COURT OF APPEALS
DECISION
DATED AND FILED

December 16, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2511-FT

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

WILLIAM E. HINTZ AND JOANN M. HINTZ,

PLAINTIFFS-APPELLANTS,

V.

GREG C. MAGNUSON AND MARGARET E. MAGNUSON,

DEFENDANTS-THIRD-
PARTY PLAINTIFFS-RESPONDENTS,

V.

LORRAINE THEEL,

THIRD-PARTY DEFENDANT-
RESPONDENT.

APPEAL from a judgment of the circuit court for Vilas County: JAMES B. MOHR, Judge. *Affirmed.*

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

HOOVER, J. William and Joann Hintz appeal a judgment dismissing their claim for a prescriptive easement across Greg and Margaret Magnuson's property.[1] The dispositive inquiry is whether the undisputed facts were sufficient to satisfy the requirement that one claiming prescriptive rights show an adverse use of another's property. A use that is by permission cannot be adverse. The parties' arguments focused primarily on whether the undisputed facts were sufficient to show that people using the path did so without the owner's permission. The Hintzes claim the trial court erred by finding permissive use of the property in question. We approach the adverse use issue from a different perspective. We conclude that, regardless whether the Hintzes' use of the land in question was without permission, they nonetheless did not present evidence that their use of the Magnusons' property was sufficiently adverse to the owners' property rights to establish prescriptive rights. We further hold that the Hintzes' adverse use was not sufficiently visible, open and notorious to support a claim for a prescriptive easement. Accordingly, the judgment is affirmed.

The parties agree with the trial court's statement of undisputed fact. At issue is use of an abandoned railroad bed twelve feet wide and approximately 189 feet long. This path is located on a large tract of land that Lorraine Theel and her husband purchased in 1944. The Theels operated a resort on the property. In 1971 they sold the resort to Thomas Moorehead, but retained a parcel. The path in question crosses the property the Theels retained. Moorehead sold the resort to the

[1] This is an expedited appeal under RULE 809.17, STATS.

Hintzes in 1980. Theel sold the retained parcel to the Magnusons in August of 1996.[2]

Theel posted her property with no trespassing signs on at least six occasions, including replacing missing signs. The signs were visible from the path. In addition, on several occasions Theel obstructed the path with a brush pile. Nevertheless, from 1971 when Moorehead bought the resort, until the Magnusons bought Theel's retained parcel, resort employees, guests and invitees used the path, without express permission, for walking, driving to a boat launch, cycling, skiing and snowmobiling. Such uses ended in August of 1996, when the Magnusons enclosed their property with a fence. The Hintzes then commenced this action under ch. 843, STATS., to establish their prescriptive rights.[3] All parties filed for summary judgment.

We are called upon to apply the prescriptive easement statute, § 893.28, STATS.,[4] to undisputed facts. As the Hintzes correctly contend, this presents a question of law that we review de novo. *See* ***Maxey v. Racine Redev. Auth.***, 120 Wis.2d 13, 18, 353 N.W.2d 812, 815 (Ct. App. 1984).

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[2] The Magnusons joined Theel as a third-party defendant and claim breach of the warranties contained in the deed they received from her.

[3] The Hintzes also pled easement by estoppel but apparently abandoned their cause of action at the trial level. In any event, the Hintzes do not brief the theory before this court and it is therefore abandoned. *See* ***Reiman Assocs. v. R/A Adver., Inc***., 102 Wis.2d 305, 306 n.1, 306 N.W.2d 292, 294 n.1 (Ct. App. 1981).

[4] Section 893.28(1), STATS., specifically addresses prescriptive easements. This statute notwithstanding, Theel argues that the Hintzes must satisfy the elements of § 893.25(2), STATS., which pertains to acquiring title by adverse possession. She relies on language in ***Shellow v. Hagen***, 9 Wis.2d 506, 511, 101 N.W.2d 694, 697 (1960), to the effect that the method by which prescriptive easements are acquired may be compared to that by which title is obtained by adverse possession. We are satisfied § 893.28 controls. ***Shellow*** predates the passage of § 893.28 and at the time the decision was written the legislature had not addressed prescriptive easements in a predecessor statute.

Section 893.28(1), STATS., prescribes the elements of a prescriptive easement:

> Continuous adverse use of rights in real estate of another for at least 20 years … establishes the prescriptive right to continue the use. Any person who in connection with his or her predecessor in interest has made continuous adverse use of the rights in the land of another for 20 years … may commence an action to establish prescriptive rights under ch. 843.

An "adverse use" is a use that is hostile and inconsistent with the exercise of the titleholder's rights. ***Ludke v. Egan***, 87 Wis.2d 221, 230, 274 N.W.2d 641, 646 (1979). In addition, to be adverse the use must be visible, open and notorious. ***County of Langlade v. Kaster***, 202 Wis.2d 448, 457, 550 N.W.2d 722, 726 (Ct. App. 1996). "This requirement is for the protection of those against whom the use is claimed to be adverse, since it is necessary to the acquisition of a prescriptive easement that the owner of the servient estate know of and acquiesce in such use, unless the user is so open, notorious, visible, and uninterrupted that knowledge and acquiescence on his part will be presumed." 25 AM.JUR.2D, *Easements and Licenses* § 60 at 526 (1996).[5]

The law does not favor prescriptive easements because they necessarily work corresponding losses or forfeitures of others' rights. *See* ***id***., § 45 at 615. Thus, a person claiming prescriptive rights must present positive evidence

[5] The Hintzes claim that in order for the adverse use of the land to be open, notorious, and visible, it must be such as would apprise a reasonably diligent landowner of the adverse use. This objective standard relates to adverse possession. The use must be of a character as to apprise a reasonably diligent landowner and the public that the possessor claims the land as his own. ***Pierz v. Gorski***, 88 Wis.2d 131, 137, 276 N.W.2d 352, 355 (Ct. App. 1979). We acknowledge that many of the principles governing adverse possession are applicable to cases involving claimed prescriptive rights. Whether the objective notice standard is one of them we decline to decide in light of our holding.

to establish a prescriptive easement, and every reasonable presumption must be made in favor of the landowner. ***Mushel v. Town of Molitor***, 123 Wis.2d 136, 145, 365 N.W.2d 622, 626 (Ct. App. 1985). We conclude that the Hintzes have not carried their burden.

The Hintzes produced affidavits in support of their motion for summary judgment to show that they and their predecessors continuously used the path for the purposes aforesaid. Despite this contention, the trial court concluded as a matter of law that the path's use to be sporadic trespass on wild, unenclosed land and that Theel did not have notice of Hintzes' adverse use. [6]

The Hintzes claim that their use of the path was not permissive and therefore adverse, because Theel posted no trespassing signs from time to time and obstructed the path with brush on several occasions. We agree that these facts imply that Theel did not intend to permit trespassing. These same circumstances would suggest Theel either knew she had trespassers from time to time, or knew that the path at least invited trespassing.[7] As the trial court pointed out, however, under the Hintzes' analysis, if the landowner's efforts at preventing one from using the land adversely are thwarted by a trespasser's *sporadic* or incidental persistence, the trespasser eventually obtains a legal right of use. We are not convinced the law compels such an incongruous and antipathetic result.

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[6] Conclusions of Law, paragraphs 7 (sporadic) and 6 (no notice); *see also* Transcript of Motion Hearing, May 28, 1997, at 15. As noted in the appellant's brief, the material facts are not at issue: "Hintzes concur with all the findings of fact made by the trial court at its May 28, 1997 hearing, as well as those set forth in Judge Mohr's July 2, 1997 Findings of Fact, Conclusions of Law and Judgment, except for how often Theel and her children visited the [property]."

[7] The trial court made no determination regarding Theel's specific knowledge of the frequency of the trespassing or the trespassers' identity. Moreover, there are no facts of record concerning the Hintzes' use of the path, which would relate to notice of adverse use to a reasonable landowner.

Moreover, an attempt to prevent the use of one's land by the general public is irrelevant to a particular person's claim of adverse use.[8] Similarly, the landowner's knowledge of occasional use of the property by persons unknown is not tantamount to knowledge that a specific person is claiming an enforceable way of prescription. We hold as a matter of law that generalized, anonymous sporadic trespass is objectively insufficient to alert a landowner that someone is attempting to burden his or her property interests with a permanent, enforceable prescriptive way. Without notice, the adverse use cannot be said to be visible, open and notorious.

In summary, we hold, as a matter of law, that evidence of attempts to prevent sporadic anonymous trespass is insufficient by itself to prove an adverse use by one attempting to establish prescriptive rights. Further, inferential evidence of the landowner's knowledge of anonymous sporadic adverse use is insufficient to prove the claimant's own use was objectively visible, open and notorious. For these reasons the trial court's judgment is affirmed.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

[8] The Hintzes produced affidavits showing that resort employees, guests and invitees put the path to similar use. Their use of the path is irrelevant to whether the *Hintzes*' use was adverse. Where an easement exists there are two distinct property interests: the dominant estate, which enjoys the privileges the easement grants, and the servient estate, which permits the exercise of those privileges. ***In re Land Located on Geneva Lake,*** 165 Wis.2d 235, 244, 477 N.W.2d 333, 338 (Ct. App. 1991). The Hintzes are the only named plaintiffs. Only they seek to establish a dominant estate. They also acknowledge that, under ***New v. Stock***, 49 Wis.2d 469, 474, 182 N.W.2d 276, 278 (1971), the public cannot acquire rights by prescription. Beyond this, the ***New*** court noted, "It is generally held that an individual property owner does not acquire a right-of-way by prescription where the claim is based on adverse use by the public for the prescriptive period." ***Id***.