COURT OF APPEALS
DECISION
DATED AND FILED

November 17, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP1335 **Cir. Ct. No. 2007CV385**

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

DAVID J. FRENCH REVOCABLE TRUST OF 1991, JEANNA N. FRENCH AND PAULA VAN AKKEREN,

PLAINTIFFS-APPELLANTS,

V.

WILLIAM C. JACOB, JR. AND VIRGINIA JACOB,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Sheboygan County: JAMES J. BOLGERT, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J. and Anderson, J.

¶1 PER CURIAM. David J. French Revocable Trust of 1991, Jeanna N. French, and Paula Van Akkeren (the Frenches) have appealed from an order denying their motion for reconsideration of an order granting summary judgment to the respondents, William Jacob, Jr., and Virginia Jacob (the Jacobs). We

conclude that summary judgment was properly granted to the Jacobs and affirm the order.

¶2 This appeal involves a property dispute. The Frenches and the Jacobs own adjacent properties on Elkhart Lake (the Jacobs' property and the French property). The Jacobs' property lies to the north of a portion of the French property.[1] It can be accessed only by French Road, which runs across the French property. At the juncture where French Road reaches the Jacobs' property, it veers south toward the portion of the French property on which the Frenches have a cottage. An easement recorded in 1955 permits the owners of the Jacobs' property to use French Road for ingress and egress.

¶3 Prior to 1955, the Jacobs' property was owned by Keith Osborn. The French property was owned by Keith's brother, Gordon. In 1979, Gordon Osborn sold his property to Rosemary and Jack Van Der Vaart. In 1989, Rosemary Van Der Vaart sold the property to the Frenches.

¶4 As of 1955, the property owned by Keith Osborn was inherited by his children, Katherine Osborn, Harriet Osborn Bliss, and Otis Osborn, whose wife was Irene S. Osborn. In 1992, Irene S. Osborn and the Otis B. Osborn Residual Trust sold the property to the Jacobs.

¶5 When the Jacobs purchased their property, it had a cottage situated on the eastern portion of the property toward the lake, and a carport on the west

[1] The Frenches own two parcels of land, parcels one and two. French Road runs along the northern border of parcel one before veering to the south. After it veers south, the road separates the Frenches' parcels one and two. The Frenches' cottage is on parcel two, whose east side abuts Elkhart Lake. The Jacobs' property and residence is immediately to the north of parcel two.

end of the property. In 2004, the Jacobs tore down the cottage and carport. They completed a new residence and garage in 2005. They paved the driveway in front of the garage. The paved driveway lies partly on the easement and partly on the property that is the subject of this litigation (the disputed property). The disputed property constitutes a rectangular piece of land approximately sixty-two feet by twenty-two feet. It lies to the west of the Jacobs' new garage, and extends south to a line of bushes, which runs east to west and separates the disputed property from the Frenches' cottage and yard immediately to the south of the bush line. The disputed property includes the south portion of the Jacobs' driveway, a portion of the walkway to their house, and a grassy area surrounding two trees, which ends at the bush line separating the disputed property from the Frenches' yard.

¶6 In their complaint, the Frenches sought a declaration that the Jacobs had no right to drive or park on the portion of the driveway that was not within the easement, no right to pave the driveway, and no right to continue parking on the remaining grassy portion of the disputed property. They sought injunctive relief and damages. The Jacobs answered and counterclaimed, alleging that they had a prescriptive right of use of the disputed property. They also claimed that the Frenches were estopped from bringing their claims.

¶7 The trial court ultimately granted the Jacobs' motion for summary judgment. It concluded that the Frenches were equitably estopped from demanding removal of the driveway or objecting to the Jacobs' use of the driveway for access to their garage. It further concluded that the Jacobs have a prescriptive right to use that part of the disputed property located south of the driveway and extending to the bush line for access and parking. We agree with both conclusions.

¶8 We review a trial court's grant or denial of summary judgment de novo. ***Krier v. Vilione***, 2009 WI 45, ¶14, 317 Wis. 2d 288, 766 N.W.2d 517. Upon review we apply the same standards as those used by the trial court, as set forth in WIS. STAT. § 802.08 (2007-08).[2] ***Krier,*** 317 Wis. 2d 288, ¶14. If the pleadings state a claim and demonstrate that material factual issues exist, our inquiry shifts to the moving party's affidavits or other proof to determine whether a prima facie case for summary judgment has been presented. ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶22, 241 Wis. 2d 804, 623 N.W.2d 751. If the moving party has made a prima facie case, the affidavits or other proof of the opposing party must be examined to determine whether there exist disputed material facts, or undisputed material facts from which reasonable alternative inferences may be drawn, sufficient to entitle the opposing party to a trial. ***Id.***

¶9 The party that opposes a summary judgment motion must set forth specific facts, evidentiary in nature and admissible in form, demonstrating that a genuine issue exists for trial. ***Helland v. Kurtis A. Froedtert Memorial Lutheran Hosp.***, 229 Wis. 2d 751, 756, 601 N.W.2d 318 (Ct. App. 1999). "It is not enough to rely upon unsubstantiated conclusory remarks, speculation, or testimony which is not based upon personal knowledge." ***Id.*** "[S]ummary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." ***M&I First Nat'l Bank v. Episcopal Homes Mgmt., Inc.***, 195 Wis. 2d 485, 497, 536 N.W.2d 175 (Ct. App. 1995).

¶10 Based upon the record, we conclude that the trial court properly granted summary judgment determining that the Jacobs have a prescriptive right to

[2] All references to the Wisconsin Statutes are to the 2007-08 version.

use that part of the disputed property located south of the driveway and extending to the bush line for access and parking. With some exceptions that are inapplicable here, the continuous adverse use of the rights of another in real estate for at least twenty years establishes the prescriptive right to continue the use. WIS. STAT. § 893.28(1). An easement by prescription has four elements: (1) adverse use hostile and inconsistent with the exercise of the titleholder's rights; (2) which is visible, open and notorious; (3) under an open claim of right; and (4) is continuous and uninterrupted for twenty years. ***Ludke v. Egan***, 87 Wis. 2d 221, 230, 274 N.W.2d 641 (1979).

¶11 The unexplained use of property for a period of twenty years is presumed to be adverse and under a claim of right. ***Widell v. Tollefson***¸ 158 Wis. 2d 674, 684, 462 N.W.2d 910 (Ct. App. 1990). Permissive use is not adverse. ***Ludke***¸ 87 Wis. 2d at 230. However, acquiescence alone does not demonstrate the type of permission needed to overcome the presumption of adverse use. ***Widell***, 158 Wis. 2d at 685. Moreover, hostility merely requires that the use be inconsistent with the rights of the titleholder. ***Id.*** at 685. It does not require unfriendly intent or ill will, nor do friendship and close personal relationships rebut the presumption of hostility and adverseness. ***Id.***

¶12 Possession, or the intent to possess as one's own, is not a prerequisite to a claim of prescriptive easement, and the use need not be to the exclusion of the owners. ***Shellow v. Hagen***, 9 Wis. 2d 506, 511, 101 N.W.2d 694 (1960). Continuity of use depends on the nature and character of the right that is claimed, and need not be constant, daily, or weekly. ***Widell***, 158 Wis. 2d at 685. A claimant's failure to use property for all purposes when not needed does not disprove the continuity of use when needed. *See* ***Shellow***, 9 Wis. 2d at 512-13.

¶13 Applying these principles to the summary judgment record, we conclude that the Jacobs established a right to summary judgment that was not rebutted by the Frenches. Irene Osborn's affidavit indicated that she began going to the Jacobs' property with her husband, Otis, in 1953, when it was still owned by Otis' parents, Keith and his wife. Irene attested that she, Otis, and their children moved to Mississippi in 1960, but returned to the cottage once a year for two to four weeks at a time during the summer months of July or August. She attested that they visited the cottage almost every year until 1979, when Otis died. She attested that Otis' sister, Harriet Bliss, also lived outside Wisconsin and would visit the cottage every summer with her children.

¶14 Irene Osborn attested that during the time she went to the cottage, "[w]e would usually park to the North of the lilac bushes, and the people from Gordon's house would usually park to the South of the bushes, but if we ever needed more parking space, cars from either house might park on the other side of the bushes or in the field across the road." Irene attested that after 1979, she went to the cottage at least twice by herself, and at some point in the 1980's began renting out the cottage.

¶15 The two affidavits of Laura Wynne, the daughter of Otis and Irene Osborn, corroborated Irene's affidavit. Wynne attested that she stayed at the property inherited by her father many times through the 1960's, 70's, 80's, and 90's. She attested that after moving to Mississippi around 1961, her family visited the cottage every summer thereafter, usually for two weeks, until 1979 when her father died. Although Wynne acknowledged that she did not go to the cottage as frequently in the 1980's, she attested that her mother went there by herself on a couple of occasions in the 1980's. Wynne also attested that she stayed there a couple of times in the 1990's, before the property was sold to the Jacobs in 1992.

¶16 In her affidavits, Wynne attested that the bush line separated her family's property from the French property to the south, which was owned by her grandfather's brother. Wynne attested that when her family owned the property, they used the carport for storage and a patio area, and parked their cars to the south and west of the carport, on the grassy area extending to the bush line. She testified that she and her family also mowed this area, and that to her knowledge, no one in her family had ever asked anyone for permission to use or park on this area. Wynne attested that she had assumed that her family had a right to park on this property and use it because that was how it had always been done.

¶17 The representations made by Wynne and Irene Osborn regarding their family's use of the disputed property for parking and their maintenance of it were consistent with the affidavits of Rosemary Van Der Vaart, Judith Miller, and John Weber. Van Der Vaart attested that she and her husband purchased the French property from Gordon Osborn in March 1979, and that she sold it to the Frenches in 1989. Van Der Vaart attested that a bush line has always run east and west between the French cottage property and the property to the north now owned by the Jacobs. Van Der Vaart attested that she thought this was the border between the two properties, and that her family never maintained the area north of the bush line. She attested that to her knowledge, any maintenance and lawn work on the property north of the bush line was done by the owners of the property now owned by the Jacobs.

¶18 Judith Miller's affidavits also establish the use of the disputed property by the Jacobs' predecessors. Miller attested that she took care of the cottage belonging to the Jacobs' predecessors, and stayed there at times from 1988

until 1992.[3] She attested that she opened the cottage in the spring, cleaned the house about once a week if someone stayed there and, along with members of the owners' families, mowed the lawn, including the disputed area up to the bush line.[4] Miller further attested that her family stayed at the cottage almost every other weekend during the summer, and that they parked on the grass to the side of the carport between the carport and the bush line, because they assumed the bush line was the property line. She attested that other than herself and members of the owners' families, she never saw anyone else mow the property behind the cottage. She attested that she was never approached by any member of the French family, and was never given direction as to where to park.

¶19 Affidavits from John Weber similarly describe the use of the disputed property. Weber attested that his family rented the cottage on what is now the Jacobs' property for reunions during one week in August 1987 and one week in July 1990. He attested that during each rental period, his group had at least four cars, and parked vehicles in the area to the west and south of the carport. He attested that there was a bush line between the property and the neighbor to the south, and that he assumed the property his family was using for parking was part

[3] In her first affidavit, Miller stated that she took care of the cottage and sometimes stayed there from 1988 to 1994. In her second affidavit she indicated that she stopped working and staying at the cottage when the Jacobs bought it, which was 1992.

[4] Miller's attestation was consistent with the affidavit of Earl Constien, who stated that during 1994 and 1995 he did lawn work on the French property, both around the cottage and in the field across the road. Constien attested that his directions were to mow the lawn and trim the bushes. He attested that the cottage area that he mowed was bounded by the bush line on the north of the French property, and that he never mowed north of the bush line. Constien attested that he never mowed or maintained any area between the Jacobs' carport and the bush line, and that he assumed the area north of the bush line was owned by the Jacobs.

of the property he was renting. He attested that he did not ask anyone's permission to park there, and received no objection.[5]

¶20 These affidavits established the Jacobs' prescriptive right to continue to use the disputed property for parking and access, as determined by the trial court. The affidavits established that the Jacobs' predecessors had openly and visibly maintained the disputed property and used it for parking cars for more than twenty years when the Jacobs purchased the property in 1992. Their use of the disputed property was inconsistent with the ownership rights of the Frenches and their predecessors, and was thus hostile, even if ill will was absent. Use of the disputed property by the Jacobs' predecessors was continuous and uninterrupted for at least twenty years.[6] In addition, the affidavits of Wynne, Miller, Weber, and Rosemary Van Der Vaart establish that the disputed property was used as part of

[5] Charlotte Zieve, a cottage owner on Elkhart Lake whose property is also accessed by French Road and lies immediately to the south of the French property, similarly attested to the parking of cars on the disputed property. Zieve attested that she and her husband bought their property in approximately 1988, when the French property was owned by the Rosemary Van Der Vaart. Zieve attested that when she drove by the Jacobs' property, she frequently saw cars parked south and west of the carport and garage.

[6] The Frenches contend that the record does not establish twenty years of continuous and uninterrupted adverse use. We disagree. The record establishes use by the Jacobs' predecessors from 1953 to 1992, including regular summer use by members and descendants of the Keith Osborn family from 1960 to 1979, and less frequent but continued use thereafter. The summer use of the cottage property by the Jacobs' predecessors was sufficient to establish continuous use for purposes of creating a prescriptive right. *Cf*. ***Widell v. Tollefson***¸ 158 Wis. 2d 674, 685-86, 462 N.W.2d 910 (Ct. App. 1990) (continuous use existed when plaintiffs used a road seasonally, and only two to three times a weekend during a portion of the twenty-year period considered in establishing a prescriptive right); ***Shellow v. Hagen***, 9 Wis. 2d 506, 512-13, 101 N.W.2d 694 (1960) (continuity of use established even though plaintiffs used a parking lot for parking cars and mooring boats only when they used their island property, and for storing boats in the fall and winter).

the Jacobs' property based on a claim of right to the use.[7] A prescriptive right of use of the disputed property was thus demonstrated by the Jacobs, and was not rebutted by the Frenches.

¶21 In determining that the Frenches did not rebut the Jacobs' prima facie case for summary judgment on the prescriptive right issue, we note that, contrary to the Frenches' argument, nothing in the record provides a basis to conclude that, at its inception, the use of the disputed property by Keith Osborn and his children was by permission. Unlike the situations in ***Schroeder v. Moeley***, 182 Wis. 484, 491-92, 196 N.W. 843 (1924) and ***Martin v. Meyer***, 241 Wis. 219, 222-23, 225, 5 N.W.2d 788 (1942), nothing in the summary judgment record indicates that Gordon Osborn or any other owner preceding the Frenches gave permission to use the disputed property to any of the Jacobs' predecessors. We agree with the trial court that Irene Osborn's affidavit did not give rise to a factual dispute on this issue.

¶22 In contending that the disputed area was used by the current and former owners of the Jacobs' property by permission, the Frenches rely on the portion of Irene Osborn's affidavit which stated that "[d]uring the time that I was

[7] The Frenches cite ***Law v. De Normandie***, 5 Wis. 2d 546, 93 N.W.2d 332 (1958), and ***Weisner v. Jaeger***, 175 Wis. 281, 184 N.W. 1038 (1921), as support for their claim that the Jacobs' predecessors did not use the disputed property under a claim of right. These cases do not alter our conclusion. The rights involved in ***Law*** originated from a lease, leading to the inference that the use permissive. ***Law***, 5 Wis. 2d at 549. ***Weisner*** involved a lakeshore pedestrian path used by people renting cottages to access a general store and entertainment area. ***Weisner***, 175 Wis. at 284. Under these facts, the court concluded that nothing in the evidence showed that any of the defendants claimed a right adverse to the plaintiffs, or that the character of the use could have brought home to the plaintiff that more than a permissive use was claimed. ***Id.*** at 285-86. In contrast, the Jacobs' predecessors' open and continued use and maintenance of the disputed property would have brought home to an adjoining property owner that they believed they had a right to use that property.

going to the cottage, I always viewed the property between the two houses, including the property to the West and South of the garage, as common ground." They also rely on the portion of her affidavit stating: "It was my understanding that this was done by mutual agreement, and that the Osborn brothers, Keith and Gordon, had agreed to use the property this way." The Frenches contend that Irene Osborn's affidavit establishes that Otis and Irene and their family parked on the disputed property with permission pursuant to an agreement between Otis' father and uncle, Keith and Gordon Osborn.

¶23 Affidavits in support of and opposition to a motion for summary judgment must be made on personal knowledge and set forth such evidentiary facts as would be admissible in evidence. ***Palisades Collection LLC v. Kalal***, 2010 WI App 38, ¶10, 324 Wis. 2d 180, 781 N.W.2d 503, *review denied*, 2010 WI 111, __ Wis. 2d __, 788 N.W.2d 381; WIS. STAT. § 802.08(3). Although Irene Osborn's statements regarding her family's use of the disputed property and her observation of vehicles parking on the disputed property are statements based on personal knowledge, nothing in her affidavit provides a basis to conclude that her "understanding" that an agreement existed between Keith and Gordon Osborn was based on personal knowledge. She did not indicate that she witnessed any parties making an agreement, saw an agreement, or heard any person discuss an agreement. Her affidavit supports nothing more than a conclusion that she assumed Keith and Gordon had reached an agreement. This was mere speculation, and did not demonstrate personal knowledge that Gordon gave Keith and his

family permission to use the disputed property, or that Keith and his family used the disputed property with permission.[8]

¶24 The summary judgment record thus establishes that the disputed property was openly, visibly, and continuously used by the Jacobs' predecessors under a claim of right for at least twenty years prior to the Jacobs' purchase of the property in 1992. As already discussed, nothing in the summary judgment record indicates that the Jacobs' predecessors were given permission to use the disputed property during this time.[9] Their maintenance and use of the disputed property for parking was inconsistent with the ownership of the Frenches and their predecessors, and was hostile as a matter of law. The mere fact that the Jacobs'

[8] The Frenches' reliance on WIS. STAT. § 907.01 and ***Eichenseer v. Madison-Dane County Tavern League, Inc.***, 2006 WI App 226, ¶27 n.12, 297 Wis. 2d 495, 725 N.W.2d 274, *aff'd*, 2008 WI 38, 308 Wis. 2d 684, 748 N.W.2d 154, is misplaced. Section 907.01 provides that a lay witness' testimony in the form of opinions or inferences is limited to those opinions or inferences that are rationally based on the perception of the witness. Nothing in Irene Osborn's affidavit indicates that her belief that a mutual agreement existed between Keith and Gordon was based on actual perception, as opposed to an assumption derived simply from the fact that Keith's family used the disputed property. Unlike the affidavits discussed in ***Eichenseer***, 297 Wis. 2d 495, ¶27 n.12, Irene Osborn's affidavit does not set forth foundational facts to support her opinion that a mutual agreement existed between Keith and Gordon.

[9] The fact that Gordon Osborn's family and the Van Der Vaart family may have acquiesced in the Keith Osborn's family's use of the disputed property did not, standing alone, mean that the use was with permission. *See* ***Widell v. Tollefson***, 158 Wis. 2d 674, 685, 462 N.W.2d 910 (Ct. App. 1990).

predecessors used the disputed property only occasionally during the summer did not defeat the Jacobs' claim that the use was open, visible, and notorious.[10]

¶25 While the Frenches testified in their depositions that on occasion prior to 2005, the Jacobs requested permission to park on the disputed property, even if true, this evidence does not give rise to a material factual dispute since the Jacobs did not purchase the property until 1992, and twenty years of continuous adverse use was already established. For the same reason, the Jacobs' offer to purchase the disputed property before building their new home and garage did not impair their right to a prescriptive use. *See* ***Ovig v. Morrison***, 142 Wis. 243, 249, 125 N.W. 449 (1910) (a defendant's offer to purchase property in order to avoid litigation did not impair the defendant's adverse possession claim when sufficient years had already passed to make the adverse possession claim unimpeachable).

¶26 The scope of a prescriptive easement is determined by the scope of the use that gives rise to the easement. ***Widell***, 158 Wis. 2d at 686. Based upon the record, we uphold the trial court's grant of summary judgment determining that the Jacobs have a prescriptive right to use that part of the disputed property located south of the driveway and extending to the bush line for access and parking.

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[10] The Frenches rely on ***Pierz v. Gorski***¸ 88 Wis. 2d 131, 276 N.W.2d 352 (Ct. App. 1979), to argue that random and occasional uses do not satisfy the notice requirement for a prescriptive easement. However, ***Pierz*** was an adverse possession case. ***Id.*** at 133. In ***Pierz***, this court affirmed the portion of a judgment that found adverse possession of a house, garage, shed, outbuildings, garden and yard with septic tank. ***Id.*** at 139. It reversed the portion of the judgment finding adverse possession of the remainder of the property because that portion of the property remained wild. *See* ***id.*** at 138-39. The activities on that portion of the land were not sufficient to apprise the owner of the adverse claim. ***Id.*** The disputed property in this case was not wild and it adjoined the Frenches' property. Its use for parking was open and visible to the owners of the French property. The Frenches' claim that they were not present on their property often enough to notice the use does not defeat the fact that the use was open and visible.

¶27 Applying summary judgment standards, we conclude that the trial court also properly granted summary judgment determining that the Frenches are equitably estopped from demanding removal of the driveway or objecting to its use by the Jacobs for access to their garage. Equitable estoppel has four elements: (1) an action or inaction; (2) on the part of one against whom estoppel is asserted; (3) that induces reasonable reliance thereon by the other; (4) which is to the relying party's detriment. ***Affordable Erecting, Inc. v. Neosho Trompler, Inc.***, 2006 WI 67, ¶33, 291 Wis. 2d 259, 715 N.W.2d 620.

¶28 According to the affidavit of William Jacob, he became aware that the disputed property was not included in the real estate description of his property when the Jacobs began their building project. Jacob attested that upon discovering that the land encompassed in the description of the Jacobs' property did not extend to French Road, he asked the Frenches about purchasing the disputed property. Jacob's allegation is corroborated by a letter to Bob and Paula Van Akkeren dated October 6, 2002. In the letter, Jacob stated that he was enclosing preliminary drawings of the plan for their new house. He stated: "To make our plan work, we would appreciate your further consideration of our request to acquire the strip of land along the road behind our garage. One of the enclosed drawings shows this area. Building rules require 25' from the edge of the road to the garage."

¶29 The site plan for the Jacobs' project was drawn to scale, and clearly provided notice of the scope of the project, including the driveway. It delineated the Jacobs' lot line and the Frenches' residence. The driveway to the garage and its boundaries were clearly depicted, as was the 25 foot setback from the road required by law and referred to in William Jacob's October 2002 letter. The plan depicted the driveway coming off French Road, which was a paved road.

¶30 In her deposition testimony, Paula Van Akkeren acknowledged that William Jacob showed her the preliminary plans. While she denied noticing that the plans indicated a paved driveway, she acknowledged seeing the plans, including the house and garage. In addition, the record establishes that the Frenches sent the Jacobs a response declining to sell any of their land, but stating: "We think the drawings of your newly planned home are great, and we wish you the best." The record indicates that the Frenches did not object to the driveway plans until one-and-a-half years after the project and driveway were complete.

¶31 The only reasonable inference from this record is that the Frenches had notice of the Jacobs' intent to use a portion of the disputed property for a driveway, and to pave the driveway. The Frenches' failure to object and to instead indicate that they approved the Jacobs' planned home reasonably induced reliance by the Jacobs. Because requiring the Jacobs to remove the driveway clearly would be detrimental to them, the trial court properly concluded that the Frenches were equitably estopped from demanding removal of the driveway or objecting to its use by the Jacobs for access to their garage.

¶32 In reaching this conclusion, we reject the Frenches' argument that the unclean hands doctrine barred the Jacobs' equitable estoppel defense as a matter of law or, at a minimum, gives rise to an issue of material fact for trial. A person asserting equitable estoppel must have clean hands. ***Godfrey Co. v. Lopardo***, 164 Wis. 2d 352, 373, 474 N.W.2d 786 (Ct. App. 1991). The unclean hands doctrine bars equitable relief when a party's own wrongful or unlawful conduct caused the harm from which he seeks relief. ***Security Pacific Nat'l Bank v. Ginkowski***, 140 Wis. 2d 332, 339, 410 N.W.2d 589 (Ct. App. 1987).

¶33 There is no evidence of wrongful conduct by the Jacobs. The Jacobs showed their plans to the Frenches, who told them they approved. The Jacobs' building project, including installation of the driveway, was conducted in the open. In ***Godfrey***, the plaintiff-developer did not inform the defendant-property owners that the developer's pier potentially interfered with the property owners' riparian rights, despite being told to do so by the Wisconsin Department of Natural Resources. ***Godfrey***, 164 Wis. 2d at 373-74. Simply viewing the pier was not sufficient to put the property owners on notice that the pier might be in their riparian space. ***Id***. In contrast, the Jacobs were entitled to rely on the fact that they had notified the Frenches of the location of the driveway by showing them their plans. In addition, it would have been apparent during the driveway construction process that part of the new driveway extended beyond the easement and was on the disputed property which previously had been used by the Jacobs and their predecessors for parking. Under these circumstances, no basis exists to conclude that the Jacobs' claim of equitable estoppel is barred by the unclean hands doctrine.[11]

By the Court.—Order affirmed.

[11] Because we uphold the trial court's determination that the Frenches are equitably estopped from demanding removal of the driveway or objecting to its use by the Jacobs, we need not address the Frenches' argument that the paving of the driveway changed the nature of the claimed prescriptive use and impermissibly increased the burden on their property. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (when this court determines that at least one ground exists to uphold a trial court order, it need not address other grounds). In any event, the newly-paved area was used for access and parking before paving, and is put to the same use now. Paving the driveway did not change the nature of the prescriptive use or increase the burden on the servient use. *See* ***Knuth v. Vogels***, 265 Wis. 341, 345, 61 N.W.2d 301 (1953) (replacing an existing cinder driveway with a concrete driveway did not unreasonably increase the burden of the easement on the servient estate).

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