STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2271

Robert T. Elthon, et al.,
Respondents,

vs.

Charles W. Wright and Suzanne F. Wright,
as Trustees or Successor Trustees of the
Charles W. Wright Revocable Trust dated July 27, 1992,
including amendments thereto,
Appellants.

Filed August 27, 2012
Affirmed
Harten, Judge[*]

Cass County District Court
File No. 11-CV-09-2531

Kenneth H. Bayliss, W. Benjamin Winger, Quinlivan & Hughes, P.A., St. Cloud, Minnesota (for respondents)

Thomas P. Melloy, Gray, Plant, Mooty, Mooty & Bennett, P.A., St. Cloud, Minnesota (for appellants)

Considered and decided by Halbrooks, Presiding Judge; Hudson, Judge; and Harten, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

HARTEN, Judge

The parties are landowners of adjoining pieces of property; respondents' property is accessed by means of a roadway on appellants' property to which respondents have an easement. Respondents brought this action claiming that they have acquired a prescriptive easement to a strip of land on either side of the roadway. Appellants counterclaimed for breach of the parties' easement agreement. The district court dismissed both claims, and each party challenges the dismissal of its claim. Because we see no error and no abuse of discretion in the district court's dismissals, we affirm.

FACTS

Appellants Charles W. Wright et al. (the Wrights) and respondents Robert T. Elthon et al. (the Elthons) agree that they are subject to an easement agreement entered into by their predecessors in 1975. The agreement permits the Elthons to use an unpaved roadway located on the Wrights' property solely for ingress to and egress from their own property and permits the Wrights to use a turnaround on the Elthons' property. The agreement limits the speed of traffic on the roadway to eight miles per hour (mph); it says nothing about either the width or maintenance of the roadway.

The parties have had an acrimonious and litigious relationship. In 1993, the Wrights sued the Elthons.[1] In resolving that action, the district court found that "[t]he width of the easement is nine feet, which is the width of the roadbed and reasonable

[1] In a memorandum accompanying its order in the 1993 action, the district court noted the parties' "acrimonious relationship" and observed that "most of these difficulties are arising because the parties simply do not care for each other."

clearance." The district court also found that the Elthons' maintenance of the roadway had been reasonable and within the terms of the easement and concluded that the Elthons could make improvements to the roadway, including blacktopping, at their own expense. Finally, the district court ordered that neither party interfere with the other party's use of the roadway.

Both parties moved for amended findings. The district court denied both motions, reiterated that the width of the roadway is nine feet, and noted that the right to use the roadway conferred by the easement necessarily implies the rights to keep the roadway free of obstructions and to "maintain and perhaps improve" it. The district court rejected the Wrights' argument that blacktopping the roadway would be contrary to law.

Fifteen years after the 1993 order, in 2008, the Elthons, at their own expense, had gravel laid over the roadway. Charles Wright was disturbed by this and wrote to the district court judge who had decided the 1993 matter, telling him that, because of his order, the nine-foot roadway had been widened to 13 and 15 feet; the wider roadway resulted in vehicles moving at speeds greater than eight mph; the easement "now look[ed] like a township road"; and the Wrights neither "need[ed] nor desire[d] to have a fast track through [their] property."

In 2009, the Elthons brought this action, claiming that, by using and maintaining an additional three to four feet on each side of the nine-foot roadway, they have acquired either a prescriptive easement 15 to 16 feet wide or adverse possession of the land at the sides of the nine-foot roadway. The Wrights counterclaimed for breach of the easement

agreement. A master was appointed to prepare proposed findings of fact, and his photographs of the roadway and maintained land were admitted into evidence at trial.

In their posttrial memorandum, the Wrights asked the district court to use its equitable powers to limit future maintenance or improvements of the roadway to preserve its condition at the time of trial and to eliminate the right to pave or blacktop the roadway.

Following trial, the district court issued findings that the width of the roadway ranges from seven feet, ten inches to ten feet, three inches and that the Elthons had performed essentially the same maintenance of the easement both before and after the 1993 court order that found their maintenance to be reasonable. Both the Elthons' claim for a prescriptive easement or adverse possession and the Wrights' claim for breach of the easement agreement were dismissed. The district court's order provided that the Elthons may maintain the easement by mowing and trimming beyond the nine-foot roadway in order to keep the easement in exactly the condition shown in the master's photographs. The order also provided that neither party may increase the maintenance beyond that shown in those photographs or make any further improvements to the turnaround or roadway, including grading or filling beyond the nine-foot roadway and blacktopping the easement or the turnaround.

The Wrights argue that the district court abused its discretion by imposing restrictions on the Wrights' use of the property on which the Elthons have an easement; the Elthons argue that the Wrights are estopped from making this argument and also that the district court erred by dismissing the Elthons' prescriptive easement claim.

D E C I S I O N

1. Estoppel

On appeal, a party may neither shift position nor obtain review by raising a new theory. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). The Elthons argue that the Wrights have shifted their position on appeal.

In their posttrial memorandum, the Wrights asked that the district court

> exercise its equitable powers to address the continuing relationship between the parties based on title documents, the original written easement, and the District Court's 1993 Orders as follows:
>
> . . . .
>
> 4. Limiting any future maintenance or improvements within the nine-foot [roadway] to maintaining the [roadway] in its current condition . . . and eliminate the right to pave or blacktop the [roadway].

On appeal, the Wrights object to two provisions of the district court's order:

> 2. . . . . [The Elthons and the Wrights] may not mow, trim, cut branches, plow, or take any similar actions outside of the exact dimensions depicted in [the photographs]. That is to say, the width, height, and nature of the maintenance depicted in [the photographs] shall not expand. . . . The current condition and configuration of the [roadway] and turn around as shown in [the photographs] are adequate and reasonable for the intended use of the [roadway] and turn around and no further alterations or improvements are necessary, nor are they permitted.
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> . . . .
>
> 5. Any grading or filling or similar actions shall be strictly confined to the [nine-]foot roadway of the [i]ngress/[e]gress [e]asement. . . . Neither party may blacktop nor asphalt the [roadway] or turn around.

The Wrights argue that the district court should have prohibited only the Elthons, not the Wrights, from performing maintenance or making improvements that would alter the current condition of the roadway and, in particular, from blacktopping it.

The Elthons argue that, because the Wrights asked the district court to restrict maintenance or improvements to acts that do not alter the roadway's current condition and to prohibit blacktopping, and because the Wrights did not specify that these restrictions should apply only to the Elthons, the Wrights cannot now object because the district court did what they asked and restricted both parties from altering the roadway.

The Wrights argue that the Elthons are reading paragraph four out of context; because paragraph three of their posttrial memorandum asked the district court to prohibit the Elthons (not both parties) from any activity outside the roadway, paragraph four should be understood to apply only to the Elthons as well.

But the Wrights, in their posttrial memorandum, asked the district court to exercise its "equitable powers" to address the parties' "continuing relationship"; imposing restrictions on only one party would neither achieve equity nor further that relationship. Moreover, in their counterclaim, the Wrights asked to have the gravel that the Elthons had deposited along the sides of the nine-foot roadway removed, so the roadway would not be widened. Permitting the Wrights now to perform maintenance or make improvements as they see fit, including blacktopping the roadway, would not preserve the nine-foot gravel roadway that they consistently told the district court they wanted.

Nothing in the Wrights' submissions to the district court indicated that they wanted themselves or anyone else to be permitted to widen, improve, maintain, or

otherwise alter the roadway. Thus, the Wrights are arguably precluded on appeal from taking a position never expressed to the district court.

Although we could affirm the district court's order on this basis, in the interest of making a thorough review, we address the merits of the Wrights' claim.

2. The Wrights' Use of Easement Property

"In an action to determine adverse property claims, a district court has jurisdiction to determine any interests or issues that are fairly covered by the pleadings and evidence presented." *Claussen v. City of Lauderdale*, 681 N.W.2d 722, 726 (Minn. App. 2004). "Generally, the decision to grant equitable relief is within the sound discretion of the district court and its decision regarding such relief will not be reversed absent an abuse of that discretion." *Id.*

The Wrights argue that the 1993 district court's construction of the 1975 easement agreement is controlling and that, because the 1993 order did not preclude the Wrights from performing maintenance or making improvements to the easement, the 2011 district court erred in doing so.

But the 1993 order did not purport to be a final resolution of the parties' disputes over the easement. In 1993, the district court responded to the parties' request for a declaration as to what maintenance of the easement would be permitted with three "Rules of the Road": (1) each party would be responsible for half of the costs of ordinary and necessary maintenance; (2) the Elthons could "make such improvements to the [roadway] at their own expense as they . . . desire[d]," including blacktopping; and (3) neither party

was permitted to substantially interfere with the other party's use of the roadway or to make the roadway impassible.

In the memorandum accompanying the May 1993 order, the district court said:

> This Court cannot provide an answer for every single incident that may occur between these two parties who have such an acrimonious relationship. It is strongly recommended to the parties that they agree to a mediator or arbitrator to help deal with future problems as they arise.
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> . . . .
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> [I]t is the express hope of the Court that the parties, now having some general rules to follow, will be able to work out the minor and insignificant details which have served to limit the enjoyment of each of the parties of their property. It is the perception of the Court that there are very small dollar amounts involved and that most of these difficulties are arising because the parties simply do not care for each other. While the parties never have to like each other, they do have to use the same road. It would be in their best interests for their future enjoyment to cooperate in its use.

In the 1993 memorandum accompanying the dismissal of both parties' motions for amended findings, the district court further stated:

> Both parties believe that the "Rules of the Road" should be more specific. The rules indeed could have been more specific, however, no degree of detail would ever solve each situation to the satisfaction of these parties.
>
> . . . If [the parties] disagree as to what is reasonable and necessary [maintenance], then perhaps they will need to find a third party to answer that question for them.

Thus, the district court did not intend its 1993 order to cover all eventualities or resolve all possible disputes; it knew it was not expressing "the last word" about this easement.

Therefore, the Wrights' argument that, because the 1993 order did not preclude them from altering the easement, the 2011 opinion could not do so, lacks merit.

The Wrights also argue that the 2011 opinion exceeds the scope of the easement agreement and the 1993 order. This is true, but irrelevant. The easement agreement is silent as to the width of the roadway and its maintenance, two issues the parties have consistently disputed. In 2011, the district court necessarily exceeded the scope of the easement agreement in order to address the width and maintenance of the roadway.

The district court's 2011 opinion also necessarily exceeded the scope of the 1993 order, because the 1993 order obviously did not resolve the parties' subsequent disputes. In fact, in their posttrial memorandum, the Wrights asked the district court for relief going far beyond the scope of either the easement agreement or the 1993 order when the Wrights asked that the easement be amended to expire when the Elthons die or transfer their property and suggested that the Elthons' property be provided with an alternative means of access. Had the district court granted the Wrights their requested relief, its order would have exceeded the bounds of both the 1975 easement agreement and the 1993 district court order.

The district court did not abuse its discretion in ordering that neither party perform maintenance or make improvements that would alter the present condition of the roadway.

3. Prescriptive Easement[2]

"To establish a prescriptive easement, a party must prove by clear and convincing evidence that their use of someone else's land was hostile, actual, open, continuous, and exclusive for over 15 years." *Oliver v. State, ex rel. Comm'r of Transp.*, 760 N.W.2d 912, 918 (Minn. App. 2009) (citing *Roger v. Moore*, 603 N.W.2d 650, 657 (Minn. 1999)). The district court dismissed the Elthons' claim that they have a prescriptive easement to a strip of land on each side of the nine-foot roadway because they have used and maintained it since 1993.

As the district court concluded, the Elthons' maintenance on the sides of the roadway cannot meet the elements of a prescriptive easement because a court previously found that maintenance to be reasonable and within the terms of the easement agreement. Therefore, the Elthons' maintenance is not hostile to the Wrights.

The Elthons rely on *Oliver* for the proposition that hostility is presumed when the other elements of a prescriptive easement are met.

> A use is hostile in prescriptive easement cases if it is nonpermissive. Hostility is presumed when the other elements of a prescriptive easement are established. Once a claimant to a prescriptive easement has established actual, open, continuous, and exclusive use for the required length of time, the burden of proof shifts to the owner of the servient estate to prove permission.

[2] Although this issue need not be decided in light of our affirmance of the district court's 2011 order, we address it to afford a thorough review.

Oliver, 760 N.W.2d at 919 (quotations and citations omitted). The facts here indicate that the Wrights agreed to the Elthons' maintenance of the land on each side of the roadway. Thus, the Elthons' reliance on *Oliver* is misplaced.

The district court did not err in dismissing the Elthons' prescriptive easement claim.

Affirmed.