

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 24, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 02-2641

Cir. Ct. No. 01-CV-5

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

TOWN OF LYNDON,

PLAINTIFF-RESPONDENT,

v.

ROBERT A. OINES AND SANDRA ANN SCHULT,

DEFENDANTS-(IN T. CT.),

**WAYNE H. SCHULT D/B/A RIVER BAY CAMPGROUND AND
MARINA AND RIVER BAY, INC., AND BANK OF
WISCONSIN DELLS,**

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Juneau County:
JOHN W. BRADY, Judge. *Affirmed in part; reversed in part and cause
remanded with directions.*

Before Dykman, Roggensack and Deininger, JJ.

¶1 DYKMAN, J. Wayne Schult, d/b/a River Bay Campground and Marina, and the Bank of Wisconsin Dells (collectively, “River Bay”) appeal from a judgment correcting a deed and conveying land to the Town of Lyndon. The judgment also enjoined River Bay’s use of a right-of-way and ordered River Bay to remove any structures in the right-of-way and within twenty-five feet of the right-of-way.

¶2 Four issues are presented for review: (1) whether a corrected legal description is consistent with the intent of the original parties to the deed; (2) whether the Town is entitled to additional land by adverse possession; (3) whether the alleged wrongful conduct by River Bay warranted the injunction; and (4) whether the trial court could order removal of the encroachments without determining if any of the structures predated the enactment of the setback ordinance. We conclude that the trial court erred when it corrected the deed description to convey an amount of land exceeding the original parties’ intent. We also conclude that the evidence does not support the Town’s adverse possession claim. Although the evidence established grounds for injunctive relief, the court’s order is overbroad. Finally, the trial court erred by ordering the removal of encroachments within the setback requirement because it did not specify which structures were nonconforming. For these reasons we modify and affirm the order for injunctive relief but reverse and remand on the remaining issues.

BACKGROUND

¶3 River Bay operates a campground and marina located on the Wisconsin River in the Town of Lyndon. In 1967, the previous owners of River Bay conveyed a right-of-way to the Town, so that the Town would assume responsibility for maintaining the boat launch and the road to the river. The deed

provided for a sixty-six-foot right-of-way, centered on River Bay Road and widening to a one-hundred-foot-by-one-hundred-foot parcel where the road ended at the Wisconsin River. The legal description, however, failed to adjust for the actual placement of the boat ramp, which lies north of a right-of-way centered on River Bay Road. The location of the road and boat ramp has not changed since the original conveyance in 1967, although the Town has made improvements to both.

¶4 Wayne Schult, one of the current owners of River Bay, bought the property in 1983. When he purchased the property, Schult was aware that the road and boat ramp belonged to the Town, but later learned that the boat ramp was not included in the right-of-way's legal description. Schult had several discussions with the Town concerning the placement of the right-of-way and what land belonged to River Bay.

¶5 In 2001, the Town commenced this action for correction and reformation of the 1967 deed to reflect the actual placement of the boat launch within the right-of-way. In the alternative, the Town claimed ownership of additional land by adverse possession and sought an order for removal of encroaching structures and compliance with a twenty-five-foot setback requirement of Town Ordinance No. 3. Further, the Town alleged that River Bay had blocked access to public parking areas and had charged fees for use of the public boat launch and for parking on land owned by the Town. The Town asked that the court enjoin River Bay from engaging in such practices or using the property in a manner inconsistent with its status as a public right-of-way.

¶6 Following a trial, the court issued findings of fact, conclusions of law and a judgment, reforming the deed's legal description of the right-of-way to

include the boat ramp and land extending north to a metal retaining wall. The trial court granted the Town's requests for injunctive relief and ordered removal of any encroachments within the right-of-way or the setback limits. River Bay appeals.

DISCUSSION

¶7 We first consider River Bay's challenge to the trial court's correction of the legal description. The trial court concluded that the legal description, as revised by the Town during trial so that it encompassed land north of the boat ramp to the metal retaining wall, was consistent with the parties' intent when River Bay's predecessor in interest conveyed the land in 1967. We disagree with this conclusion.

¶8 The trial court's findings of fact will not be reversed unless they are clearly erroneous. WIS. STAT. § 805.17(2) (2001-02).¹ Thus, even when the evidence would permit a contrary finding, we will affirm the findings of fact as long as the evidence would permit a reasonable person to make the same finding. *Reusch v. Roob*, 2000 WI App 76, ¶8, 234 Wis. 2d 270, 610 N.W.2d 168.

¶9 Under WIS. STAT. § 847.07(1), the circuit court has the authority to correct a legal description in a deed upon proof that "[t]he conveyance contains an erroneous description, not intended by the parties to the conveyance" or when the description is ambiguous and "does not clearly or fully describe the premises intended to be conveyed." It is undisputed that the legal description in the original deed was erroneous in that it omitted the boat ramp from the description of the

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

right-of-way. However, we conclude that the trial court erroneously corrected the legal description to convey more land to the Town than originally intended by the 1967 deed.

¶10 At trial, Brett Davies, a licensed land surveyor, testified that at the Town's request he surveyed River Bay Road and verified that the 1967 deed description excluded the land containing the boat ramp. His revised legal description, which the Town had used in its complaint, reads as follows:

A parcel of land 66 feet in width lying 33 feet north and south of each side of the centerline of a presently existing town road known as River Bay Road (excepting that the most easterly 100 feet thereof shall be 100 feet in width lying 50 feet north and south of the centerline of said most easterly 100 feet thereof) located in the East Half of the Southwest Quarter of Section 18, Township 14 North, Range 6 East, and more particularly described as follows: Commencing at the South Quarter corner of said Section 18, thence South 89-49-24 West 1287.11 feet along the south line of said Southwest Quarter to the centerline of County Trunk Highway N; thence [N 00-03-48 E], 381.18 feet along the centerline of County Trunk Highway N to the point of beginning of the described centerline; thence N 87-16-41 E 724.69 feet; thence N 87-31-35 E, 658.93 feet; thence S 85-24-26 E, 112.42 feet to point "A"; thence continuing S 85-24-26 E, 54.75 feet; thence N 72-33-36 E, 192.30 feet more or less to the ordinary high water mark of the Wisconsin River and the end of the described centerline.

Also including all lands lying north and east of point "A" described above to the ordinary high water mark of the Wisconsin River.²

² The original deed legal description read:

(continued)

¶11 In response to questioning by the Town, Davies agreed that this description still did not include the boat ramp. However, if the language in parentheses describing the hundred-foot box were deleted, the description would then encompass the boat ramp as well as the land to the north of the ramp, up to the metal retaining wall. At the Town's direction, Davies crossed out the reference limiting the right-of-way to a hundred-foot box on the eastern edge.

¶12 On cross-examination by River Bay, Davies acknowledged that the legal description, as just revised at the Town's request, was not what was in the original deed. He agreed that the error in the original deed was not that the dimensions were wrong, but that the bearings failed to adjust for the angle of River Bay Road.³

¶13 Donald Donnelly, owner of River Bay in 1967, was the only party to the original deed to testify. He stated that when the deed to the right-of-way was executed, the intent was to transfer the existing road and boat ramp to the Town,

A parcel of land being in the SE1/4SW1/4 and Government Lot 9 of Section 18, Township 14 North, Range 6 East, more particularly described as follows: Said parcel being 66 feet in width, except that the most easterly 100 feet shall be 100 feet in width, lying on either side of and adjacent to the following described centerline: Commencing at the southwest corner of said SE1/4SW1/4; thence north along the centerline of C.T.H."N" a distance of 373 feet to the point of beginning, thence along the reference line bearing S 87° 15' East a distance of 1628 feet to the normal water mark of the Wisconsin River.

³ We reject the Town's argument that River Bay failed to object to the change in the legal description and therefore has waived the right to argue it on appeal. The record shows that in its opening remarks, River Bay agreed with Davies's original legal description, but after Davies's changed the description during his testimony, River Bay objected and informed the court that it did not accept the revised legal description.

so that the Town would maintain them. It was not his intention to transfer more land than the amount described in the deed. At the time he assumed that the legal description was accurate. He also stated that the metal retaining wall was not in existence when he owned River Bay.

¶14 The express language in the deed describes a sixty-six-foot right-of-way centered on River Bay Road which then increases to a one-hundred-by-one-hundred-foot parcel at the riverfront. Donnelly testified that in 1967 the intent was to convey the road and the boat ramp to the Town, but not more than one hundred feet of riverfront property. The Town presented no testimony to counter Donnelly's description of the amount of land he intended to convey. In light of this unchallenged evidence, and the deed's description of the one-hundred-foot-by-one-hundred-foot parcel, the trial court's finding that the original parties to the deed intended to convey a parcel containing more than one hundred feet of river frontage, reaching up to the metal retaining wall, is clearly erroneous. The only rational conclusion that can be drawn from the facts is that the right-of-way begins at the northern edge of the boat ramp and runs one hundred feet south from that point along the riverfront to form the eastern edge of the hundred-foot square parcel described in the deed. The northern boundary of the square parcel runs one hundred feet to the west, parallel to the metal retaining wall. On remand, the trial court shall correct the original deed to reflect this partial description. The Town, however, contends that it adversely possesses additional land, an issue we next consider.

Adverse possession

¶15 The trial court also found that the Town had adversely possessed the "land intended to be conveyed in the said 1967 conveyance" and that this

possession had been “visible, open and notorious” for a period of over twenty years. River Bay does not contest the Town’s right to the road and the boat ramp as intended to be conveyed in the original deed, limited to one hundred feet of river frontage. We therefore confine our discussion to whether the evidence at trial supports a finding of adverse possession of the grassy area of land between the boat ramp and the retaining wall.⁴

¶16 “Adverse possession requires enclosure, cultivation or improvement of the land. The physical possession of the property must be hostile, open and notorious, exclusive and continuous for the statutory period.” *Leciejewski v. Sedlak*, 116 Wis. 2d 629, 636, 342 N.W.2d 734 (1984) (citation omitted). Whether we apply the twenty-year statutory period for adverse possession set forth in WIS STAT. § 893.25, or the ten- or seven-year periods required by WIS. STAT. §§ 893.26 and 893.27 for adverse possession founded upon a written instrument, we first review the record for evidence that the Town used the grassy parking area in a “hostile, open and notorious, exclusive and continuous manner.” *Keller v. Morfeld*, 222 Wis. 2d 413, 417, 588 N.W.2d 79 (Ct. App. 1998) (quoting *Leciejewski*, 116 Wis. 2d at 343).

¶17 Schult testified that in the early 1990’s he had the area north of the boat ramp dredged and then constructed the metal seawall before completing the improvement with a rock wall a few years later. River Bay mowed the grassy area up to the edge of the river and charged for parking there. The trial court made no findings detailing Town maintenance or possession of the grassy area. The Town

⁴ To the extent that the Town claims by adverse possession the grassy parking area up to the metal retaining wall, it effectively concedes that that parcel was not included in the original deed.

presented no evidence showing that the Town had possessed this area in addition to the road and boat ramp. There was no evidence that the Town maintained this area or asserted control over it. Although the Town put up five “Free Parking” signs along the right-of-way, the record does not disclose if any of these signs were placed in this area, nor is there other evidence that the Town maintained or asserted control over the parcel. And someone changed the signs to read “Fee Parking.”

¶18 The only pertinent testimony came from Schult, who stated that he had made the improvements, maintained that area of river frontage and charged people for parking there. The burden of proof is on the Town, as the party asserting ownership by adverse possession. *Harwick v. Black*, 217 Wis. 2d 691, 699, 580 N.W.2d 354 (Ct. App. 1998). In sum, nothing in the record supports the Town’s adverse possession claim to this area north of the boat ramp.

The Permanent Injunctions

¶19 Next, we address River Bay’s argument that the trial court erroneously exercised its discretion when it granted the Town’s requests for injunctive relief, permanently enjoining River Bay from using the land deeded to the Town for purposes other than as a public right-of-way. “Injunctive relief is not ordered as a matter of course, but instead rests on the sound discretion of the court, to be used in accordance with well-settled equitable principles and in light of all the facts and circumstances of the case.” *Forest County v. Goode*, 219 Wis. 2d 654, 670, 579 N.W.2d 715 (1998). Thus we will not overturn a trial court’s decision granting injunctive relief absent a showing that the trial court has erroneously exercised its discretion. *Sunnyside Feed Co. v. City of Portage*, 222 Wis. 2d 461, 471, 588 N.W.2d 278 (Ct. App. 1998). With respect to injunctive

relief, an erroneous exercise of discretion occurs when the trial court: (1) fails to consider and make a record of the factors relevant to its determination; (2) considers clearly irrelevant or improper factors; and (3) clearly gives too much weight to one factor. *Id.* at 471. In addition, we may find an erroneous exercise of discretion when the trial court makes an error of law. *Id.* at 471-72.

¶20 When seeking an injunction, a plaintiff must show a sufficient likelihood that the future conduct of the defendant will cause the plaintiff irreparable harm. *Pure Milk Prods. Co-op. v. Nat'l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979). Irreparable harm is that which is not adequately compensable in damages. *Id.* Also, the plaintiff must lack an adequate remedy at law. *Sunnyside Feed*, 222 Wis. 2d at 472.

¶21 At issue are the following paragraphs in the trial court's findings of fact, conclusions of law and judgment:

13. [River Bay has] used the land intended to be conveyed for purposes other than as a public right-of-way and [has] blocked access to the public to said land.

....

21. [River Bay is] hereby strictly enjoined and prohibited from using any or all of the real estate described above for purposes other than as a public right-of-way.

22. [River Bay is] hereby strictly enjoined and prohibited from using any or all of the real estate described above and from charging a fee to any member of the public for parking on any of the real estate described above or for use of the boat ramp or boat launching facilities located on the real estate described above.

¶22 River Bay contends that the injunctions cannot stand because the trial court did not set forth the basis for granting them, the Town failed to show that it lacked an adequate legal remedy and the injunction in paragraph 22 is

overbroad. While we agree that the language in paragraph 22 goes too far because it deprives River Bay of *any* use of the right-of-way, we conclude that the trial court reasonably prohibited River Bay from charging fees or otherwise engaging in conduct that infringes on the public's use of the right-of-way.

¶23 The trial court found that River Bay had “used the land intended to be conveyed for purposes other than as a public right-of-way and [has] blocked access to the public to said land.” Although the court did not specify how River Bay's conduct constituted a sufficient threat of irreparable injury justifying an injunction, its finding is supported by the record.

¶24 Robert Linn, a town resident, testified that River Bay had charged him for use of the boat ramp. Other evidence supported the inference that River Bay had interfered with public use of the right-of-way. While Schult denied ever charging for use of the boat ramp, he agreed that he had charged for parking on land that he viewed as private property. The court also heard testimony from Burt Sylvander, a volunteer on the Town Boat Ramp Committee, who stated that he had taken down a number of “No Parking” signs that had been placed on either side of River Bay Road, and that those signs had not been authorized by the Town. When the Town replaced the “No Parking” signs with five signs reading “Free Parking,” the new signs were altered, without Town approval, to read “Fee Parking.”

¶25 The trial court could reasonably infer that River Bay was responsible for the “No Parking” signs along the Town's right-of-way, as well as the alteration of the Town's five “Free Parking” signs to read “Fee Parking.” As the sole arbiter of witness credibility, the trial court was entitled to believe Linn's testimony that he had paid to use the boat ramp, and to place little or no weight upon Schult's

denials of charging such fees. We will not disturb the trial court's credibility determinations on appeal, nor is it our role to reweigh the evidence. *Noll v. Dimiceli's, Inc.*, 115 Wis. 2d 641, 643-44, 340 N.W.2d 575 (Ct. App. 1983).

¶26 River Bay's interference with the public's use of the right-of-way constitutes an irreparable harm to the Town. And, because the Town would not have standing to collect damages for wrongful charges made to third parties, it lacked an adequate remedy at law. The evidence of past wrongful conduct by River Bay "gives rise to an inference of a reasonable expectation of continued violations." *Pure Milk*, 90 Wis. 2d at 802-03. Thus it was appropriate for the trial court to enjoin these practices by River Bay in order to protect the Town's interest in the public's unencumbered use of the right-of-way.

¶27 The breadth of an injunction, however, must be tailored to the necessities of each case. *Pure Milk*, at 803; *State v. Seigel*, 163 Wis. 2d 871, 890, 472 N.W.2d 584 (Ct. App. 1991). In paragraph 22 of its findings of fact and conclusions of law, the trial court "strictly enjoined and prohibited [River Bay] from using *any or all of* the [right-of-way]" as well as precluded it from charging the public for using the boat ramp or parking on the right-of-way. By categorically denying River Bay the use of the right-of-way, and not restricting the injunction to those actions that are incompatible with the public's use of River Bay Road and the boat ramp, the court's injunction exceeded the scope of the harm being remedied. *See Bachowski v. Salamone*, 139 Wis. 2d 397, 414, 407 N.W.2d 533 (1987) (harassment injunction overbroad when it enjoined non-harassing actions or proscribed constitutionally protected conduct). Moreover, paragraph 22 is inconsistent with the preceding paragraph, which contains the qualifying language, "for purposes other than as a public right-of-way."

¶28 The Town concedes that paragraph 22 “contains a typographical error,” and should not prevent River Bay from using the right-of-way as a member of the general public. However, the Town asserts that this is an example of manifest error. Because River Bay did not raise the issue of overbreadth in a motion for reconsideration to the trial court, the Town, relying on *Schinner v. Schinner*, 143 Wis. 2d 81, 92-93, 420 N.W.2d 381 (Ct. App. 1988), concludes that River Bay has waived the right to argue it on appeal.

¶29 There is merit to the Town’s argument that the language in paragraph 22 preventing River Bay from “any and all” use of the right-of-way falls within the definition of manifest error. We have stated that “manifest error” is that “self-evident kind of error which results from ordinary human failings due to oversight, omission, or miscalculation. It is the type of error which tends to immediately reveal itself as such to reasonable legal minds.” *Id.* Upon reading the two paragraphs, a reasonable legal mind would readily discover the confusion created by a judgment that allows use of the public right-of-way but in the next paragraph prohibits “any and all” use of the same right-of-way. Correcting this inconsistency would have been a proper basis for a motion for reconsideration under WIS. STAT. § 805.17(3). But while River Bay should have brought this error to the attention of the trial court, it makes no sense to perpetuate this error on appeal. The alternative is to let stand a confusing and concededly overbroad injunction that, if applied literally, denies River Bay the rights available to the rest of the public.

¶30 We conclude that the trial court properly remedied the harm to the Town by enjoining future actions by River Bay that conflict with public use of the right-of-way. But it erroneously exercised its discretion by issuing an overbroad injunction prohibiting River Bay’s lawful use of the right-of-way.

Setback Ordinance

¶31 Last, River Bay contends that the trial court erred when it ordered the removal of all structures within twenty-five feet of the right-of-way in conformance with Town Ordinance No. 3. We find little merit in River Bay’s argument that it could not comply with the setback ordinance because, until the trial court corrected the legal description, River Bay did not know the right-of-way’s proper boundary lines. It is undisputed that the location of the road and the boat launch has not changed since 1967; the new legal description simply reflects the true placement of the boat launch. River Bay therefore has no basis to claim lack of knowledge of the boundary lines regarding encroachments along River Bay Road, west of the disputed hundred-foot parcel containing the boat launch. However, we agree with River Bay that the trial court’s order should have excluded those encroaching structures that pre-date the ordinance.⁵

¶32 A structure’s location or its use “qualifies as ‘nonconforming’ if there is an active and actual use of the land and buildings which existed prior to the commencement of the zoning ordinance and which has continued in the same or a related use until the present.” *Waukesha County v. Seitz*, 140 Wis. 2d 111, 115, 409 N.W.2d 403 (Ct. App. 1987). The Town Board enacted Ordinance No. 3 in 1982.

⁵ River Bay also argues that the setback ordinance is ambiguous because it bars structures within twenty-five feet of “adjoining properties.” According to River Bay, the proper term for properties that border a right-of-way is “abutting properties,” and therefore, when the ordinance does not expressly address rights-of-way, the ordinance should be read as requiring a setback only when privately-owned properties adjoin. We need not consider this argument because River Bay did not raise it before the trial court. *Wirth v. Ehly*, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980) (courts generally do not review issues raised for first time on appeal).

¶33 In its argument, the Town overlooks the grandfather clause in the ordinance. Section 16 of Ordinance No. 3 provides that “[a]ny structure or building hereafter erected, placed upon, moved upon or enlarged without a permit as required by this ordinance or otherwise not in conformity with this ordinance shall be removed and shall be deemed an unlawful structure”⁶ Although both Donnelly and Schult testified that various structures had been in place for several years, if not decades, the trial court made no findings regarding which encroachments predated the enactment of the setback requirement.⁷ Under section 16, such structures would be nonconforming. For that reason, we remand for a determination of which structures are nonconforming but grandfathered as permitted structures.

¶34 Likewise, on remand the trial court should consider whether any structures that encroached upon the sixty-six-foot right-of-way in 1967 may remain. Under WIS. STAT. § 86.04, any encroachment within the sixty-six-foot right-of-way must be removed upon the order of the appropriate governing body.⁸

⁶ This same language is found in § 15 of the 1982 version of Ordinance No. 3.

⁷ Nor was any determination made regarding what structures would have required a building permit under the original 1982 ordinance.

⁸ WISCONSIN STAT. § 86.04 provides in pertinent part:

(1) Order for removal. If any highway right-of-way shall be encroached upon, under or over by any fence, stand, building or any other structure or object, and including encroachments caused by acquisition by the public of new or increased widths of highway right-of-way, ... the town board, in case of a street or highway maintained by or under the authority of any ... town, may order the occupant or owner of the land through or by which the highway runs, and to which the encroachment shall be appurtenant, to remove the encroachment beyond the limits of the highway within 30 days.

But because adverse possession is a defense to an action for removal based upon § 86.04, *DOT v. Black Angus Steak House, Inc.*, 111 Wis. 2d 342, 330 N.W.2d 240 (Ct. App. 1983), on remand the trial court should make findings regarding River Bay's adverse possession of structures encroaching upon the right-of way.

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

Not recommended for publication in the official reports.

