COURT OF APPEALS DECISION DATED AND RELEASED

October 23, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-3169

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

UNITED STONE CORPORATION,

Plaintiff-Respondent,

v.

COUNTY OF WAUKESHA,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Waukesha County: ROGER P. MURPHY, Judge. *Affirmed in part; reversed in part and cause remanded*.

Before Anderson, P.J., Nettesheim and Snyder, JJ.

PER CURIAM. The County of Waukesha appeals from a judgment which grants United Stone Corporation easements by necessity and prescription over land owned by the County. We conclude that a material issue of fact exists as to whether United Stone acquired its property as a severance from a larger parcel with a common owner such that an easement by necessity exists. We reverse that part of the judgment granting an easement by necessity and affirm that part of the judgment granting a prescriptive easement. We

remand the action for further proceedings to determine the claim for an easement by necessity.

United Stone commenced this action for a prescriptive easement across county land to the east of United Stone's land and across a recreational trail to the south and east of the County's parcel. The County acquired the property to the east of United Stone's land in 1988 pursuant to an in rem tax delinquency proceeding under § 75.521, STATS. The recreational trail is an abandoned railroad right-of-way purchased by the County in 1978. United Stone acquired its property in 1962 and has been crossing the properties which now belong to the County since that time. To get to its property, United Stone uses a private driveway by an easement granted from the property owner. It crosses the recreational trail at a location marked by stop signs for the users of the trail. United Stone then travels a gravel road which traverses the County property for approximately 300 yards. United Stone maintains the road for access to its property.

We review a summary judgment under the same methodology as the trial court, and we are not bound by the trial court's ruling. ***Garcia v. Regent Ins. Co.***, 167 Wis.2d 287, 294, 481 N.W.2d 660, 663 (Ct. App. 1992). Summary judgment should be granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. ***Id.*** Where complex issues are presented to a court on summary judgment, they often cannot be decided on the basis of affidavits and depositions. *See* ***Peters v. Holiday Inns, Inc.***, 89 Wis.2d 115, 129, 278 N.W.2d 208, 215 (1979).

An easement by necessity arises when an owner of land severs a landlocked portion of the land by conveying it to another. ***Ludke v. Egan***, 87 Wis.2d 221, 229-30, 274 N.W.2d 641, 645 (1979). A way of access is then implied over the land retained by the grantor. ***Id.*** at 230, 274 N.W.2d at 645. Common ownership of the two parcels is a necessary precondition for the establishment of an easement of necessity. ***Ruchti v. Monroe***, 83 Wis.2d 551, 556, 266 N.W.2d 309, 312 (1978). It is also necessary to establish that the property is landlocked. ***Ludke***, 87 Wis.2d at 230, 274 N.W.2d at 645. Landlocked generally means that a piece of land is surrounded by land belonging to other persons so that it cannot be reached by a public roadway. ***Id.***

The County argues that issues of fact exist as to both requirements. We first consider whether a factual dispute exists as to whether United Stone's land is landlocked. The County contends that it is not because Vince Galbavy, a United Stone officer, admitted in his deposition that there are two routes to the property. However, the County overlooks the fact that the second route described by Galbavy also entails traveling over lands owned by other people. Thus, the United Stone parcel cannot be reached by public roadway without traveling over other lands. There is no dispute that the parcel is landlocked.[1]

We conclude, however, that there is an issue of fact as to whether United Stone acquired the land by a conveyance from a common owner of both lands which severed United Stone's parcel from a larger parcel. The County points to Galbavy's testimony that he purchased the land from Brian and Patrick Cull. Yet the February 16, 1962 deed was signed by Roderick Cull, Brian and Patrick's father. On March 3, 1961, the property was mortgaged by Roderick, Brian, Patrick and Diane Cull. Further complicating the issue is Galbavy's testimony that the land was purchased out of an estate divided into six portions and that Roderick acted as an "administrator" for estate participants. He referred to the property next door as being owned by the "Cull estate." The tax foreclosure documents indicate that notice was given to nine different Culls and do not reflect the actual owner of the property the County acquired. Relying on the 1961 mortgage document, United Stone asserts that its property was once part of a larger parcel owned by Roderick. But it cannot be ascertained from the description in the mortgage document whether the County's parcel was within the boundaries described.

Thus, the summary judgment record is inconclusive on whether United Stone acquired the property under circumstances giving rise to an easement by necessity, and we reverse that portion of the judgment. If there are disputed issues of material fact, they should be decided by the fact finder at trial. *See* ***Landreman v. Martin***, 191 Wis.2d 787, 801, 530 N.W.2d 62, 67 (Ct. App. 1995).

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[1] Although the ability to reach the land by permissive use over others' lands may be a factor in a proceeding to compel the laying of a highway under ch. 80, STATS., it has no bearing on the definition of landlocked for the purpose of determining an easement by necessity.

We turn to whether a prescriptive easement over the recreational trail could be determined by summary judgment. The parties agree that because United Stone purchased its land in 1962, it must establish forty years of use to establish a prescriptive interest over the recreational trail. *See* § 330.10, STATS., 1961; ***Petropoulous v. City of West Allis,*** 148 Wis.2d 762, 767, 436 N.W.2d 880, 882 (Ct. App. 1989) (prospective application of adverse possession statutes). The applicable years are 1954 to 1994.

The County argues that the record fails to establish that the nature of the use of the railroad right-of-way was adverse.

> A use which is permissive is subservient and not adverse. A use of an easement ... unexplained, is presumed to be adverse and under a claim of right, unless contradicted or explained. However, the presumption may be rebutted by proof that the use was under license, indulgence or special contract inconsistent with a claim of right.

Ludke, 87 Wis.2d at 230-31, 274 N.W.2d at 646.

The County characterizes Galbavy's testimony as supporting a conclusion, at best, that the railroad gave permissive use of the crossing. However, Galbavy's admission that the railway workers, with whom he was close friends, knew people were using the crossing is not sufficient to rebut the presumption of adversity. "Hostile use is not an unfriendly intent and does not mean a controversy or a manifestation of ill will." ***Shellow v. Hagen***, 9 Wis.2d 506, 511, 101 N.W.2d 694, 697 (1960). Moreover, neither friendship, close social relations or mere acquiescence rebut the presumption. ***Id.*** at 514, 101 N.W.2d at 698.

The County also contends that there is no evidence of use before United Stone's acquisition of the property. On the contrary, the record reflects that the crossing was used during the childhood of men born in 1929 and 1937. The County offered nothing to contradict this evidence. Sufficient adverse use was established to support the granting of the prescriptive easement.

Claiming that it was a bona fide purchaser from the railroad without notice of the easement, the County argues that it acquired the railroad right-of-way free and clear of the easement. The County contends that the prescriptive period started anew when, as a bona fide purchaser without notice, it purchased the property. However, the County acquired the railroad right-of-way by virtue of a quitclaim deed which stated that title was subject to all existing easements, "whether or not of record." The County acquired the interest of the railway. That interest was subject to the claim of a prescriptive easement.

Because we reverse the judgment in part and remand for further proceedings on whether an easement by necessity exists, we need not address the County's claim that under § 75.521(8), STATS., the in rem tax delinquency proceeding extinguished any easement claim. If no easement exists, the application of the statute need not be determined.[2]

By the Court.—Judgment affirmed in part; reversed in part and cause remanded.

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

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[2] We agree with the trial court that ***Leciejewski v. Sedlak***, 116 Wis.2d 629, 637-40, 342 N.W.2d 734, 738-39 (1984), does not answer the question of the statute's applicability when property is landlocked and an easement by necessity exists. ***Leciejewski*** held that title acquired from the county following a tax foreclosure defeated a claim of ownership based on adverse possession. ***Leciejewski*** is confined to the facts of that case. It involved a claim to ownership of a portion of land acquired by another after a tax deed created "a new title that extinguishes all former titles and liens." ***Id.*** at 639, 342 N.W.2d at 739. It did not address potential easement claims which, by legal definition, are not equated with title or ownership rights.