COURT OF APPEALS
DECISION
DATED AND RELEASED

December 3, 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

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No. 95-2419

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

The Hearst Corporation,
a Delaware Corporation,

Plaintiff-Respondent,

v.

Weigel Broadcasting Company,
an Illinois Corporation and
Milwaukee County, a Wisconsin
Municipal Corporation,

Defendants-Appellants.

APPEAL from a judgment of the circuit court for Milwaukee County: FRANK T. CRIVELLO, Judge. *Affirmed in part, reversed in part and cause remanded*.

Before Wedemeyer, P.J., Schudson and Cane, JJ.

PER CURIAM. Weigel Broadcasting Co. and Milwaukee County appeal from a declaratory judgment and permanent injunction prohibiting

Weigel from using any part of an easement and a leasehold interest held by the Hearst Corporation. The appeal results from Weigel's desire to use property owned by the County for ingress and egress. Weigel and the County contend that the trial court misconstrued the agreement creating Hearst's interests and that the court's judgment grants Hearst rights it does not have. They also contend that the trial court impermissibly denied the County its right to assign rights it specifically retained in the agreement. Finally, they contend that the permanent injunction exceeds Hearst's rights and is impermissibly broad.

We conclude that the County cannot grant Weigel the right to use any part of Hearst's leasehold interest. We also conclude that the agreement is ambiguous regarding whether the County may grant Weigel an easement for ingress and egress across the land subject to Hearst's easement. Consequently, the trial court may enter a permanent injunction that prohibits Weigel from conducting any activities on the leased land; however, any prohibition of activities in the easement area must await resolution of factual issues. Weigel does not contest the permanent injunction's prohibition against the use of Hearst's easement for Weigel's antenna tower or transmitter building, and we affirm that provision. Therefore, we affirm the judgment and permanent injunction in part and reverse in part. The case is remanded to the trial court for further proceedings.[1]

BACKGROUND

Hearst owns a television antenna tower, earth station satellite receivers, and service building located in a wooded area of Lincoln Park. Hearst's predecessor in title constructed the antenna tower and service building when it owned the land. Hearst's predecessor conveyed the land to the County and retained easements allowing it to use the antenna tower and service building.

[1] Hearst asks that, if we reverse the judgment and remand the case, we clarify that the preliminary injunction continues. The factual status of the case has changed since the entry of the preliminary injunction, and our decision in this opinion narrows and clarifies the issues. We leave to the trial court the determination of the appropriateness and scope of a preliminary injunction.

In 1984, Hearst wanted to adjust the areas subject to its easement and to obtain the use of additional land for earth stations to receive satellite transmissions. The County and Hearst negotiated a new agreement that superseded prior documents. In the 1984 agreement, Hearst obtained a ninety-nine-year lease for the land it needed for the earth stations (earth station clearance area). The lease reserved to the County the right to supervise changes in the vegetation in the earth station clearance area and to approve the plans and specifications for the earth stations.

The 1984 agreement also contained the following provision granting an easement in an area identified as the tower easement area:

> County hereby grants to [Hearst] a perpetual and exclusive easement for the purposes of maintaining, restoring, and replacing the [t]ower and the guy wires and anchor points which support the [t]ower, and for the purposes of maintaining, restoring, and replacing the service building presently located near the base of the [t]ower and the paved service drive and parking area leading from the Milwaukee River Parkway to said service building, and for the purpose of limiting the height of trees and underbrush ....

The legal description for the tower easement area is composed of three separately identified parcels. One of the parcels encompasses a paved service drive, which is a driveway from a public street to the service building. The second parcel is for the tower, guy wires and anchors, and the third is for the transmitter building and its environs.

A provision in the easement portion of the agreement expressly gave Hearst the right to replace the improvements in the tower easement area prior to dismantling the existing structures. Hearst also obtained the right to install a locking gate across the service drive to "prevent vehicular access to the site by the general public." Hearst agreed to provide the County with a key to the gate so the County could "use the service drive for access (not including access by the general public) to [c]ounty lands not demised" to Hearst by the

agreement. As with the earth station clearance area, the County retained the right to supervise the clearance of vegetation within the tower easement area.

The present controversy arises out of Weigel's attempt to locate a site for a television antenna tower and transmitter building. Weigel approached the County about the possibility of locating the facilities in a county park. As an incentive, Weigel offered use of the proposed antenna tower for the County's fire and emergency radio transmissions. The site the County initially selected for the Weigel antenna tower was approximately 250 feet from Hearst's antenna tower. At that location, the guy wires for the Weigel antenna tower would not only cross the Hearst easements, they would intersect with the guy wires for the Hearst antenna tower. When Hearst was unable to dissuade the County from its selected site, Hearst filed the present action for injunctive relief. While the litigation was pending, Weigel and the County determined that Weigel's antenna tower should be located on the bank of Lincoln Creek, a greater distance away from the Hearst antenna tower. They continue to claim, however, that the County can assign Weigel a right of ingress and egress across the land burdened with Hearst's interests.

The trial court decided the case on Hearst's motion for summary judgment. The court stated that the only consideration was the property rights created by the 1984 agreement. The court concluded that the agreement was not ambiguous and that only Hearst and the County could use the paved service drive. The court concluded that if Weigel acted on its agreement with the County, Weigel would unreasonably interfere with Hearst's contractual rights. The court then entered a permanent injunction prohibiting Weigel from engaging in the following activities:

a)Cutting across, walking upon, or trespassing upon certain areas that are the subject of this lawsuit[;]

b)Inserting, suspending, installing, occupying, maintaining, or leaving any structures, guy wires, survey markers, frames or anchors in or above certain areas[;]

c)Using or traveling on [Hearst's] driveway due to the fact that [Hearst] has an easement for the purpose of

> constructing and maintaining the driveway...[; and]
>
> d)Engaging in any activity near or immediately around certain areas as will cause interference or disturbance of any [of Hearst's] television, radio, and microwave broadcasts or receptions from within its area or which creates any risk of bodily injury or property damage to persons or property on areas at issue.

Weigel and the County are not challenging the injunction to the extent that it prevents Weigel from using Hearst's easement or leasehold interests for its own antenna tower or related equipment. On appeal, they focus on the denial of ingress and egress across the Hearst interests and on prohibition d.

GENERAL LEGAL PRINCIPLES

As stated by the trial court, the issue in this case is the clarification of vested property rights created by the language of the 1984 agreement. In their brief, Weigel and the County discuss the public benefit of the County's use of Weigel's tower and of a stronger broadcast signal, and they accuse Hearst of attempting to stifle competition. Hearst argues that Weigel has other access routes to the Lincoln Creek site and that it does not need to cross the land burdened with Hearst's interests. These extraneous matters are irrelevant to the issues in the case. Both Hearst and the County are entitled to enforcement of their respective vested rights in the tower easement area and the earth station clearance area as those rights were created in the 1984 agreement. To determine the validity of the trial court's judgment, only the 1984 agreement and the laws governing easements and leases are relevant.

Summary judgment is used to determine whether there are disputed issues for trial. ***U.S. Oil Co. v. Midwest Auto Care Servs., Inc.***, 150 Wis.2d 80, 86, 440 N.W.2d 825, 827 (Ct. App. 1989). When reviewing a grant of summary judgment, we apply the same methodology as the trial court. ***Id.*** Summary judgment is appropriate when material facts are not disputed and the moving party is entitled to judgment as a matter of law. Section 802.08(2),

STATS. All doubts on factual matters are resolved against the party moving for summary judgment. ***Williamson v. Steco Sales, Inc.***, 191 Wis.2d 608, 624, 530 N.W.2d 412, 419 (Ct. App. 1995).

The goal of judicial construction of a legal document is to determine what the parties agreed to in a legal sense as evidenced by the language they used. ***Sampson Inv. v. Jondex Corp.***, 176 Wis.2d 55, 62, 42 N.W.2d 177, 180 (1993). If the terms of the document are plain and unambiguous, it is the court's duty to construe the document according to its plain meaning even though the parties may have construed it differently. ***Kreinz v. NDII Secs. Corp.***, 138 Wis.2d 204, 216, 402 N.W.2d 164, 169 (Ct. App. 1987). The determination of whether a document is ambiguous presents a question of law, ***Erickson v. Gundersen***, 183 Wis.2d 106, 115, 515 N.W.2d 293, 298 (Ct. App. 1994), as does construction of an unambiguous document, ***Kreinz***, 138 Wis.2d at 216, 406 N.W.2d at 169. Appellate courts need not defer to the trial court's conclusions on questions of law. ***Id.*** If the document is ambiguous, the consideration of extrinsic evidence is appropriate, and summary judgment must be denied. *See* ***Erickson***, 183 Wis.2d at 118, 515 N.W.2d at 299.

The trial court's decision to grant an injunction is discretionary. ***State v. Seigel***, 163 Wis.2d 871, 889, 472 N.W.2d 584, 591 (Ct. App. 1991). The trial court's exercise of discretion will be sustained if it involves a rational reasoning process based on the facts of record and the application of the appropriate law. ***Id.*** at 889, 472 N.W.2d at 592. A permanent injunction is to be tailored to the specific needs of the case, and because it is preventative, not punitive, it should be no broader than equitably necessary. ***Id.*** at 890, 472 N.W.2d at 592. Additionally, it must be specific regarding the acts and conduct prohibited. ***W.W.W. v. M.C.S.***, 185 Wis.2d 468, 496, 518 N.W.2d 285, 295 (Ct. App. 1994).

When an injunction enjoins an unreasonable interference with an easement, a mixed question of law and fact is presented. ***Figluizzi v. Carcajou Shooting Club***, 184 Wis.2d 572, 588, 516 N.W.2d 410, 417 (1994). In general, we uphold a trial court's factual determination regarding the landowner's proposed use of the land and how the use will affect the easement holder's use of the easement unless the findings of fact are clearly erroneous. ***Id.*** at 589, 516 N.W.2d at 517. Consequently, summary judgment may only be granted if these factual issues are not disputed. Whether the proposed use is an unreasonable

interference with the easement presents a question of law that is intertwined with the factual findings. ***Id.*** at 589-90, 516 N.W.2d at 517. As a result, we review the legal questions independently, but give weight to the trial court's conclusion. ***Id.*** at 590, 516 N.W.2d at 517.

CONTROVERSY REGARDING SERVICE DRIVE

Weigel claims the right to traverse the property subject to Hearst's interests to reach its antenna tower site on Lincoln Creek. It bases its claim on a partial assignment of the County's retained right to use the service drive. Weigel further claims that the service drive consists of both a paved portion and an unpaved portion. The paved portion is the driveway identified in the tower easement area. Weigel and the County allege that the unpaved portion extends from the paved drive to Lincoln Creek. They also argue that the County's retained use of the service drive includes both the paved and the unpaved portions.

According to exhibits filed by Hearst, the alleged unpaved portion crosses the southern half of the earth station clearance area and the southern edge of the parcel of the tower easement area identified for the transmitter building and its environs. The alleged unpaved portion also crosses through one leg of the easement for the tower guy wires and anchors.

To support its assertion that the service drive has an unpaved portion, Weigel relies on affidavits from Irving Heipel, the County's former landscape architect, and Dennis Carey, who had had management responsibility for Lincoln Park. Both men assert that the service drive extends from a public street to Lincoln Creek and that use of the entire length is necessary for the County to have vehicular access to its land.

Hearst denies that the County may partially assign its right to use the service drive. It also denies that an unpaved portion exists. Gerald Robinson, a vice-president of engineering at Hearst, prepared an affidavit in which he asserted that the paved service drive is the only road or drive at the site. He claims that what Weigel calls the unpaved portion of the service road is merely a natural clearing or open area of high grasses, weeds, and underbrush over which a field vehicle, snowmobile, or dirt bike can travel. Hearst also denies that the 1984 agreement created an exception to Hearst's right to exclusive possession of the earth station clearance area.

As previously indicated, the 1984 agreement created a leasehold estate in the earth station clearance area and an easement over the tower easement area. The rights of an easement owner and of a lessee *vis-a-vis* the owner of the land are different. Thus, to determine whether the dispute regarding the service drive presents a material issue of fact, we must separately examine the respective rights of Hearst and the County in the easement and in the leased property.

TOWER EASEMENT AREA

An easement is an interest in another's land that grants the easement holder the right to use the land for specific purposes. ***Hunter v. McDonald***, 78 Wis.2d 338, 344, 254 N.W.2d 282, 285 (1977). The language of the grant determines the primary purposes of the easement. *See* 3 RICHARD R. POWELL AND PATRICK J. ROHAN, POWELL ON REAL PROPERTY § 34.12[1] (1996). In addition, the easement holder has those supplemental or secondary rights necessary to utilize the easement for its intended purposes. ***Id.*** The grant of an easement for specific uses does not, however, include additional uses not necessary to accomplish the stated purposes. Thus, an easement for swimming and boating in a lake does not include the additional right to fish in the lake. *See* ***Alexander Dawson, Inc. v. Fling***, 396 P.2d 599, 602 (Colo. 1964).

Generally, the owner of land burdened by an easement may use the land for any purpose, provided the use does not unreasonably interfere with the easement holder's use of the easement. ***Hunter***, 78 Wis.2d at 343, 254 N.W.2d at 285. The landowner is legally obligated to protect the easement holder's right to use the easement. ***Id.*** at 344, 254 N.W.2d at 285. The easement holder may enforce this obligation through an injunction against an unreasonable interference. ***Lintner v. Augustine Furniture Co.***, 199 Wis. 71, 73, 225 N.W. 193, 194 (1929) (blockage of alley for five minutes several times a day was material and unreasonable).

If the easement is not exclusive, the landowner may grant additional easements, provided any additional easements do not unreasonably interfere with the original easement holder's use of the easement. ***Lintner v. Office Supply Co., Inc.***, 196 Wis. 36, 49, 219 N.W. 420, 425 (1928). In ***Office Supply***, the court stated that the "owner of a right of way, unless expressly made exclusive, does not acquire dominion over the property affected, but is entitled 'only to a reasonable and usual enjoyment thereof.'" ***Id.*** at 50, 219 N.W. at 425 (citation omitted). An exclusive easement, however, gives the easement holder a limited right to exercise control over the property because the landowner may not grant third parties easements for the same purposes. F. THOMPSON ON REAL PROPERTY, THOMAS EDITION, § 60.04(b)(2) (David A. Thomas, ed. 1994); *see also* ***Office Supply***, 196 Wis. at 49, 219 N.W. at 425.

A frequent question in cases involving exclusive easements is whether the landowner may use the easement, i.e., whether the landowner may use his or her own land for the same purposes as the easement holder. JON W. BRUCE AND JAMES W. ELY, JR., LAW OF EASEMENTS AND LICENSES IN LAND ¶1.06[3] (Revised ed. 1996). Exclusive easements create three possible interests: an easement giving the easement holder the right to prevent anyone from using the easement area for the easement's purposes; an easement giving the easement holder the right to prevent anyone but the landowner from using the easement area for the easement's purposes; or, if the easement creates a substantial burden on the land, such as a right of way, a fee simple estate in the easement holder. ***Latham v. Garner***, 673 P.2d 1048, 1052 (Idaho 1983). Exclusive easements are generally not favored by the courts, THOMPSON ON REAL PROPERTY *supra*, § 60.04(b)(2), and a clear intent to exclude the landowner must be apparent from the creating document, ***Latham***, 673 P.2d at 1050-51.

Hearst has a perpetual, exclusive easement in the tower easement area for the purposes of "maintaining, restoring, and replacing" the antenna tower, its guy wires and anchors, the service building, and the paved service drive and parking area and for the purpose of controlling vegetation within the easement. The primary purposes are "maintaining, restoring, and replacing" the identified structures and paved service drive and "controlling" vegetation. Because the easement is exclusive, the County may not grant another entity or person an easement for these purposes within the tower easement area. Additionally, Hearst has a legal right under the 1984 agreement to construct replacements for the antenna tower or the service building without first demolishing the existing facility. Consequently, the County may not grant a third party a use that will unreasonably interfere with Hearst's ability to construct a replacement facility adjacent to an existing facility.

Hearst's secondary rights in the tower easement area included the right of access to its facilities. Consistent with the courts' general disfavor of exclusive easements, this incidental secondary right would not be exclusive unless there is evidence that the parties intended it to be or unless exclusivity is necessary to protect the easement holder's exclusive use of the easement for its primary purposes.[2]

[2] The 1984 agreement did not specifically grant Hearst the exclusive right to have an antenna

The 1984 agreement is ambiguous on the issue of whether Hearst's secondary right of ingress and egress was intended to be exclusive. The tower easement area is part of a public park, open to everyone for recreational uses. The agreement granted Hearst the right to install a locking gate to "prevent vehicular access to the site by the general public." Clearly, the service drive is not a public road open to all.[3] The agreement's language does not, however, explicitly preclude the use of the driveway as a "private road," i.e., a means of ingress and egress for a restricted number of third parties who use the road for a reason other than recreation in the park. Thus, the agreement is ambiguous regarding whether the County can grant one or more additional easements to persons or entities who need ingress and egress across the service drive for reasons other than general park usage.

The alleged unpaved portion of the service drive presents additional issues. The first is whether there is an unpaved portion sufficiently identifiable to be considered a service drive. If so, does the term "service drive" as used in the paragraph discussing the locking gate mean something more than the paved service drive? Consideration must also be given to the affect a grant of an easement for ingress and egress to third parties will have on Hearst's use of the easement. Even if Hearst's secondary right of access is not exclusive, the County cannot grant additional easements if they will unreasonably interfere with Hearst's exclusive rights. Resolution of the issue of whether the County may grant additional easements for ingress and egress over the paved service drive and over other land in the tower easement area requires consideration of extrinsic evidence. Summary judgment should not have been granted.

(..continued)
tower, guy wires, anchors, or service building within the tower easement area because "maintain" implies acts of repair or preservation rather than the passive continued existence of something. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1362 (1976) ("maintain" - to keep in state of repair, efficiency, or validity or to preserve from failure or decline). The secondary rights include the right to use the easement as a location for the pre-existing facilities. It appears that, by implication, this secondary right would be exclusive. If a third party is allowed to locate any part of its own antenna tower, guy wires, or service building within the antenna easement area, the third party would, by necessity, have to use the easement to maintain those facilities, and doing so would violate Hearst's exclusive rights.

[3] "Public" refers to the people or citizenry as a whole, and "general" implies no differentiation is made among the members of the whole. WEBSTER'S, *supra* note 2, 1836, 944.

We reject Weigel's argument that the County can partially assign its retained right to use the service drive even if Hearst's right is exclusive. Weigel relies on the general rule that rights in property are assignable. *See* 6A C.J.S. *Assignments* § 13 (1975). The general rule of assignability must, however, give way to the additional, more specific rule that the holder of an exclusive easement may prevent anyone but the landowner from using the easement. If the landowner could freely assign its retained right to use the easement, such assignments would destroy the exclusive character of the easement. Weigel also relies on the provision in the 1984 agreement that provides the agreement shall "bind and benefit the parties hereto and their respective successors and assigns." This provision is part of a provision titled "Covenants With The Land." It does not specifically authorize a partial assignment of any right created by the agreement, and it is not sufficient to make otherwise unassignable rights assignable.

EARTH STATION CLEARANCE AREA

Hearst's right to the earth station clearance area is based on a ninety-nine-year lease. The lease was created in a portion of the 1984 agreement titled "Lease for Earth Station Area." While the County retained the right to supervise changes Hearst made to the vegetation in the area and to approve construction plans for the earth stations, it did not specifically reserve the right to enter upon or cross the leased premises. Additionally, the various paragraphs dealing with the lease and its terms do not refer to the service drive.

A basic concept of a leasehold estate is that the tenant obtains possession of the property. RESTATEMENT (SECOND) OF PROPERTY, LANDLORD AND TENANT § 1.2 and cmt. a (1977). Unless the document creating the leasehold estate provides otherwise, the tenant is entitled to exclusive possession of the leased premises, subject to the landlord's access to inspect and repair. Section 704.05(2), STATS.

Weigel and the County argue that the County's retained use of the service drive in the 1984 agreement created an exception to Hearst's exclusive possession; however, the agreement does not support their argument. As noted, the references to the service drive are only in the easement portion of the agreement. Additionally, the agreement provided that Hearst would give the

County a key to the locking gate so the County could have access to county lands not "demised" to Hearst by the agreement. "Demise" means to lease or to convey or create an estate for years or life. *See* BLACK'S LAW DICTIONARY 431 (6th ed. 1990). The County specifically did not retain the right to access the land that it leased, i.e., the earth station clearance area. Thus, 1984 agreement did not create an exception to Hearst's exclusive possession of the earth station clearance area, and it cannot be used for ingress and egress to Weigel's proposed site.[4]

VALIDITY OF PERMANENT INJUNCTION

We have concluded that the 1984 agreement did not unambiguously grant Hearst the exclusive use of the service drive for ingress and egress. A question of fact exists as to whether the County may grant third parties easements for ingress and egress over the service drive and the additional land in the tower easement area. Therefore, the permanent injunction prohibiting Weigel from cutting across, walking on, or trespassing on the tower easement area and using or traveling on the driveway is premature and must be reversed.

We have also concluded that Hearst has the right to exclusive possession of the earth station clearance area. Thus, a permanent injunction prohibiting Weigel from cutting across, walking on, or trespassing on the earth station clearance area does not exceed Hearst's rights in the parcel.

Weigel contends that the provision in the injunction prohibiting it from engaging in any activity, near or immediately around Hearst's interests, that interferes with Hearst's broadcasting activities or creates a risk of bodily

[4] The Carey affidavit appears to represent that the County has crossed the earth station clearance area to inspect vegetation, remove diseased trees, check for vandalism, and obverse the condition of its property. Hearst is not challenging the County's past entry onto the leased land and the injunction prohibits actions by Weigel and not the County; therefore, we need not address the propriety of the County's entry onto the land.

injury or property damage exceeds the relief available to an easement holder, engrafts tort law onto the enforcement of property rights, and is overly broad and vague. We do not specifically address Weigel's arguments; however, we agree that this dragnet provision is an erroneous exercise of discretion and must be reversed.

The permanent injunction adopts the language of the preliminary injunction entered at the time Weigel intended to build its antenna tower within 250 feet of Hearst's antenna tower. Arguing for the preliminary injunction, Hearst raised claims that the close proximity of Weigel's antenna tower would be hazardous for Hearst's agents performing maintenance on Hearst's antenna tower, would increase the risk of damage or destruction of Hearst's facilities, and would increase the risk of bodily injury or property damage. Because the Weigel antenna tower will not be located so close to the Hearst antenna tower, it appears that Hearst's concerns about safety and increased risks are moot. A permanent injunction that includes a broad prohibition directed at a set of facts that has been abandoned is not tailored to the needs of the case and is broader than equitably necessary.

In summary, we affirm the judgment and permanent injunction insofar as it prohibits Weigel from using the property subject to Hearst's interests for its own antenna tower or transmitter building because Weigel has not challenged this prohibition. We reverse the remainder of the judgment and permanent injunction and remand the case to the trial court for further proceedings. Hearst can exclude Weigel from the earth station clearance area in which Hearst has a leasehold interest, and the trial court may reinstate a properly drafted permanent injunction prohibiting Weigel's entry onto this property. Summary judgment was not properly entered in Hearst's favor regarding the tower easement area because there is a question of material fact regarding whether the County may grant easements for ingress and egress across the tower easement area and whether Weigel's proposed use of the land for ingress and egress to its antenna tower site would unreasonably interfere with Hearst's exclusive use of its easement. Resolution of these issues requires fact-finding.

Neither party is entitled to costs.

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.