STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0529

Michael C. Mahoney, et al.,
Appellants,

vs.

Roman B. Spors, et al.,
Defendants,

Paul R. Nelson, et al.,
cross-claimants,
Respondents,

vs.

Roman B. Spors, et al.,
Cross Defendants.

Filed May 20, 2008
Affirmed
Klaphake, Judge

Crow Wing County District Court
File No. C4-03-2949

Michael C. Mahoney, Mahoney & Emerson, Ltd., 539 East Lake Street, Wayzata, MN 55391 (pro se appellant attorney)

Paul R. Nelson, 12780 Manhattan Point Boulevard, Cross Lake, MN 56442 (pro se respondent)

Kristi Ann Nelson, 12780 Manhattan Point Boulevard, Cross Lake, MN 56442 (pro se respondent)

Considered and decided by Schellhas, Presiding Judge; Klaphake, Judge; and Halbrooks, Judge.

U N P U B L I S H E D O P I N I O N

KLAPHAKE, Judge

In this easement dispute involving Big Trout Lake access over two adjacent properties located in Crosslake, appellants Michael C. and Virginia A. Mahoney challenge the district court's ruling that they have no easement over property owned by respondents Paul R. and Kristi A. Nelson. Appellants claim that the district court erred in finding an easement in gross over respondents' property held by a predecessor-in-interest to appellants' property, and in concluding that appellants have no easement by prescription over the subject property. Because we conclude that the district court was correct in its rulings, we affirm. We also deny respondents' request for attorney fees.

D E C I S I O N

The district court's decision whether to grant a new trial is discretionary, and this court will not disturb that decision absent clear abuse of discretion. *Halla Nursery, Inc. v. Baumann-Furrie & Co.,* 454 N.W.2d 905, 910 (Minn. 1990). "In a declaratory judgment action tried without a jury, the court as the trier of facts must be sustained in its findings unless they are palpably and manifestly contrary to the evidence." *Samuelson v. Farm Bureau Mut. Ins. Co.,* 446 N.W.2d 428, 430 (Minn. App. 1989), *review denied* (Minn. Nov. 22, 1989). A trial court's legal determinations are subject to de novo review. *Rice Lake Contracting Corp. v. Rust Env't & Infrastructure, Inc.,* 549 N.W.2d 96, 98-99 (Minn. App. 1996), *review denied* (Minn. Aug. 20, 1996).

An easement is defined as "an interest in land in the possession of another which entitles the owner of such interest to a limited use or enjoyment of the land in which the interest exists." *Minneapolis Athletic Club v. Cohler,* 287 Minn. 254, 258, 177 N.W.2d 786, 789 (1970). Easements may be either appurtenant or in gross. *Lidgerding v. Zignego*, 77 Minn. 421, 424-25, 80 N.W. 360, 361 (1899). An easement appurtenant is granted for the benefit of the grantee's property, but "[a]n easement in gross is the right to use another's property that is personal and revocable." *Block v. Sexton*, 577 N.W.2d 521, 525 (Minn. App. 1998) (citations omitted).

Easement in Gross

Appellants' property, referred to in district court proceedings as the "Back Lots," is adjacent to the west boundary line of respondents' property referred to as the "Front Lot." The northern boundary of the "Front Lot" is on Big Trout Lake. The district court found that Mary Finn, who had owned the "Front Lot," was granted an easement in gross to access the lake over the "Front Lot," by Father Roman Spors, who had owned the "Back Lots," when Finn and Spors exchanged properties in 1974. In making this ruling, the district court relied on the following evidence: (1) Spors and Finn failed to include words of inheritance in the reservation language of the property transfer documents; (2) Spors testified that he intended "Mary and the boys" to have access to the "Front Lot" and that "the boys" included only Finn's sons Dan and Jim, because they were the only Finn children living with Finn at that time; (3) Spors' stated intention was that Finn's access would mirror access that Spors had been allowed by Finn when she owned the "Front Lot"; (4) when Spors had access over the "Front Lot," his access was not

connected to his ownership of the "Back Lots" and was non-assignable and non-transferable; and (5) a 2003 letter from Spors' counsel to appellants, indicating that Finn "continues to have right to access the lake."

Our review of the record supports the district court's determination that Finn held an easement in gross. To the extent that Spors' intention was recorded, it was stated in the warranty deed and exclusive to the "Seller," Finn, and limited in the extent of the grant to "access to the lake via presently existing steps." While this recorded intention is somewhat ambiguous in its reference, Spors' testimony, as well as the evidence of use by Finn and her sons, supports the determination that Spors intended to grant the same access to Finn that Spors had been allowed when Finn owned the "Front Lot." Thus, the district court did not err in concluding that Spors granted to Finn an easement in gross. *See Highway 7 Embers, Inc. v. Nw. Nat'l Bank*, 256 N.W.2d 271, 275 (Minn. 1977) (stating that scope of easement "depends entirely upon the construction of the terms of the grant").

Appellants further claim that the district court erred by concluding that Finn held an easement in gross because the law prefers appurtenant easements and the language of this easement was "unclear and clumsy" and "not literally followed in practice." An easement appurtenant is granted "for the benefit of the grantee's land," however, and the evidence here shows that it was granted for the benefit of Finn, rather than the "Back Lots." *Block*, 577 N.W.2d at 525. Appellants assert that the law prefers easements appurtenant, relying on *Winston v. Johnson*, 42 Minn. 398, 403, 45 N.W. 958, 960 (1890), and case law from other jurisdictions. Even if this court were to uphold such a

preference, the facts would not permit use of the preference here, because "[i]t is well settled that the extent of an easement should not be enlarged by legal construction beyond the objects originally contemplated or expressly agreed upon by the parties." *Cohler*, 287 Minn. at 258, 177 N.W.2d at 789-90. There is no evidence that Spors ever intended the easement to be other than personal to Finn.

For these reasons, we conclude that the district court did not err in concluding that the easement granted by Spors to allow Finn lake access was an easement in gross, and the court did not abuse its discretion in declining to grant appellants' posttrial motions.

Prescriptive Easement

Appellants further claim that if this court affirms the existence of an easement in gross, it should conclude that the district court erred in failing to find the existence of a prescriptive easement.

> To establish an easement by prescription, a claimant must prove he or she used the easement for the prescriptive period of 15 years and that such use was hostile, actual, open, continuous, and exclusive. In rural or undeveloped areas, occasional and sporadic use may give rise to a prescriptive easement.

Block, 577 N.W.2d at 524 (citation omitted); *see Rogers v. Moore*, 603 N.W.2d 650, 657 (Minn. 1999). Where the adverse nature of the use is a fact issue, it must be proved by "clear and unequivocal proof of inception of hostility." *Burns v. Plachecki*, 301 Minn. 445, 449, 223 N.W.2d 133, 136 (1974). If an original use is permissive, the law presumes continued permissive use "until the contrary [is] affirmatively shown." *Norgong v. Whitehead*, 225 Minn. 379, 383, 31 N.W.2d 267, 269 (1948). To

demonstrate the transformation of a permissive use into a hostile use, the claimant must show "a distinct and positive assertion of a right hostile to the rights of the owner." *Johnson v. Hegland,* 175 Minn. 592, 596, 222 N.W. 272, 273 (1928) (quotation omitted).

In accordance with the district court's findings, until the "Back Lots" were sold to appellants in 1992, the use of the lake access by members of the Finn family was permissive. In *Boldt v. Roth,* 618 N.W.2d 393, 398 (Minn. 2000), the supreme court restated the general rule that family members crossing each other's adjacent properties is considered permissive because "the nature of a familial relationship suggests that the family member whose property is being used would not know, without some other assertion, that the use by the relative was hostile." Based on the testimony of most of the witnesses, whom the district court apparently found credible, the groups had cordial relations for many years, according to them, "like an extended family," that allowed members of the Finn family to use the lake access. This evidence shows that the Finn family's use of the "Front Lot" was permissive and not hostile. After the sale of the "Back Lots," appellants' period of use was approximately 11 years and, to the extent that it was hostile, failed to meet the 15-year requirement to establish hostile use. *See Magnuson v. Cossette,* 707 N.W.2d 738, 745 (Minn. App. 2006) (refusing to find prescriptive easement when claimant did not meet 15-year requirement).

Because appellants failed to prove by clear and convincing evidence that their use of the lake access was hostile or satisfied the time requirements to establish a prescriptive easement, we conclude that the district court did not err in refusing to grant appellants' motion for amended findings or a new trial on this issue.

Attorney Fees

Respondents claim that they incurred attorney fees of over $10,000 in district court and filed a pro se brief on appeal because they cannot afford an attorney. They assert that they sought attorney fees at trial, where they were represented by counsel, but the court failed to rule on their request. Respondents' answer "acknowledges" that attorney fees may be awarded "pursuant to [Minn. Stat. §] 549.21, [subd.] 2," a statute that was repealed in 1997. 1997 Minn. Laws ch. 213, art 2, § 6. Respondents also failed to comply with the requirements of its successor, Minn. Stat. § 549.211, subd. 4(a) (2006), which requires a party seeking attorney fees as a sanction to file a separate motion for fees and allow the other party 21 days before filing the motion to allow the nonmoving party time to withdraw or correct their pleadings. Because respondents failed to make a proper motion for attorney fees, relied on law no longer in effect, provided no evidentiary basis for an award of attorney fees, and the district court did not consider or rule on this issue, they have not provided a valid basis for an award of attorney fees, and we deny their request.

Affirmed.