**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**December 21, 2004**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 04-0646** **Cir. Ct. No. 02CV117**

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

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**JOAN M. KUDLICK, TRUSTEE OF THE JOAN M. KUDLICK TRUST #1, PETER N. LALLY AND ELAINE P. LALLY, CO-TRUSTEES OF THE LALLY FAMILY TRUST,**

**PLAINTIFFS-RESPONDENTS,**

**V.**

**JAMES E. BIVENS AND SANDRA J. BIVENS,**

**DEFENDANTS-APPELLANTS.**

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APPEAL from a judgment of the circuit court for Washburn County: MICHAEL J. GABLEMAN, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. James and Sandra Bivens appeal a judgment granting a prescriptive easement to Joan Kudlick, trustee of the Joan M. Kudlick Trust #1, and Peter N. Lally and Elaine P. Lally, co-trustees of the Lally Family Trust (collectively, the Lallys). The Bivenses argue the trial court erred because

(1) the Lallys failed to give reasonable notice of adverse use to the Bivenses' predecessor in title; (2) all parties believed that the access road was on Kudlick's property; (3) the Lallys did not prove exclusive possession during the requisite twenty years; and (4) the Lallys were granted permission to use the disputed property. We reject their arguments and affirm the judgment.

¶2 The parties own adjacent properties. The Lallys' complaint alleges that in order to access their property, they must cross a portion of the Bivenses' land. It states that the disputed area consists of a gravel road beginning at the southeast corner of the Bivenses' property and Chicog Lake Road. The Lallys claim that they and their predecessors-in-title have used the access road in excess of thirty years, and their use was continuous and adverse to the true owner, thereby establishing prescriptive rights under WIS. STAT. § 893.28.[1]

¶3 At trial, one of the plaintiffs, Peter Lally, testified that he constructed a driveway and, in 1974, planted seven hundred pine and spruce trees along the driveway, a portion of which extended over the disputed parcel. He stated that to grade the driveway, he brought in at least eight or nine loads of sand gravel mix. He regularly trims the tree limbs so they do not extend over the disputed roadway. He mows the grass four or five times a year and installed wooden channels to divert water. He and his family use the disputed driveway regularly to access their property. The driveway also serves the Kudlicks' property, who similarly used and helped maintain it.

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

¶4 The Bivenses purchased their property from Mosinee Paper Corporation in 1995. In 1997, the Lallys had contact for the first time with the Bivenses, who told the Lallys that the Bivenses had a survey completed. The survey showed that the driveway partially crossed over the Bivenses' land. James Bivens testified that before the survey was completed, he had not realized that the driveway crossed a corner of his land. A manager for the paper company testified that there is no indication that the company ever consented to the Lallys' use of the disputed area and was unaware of its existence. He acknowledged, however, that a 1973 aerial photograph showed the driveway entering the Lallys' properties.

¶5 The trial court found that the disputed 120' x 60' area, although small, "is an extraordinarily important plot for it contains a portion of the driveway which Plaintiffs have been using for entrance and egress to and from their properties." It determined that since 1969, Peter Lally continuously used the disputed area as a driveway and performed the bulk of the work and most of the expense associated with maintaining it. The court noted:

> On its physical inspection of the property, the Court observed all portions of the driveway, including the portion from which Defendants now seek to exclude Plaintiffs.
>
> The driveway is maintained about as meticulously as such a drive could be. The rows of trees planted by Lally in 1974 have grown to form a natural – appearing border and the driveway is mowed, free of debris, obviously used regularly and generally well-tended.

¶6 The court found that since at least 1969, the Lallys "have been acting exactly like owners of the disputed property; they have been taking all reasonable actions to use it just as an owner of a similarly – situated plat of land would; they have been tending it, caring it, watching over its use to prevent its destruction or abuse …." The court found that there was "little more that the Plaintiffs could

have reasonably done to make their asserted ownership more hostile, open, notorious[,] exclusive and continuous." Consequently, the court found that the Lallys met their burden of proof and "so it is determined they have acquired prescriptive rights to the use of the unpaved access road to their property in the same manner that they have been utilizing [it] for at least the last thirty-four years." The court entered judgment awarding the Lallys prescriptive rights to use the driveway as they have been using it for the last thirty-four years. The Bivenses' appeal follows.

¶7 The Bivenses argue the trial court erred by awarding a prescriptive easement because the Lallys failed to give reasonable notice of their adverse use to the Bivenses' predecessor in title. They quote the testimony of a forester for the paper company, who saw no documentation of adverse use in his file and, in his travels, he never noticed any "difference in land use or road use than normal." Based on this testimony, the Bivenses argue that the logical conclusion is that no adverse activities took place.

¶8 The Bivenses' argument fails for two reasons. First, they misperceive the elements required to prove a prescriptive easement; second, they fail to apply the appropriate standard of review.

¶9 Under WIS. STAT. § 893.28, the elements of a prescriptive easement claim are similar but not identical to a claim of adverse possession.[2] An easement

[2] WISCONSIN STAT. § 893.28, entitled "Prescriptive rights by adverse user," provides:

(continued)

by prescription requires the following elements: adverse use that is hostile and inconsistent with the exercise of the titleholder's rights; which is visible, open and notorious; under an open claim of right, and is continuous and uninterrupted for twenty years. ***Mushel v. Town of Molitor***, 123 Wis. 2d 136, 144, 365 N.W.2d 622 (Ct. App. 1985). Unlike adverse possession, under which the adverse user gains title, the adverse user of a prescriptive easement acquires only a right to use the property. *See* ***Ludke v. Egan***, 87 Wis. 2d 221, 231, 274 N.W.2d 641 (1979).

¶10 A use of an easement for twenty years, unexplained, is presumed to be adverse and under a claim of right, unless contradicted or explained. *See* ***Shellow v. Hagen***, 9 Wis. 2d 506, 510, 101 N.W.2d 694 (1960). However, the presumption may be rebutted by proof that the use was under license, indulgence or special contract inconsistent with a claim of right. *See* ***id.*** A use that is permissive is subservient and not adverse. *See* ***Ludke***, 87 Wis. 2d at 230.

¶11 To create easement by prescription, use need not be to the exclusion of owners. ***Shellow***, 9 Wis. 2d at 511. Claim of title is not necessary. ***Id.*** Moreover, hostile use is not an unfriendly intent and does not mean a controversy or manifestation of ill will; an act is hostile when it is inconsistent with the right of

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> **(1)** 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 rights in the land of another for 20 years, except as provided by s. 893.29, may commence an action to establish prescriptive rights under ch. 843.
>
> ….
>
> **(3)** The mere use of a way over unenclosed land is presumed to be permissive and not adverse.

the owner and not done in subordination thereto. ***Id.*** The analogy to adverse and hostile possession does not mean that the acts of the claimant must be identical in both adverse possession and easements by prescription but, rather, that they must be similar, taking into account the difference in the physical nature of the acts of possession and use. ***Id.*** at 511-12.

¶12 An easement by prescription is sufficiently similar to adverse possession to present the analogous issues. *See* ***Ludke***, 87 Wis. 2d at 231. Thus, like adverse possession, prescriptive easement issues usually present mixed questions of fact and law. *See* ***Perpignani v. Vonasek***, 139 Wis. 2d 695, 728, 408 N.W.2d 1 (1987). Whether the proven facts fulfill the legal standard of prescriptive use is a question of law. *See* ***id.***

¶13 We do not overturn findings of fact unless clearly erroneous. WIS. STAT. § 805.17(2). As long as the facts could be reached by a reasonable factfinder based upon the evidence presented, a reviewing court is required to accept them. ***Lellman v. Mott***, 204 Wis. 2d 166, 170-71, 554 N.W.2d 525 (Ct. App. 1996). The credibility of witnesses and the weight to be attached to their testimony is for the trier of fact, not the appellate court, to determine. *See* ***id.*** at 172. We review the record to locate evidence to support the trial court's findings, not for evidence to support findings the court did not make. ***Estate of Dejmal***, 95 Wis. 2d 141, 154, 289 N.W.2d 813 (1980). Such deference to the trial court's determination of the credibility of witnesses is justified, the court has said, because of the "superior opportunity of the trial court to observe the demeanor of witnesses and to gauge the persuasiveness of their testimony." ***Kleinstick v. Daleiden***, 71 Wis. 2d 432, 442, 238 N.W.2d 714 (1976).

¶14 Here, the record supports the trial court's findings as to the elements of adverse possession. There is no dispute that Peter Lally planted trees, and put in and maintained the driveway that he and the Kudlicks used for over thirty-four years. While a manager for the paper company testified that there is no indication that the company ever consented to the Lallys' use of the disputed area and was unaware that it existed, he acknowledged that a 1973 aerial photograph showed the driveway entering the Lallys' properties. Based on the testimony, the trial court was entitled to find that the Lallys' use was visible, open, notorious, continuous and uninterrupted for more than twenty years, thus constituting adverse use that is hostile and inconsistent with the owners' rights. *See* ***Mushel***, 123 Wis. 2d at 144.

¶15 By arguing that the paper company did not notice the driveway on their land and, therefore, the Lallys' use was not "reasonable notice," the Bivenses are asking, in effect, this court to substitute their inference for that of the trial court on a non-existent element. "Reasonable notice" is not an element of a prescriptive easement. *See* ***id.*** Because we must accept the reasonable inferences drawn by the trial court, and because the record supports the trial court's determination of adverse use for the requisite time frame, their argument fails. *See* ***Nieuwendorp v. American Family Ins.***, 191 Wis. 2d 462, 472, 529 N.W.2d 594 (1995) (We are bound to accept the reasonable inferences drawn by the trier of fact.).

¶16 Next, the Bivenses argue that "[t]he court erred in granting adverse possession because all parties believed this access road was located on Ms. Kudlick's property." Without citation to authority, they contend that because of this mistake of fact, adverse possession cannot be granted against the true owners because neither they, nor the paper company had notice of the claim being made against them. This court will not consider arguments unsupported by legal

authority. *See* ***State v. Shaffer***, 96 Wis. 2d 531, 545-46 n.3, 292 N.W.2d 370 (Ct. App. 1980).

¶17 Next, the Bivenses argue that the trial court erred by granting adverse possession because the Lallys did not prove exclusive possession for twenty years. However, the trial court did not grant adverse possession; it granted a prescriptive easement. The elements to prove a prescriptive easement claim are similar to those necessary to show adverse possession; they are not, however, identical. ***Shellow***, 9 Wis. 2d at 511. An essential element of adverse possession is the exclusivity of the occupation or possession. WIS. STAT. § 893.25(2)(a). A prescriptive easement has no such requirement of exclusivity. WIS. STAT. § 893.28; *see also* ***Shellow***, 9 Wis. 2d at 511 ("[T]he use need not be to the exclusion of the owners."). Because the Bivenses misperceive the court's holding, their argument fails.

¶18 Finally, the Bivenses argue that the trial court erroneously granted adverse possession because the Lallys were permitted the use of the disputed property by the paper company. They quote portions of the paper company's employee's testimony that indicates the paper company permits the general public to hunt and fish on its land. This argument also fails. There is no evidence that the paper company granted the Lallys permission to put in and use the driveway. The activities that they engaged in, such as bringing in fill, mowing grass and planting trees, were not the type of sporadic recreational uses the paper company permitted. Also, their activities extended well beyond "mere use" over unenclosed land, thereby rebutting any presumption of permissive use. *See* WIS. STAT. § 893.28(3). Because the record provides no support for the Bivenses' argument, it is rejected.

*By the Court.*—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.