

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

July 31, 1997

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. 97-0859-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

EDWIN TALLARD AND VIVIAN TALLARD,

PLAINTIFFS-APPELLANTS,

v.

NORTHERN STATES POWER COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Bayfield County:
THOMAS J. GALLAGHER, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

LaROCQUE, J. Edwin and Vivian Tallard appeal a summary judgment declaring that they acquired their real estate subject to a written unrecorded easement granting a power company the right to construct and

maintain a power line on the property.¹ The Tallards brought an action against Northern States Power Company (NSP) claiming trespass and conversion arising out of NSP's cutting of trees in 1994 along a corridor fifteen feet of either side of its power poles, including some mature trees. NSP's agent also cut trees outside that range that were deemed a threat to fall onto the lines. The Tallards maintain that they were charged with constructive notice only of "an easement" and not the specific provisions of the written but unrecorded easement. Both sides initially moved for summary judgment, but later stipulated that the trial court could consider each side's affidavits and resolve credibility questions to decide the liability issues. This court affirms the judgment in favor of NSP.

The parties' stipulation provides in part as follows:

WHEREAS, Plaintiffs and Defendant believe that there is sufficient evidence before the Court based upon evidence in the record for the court to determine certain issues

WHEREAS, Plaintiffs and Defendant wish the Court to make those determinations while requesting the court to reserve determination as to other issues

WHEREAS, Plaintiffs and Defendant believe that any hearing as to the issues set forth below would not result in an economical use of the Court's time; and

....

WHEREAS, the Court may weigh the credibility of the proponents of the various affidavits or other evidence in the record as if they had respectively testified in open court.

IT IS HEREBY STIPULATED that the Court has sufficient evidence before it to determine the following issues:

¹ This is an expedited appeal. RULE 809.17, STATS.

1. Whether Defendant had an easement over Plaintiffs' property and the extent of that easement, both spacial and maintenance.
2. The reasonableness of actions taken by Defendant in exercising any easement rights.
3. The reasonableness of Defendant's actions on that portion of the property not within any easement rights.
4. Any other issues as it relates to potential liability of Defendant.

Because the stipulation provides that the court may weigh credibility of the statements in the affidavits, "as if they had respectively testified in open court," we construe these provisions to allow the trial court to resolve disputed factual matters as though the case had been tried as a bench trial on the merits.

The trial court made certain findings in a written memorandum decision. The court found that the Tallards' predecessors in title had granted a written easement to NSP's predecessor in interest in 1939 that went unrecorded. The power lines were constructed in 1940 and have been maintained over the property ever since. The Tallards acquired the property at an unspecified date after the lines were constructed.

The court concluded as a matter of law that the Tallards had constructive notice of the contents of the written easement. The Tallards contend that this was an error of law, and that constructive notice of "an easement" does not impute to them the actual language of the written document. The Tallards, however, do not respond to NSP's reference to the statement of Wisconsin case law on this subject found in *Welfare Bldg. & Loan Ass'n v. Krieger*, 226 Wis. 105, 110, 275 N.W. 891, 893 (1937) (quoting 19 C.J. § 145 at 939):

One who purchases land with notice, actual or constructive, that it is burdened with an existing easement takes the estate subject to the easement, and will be restrained from doing any acts, which will interfere with the benefits and enjoyment of the easement to the full extent to which the party having a right thereto, who has not parted with or impaired the same, was entitled at the time when such purchaser bought. See cases cited in footnote 98, 19 C. J. p. 939.

Another Wisconsin decision speaks of the holding “in twenty-eight states of the Union,” and describes the law as follows: “It is the general rule that actual possession of real estate is constructive notice of the rights of the possessor ... and of all facts connected therewith which a reasonable inquiry would disclose.” *State v. Jewell*, 250 Wis. 165, 172, 26 N.W.2d 825, 828 (1947). Thus, in *Jewell*, a purchaser of land was charged with notice of an unrecorded deed granting the state a highway right-of-way across the property, but the highway occupied only part of the premises conveyed by the deed. The court held: “The notice was not confined to that part of the premises used as a highway but extended to the lands described in the deed.” *Id.*

The Tallards also maintain that the destruction of the trees exceeded the scope of the easement, although in light of their argument concerning notice, they do not focus on the language of the written easement but upon a document included in the appendix attached to their brief that apparently relates to NSP’s company policy regarding clearing the right-of-way for power lines.²

² The appendix to the Tallards' brief includes a copy of an extract from a document marked “Exhibit C” and headed “Distribution Line Clearance Specifications, Methods, and Procedures.” The Tallards' brief refers to the deposition of Norris Wahl, but we do not find any depositions in the appellate record. The record does include Wahl’s affidavit, which indicates he is the “Line Clearance Superintendent” for NSP. We do not know if the document was presented to the trial court.

The written easement grants the power company the

power and privilege to construct, maintain, inspect, repair, rebuild and operate across the premises...[and] the perpetual right from time to time to cut, trim, destroy and remove from said lands any brush, trees, logs, stumps, branches, weeds or grass which by reason of their proximity may endanger or interfere with the said line or lines or the operation thereof, and to enter upon or cross over said premises in so far as may be reasonably necessary in the exercise and enjoyment of said rights.

The trial court made the following finding:

The use of this easement must be confined to the terms and purposes of the grant. ... This is a rural electric power line running through the north woods. From all the evidence I find that NSP's periodic clearing of trees under and adjacent to the line, as here, is a reasonable and necessary exercise of its rights under the easement to protect and maintain the line so as to avoid interruption of power to the public. The terms of the easement do not require any further consent from the Tallards.

A trial court's findings of fact will not be set aside unless they are clearly erroneous. Section 805.17(2), STATS. The court's findings here are not clearly erroneous. There is ample evidence from NSP's affidavits to establish the reasonableness of their actions. If there are conflicting statements of fact or competing inferences to be drawn from statements of fact, these are matters for the trial court and not this court to decide. See *Leciejewski v. Sedlak*, 116 Wis.2d 629, 637, 342 N.W.2d 734, 738 (1984).

Finally, the Tallards contend that NSP violated the provisions of § 182.017(5), STATS., which provides:

(5) **Trees trimming.** Any such [power transmission] corporation which shall in any manner destroy, trim or

injure any shade or ornamental trees along any such lines or systems ... except by the consent of the owner, or after the right so to do has been acquired, shall be liable to the person aggrieved in 3 times the actual damage sustained, besides costs.

Because the written easement from the previous landowners granting reasonable privileges to cut and trim trees is binding upon the Tallards, they are deemed to have consented to the destruction of the trees in dispute, and the trial court's judgment dismissing the claims against NSP must be affirmed.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

No. 97-0859(D)

MYSE, J. (*Dissenting*). I disagree with the majority that Northern States Power's (NSP) right to maintain their power line is determined by the terms of an unrecorded easement between NSP and the previous owners. The majority correctly notes that a buyer with notice of the existence of the easement takes subject to an easement. I do not agree, however, that to the extent the easement contains terms and conditions that are extraordinary, constructive notice encompasses such conditions.

The record demonstrates that the easement obtained by NSP for its primary lines is significantly different than that which is obtained for secondary lines. NSP has a policy manual that governs the terms of the easements necessary for the maintenance of both primary and secondary lines. The manual provides:

4.8 Primary Lines Rights-of-Way for Rural Sites

The Contractor shall meet the required right-of-way width in designated areas by removing and/or trimming trees and other woody vegetation (all dbh classes). The work shall meet with the authorized NSP representative's approval.

The right-of-way clearance required on rural sites where trimming is the only work type shall be defined by vertical planes on each side of the line, 15 feet from the outermost conductor(s). the height shall extend from ground to 15 feet above the highest conductor.

The primary tree clearance area extends ten feet, 360 degrees from all equipment energized at primary voltage.

Trees and other woody vegetation within the right-of-way limits shall be cut down at the ground. All Aspen (populus spp) and other fast-growing weed tree species of any diameter within the right-of-way limits shall also be cut down at the ground (see Herbicide Use). These trees shall be exempt from extra pay schedule.

Other tree species which are vigorous and sound, including Maple (*Acer* spp, except Box Elder), Ash (*fraxinus* spp), Pine (*pinus* spp) and Oak (*querus* spp), outside of the established right-of-way width, shall be side trimmed back to the main stem using natural pruning methods. The result of the side trimming should be 15 feet or more of tree clearance, as per Table 1.

All live branches above the conductors should be removed to a height of 15 feet. All dead branches at any height which overhang the conductor(s) shall be removed.

Rights-of-way on which past vegetation maintenance practices have established wider limits shall be maintained to the full extent of the previously maintained width.

4.9 Secondary Lines Rights-of-Way for Rural Sites

All limbs and branches within three feet of secondary conductor shall be removed by natural pruning methods. Trees in which the main stem contacts secondary conductors shall be removed. Secondary circuits include all right-of-way between the NSP-owned pole with transformer and the final NSP-owned pole.

The line servicing Edwin and Vivian Tallard's cottage is a secondary line. The constructive notice imposed upon the Tallards by virtue of the observation that a power line was servicing the cottage is sufficient to alert them that an easement customarily associated with the maintenance of a secondary line exists. Knowledge that a secondary line easement exists, however, is not sufficient to create constructive notice that NSP possesses an easement much broader than that associated with secondary lines.

The authorities relied upon by the majority do not address situation presented by the facts of this case. The issue before us is whether knowledge that a secondary power line services the cottage is sufficient to impose constructive notice of the terms and conditions of an unrecorded easement claimed to be broader than normally applied to secondary lines. The terms of the constructive

notice are limited to those terms that are reasonable and necessary to maintain the easement on the secondary line.

NSP failed to record the easement. The majority's decision rewards this failure by imposing the terms and conditions contained within the easement even though they are broader and more intrusive than that which would be reasonably understood by one with knowledge that a secondary line easement is in existence. NSP should be restricted to the easement necessary to maintain the secondary line without regard to the terms of the actual easement because of its failure to record the terms of the easement.

Because NSP's twenty-eight-foot-wide clear cutting of the Tallard's property is substantially in excess of the type of maintenance necessary for a secondary line I would conclude that NSP was guilty of trespass and hold them accountable for provable damages.

Even if the terms of the unrecorded easement are effectuated, the trial court's conclusion that the affidavits are sufficient to demonstrate the reasonableness of clear cutting a twenty-eight-foot-wide path in the maintenance of a secondary line is in error. The easement grants the right only to do what is reasonably necessary for NSP to maintain its lines. The affidavits recite only that the reason for clear cutting a twenty-eight-foot-wide path is that the unrecorded easement granted the authority to do so. Nothing in the affidavits disclose why a path two and one-half times that normally required for secondary lines was reasonable or necessary in this case. Secondary lines are uniformly maintained by a much more restrictive easement permitting clearing three feet on each side of the line. NSP cites no reason for such a disastrous assault upon this property owners' wooded land. I would conclude that it was not reasonably necessary to cut a

twenty-eight-foot-wide path to maintain a secondary line servicing only the Tallard cottage. Because the easement grants authority to cut trees reasonably necessary to the maintenance of its lines, exceeding the terms of that which is necessary constitutes trespass and renders NSP liable for damages.

