

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 22, 2010

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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Appeal No. 2009AP1928
STATE OF WISCONSIN

Cir. Ct. No. 2007CV315

**IN COURT OF APPEALS
DISTRICT IV**

KATHLEEN A. HOUSE,

PLAINTIFF-RESPONDENT,

V.

JUDITH B. PASKO,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waushara County:
GUY D. DUTCHER, Judge. *Affirmed.*

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

¶1 HIGGINBOTHAM, J. Judith Pasko appeals a judgment following a trial to the court granting Kathleen House's request for an easement by implication for the use of a road (herein, "the cottage road") across Pasko's property to provide access to a cottage and to the western portion of House's property. On

appeal, Pasko contends that House did not demonstrate a clear and absolute necessity for the easement traversing the cottage road because she failed to prove that a proposed route over the southwestern portion of House's property was not a viable alternative to the requested easement. Pasko also argues that the trial court misused its discretion in failing to balance the burdens the cottage road easement would place on Pasko's property against the benefits it would provide to House's property.¹ We reject these arguments and affirm.

BACKGROUND

¶2 The following facts are taken from the bench trial and viewed in the light most favorable to the verdict. Judith Pasko and Kathleen House derive title to their property from a common grantor, their father, James Brownell. Brownell acquired partial title in 1942 and full title in 1946, and built a cottage on the southern half of the wooded, hilly property, close to where it borders Mill Pond in Waushara County. The cottage is accessed via a rudimentary dirt road, the "cottage road," starting from Brown Deer Avenue on the north boundary of the property and running through the middle of the property to the cottage near Mill Pond on the southern half of the property. The family used the cottage as a vacation home on weekends and when Brownell had time off from work. In 1968, House moved into a trailer home on the southern part of the property as her parents' tenant. In the 1970s, James and Ann Brownell built and lived in a house on the northern half of the property directly off of Brown Deer Avenue. In 1987,

¹ In her reply brief, Pasko challenges the trial court's determination that the use of the cottage road was intended to be permanent. We generally do not address arguments not raised in the appellant's brief-in-chief, and we decline to do so here. *Torke/Wirth/Pujara, Ltd. v. Lakeshore Towers*, 192 Wis. 2d 481, 492, 531 N.W.2d 419 (Ct. App. 1995).

House acquired title to the southern half of the property by a grant from her parents shortly before her mother's death. Pasko acquired title to the northern half of the property upon her father's death in 1997.

¶3 From approximately 1987 to 1997, House, Pasko, and Brownell continued to use the cottage road to access the cottage and the western portions of both Brownell's and House's property. After her father's death, Pasko rented the house on Brown Deer Avenue to House's daughter, Irene House, and both House and Pasko continued to use the cottage road as before. After Irene moved out in 2006, Pasko began to visit the property to make repairs before taking up residence in 2007. While visiting the property, Pasko discovered that her house had been broken into repeatedly and beer cans and bottles were being shot and discarded in the woods. After moving in, Pasko also discovered that shooting lanes were cut on her property and that three tree stands had been put up without her knowledge or consent.

¶4 In the fall of 2007, Pasko erected a gate at the head of the cottage road and forbade House from going onto her property. The gate blocked the sole vehicular access to the cottage and the western portion of House's property. House brought this action in Waushara County Circuit Court claiming easements by prescription, necessity, and implication, and damages for interference with property. Pasko counterclaimed for damages for trespass.² Following a two-day trial, the trial court found that House had established a clear and absolute necessity for an easement by implication and entered judgment creating an easement over

² The trial court did not award any damages to Pasko. Pasko does not appeal this part of the court's decision.

Pasko’s property for the use and maintenance of the cottage road. Portions of the trial court’s decision are set forth in detail in the discussion section.

DISCUSSION

I. Easements by Implication

¶5 An easement is an interest that encumbers the land of another. *AKG Real Estate, LLC v. Kosterman*, 2006 WI 106, ¶2, 296 Wis. 2d 1, 717 N.W.2d 835. “It is a liberty, privilege, or advantage in lands, without profit, and existing distinct from the ownership of the land.” *Id.* An easement creates two distinct property interests—the dominant estate, which enjoys the privileges granted by the easement, and the servient estate, which permits the exercise of those privileges. *Id.*, ¶3.

¶6 A party seeking the creation of an easement by implication must establish “separation of title, a use before separation took place which continued so long and was so obvious or manifest as to show that it was meant to be permanent, and it must appear that the easement is necessary to the beneficial enjoyment of the land granted or retained.” *Schwab v. Timmons*, 224 Wis. 2d 27, 36-37, 589 N.W.2d 1 (1999) (quoting *Bullis v. Schmidt*, 5 Wis. 2d 457, 460-61, 93 N.W.2d 476 (1958)). Easements by implication are generally disfavored in Wisconsin. See *Bullis*, 5 Wis. 2d at 461-63; see also *Tarman v. Birchbauer*, 257 Wis. 1, 4-5, 42 N.W.2d 158 (1950) (“[E]asements in the land of another, with the exception of rights of way by necessity, can only be created by grant or prescription.”); *Miller v. Hoeschler*, 126 Wis. 263, 70, 105 N.W. 790 (1905) (“[N]ecessity must be so clear and absolute that without the easement the grantee cannot in any reasonable sense be said to have acquired that which is expressly granted”). Thus, an implied easement may only be created when the party

seeking the easement establishes that the easement's necessity is "so clear and absolute that without the easement the grantee cannot enjoy the use of the property granted to him for the purposes to which similar property is customarily devoted." *Schwab*, 224 Wis. 2d at 37 (quoting *Bullis*, 5 Wis. 2d at 462); see also *Miller*, 126 Wis. at 270.

¶7 Wisconsin has rejected the majority rule of easements by implication, under which a necessity may be found if the use is reasonably necessary or convenient for the enjoyment of the proposed dominant estate. *Bullis*, 5 Wis. 2d at 461. Thus, where the easement is merely reasonably necessary or convenient, the clear and absolute necessity for an easement by implication does not exist. Moreover, the clear and absolute necessity for an easement by implication does not exist where an alternative means to enjoy the land may be acquired for a reasonable sum. *Id.* at 462-63 (declining to create an easement by implication where an alternative means of use and enjoyment was available for \$490 and did not require the easement). Rather, clear and absolute necessity exists only where "without the easement the grantee cannot enjoy the use of the property." *Id.* at 462.

II. Standard of Review

¶8 "[T]he judicial creation of an easement is inherently equitable in nature," and "[e]quitable decisions are generally discretionary." *McCormick v. Schubring*, 2003 WI 149, ¶14, 267 Wis. 2d 141, 672 N.W.2d 63. However, where only one outcome is permissible under the relevant legal standard, the question is one of law. *Id.* We review the trial court's findings of facts under the clearly erroneous standard and application of the proper legal standard to those facts de novo. *Phelps v. Physicians Ins. Co. of Wisc., Inc.*, 2009 WI 74, ¶¶34-35, 319

Wis. 2d 1, 768 N.W.2d 615. Where the trial court applied the proper legal standard to the correct factual findings, we review the court's decision to grant or deny an easement for misuse of discretion. *McCormick*, 267 Wis. 2d 141, ¶16.

III. Clear and Absolute Necessity for the Easement

¶9 The parties' dispute focuses on whether the facts establish that a clear and absolute necessity exists for the creation of an easement along the cottage road. At trial, evidence of three possible alternative routes of access to the section of the cottage road on House's property were introduced: to the south along the Mill Pond to the cottage, to the west beginning on a path up the hill behind House's home, and to the southwest. The trial court found that House had proved that all three paths were impassable.

¶10 Pasko does not challenge the court's findings with respect to the first two paths. Pasko argues, however, that she proved the viability of the third path as a reasonable alternative route to the cottage road on House's property and that House failed to prove that this path was impassable, and thereby failed to show a clear and absolute necessity for the cottage road easement. House responds that the evidence supports the trial court's finding that the southwestern route "provides impractical service toward the objective of providing House with meaningful enjoyment of the cottage and the southwestern portion of her parcel."

¶11 Whether House met her burden to show a clear and absolute necessity for the cottage road easement rests on whether she showed the non-viability of a third route, the southwestern route.³ This route, proposed by Pasko,

³ House does not argue that the cost of constructing a driveway along the southwestern route would be prohibitive. Unlike other cases in this area, *see, e.g. Bullis v. Schmidt*, 5 Wis. 2d (continued)

would run from just below the point where the hill west of House's home becomes overly steep⁴ and then traces a path southwest along the hill in an area of relatively flat terrain before meeting up with House's section of the cottage road. Pasko introduced into evidence testimony and exhibits supporting the proposed route, including testimony from John Bronk and Arthur Stych, both of whom had recently walked the route in the company of Pasko and her attorney.

¶12 The court recognized Bronk as an expert based on Bronk's long experience supervising the construction of buildings and roads. Bronk also had substantial experience in reading contour maps and taught map-reading in the military. Bronk testified that he had walked the western route following the most level route using a contour map and found the point where the slope changed from 8% to 26%, and then continued south along the same contour towards the cottage road. Bronk opined that a driveway could easily be constructed along the contour that he had walked. Stych, Pasko's friend and neighbor, also testified that he had walked the contour and offered his lay opinion that a driveway could be built along Pasko's alternative route.

¶13 Pasko introduced into evidence five photographs taken along the southwestern route looking east or southeast. Bronk marked on an aerial map of the House and Pasko properties the approximate locations where the photos had

457, 462-63, 93 N.W.2d 476 (1958), cost appears not to have been a factor in determining whether House proved a clear and absolute necessity for the proposed easement.

⁴ Michael Moe, the Waushara County Surveyor, prepared a Centerline Profile (profile) of the western route which shows the slope of the path leading up the hill to the west of the House residence. The slope, as depicted by the profile, ranges from a decline of 4.2% just behind House's home, to a 26.2% incline in the steepest section. Below the steepest slope indicated on the profile is an area with a moderate 8.7% incline. This is the point at which Pasko's alternative route deviates from the western path.

been taken. Bronk testified that the photos showed areas that were either actually flat, or sufficiently flat to put in a path equivalent to the cottage road. Stych testified that the photos showed areas that had a slight pitch, but that were fairly flat, unlike the rest of the hilly property.

¶14 In testimony, House disputed Bronk's and Stych's testimony that the area shown in the photographs was relatively flat. House testified that she had resided on the property since 1969, and had walked many times in the general area where the southwestern route had been proposed. She testified that the pitch of the proposed route shown in the photos was similar to the pitch of the path leading up the hill to the west of her residence, and that this western path was difficult for her to walk up.

¶15 The trial court concluded that none of the alternative routes, including the southwestern route, were viable. The court made detailed factual findings regarding the general terrain and the difficulty of constructing an alternative route through any part of House's property:

[T]he venture seeking to create a new path between the House residence and the cottage would face more practical obstacles; topography being foremost among them. The area in question is hilly and uneven. Irrespective of the route that is pursued, the significant incline between the home and the southern portion of the property must be overcome. Whether broached from a perpendicular angle or in a more gradual fashion, the substantial grade involved will frustrate vehicular travel at all times of the year, especially during winter when traction will be impeded by snow.

The court made the following specific findings regarding the proposed southwestern route:

Addressing the problem from the side, from a more subtle angle [than the undisputedly impassable southern route],

would be no less problematic; a conclusion premised upon the photographs presented by Pasko, which reveal several areas where the proposed path would tilt eastward while clinging to a noticeable incline that slopes from west to east. This slope would also challenge the stability of all but the most athletic of pedestrians, especially under wet or snow covered conditions.

¶16 Having carefully examined the photographs and thoroughly reviewed the remainder of the trial record, we cannot conclude that the court's findings regarding the topography of House's property and the impassability of the southwestern route were clearly erroneous. Moreover, while the court did not make any explicit credibility determinations regarding the testimony of Pasko's witnesses, Bronk and Stych, about the viability of the southwestern route, we infer from the court's ruling that it found House's testimony on the subject, which was based in part on her having lived on the property since 1969, to be more credible.⁵ See *Jacobson v. American Tool Cos., Inc.*, 222 Wis. 2d 384, 390, 588 N.W.2d 67 (Ct. App. 1998) ("If a circuit court does not expressly make a finding about the credibility of a witness, we assume it made implicit findings on a witness' credibility when analyzing the evidence.").

¶17 Based on these particular findings regarding the terrain of House's property and the impassability of the southwestern route, we cannot conclude that the trial court's more general finding that House proved a clear and absolute necessity for the cottage road easement was clearly erroneous. We acknowledge that Pasko presented more evidence than House on the issue of the viability of the

⁵ The court's response from the bench to Bronk's testimony describing the terrain in one of the photos as "flat" sheds light on the credibility determinations that are otherwise implicit in the court's ruling. Interrupting counsel's direct examination of Bronk, the court challenged the witness: "[Y]ou are saying that the third picture on Exhibit M is flat? It looks like a fairly significant pole side, or am I missing my perspective[?]"

southwestern route. Pasko introduced the photographs depicting the proposed route and called two witnesses, including an expert with many years of experience in building driveways, to testify as to the viability of the southwestern route. For her part, House challenged the viability of the proposed route in her own testimony, but did not recall her expert, the surveyor Michael Moe, to address the issue. However, we cannot say that the court's findings that House proved the non-viability of the southwestern route, and thereby showed the clear and absolute necessity for the cottage road easement, are contrary to the great weight and clear preponderance of the evidence. *Neff v. Pierzina*, 2001 WI 95, ¶40, 245 Wis. 2d 285, 629 N.W.2d 177 (an appellate court may not substitute its judgment for that of the fact finder unless the finding is contrary to the great weight and clear preponderance of the evidence).

IV. Equities of Granting the Easement

¶18 Pasko also contends that the trial court misused its discretion by failing to balance the burdens the cottage road easement would place on Pasko's property against the benefits it would provide to House's property. Pasko cites *Richards v. Land Star Group, Inc.*, 224 Wis. 2d 829, 847-48, 593 N.W.2d 103 (Ct. App. 1999), for the proposition that a trial court assessing a request for an easement must balance within its discretion the equities that affect the judgment. *Richards* addressed a request for an easement by necessity, not an easement by implication. *See id.* Assuming without deciding that the court's duty to balance the equities affecting the judgment applies to requests for easements by implication as well as requests for easements by necessity, we conclude for the reasons provided below that the trial court properly exercised its discretion by taking into consideration equitable concerns raised by Pasko at trial.

¶19 The burden that Pasko argues would be placed on her property by the granting of the easement is the threat that her property would be damaged by those who would use the cottage road. Pasko presented substantial evidence at trial showing that members of the House family and other persons using the cottage road had previously damaged Pasko's property. The court described some of this history in its decision:

Unfortunately, certain members of the House family and/or their acquaintances have recently chosen to abuse the territorial benevolence that Pasko was previously willing to extend [by allowing them to use the cottage pathway]. Junk and other discarded items have been strewn about her 40 acre parcel, portions of the cottage trail have been enhanced and graded in apparent defiance of prior court directives, and multiple deer hunting stands have been erected without permission. Furthermore, some individuals using the trail have demonstrated a propensity to traverse the entire depth of Pasko's property during peak hunting hours and in a manner tending to disturb any bedded game.

¶20 As a result of these incidents, the court imposed several restrictions on the easement, including, among others: (1) limiting its parameters to the current location and dimensions of the cottage road; (2) restricting its use to Kathleen House and members of her direct family; (3) allowing only persons who have reached twenty-five years of age or are accompanied by another person who has reached age thirty to use the easement; (4) providing that the easement is non-transferable; (5) placing certain restrictions on use of the easement during deer hunting season; and (6) requiring House to remove all junk and trash placed on Pasko's property by a certain date.

¶21 In light of these restrictions on the easement, we reject Pasko's argument that the court failed to balance the equities in this case. The multiple restrictions demonstrate that the court took seriously the possibility that House's

family and their acquaintances might abuse the easement and continue to cause damage to Pasko's property. By granting the easement while imposing tight restrictions on its use, the trial court properly exercised its discretion to balance the burdens the easement might place on Pasko's property against the benefits the easement would provide to House's property.

CONCLUSION

¶22 For the reasons stated above, we conclude that the trial court's finding that House showed a clear and absolute necessity for the cottage road easement was not clearly erroneous. We further conclude that the trial court did not misuse its discretion in balancing the burdens the easement would place on Pasko's property against the benefits it would provide to House's property. Accordingly, we affirm the trial court's judgment granting House's request for an easement along the cottage road.

By the Court.—Judgment affirmed.

Not recommend for publication in the official reports.

