COURT OF APPEALS
DECISION
DATED AND FILED

October 6, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2168 **Cir. Ct. No. 2007CV72**

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

DONALD ARMSTRONG AND JUDY ARMSTRONG,

PLAINTIFFS-APPELLANTS,

V.

FRANCIS E. FISCHER AND JOYCE L. FISCHER,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Shawano County: THOMAS G. GROVER, Judge. *Judgment reversed and cause remanded*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Donald and Judy Armstrong appeal a judgment dismissing their action under WIS. STAT. § 805.17(1).[1] The trial court concluded

[1] WISCONSIN STAT. § 805.17(1) permits the defendant to move for dismissal at the close of the plaintiff's evidence during a trial to the court. All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

that the land over which the Armstrongs sought a prescriptive easement was wild and unimproved under WIS. STAT. § 893.28(3).[2] Based on the evidence, the trial court determined that Francis and Joyce Fischer were entitled to the statutory presumption of permissive use.

¶2 We conclude that the court erred in dismissing the action at the close of the Armstrongs' evidence. The Armstrongs have made a prima facie showing that WIS. STAT. § 893.28(3) is inapplicable. They have also established a prima facie case for a prescriptive easement. We reverse and remand for further proceedings consistent with this opinion.

BACKGROUND

¶3 Donald Armstrong purchased forty acres of property in Shawano County on January 31, 1967. At the time of the sale, Lloyd and Sadie Young owned property adjacent to and immediately west of the Armstrong parcel. The Armstrong property is primarily swamp with some hardwood and a one- or two-acre clearing at the southwest corner that the Armstrongs used as a Christmas tree plantation. The Armstrongs cannot traverse their parcel from north to south without high rubber boots.

¶4 Since the Armstrongs took title in 1967, they used a private road on the Youngs' property. They traveled the road regularly to access the southern portion of their parcel for maintenance of the tree farm, deer hunting, and walking. Donald Armstrong described the road as a "corduroy road" that was sometimes

[2] WISCONSIN STAT. § 893.28(3) provides that "[t]he mere use of a way over unenclosed land is presumed to be permissive and not adverse."

overgrown and wet.[3] Donald testified that the road was covered with gravel and that a culvert was secured in the gravel bed. The road began at a point on the Youngs' driveway near the east side of their residence, and the Armstrongs used the road in open daylight and would often wave to the Youngs as they drove by. The Armstrongs never asked for nor were they ever given permission to use the road by the Youngs. Some members of the public also travelled the road. Donald did most of the road maintenance, including cutting alders and filling potholes.

¶5 In 1994, the Youngs sold their property to the Fischers. During the first few years of the Fischers' ownership, the Armstrongs continued to use the road as they had in the past. Later, the road had to be expanded to accommodate large machinery used to farm the Fischers' land. The Fischers erected a locked gate across the road's entrance shortly after the expansion. The Armstrongs were initially given a key, but a few years later the Fischers placed a locked chain on the gate that sometimes rendered the road inaccessible. In 2006, the Fischers locked the gate and set up surveillance equipment after a confrontation with Donald over the placement of a deer stand.

¶6 The Armstrongs filed suit seeking a declaration that they held a prescriptive easement over the road. After the close of the Armstrongs' evidence, the Fischers moved for dismissal under WIS. STAT. § 805.17(1), arguing that the Armstrongs had not shown they were entitled to relief. Although the trial court found that "Mr. Armstrong drove down that road for more than twenty years" and "that he did not sneak down the road," the court granted the motion. The court

[3] A corduroy road is "a road built of logs laid side by side transversely and usu[ally] used in low or swampy places." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 506 (unabr. 1993).

concluded that the road ran over "unenclosed land" within the meaning of WIS. STAT. § 893.28(3) and that the Armstrongs had not overcome the statutory presumption of permissive use. The court further determined that the Armstrongs were not entitled to a prescriptive easement under WIS. STAT. § 893.28(1) because the Youngs had consented to their use.

DISCUSSION

¶7 This appeal principally involves the interpretation and application of WIS. STAT. § 893.28. Although the Fischers argue otherwise, the interpretation and application of a statute are questions of law that we review de novo. *See* ***Williams v. American Transm. Co.***, 2007 WI App 246, ¶5, 306 Wis. 2d 181, 742 N.W.2d 882. The court's factual findings will not be disturbed unless they are clearly erroneous. WIS. STAT. § 805.17(2).

¶8 As the trial court acknowledged, the law of servitudes often uses presumptions to assist in determining whether the use of property is permissive or prescriptive. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.16 cmt. g (2000). The general rule is that "[c]ontinuous adverse use of rights in real estate of another for at least twenty years … establishes the prescriptive right to continue the use." WIS. STAT. § 893.28(1). Subsection 893.28(1) codifies the common law presumption of adverse use:

> When it is shown that there has been the use of an easement for twenty years, unexplained, it will be presumed to have been under a claim of right and adverse, and will be sufficient to establish a right by prescription, and to authorize the presumption of a grant, unless contradicted or explained.

Carmody v. Mulrooney, 87 Wis. 552, 554, 58 N.W. 1109 (1894). However, WIS. STAT. § 893.28(3) reverses the adverse use presumption and assumes that the

owner of "unenclosed" lands has consented to the use. *See* ***Christenson v. Wikan***, 254 Wis. 141, 144, 35 N.W.2d 329 (1948).

¶9 The Armstrongs contend that the trial court made two errors in applying WIS. STAT. § 893.28. First, the Armstrongs claim that the presumption of permissive use under WIS. STAT. § 893.28(3) does not apply because the land is not "unenclosed." They also argue that the court improperly dismissed the action under WIS. STAT. § 893.28(1) when it concluded that the Armstrongs had used the road with the Youngs' permission. We analyze each of these claims separately.

A. "UNENCLOSED LAND" UNDER WIS. STAT. § 893.28(3)

¶10 The presumption of permissive use under WIS. STAT. § 893.28(3) applies to lands that are "wild, unoccupied, or of so little present use as to lead legitimately to the inference that an owner would have no motive in excluding persons from passing over the land." ***Shepard v. Gilbert***, 212 Wis. 1, 6, 249 N.W. 54 (1933). Thus in ***Shepard***, land that had begun to assume the characteristics of "a suburban development"—namely, being broken up and disposed of for residential property—was not "unenclosed" and the presumption of permissive use did not apply. ***Id.*** at 10-11. Further, in ***Shellow v. Hagen***, 9 Wis. 2d 506, 509, 101 N.W.2d 694 (1960), the court refused to apply the presumption to an occasionally used parking lot adjacent to a shallow, weedy shoreline where the plaintiffs had "constructed and installed piers, planted trees … and spread some gravel …." ***Id.*** The court held that the land was not wild and unimproved because it had "been occupied and used continuously …." ***Id.*** at 514.

¶11 The Armstrongs argue that their situation is similar to that of the plaintiffs in ***Carlson v. Craig***, 264 Wis. 632, 60 N.W.2d 395 (1953), who had used an aging dirt road on the defendant's property for more than twenty years before

the defendant took ownership of the parcel. In ***Carlson***, the plaintiff and his father "cut grass and brush and made improvements to the roadway." ***Id.*** at 637. Additionally, a portion of the property had been cleared for fruit trees and it was "apparent … that … the property was improved or in the process of being improved for agricultural purposes." ***Id.*** These facts led the supreme court to conclude that WIS. STAT. § 893.28(3)'s presumption of permissive use did not apply.

¶12 We conclude that the trial court erred in assuming permissive use under WIS. STAT. § 893.28(3). The Armstrongs have made a prima facie showing that the land was not wild, unoccupied or useless under ***Shepard***, ***Shellow***, and ***Carlson***. According to Donald Armstrong's testimony, the road began off the Fischers' driveway and extended past their residence. The road was composed of logs and gravel and had to be enlarged to support the large farming machinery used on the Fischers' land. Donald occasionally performed maintenance by filling potholes with gravel and clearing vegetation. The roadway improvements alone would render § 893.28(3) inapplicable under ***Carlson*** and ***Shellow***.

¶13 Despite this evidence, the Fischers argue that the "land over which the alleged easement goes is, in fact, unenclosed and unimproved." They claim that under ***Bino v. City of Hurley***, 14 Wis. 2d 101, 109 N.W.2d 544 (1961), our analysis should focus solely on improvements to the land and not those to the road. In ***Bino***, the issue before the court was whether a public highway had been established under WIS. STAT. § 80.01(2) (1961) (current version at WIS. STAT. § 82.31(2)). The court considered how the land surrounding the road had been used and concluded that the property was wild and unenclosed.

¶14 The ***Bino*** case does not alter our analysis. First, the Fischers misread ***Bino*** when they suggest that the supreme court has prohibited consideration of roadway improvements. Since the road is a part of the land, roadway improvements remain relevant. In addition, the supreme court considered improvements to the claimed easement in both ***Shellow*** and ***Carlson***. The Fischers weaken their argument further by describing the road as "nothing more than a farm lane," a fact that would have no relevance under their interpretation of ***Bino***.

¶15 Even if we accepted the Fischers' reading of ***Bino***, the Armstrongs have rendered WIS. STAT. § 893.28(3) inapplicable by presenting prima facie evidence of improvement to the land surrounding the easement. Evidence at trial revealed that the land was continuously occupied and that the Fischer parcel contained a residential structure. The prima facie evidence also established that the surrounding land was utilized for a variety of purposes. The Fischers used at least some of their property for agricultural purposes. The Armstrongs spent years clearing land for and constructing a tree farm. Finally, Donald placed deer stands and hunted the property with regularity. In sum, the Armstrongs are entitled to a rebuttable presumption that the land is not "wild, unoccupied, or of so little present use as to lead legitimately to the inference that an owner would have no motive in excluding persons from passing over the land." ***Shepard***, 212 Wis. at 6. On remand, the Fischers may introduce rebuttal evidence to the contrary.

B. PRESUMPTION OF ADVERSE USE UNDER WIS. STAT. § 893.28(1)

¶16 We also consider whether the Armstrongs have established a prima facie case for a prescriptive easement. A prescriptive easement is created by "(1) adverse use that is hostile or inconsistent with the exercise of the title holder's

rights, (2) visible, open, and notorious action, (3) open claim of right, and (4) continuous and uninterrupted use for the entire [twenty-year] period required by [WIS. STAT. § 893.28(1)]." ***Mayer v. Grueber***, 29 Wis. 2d 168, 177, 138 N.W.2d 197 (1965). The Armstrongs may rely on the presumption establishing these elements if they have shown they used the Fischers' property, without explanation, for at least twenty years. WIS. STAT. § 893.28(1); s*ee also* ***Carmody***, 87 Wis. at 554.

¶17 The Armstrongs' prima facie evidence satisfies the requirements of WIS. STAT. § 893.28(1) and ***Carmody*** and supports the trial court's conclusion that the Armstrongs have openly traveled the road for more than twenty years. Testimony established that Donald Armstrong used the road since he purchased his property in 1966. The Armstrongs traveled the roadway whenever they wished to perform an activity on the southern end of their parcel. This use continued until Francis Fischer confronted Donald in 2006. Donald never asked for nor was he ever given permission to use the road from the neighboring landowners, even though the roadway began at the Youngs' driveway and ran near their home. He gave others permission to travel the road but never gave the Youngs notice of any use. In Donald's words, he would "just come and go."

¶18 Despite this evidence, the trial court concluded that the Armstrongs' use was not adverse because the Youngs had consented to it. The court found that:

> The Youngs weren't interested in stopping anybody from going down that road and that therefore just driving down the road did not constitute hostile and inconsistent adverse use …. [T]he Youngs and the Armstrongs knew each other and … they were friends and … there was a social relationship at times with members of those families ….

The court "believ[ed] that Mr. Young … didn't have any problem with Mr. Armstrong using [the road] … even though he didn't say it in so many words." The court erred in concluding the Armstrongs' use was permissive.

¶19 The court first erred when it analyzed the evidence for proof of a dispute. Hostile use does not require proof of an unfriendly intent nor does it necessarily require evidence of a controversy or a manifestation of ill will. ***Shellow***, 9 Wis. 2d at 511. "The use need not be exclusive or inconsistent with the rights of the owner so long as the particular use is made in disregard or nonrecognition of the true ownership." ***Id.*** at 512. The court also erred in considering the friendship and neighborly status of the Youngs and the Armstrongs. "[N]either friendship nor close social relations of the owner and initial user can be effective to rebut the presumption [of adverse use.]" ***Shepard***, 212 Wis. at 11. Nor will the fact that the Armstrongs and the Youngs were neighbors effectively rebut the presumption under WIS. STAT. § 893.28(1) and ***Carmody***. *See* ***Shellow***, 9 Wis. 2d at 514.

CONCLUSION

¶20 The Armstrongs have presented prima facie evidence of both the improved nature of the land under WIS. STAT. § 893.28(3) and of continuous adverse use under WIS. STAT. § 893.28(1). We reverse the trial court's judgment and remand for further proceedings consistent with this opinion. We emphasize that our conclusions are based solely upon the Armstrongs' evidence, and the Fischers shall have the opportunity to present rebuttal evidence on remand.

By the Court.—Judgment reversed and cause remanded.

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