COURT OF APPEALS
DECISION
DATED AND FILED

May 20, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2420 **Cir. Ct. No. 2011CV439**

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

BRADLEY E. ALLEN,

PLAINTIFF-APPELLANT,

V.

WOELFEL FAMILY REVOCABLE TRUST, CHRISTIAN G. WOELFEL AND MARY G. WOELFEL, AS CO-TRUSTEES OF THE WOELFEL FAMILY REVOCABLE TRUST,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Oneida County: PATRICK F. O'MELIA, Judge. *Affirmed in part; reversed in part and cause remanded with directions*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. This case is before us for a second time. In a previous opinion, we affirmed the circuit court's decision granting summary

judgment to the Woelfel Family Revocable Trust and its co-trustees, Christian and Mary Woelfel, (collectively, the Woelfels) on Bradley Allen's claim for a prescriptive easement. *See* ***Allen v. Woelfel Family Rev. Trust***, No. 2012AP2415, unpublished slip op. (WI App May 14, 2013). Following our decision, the circuit court granted the Woelfels' motion for sanctions against Allen, concluding Allen frivolously continued his prescriptive easement claim following the close of discovery. The court ordered Allen to pay a portion of the Woelfels' attorney fees, and the judgment stated the attorney fee award would accrue interest at a rate of twelve percent per year. Allen now appeals.

¶2 We conclude the circuit court properly determined Allen frivolously continued his prescriptive easement claim. We therefore affirm in part. However, we agree with the parties that the court erred by applying a twelve percent interest rate. We therefore reverse in part and remand with directions that the court amend the judgment to provide for an interest rate of 4.25 percent per year.

BACKGROUND

¶3 Allen and the Woelfels own adjacent parcels of land on East Kaubashine Road in Oneida County. Allen purchased his property in July 2010 from Lucille Neuman. On September 30, 2011, Allen filed the instant lawsuit, alleging he had a right to use a driveway crossing the Woelfels' property to access East Kaubashine Road. The complaint alleged a prescriptive easement came into being over the driveway in 1997 due to "20 years of actual, open, notorious, hostile and adverse use" by Neuman and her husband.

¶4 The Woelfels answered Allen's complaint, denying that the Neumans' use of the driveway created a prescriptive easement. In addition, they affirmatively alleged Allen could not show twenty years of adverse use because

the Neumans had permission to use the driveway. The Woelfels subsequently filed a motion for sanctions against Allen, pursuant to WIS. STAT. § 802.05, asserting Allen's prescriptive easement claim was frivolous and Allen knew or should have known there was no legal basis for the claim.[1] The Woelfels did not request a hearing on their sanctions motion, and the circuit court did not take any action on it.

¶5 Following discovery, the parties filed cross-motions for summary judgment. In support of their motion, the Woelfels argued Allen's prescriptive easement claim failed as a matter of law because the undisputed facts showed the Neumans had permission to use the driveway, and under Wisconsin law a prescriptive easement cannot arise from permissive use. In response, Allen cited the RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.16 cmt. a (2000) (hereinafter, Restatement § 2.16), which states a prescriptive easement can arise if the parties "try to create a servitude but fail, initially because they do not fully articulate their intent or reduce their agreement to writing … [and] proceed to act as though they have been successful in creating the servitude, and continue to do so for the prescriptive period[.]" Allen contended the undisputed facts showed the Woelfels' predecessors in title orally granted the Neumans irrevocable permission

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

WISCONSIN STAT. § 802.05(3)(a)1. contains a safe harbor provision, which states that a motion for sanctions "shall be served … but shall not be filed with or presented to the court unless, within 21 days after service of the motion or such other period as the court may prescribe, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected." The Woelfels contend they complied with this safe harbor provision, and Allen does not dispute their assertion.

to use the driveway. He therefore argued the Neumans' use of the driveway gave rise to a prescriptive easement under Restatement § 2.16.

¶6 The circuit court granted summary judgment in favor of the Woelfels. The court concluded the undisputed facts showed the Neumans' use of the driveway was permissive, and it agreed with the Woelfels that permissive use cannot give rise to a prescriptive easement under Wisconsin law. The court declined Allen's request to apply Restatement § 2.16, noting that section is "not controlling law in Wisconsin[.]"

¶7 Allen appealed from the circuit court's summary judgment decision, and we affirmed. *See* ***Allen***, No. 2012AP2415, unpublished slip op. ¶1. We rejected Allen's argument that use made pursuant to an oral grant of permission could give rise to a prescriptive easement. ***Id.***, ¶14. Citing multiple cases, we noted it is "well-established that a use of land is not adverse if it is carried out with the owner's permission." ***Id.*** We agreed with the circuit court that the undisputed facts showed the Neumans' use of the driveway was permissive. ***Id.***, ¶18. In addition, we rejected Allen's request to apply Restatement § 2.16. ***Id.***, ¶16. We reasoned Restatement § 2.16 had not been adopted as law in Wisconsin and, to the extent it allowed prescriptive easements to be based on permissive use, it directly conflicted with Wisconsin law. ***Id.***

¶8 After we issued our decision, the Woelfels requested a hearing in the circuit court on their motion for sanctions. They submitted a brief in support of their motion, in which they argued Allen's lawsuit was frivolous under WIS. STAT. § 802.05(2) because Wisconsin law clearly showed the Neumans' permissive use of the driveway could not give rise to a prescriptive easement. In response, Allen asserted that, even if his claim was not warranted by existing Wisconsin law, it

was supported by "a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." *See* WIS. STAT. § 802.05(2)(b). Specifically, Allen contended he had made a nonfrivolous argument that the court should adopt Restatement § 2.16.

¶9 In reply, the Woelfels asserted Allen had merely cited Restatement § 2.16 and had never actually asked either the circuit court or the court of appeals to change Wisconsin law. The Woelfels argued, "[M]erely citing a Restatement section that has never been adopted in Wisconsin is not at all the same thing as acknowledging that present Wisconsin law does not support [one's] case, and arguing that Wisconsin law is wrong and should be changed." At the hearing on their sanctions motion, the Woelfels again asserted Allen had "in no way" argued for an extension or modification of existing law. Allen did not dispute that assertion.

¶10 The circuit court concluded Allen's lawsuit was not frivolous when initially filed because it was unclear at that point whether the Neumans' use of the driveway was permissive. However, the court concluded Allen frivolously continued the lawsuit following the close of discovery because, at that point, it became "quite apparent" Allen did not have a valid claim, as "[n]ot one witness or document supported a prescriptive easement under Wisconsin [l]aw." Thus, Allen and his attorneys "knew or should have known that their claim was without any reasonable basis in law or equity." The court also observed that, although Allen cited Restatement § 2.16 in his summary judgment brief, he never claimed Wisconsin law was wrong or should be changed.

¶11 The circuit court ultimately awarded the Woelfels $12,632.45 in attorney fees as a sanction for Allen's conduct. The judgment stated this amount

would "accrue statutory interest at the rate of 12% per annum." Allen now appeals, challenging both the court's conclusion that he frivolously continued his lawsuit and its decision to apply a twelve percent interest rate to the attorney fee award.

DISCUSSION

I. Frivolousness

¶12 WISCONSIN STAT. § 802.05(2) provides that, by presenting any paper to the court, an attorney or unrepresented party certifies that the paper is not "presented for any improper purpose[;]" that the claims, defenses, and other legal contentions stated in the paper are "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law[;]" and that the factual allegations in the paper have "evidentiary support[.]"[2] If the circuit court determines that a paper violated

[2] WISCONSIN STAT. § 802.05(2) reads in full:

> REPRESENTATIONS TO COURT. By presenting to the court, whether by signing, filing, submitting, or later advocating a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, all of the following:
>
> (a) The paper is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
>
> (b) The claims, defenses, and other legal contentions stated in the paper are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

(continued)

§ 802.05(2), it may sanction the attorney, law firm, or party responsible for the violation. WIS. STAT. § 805.02(3). Permissible sanctions include "an order directing payment … of some or all of the reasonable attorney fees and other expenses incurred as a direct result of the violation[.]" WIS. STAT. § 805.02(3)(b).[3]

¶13 Here, the circuit concluded Allen did not violate WIS. STAT. § 802.05(2) by filing his prescriptive easement claim, but he did violate the statute by continuing to pursue that claim after the close of discovery. Whether an action was continued frivolously presents a mixed question of fact and law. *See* ***Keller v. Patterson***, 2012 WI App 78, ¶22, 343 Wis. 2d 569, 819 N.W.2d 841. What an individual or attorney knew or should have known when presenting a paper to the court is a question of fact, ***id.***, and we uphold the circuit court's factual findings unless they are clearly erroneous, WIS. STAT. § 805.17(2). However, whether the court's factual findings support a conclusion that an action was continued frivolously is a question of law that we review independently. ***Keller***, 343 Wis. 2d

---

> (c) The allegations and other factual contentions stated in the paper have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.
>
> (d) The denials of factual contentions stated in the paper are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

[3] In addition, WIS. STAT. § 895.044(1)(b) provides that a party or attorney "may be liable for costs and fees under this section for commencing, using, or continuing an action, special proceeding, counterclaim, defense, cross complaint, or appeal" if he or she "knew, or should have known, that the action, special proceeding, counterclaim, defense, cross complaint, or appeal was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification, or reversal of existing law." Neither the parties nor the circuit court addressed § 895.044(1)(b). We do not separately address this statute because we conclude our analysis would be nearly identical to the analysis under WIS. STAT. § 802.05(2)(b).

569, ¶22. We must resolve all doubts regarding whether a claim is frivolous in favor of the party or attorney who is claimed to have continued a frivolous action. ***Id.***

¶14 The circuit court found that, after the close of discovery, Allen and his attorneys "knew or should have known that their claim was without any reasonable basis in law or equity." This factual finding is not clearly erroneous. Wisconsin law clearly holds that a prescriptive easement can only arise based on the adverse use of another's real estate. *See* WIS. STAT. § 893.28(1); ***Ludke v. Egan***, 87 Wis. 2d 221, 230, 274 N.W.2d 641 (1979); ***County of Langlade v. Kaster***, 202 Wis. 2d 448, 457, 550 N.W.2d 722 (Ct. App. 1996). It is also well-established that a use of land is not adverse if it is carried out with the owner's permission. *See* ***Ludke***, 87 Wis. 2d at 230 ("A use which is permissive is subservient and not adverse."); ***County of Langlade***, 202 Wis. 2d at 457 ("Hostile intent does not exist if the use is pursuant to the permission of the true owner."); *see also* ***McCormick v. Schubring***, 2003 WI 149, ¶20 n.5, 267 Wis. 2d 141, 672 N.W.2d 63 (noting that, because the plaintiff and his predecessors used a road with the owner's permission, the plaintiff could not establish the elements of a prescriptive easement). After discovery, undisputed evidence showed that the Neumans had permission from the Woelfels and their predecessors in title to use the disputed driveway. *See* ***Allen***, No. 2012AP2415, unpublished slip op. ¶¶4, 6, 18. On this record, the circuit court could easily find that Allen and his attorneys knew or should have known the Neumans' use of the driveway could not give rise to a prescriptive easement under Wisconsin law.

¶15 In his summary judgment brief, Allen argued the undisputed facts established that the Neumans and the Woelfels' predecessors in title agreed to "an oral grant of a prescriptive easement." However, this argument is clearly contrary

to Wisconsin law. Wisconsin courts have long held that oral permission to use land is revocable and does not create an easement. *See* ***Thoemke v. Fiedler***, 91 Wis. 386, 389-90, 64 N.W. 1030 (1895) (rejecting assertion that an oral agreement to use land created an easement); *see also* ***Huber v. Stark***, 124 Wis. 359, 365, 102 N.W. 12 (1905) (same); ***Rohr v. Schoemer***, 1 Wis. 2d 283, 286-87, 83 N.W.2d 679 (1957) (same). Moreover, the statute of frauds clearly states that every transaction by which any interest in land is created must be evidenced by a written conveyance that is signed by the grantor and identifies the parties, the land, and the interest conveyed. WIS. STAT. § 706.02(1). "An oral contract for the conveyance of an interest in land is void[.]" ***Trimble v. Wisconsin Builders, Inc.***, 72 Wis. 2d 435, 441, 241 N.W.2d 409 (1976). Thus, Allen had no basis to argue that the Neumans received an "oral grant of a prescriptive easement" from the Woelfels' predecessors in title.

¶16 Allen also argued in his summary judgment brief that, pursuant to WIS. STAT. § 893.28(1), "a use of an easement for twenty years, if unexplained or uncontradicted, is presumed to be adverse and under a claim of right." However, § 893.28(1) does not set forth any such presumption of adverse use.[4] The presumption Allen cites actually comes from ***Ludke***, 87 Wis. 2d at 230-31. As the Woelfels note, ***Ludke*** was decided on January 30, 1979, *see* ***id.*** at 221, before the

[4] WISCONSIN STAT. § 893.28(1) states:

> Continuous adverse use of rights in real estate of another for at least 20 years, except as provided in s. 893.29 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.

legislature enacted § 893.28(1), *see* 1979 Wis. Laws, ch. 323, § 28. In addition, ***Ludke*** explicitly states that the presumption of adverse use may be rebutted by proof that the use was permissive. ***Ludke***, 87 Wis. 2d at 231. Following discovery, undisputed evidence showed that the Neumans had permission to use the driveway over the Woelfels' property. Accordingly, Allen had no basis to argue that the presumption of adverse use set forth in ***Ludke*** supported his prescriptive easement claim.

¶17 The circuit court also found that, although Allen cited Restatement § 2.16 in his summary judgment brief, he never acknowledged that § 2.16 conflicted with Wisconsin law, and he never argued Wisconsin law should be changed to correspond with § 2.16. Again, this factual finding is not clearly erroneous. Our review of Allen's summary judgment motion and brief shows that Allen cited § 2.16 and argued it supported his prescriptive easement claim, but he never argued for a change in existing law. Nor did Allen argue in his previous appeal that Wisconsin law should be changed to correspond with § 2.16. Further, at the hearing on the Woelfels' sanctions motion, the Woelfels asserted Allen had never argued for an extension or modification of existing law, and Allen did not dispute that assertion. On this evidence, the circuit court could properly find that Allen never made any argument for the extension, modification, or reversal of existing law or for the establishment of new law.

¶18 Based on the circuit court's factual findings, the only reasonable conclusion is that Allen violated WIS. STAT. § 802.05(2)(b) by continuing to pursue his prescriptive easement claim following the close of discovery. By that point, it was clear Allen's claims were not "warranted by existing law[.]" ***Id.*** In addition, although Allen cited Restatement § 2.16 in his summary judgment brief,

he never actually asked the court to extend, modify, or reverse existing law or establish new law.

¶19 Allen complains he should not have been expected to explicitly seek the extension, modification, or reversal of existing law on summary judgment because "the Woelfels hadn't even moved to place their sanctions motion before the circuit court until after the appellate court issued its merits ruling[.]" (Some capitalization omitted.) This argument is undeveloped. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). By filing their sanctions motion, the Woelfels put Allen on notice that they believed his prescriptive easement claim violated WIS. STAT. § 802.05(2)(b) because it was not warranted by existing law. If Allen believed he had not violated § 802.05(2)(b) because his claim was supported by a nonfrivolous argument for the extension or modification of existing law, he should have actually made that argument on summary judgment, instead of simply citing Restatement § 2.16. Allen does not explain why the Woelfels' failure to request a hearing until after his first appeal should excuse his failure to argue for a change in the law.

¶20 Allen also suggests, somewhat obliquely, that merely relying on Restatement § 2.16 to support the allegations in his complaint was sufficient to comply with the requirements of WIS. STAT. § 802.05(2)(b), and he did not need to explicitly advocate for the extension of existing law. However, Allen does not develop any cognizable legal reasoning supporting this argument. We therefore decline to address it. *See* ***Pettit***, 171 Wis. 2d at 646. As a result, we affirm the circuit court's conclusion that Allen frivolously continued his prescriptive easement claim following the close of discovery.

II. Twelve percent interest rate

¶21 Allen next argues the circuit court erred by applying a twelve percent annual interest rate to the attorney fee award. The Woelfels concede the twelve percent interest rate is incorrect as a matter of law. Our independent review of this issue confirms that the court incorrectly applied a twelve percent interest rate. *See* ***Burlington N. R.R. Co. v. City of Superior***, 159 Wis. 2d 434, 436, 464 N.W.2d 643 (1991) (determination of correct postjudgment interest rate is an issue of law).

¶22 WISCONSIN STAT. § 815.05(8) establishes the postjudgment interest rate that applies to all money judgments, unless another statue expressly specifies a different rate. ***Burlington***, 159 Wis. 2d at 441. No statute sets forth a different interest rate for a money judgment awarded as a sanction under WIS. STAT. § 802.05. Accordingly, the interest rate set forth in § 815.05(8) applies to the judgment at issue in this case.

¶23 For many years, the postjudgment interest rate prescribed by WIS. STAT. § 815.05(8) was twelve percent. *See, e.g.*, ***Burlington***, 159 Wis. 2d at 436 n.1. However, effective December 2, 2011, the legislature amended § 815.05(8) to provide for a postjudgment interest rate

> equal to 1 percent plus the prime rate in effect on January 1 of the year in which the judgment is entered if the judgment is entered on or before June 30 of that year or in effect on July 1 of the year in which the judgment is entered if the judgment is entered after June 30 of that year, as reported by the federal reserve board in federal reserve statistical release H. 15[.]

See 2011 Wis. Act 69, §§ 3-4. The judgment against Allen was entered on August 15, 2013. As of July 1, 2013, the prime rate was set at 3.25 percent. *See*

http://www.federalreserve.gov/releases/h15/20130701/. As a result, the correct postjudgment interest rate for the judgment against Allen was 4.25 percent. We therefore reverse in part and remand with directions that the circuit court amend the judgment to provide for an annual interest rate of 4.25 percent.

¶24 Only the Woelfels may recover their appellate costs. *See* WIS. STAT. RULE 809.25(1).

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

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