse, despite the uncontradicted evidence to the contrary. However, as the Woelfels note, the presumption of adverse use may be rebutted by proof that the use was permissive. *See* ***id.*** at 231. The Woelfels produced undisputed evidence that the Neumans had permission to use the driveway. Consequently, the Woelfels overcame the presumption of adverse use, and the circuit court properly granted summary judgment in their favor.[4]

¶20 Finally, we note that WIS. STAT. RULE 809.23(3) prohibits citation to unpublished opinions, except for authored opinions issued after July 1, 2009, which may be cited for their persuasive value. *See* WIS. STAT. RULE 809.23(3)(a)-(b). Allen cited two unpublished opinions in his appellate brief: a per curiam opinion from 2001, and a per curiam opinion from 2009. These citations violated

[4] The Woelfels contend that we should apply a presumption in favor of permissive use. They cite WIS. STAT. § 893.28(3), which provides, "The mere use of a way over unenclosed land is presumed to be permissive and not adverse." We need not address the Woelfels' argument that the presumption set forth in § 893.28(3) applies because, even without applying that presumption, we conclude the Woelfels were entitled to summary judgment. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed). Additionally, the Woelfels did not argue in the circuit court that § 893.28(3) applied. We generally refuse to address issues raised for the first time on appeal. *See* ***State v. Van Camp***, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997).

RULE 809.23(3). In addition, Allen cited both opinions not as persuasive authority, but in direct support of his arguments. The circuit court previously admonished Allen for citing the same two unpublished opinions, calling the citations "irresponsible and disrespectful[.]" Under these circumstances, we deem it appropriate to, and do, sanction Allen's attorneys and direct that they each pay $100 to the clerk of this court within thirty days of the release of this opinion. *See* WIS. STAT. RULE 809.83(2).

By the Court.—Judgment affirmed.

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