

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**April 1, 2010**

David R. Schanker  
Clerk of Court of Appeals

**NOTICE**

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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. 2009AP455**

**Cir. Ct. No. 2007CV342**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**KURT FOSTER AND JEAN FOSTER,**

**PLAINTIFFS-APPELLANTS,**

**NICHOLAS L. SIES, JENNIFER M. SIES, GEORGE EICHELKRAUT,  
LOIS EICHELKRAUT, JON MARSH, CINDY MARSH AND JEFFREY  
SARBACKER,**

**PLAINTIFFS,**

**v.**

**JEROME J. FABISH AND NATASCHA BUTER,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from an order of the circuit court for Green County:  
JAMES R. BEER, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Kurt and Jean Foster appeal a summary judgment order that dismissed their claims against Jerome Fabish and Natascha Buter for adverse possession, trespass, and declaratory judgment of their rights under an easement. For the reasons discussed below, we affirm the circuit court.

## BACKGROUND

¶2 The dispute in this case involved several neighboring parcels of land in New Glarus that were once commonly owned, but were sold off separately over a period of years. The Fosters, Nicholas and Jennifer Sies, Jon and Cindy Marsh, Jeff Sarbacher, and George and Lois Eichelkraut all claimed to own or rent parcels with a common right-of-way over a driveway located along the north side of property owned by Fabish and Buter. In 2007, Fabish and Buter placed various obstructions on the driveway that the easement holders believed interfered with their right-of-way. The easement holders filed this suit in response to the obstructions, and eventually amended their complaint to seek damages on claims of adverse possession and trespass, as well as declaratory judgment on the scope of their rights under a recorded easement.<sup>1</sup>

¶3 The plaintiffs' claim of a recorded easement was based on a provision in Fabish and Buter's deed stating that Fabish and Buter's property is subject to a right-of-way on the driveway along the north side of the property, to be used in common with others. The claimed easement holders and their predecessors in interest further alleged that they had paved and otherwise maintained the driveway for a period of more than twenty years. Fabish and Buter

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<sup>1</sup> The amended complaint also requested punitive damages, but that is merely a form of relief, not a separate cause of action.

provided affidavits averring that they and their predecessors had also used and performed maintenance on the driveway since at least the 1960s.

¶4 The circuit court dismissed all of the plaintiffs' claims, and the Fosters alone appeal.

### STANDARD OF REVIEW

¶5 Contrary to the Fosters' contention, a summary judgment decision is not a discretionary determination subject to the erroneous exercise of discretion analysis. Rather, this court reviews summary judgment decisions *de novo*, applying the same methodology and legal standard employed by the circuit court. *Brownelli v. McCaughtry*, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994).

We first examine the complaint to determine whether it states a claim, and then we review the answer to determine whether it joins a material issue of fact or law.... [If a claim has been stated and issue has been joined, we next] examine the moving party's affidavits to determine whether they establish a *prima facie* case for summary judgment. If they do, we look to the opposing party's affidavits to determine whether there are any material facts in dispute that entitle the opposing party to a trial.

*Frost v. Whitbeck*, 2001 WI App 289, ¶6, 249 Wis. 2d 206, 638 N.W.2d 325 (citations omitted). Each step of this process involves a question of law. The legal standard is whether there are any material facts in dispute that entitle the opposing party to a trial. *See, e.g., Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25, ¶24, 241 Wis. 2d 804, 623 N.W.2d 751.

## DISCUSSION

### *Adverse Possession*

¶6 Regarding the first step of the summary judgment method, the Fosters assert that their amended complaint states a claim for adverse possession merely by “recit[ing all of the] boiler plate elements” necessary to establish that cause of action. This assertion misstates the applicable test, however. It is not sufficient to allege the *elements* of a cause of action; a plaintiff must allege the *facts* necessary to establish each of those elements. We accept the pleaded facts as true for purposes of a summary judgment motion, and liberally construe them to give the plaintiff the benefit of all inferences that might establish conditions under which the plaintiff might prevail. See *Bank One, NA v. Ofojebe*, 2005 WI App 151, ¶7, 284 Wis. 2d 510, 702 N.W.2d 456. We nonetheless conclude that the facts pled here do not support an adverse possession claim.

¶7 WISCONSIN STAT. § 893.25 (2007-08)<sup>2</sup> permits a person to acquire title to real property by adverse possession for an uninterrupted period of twenty years. The statute requires the land to be actually occupied and either protected by a substantial enclosure or usually cultivated and improved. WIS. STAT. § 893.25(2). A person claiming adverse possession must show that the disputed property was used for the requisite period of time in an “open, notorious, visible, exclusive, hostile and continuous” manner that would apprise a reasonably diligent landowner and the public that the possessor claimed the land as his or her own. *Pierz v. Gorski*, 88 Wis. 2d 131, 137, 276 N.W.2d 352 (Ct. App. 1979). A use of

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<sup>2</sup> All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

land is not adverse if it is carried out with the owner's permission. *County of Langlade v. Kaster*, 202 Wis. 2d 448, 457, 550 N.W.2d 722 (Ct. App. 1996).

¶8 Here, the Fosters alleged that they had a recorded easement, held in common with several others, to use a driveway running east and west and located along the north side of the property titled to Fabish and Buter. A recorded easement plainly constitutes written consent to the use of the titleholder's land. Therefore, the facts the Fosters alleged would establish that their use of the north driveway was with permission and, therefore, not adverse to Fabish and Buter's title to the underlying land.

¶9 To the extent that the Fosters' adverse possession claim might be broadly construed to also encompass a portion of the driveway running north and south on the western portion of Fabish and Buter's property, even though not explicitly mentioned in the complaint, the facts the Fosters alleged are insufficient to establish the exclusive-use requirement. Specifically, the Fosters alleged that the owners of several other parcels shared common use of the west driveway, but made no assertion that Fabish and Buter or their predecessors were not also among those who used the driveway over the years. We therefore conclude, as did the circuit court, that the facts alleged in the amended complaint were insufficient to state a claim on which relief could be granted for adverse possession to title of the land underlying either the north portion of the driveway or the west portion of the driveway.

#### *Trespass*

¶10 A trespass occurs when a person enters or remains upon land in the possession of another without a privilege to do so. *Geyso v. Daly*, 2005 WI App 18, ¶8, 278 Wis. 2d 475, 691 N.W.2d 915 (Ct. App. 2004). The Fosters seem to

be operating under the mistaken assumption that an interference with a right they might have to use the driveway on Fabish and Buter's property constitutes a trespass. We have, however, already explained why the Fosters did not have a claim for adverse possession. To the extent their trespass claim is premised on an alleged interference with an easement, none of the facts alleged in the complaint suggest that Fabish and Buter did not also have the right to use the driveway on their own property. There is no trespass when Fabish and Buter enter their own land, even assuming others have a right to use such land. We therefore conclude, as did the circuit court, that the facts alleged in the amended complaint failed to state a claim upon which relief could be granted for trespass.

*Declaratory Judgment On Easement*

¶11 The recorded easement subjects the Fabish and Buter property to “a right-of-way and easement for a driveway along the North side and said driveway to be used in common with others.” The Fosters requested a declaratory judgment regarding their rights with respect to this easement. The circuit court dismissed the action, thereby rejecting this request. As explained below, we affirm the circuit court's rejection of the requested declaratory relief regarding the north driveway.

¶12 Although it is clear from the briefing before this court and from the summary judgment materials, including Kurt Foster's “notice of prescriptive easement,” that the parties have multiple factual disputes regarding the existence and scope of an alleged easement over the portion of the driveway to the west of Fabish and Buter's residence, that portion of the driveway does not appear to be covered by the easement that we address in this section. Indeed, the declaratory judgment claim in the amended complaint expressly refers to an easement over the

driveway “along the north side” of Fabish and Buter’s property. The circuit court invited the plaintiffs to amend their pleadings and, in context, it was clear that the court meant that the plaintiffs should amend their pleadings to add causes of action relating to the west portion of the driveway and make the assertion that this portion was covered by the easement. The plaintiffs failed to do so. Thus, the circuit court correctly determined that any such factual disputes as to this west driveway are immaterial to the request for declaratory relief.

¶13 We note that it is not apparent what use the Fosters might make of the north driveway easement without the ability to use the portion of the driveway to the west of the Fabish and Buter residence. So far as we can tell, the north driveway is of interest to the Fosters because it provides a better or sometimes more convenient way to access their property. But that access route is blocked without use of the portion of the driveway on land owned by Fabish and Buter to the west of their residence. And, we have already rejected the arguments that pertain to that portion of the driveway.

¶14 We now focus our attention on the north driveway easement. The Fosters argue that we should reverse the circuit court because it failed to properly follow summary judgment methodology. This argument fails because our standard of review is *de novo*. Regardless of the reasoning employed by the circuit court, we review the pleadings and submissions to determine whether summary judgment is warranted.

¶15 We are uncertain what is left of the Fosters’ argument with respect to the dismissal of their request for declaratory relief. The Fosters blend their arguments on adverse possession, trespass, and declaratory judgment. All that

appears to remain is the Fosters' bald assertion that they stated a claim for declaratory relief.

¶16 Our review of the record causes us to question whether there is a true dispute about the north driveway easement. For example, although the complaint might be read as suggesting that the Fosters complained that the piles of dirt placed by Fabish and Buter impeded the Fosters' use of the north driveway, the arguments of counsel indicate that the actual asserted problem was that the piles of dirt prevented the Fosters from driving over the *west driveway* on the Fabish and Buter property. Similarly, as to who may use the easement, the circuit court at one point stated: "The easement itself grants to everybody the use along the north side." And Buter responded: "Right."<sup>3</sup>

¶17 Under these circumstances, we decline to reverse the circuit court.

¶18 In summary, we affirm the circuit court's decision to dismiss the adverse possession and trespass claims, and we agree with the court's assessment that any dispute about the western portion of Fabish and Buter's driveway was not before the court. We also affirm dismissal of the request for declaratory judgment with respect to the north driveway easement.

*By the Court.*—Order affirmed.

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

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<sup>3</sup> Buter went on to say that the term "others" in the easement includes Scott Foster, who lives to the north of the north driveway, but there was no significant discussion of who else might be included in the term "others."



