COURT OF APPEALS
DECISION
DATED AND FILED

December 9, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP149 **Cir. Ct. No. 2012CV223**

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

PETER G. LOGGHE,

PLAINTIFF-APPELLANT,

V.

CHARLES W. HEBERT AND LAURIE L. HEBERT,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Chippewa County: JAMES M. ISAACSON, Judge. *Reversed and cause remanded for further proceedings.*

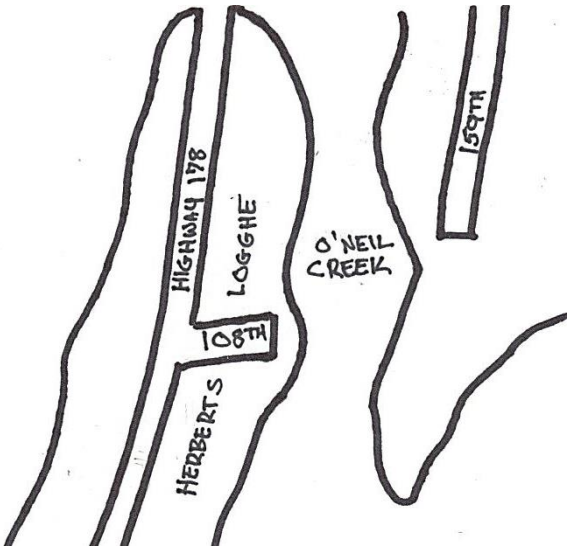
Before Hoover, P.J., Hruz and Reilly, JJ.

¶1 PER CURIAM. Peter Logghe appeals an order granting summary judgment to Charles and Laurie Hebert (the Heberts) in his declaratory judgment action to settle a boundary dispute. Logghe's deed, and those of his predecessors

in interest, granted him property bounded, in part, by the northern edge of County Trunk Highway I as it was traveled at the time of the grant in 1938. Logghe claims the Heberts failed to establish a prima facie case for summary judgment because their submissions did not include any averment, made on the basis of personal knowledge, or other competent evidence as to the location of the highway at the relevant time. As such, the parties' respective rights regarding the disputed land remain undetermined. We agree with Logghe, reverse, and remand for further proceedings consistent with this opinion.

BACKGROUND

¶2 This case concerns two properties separately owned by Logghe and the Heberts in Chippewa County. The properties are located on a narrow strip of land between State Trunk Highway 178 and O'Neil Creek. 108th Avenue lies between the properties as shown below:[1]



[1] The drawing was prepared by the court and is for illustrative purposes only.

¶3 Before 1943, Highway 178 traveled over the general areas shown as 108th Avenue and 159th Street in the illustration above. A bridge known as the Chippewa City Bridge connected what are now 108th Avenue and 159th Street; the road then crossing those areas was known as County Trunk Highway I. Highway 178 was rerouted to its present location some time after 1943. Afterwards, what are now 108th Avenue and 159th Street, as connected by the bridge, were known as Chippewa City Drive. The Chippewa City Bridge was closed in the 1990s and demolished around 2003. When Chippewa County converted to a numbering system for town highways, 108th Avenue and 159th Street were given their current designations.

¶4 Logghe and the Heberts trace their titles to a common grantor, Mary Emerson. Logghe's predecessor, Prosper LeDuc, received title on February 7, 1938. That deed contained a metes and bounds description of the property "[c]ommencing at a point on the Westerly line[2] of County Trunk Highway 'I' as now traveled …." The property grant terminated at "the intersection of the right bank of O'Neill Creek with the Westerly line of County Trunk Highway 'I', at what is known as the Chippewa City Bridge; thence Southwesterly along said Westerly line of County Trunk Highway 'I', to the point of beginning …." Logghe's deed contains nearly identical language.[3]

[2] The parties agree the "Westerly line" refers to the generally northeast-traveling line that constitutes the road's northern boundary.

[3] Given that "Country Trunk Highway I" did not exist at that location in 1988 when Logghe received his deed, and therefore could not be "as now traveled," it is clear Logghe's deed copies in that regard from the language in the 1938 deed. In any event, neither Logghe nor the Heberts contend that this language in Logghe's 1988 deed refers to a property interest different than that which Prosper LeDuc obtained in 1938, when the roadway was so named.

¶5 In 1943, Emerson conveyed property to the Heberts' predecessors in interest, Louis and Emily Hebert. That deed's description concluded with several exceptions to the property interest described. As pertinent here, the deed excluded "part of the NE 1/4 of Sec. 16, conveyed by warranty deed Feb. 7th, 1938, to Prosper LeDuc …."

¶6 The property comprising the Hebert parcel was successively transferred until the Heberts ultimately obtained title in 1998. The 1998 warranty deed designated their property as running "to the southerly right of way line of Chippewa City Drive, thence Northeasterly along the South right of way line of Chippewa City Drive 160.0 feet, more or less, to the water's edge …."

¶7 In 2005, the Heberts recorded a "correction" warranty deed for their parcel, prompted by their belief that the 1998 deed did not convey all of their predecessor's land lying west of O'Neil Creek.[4] In particular, the 2005 deed set the boundary of their property at "the *northerly* right of way of Chippewa City Drive, formerly known as County Trunk I, thence Northeasterly along the *north* right of way line of Chippewa City Drive, formerly known as County Trunk I, 160.0 feet, more or less, to the water's edge …." (Emphasis added.) In effect, the Heberts claimed ownership of all the land underlying the right of way.

¶8 In 2007, Logghe and the Heberts were parties to litigation concerning the vitality of the public right of way over what is now 108th Avenue.[5]

[4] The record contains references to both "O'Neil Creek" and "O'Neill Creek." We presume they refer to the same body of water.

[5] Two separate lawsuits, Chippewa County case Nos. 2007CV147 and 2007CV437, were ultimately consolidated.

That litigation, which included additional parties including the State of Wisconsin, concluded in 2010 after the circuit court determined that 108th Avenue had not been abandoned as a public right of way for navigable water access. The court then entered an order adopting a stipulation and side stipulation among all of the parties involved in that litigation. The parties agreed the public easement would extend "twenty feet on either side of the centerline of the highway *as it exists as of the date of this stipulation*, extending from the right-of-way of [Highway] 178 to the end of the pavement thereof *as it currently exists*." (Emphasis added.) The location of the easement between the eastern edge of the pavement and the shoreline was to be determined by a survey conducted in accordance with the terms of the side stipulation. The survey ultimately setting forth the remaining easement dimensions is known as the Ty Dodge survey.

¶9 Logghe filed the present action in 2012. He directly challenged the Heberts' 2005 correction deed, alleging the Heberts "have no right, title or interest to the public right of way or to lands that extend to the north right of way of Chippewa City Drive, now known as 108th Avenue." As relief, Logghe requested a declaration that the Heberts owned no land beyond the south right of way, and any other relief deemed appropriate.

¶10 The Heberts filed a motion for summary judgment. Their motion stated the case "boils down to one simple question—where is the property line between the Heberts' and Logghe['s] properties?" The Heberts argued the boundary was the northern edge of the 108th Avenue right of way, as established by the Ty Dodge survey. They submitted affidavits from Charles Hebert and Larry Hebert, a relative, averring that 108th Avenue is in the same location as where County Trunk Highway I and Chippewa City Drive existed in years past.

¶11 Logghe responded that, given the changes to the area over the years, it was not reasonable to conclude that what was County Trunk Highway I in 1938 existed in the precise location as present-day 108th Avenue. He also argued the order, stipulations, and survey that concluded the earlier litigation had no bearing on the present action. Logghe's opposition brief was accompanied by an affidavit from his attorney, Amanda Wieckowicz, which merely attached numerous exhibits, mostly the relevant deeds.

¶12 The Heberts submitted a reply brief, which included an affidavit from their attorney, William Thiel. Attached to Thiel's affidavit was an 1849 land survey, which the Heberts asserted, when compared to the deeds, demonstrated their ownership of what would have constituted County Trunk Highway I in 1938.

¶13 The court heard argument on the motion and determined the Heberts were entitled to summary judgment. The court deemed it a matter of "semantics" as to what the road was called, and concluded the Ty Dodge survey definitively established "where that road is," and, consequently, the boundary between the Logghe and Hebert properties at issue.

¶14 The court then submitted a written order granting the Heberts' motion. It reached several conclusions, styled "Findings of Fact."[6] Among other things, the court concluded "County Trunk Highway 'I' in 1938 is currently 108th Avenue" and the "Westerly line of County Trunk Highway 'I' is the same as the

[6] Although the circuit court's findings are styled "Findings of Fact," we need not treat them deferentially. "Summary judgment methodology prohibits the trial court from deciding an issue of fact." ***Preloznik v. City of Madison***, 113 Wis. 2d 112, 116, 334 N.W.2d 580 (Ct. App. 1983). When reviewing a decision granting summary judgment, this court is as competent as the circuit court to determine whether the pleadings and other filings raise genuine issues of material fact.

westerly right-of-way line of present day 108th Avenue." Accordingly, the court determined that the Ty Dodge survey definitively established the parties' property line at the northern boundary of 108th Avenue, including the unpaved portion between the eastern edge of the pavement and the shoreline. The court subsequently denied Logghe's motion for reconsideration.

DISCUSSION

¶15 We review a grant of summary judgment de novo, using a well-established methodology. ***Palisades Collection LLC v. Kalal***, 2010 WI App 38 ¶9, 324 Wis. 2d 180, 781 N.W.2d 503. Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).[7] We first examine the moving party's submissions to determine whether they constitute a prima facie case for summary judgment. ***Palisades Collection LLC***, 324 Wis. 2d 180, ¶9. If so, we then examine the opposing party's submissions to determine whether there are material facts in dispute that entitle the opposing party to a trial. ***Id.***

¶16 As the Heberts' summary judgment brief noted, the only real issue in this case is where the property line between the Logghe and Hebert properties is located. That question, as the Heberts put it, must be "answered with reference to

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

the chains of title to their respective parcels of land." The Heberts acknowledged the deeds "speak for themselves."[8]

¶17 The first step in interpreting a deed "is to examine what is written within the four corners of the deed, for this is the primary source of the intent of the parties." ***Rikkers v. Ryan***, 76 Wis. 2d 185, 188, 251 N.W.2d 25 (1977). When a deed is unambiguous—that is, the language is susceptible to only one reasonable interpretation—we give effect to that language and will not refer to extrinsic evidence to establish the parties' intent. ***Id.***

¶18 It is undisputed that Logghe and the Heberts trace their titles to a common grantor, Mary Emerson. In 1938, Prosper LeDuc took title to property whose location was fixed by "the Westerly line of County Trunk Highway 'I' *as now traveled* …." (Emphasis added.) In 1943, Emerson conveyed property to the Heberts' predecessors in interest that specifically excluded the parcel conveyed to LeDuc in 1938. In effect, the Heberts' predecessors received title to a portion of Emerson's property not subject to the earlier grant. The legal effect of these deeds is fairly straightforward: generally speaking, the Heberts own what Logghe does not, at least as to the area at issue in this case. County Trunk Highway I, as

[8] On appeal, the Heberts argue that Logghe's exhibits submitted in response to the Heberts' summary judgment motion, which include numerous deeds, are insufficient without sworn testimony as to their factual or legal effect. That is incorrect. "When the evidence is documentary, an appellate court may interpret such evidence for itself and is as equally competent as the trial court to do so." ***Zurbuchen v. Teachout***, 136 Wis. 2d 465, 471, 402 N.W.2d 364 (Ct. App. 1987).

traveled on February 7, 1938, is the point of reference for determining the scope of the Heberts' property rights, as well as Logghe's.[9]

¶19 Logghe's complaint alleges that the Heberts "have no right, title or interest to the public right of way or to lands that extend to the north right of way of Chippewa City Drive, now known as 108th Avenue." To determine the validity of that assertion, we must know the precise and actual boundary of Logghe's property. That is, we must know where County Highway I, as traveled in 1938, was located. We therefore turn to the Heberts' summary judgment materials to determine whether they have made a prima facie case that they own the disputed area. *See* ***Palisades Collection LLC***, 324 Wis. 2d 180, ¶9.

¶20 The Heberts assert on appeal, as they did below, that Logghe's deed is clear and conveys only that land up to the northern boundary of what is now 108th Avenue. The circuit court concluded the northern boundary of what is now 108th Avenue was the same as the "Westerly line" of County Trunk Highway I in 1938, apparently under the belief that the two roads occupied the exact same physical swath of land. A careful review of the Heberts' summary judgment submissions shows that belief is not supported by the record.

¶21 In their affidavits, Larry and Charles Hebert aver that what is now 108th Avenue was formerly known as County Trunk Highway I, State Highway 178, and Chippewa City Drive. Larry Hebert claimed the easement dimensions

[9] The fact that the Heberts' 1998 and 2005 warranty deeds set forth different boundaries—first, the southerly right of way line of Chippewa City Drive, and then, in 2005, the northerly line—is immaterial. A grantee can have no better title than the grantor. ***Stone Bank Imp. Co. v. Vollriede***, 11 Wis. 2d 440, 446, 105 N.W.2d 789 (1960). The Heberts might own less than their predecessors, but without proof of intervening land acquisitions covering the area in question, they cannot own more without infringing upon Logghe's ownership rights.

established by the Ty Dodge survey represent "the same highway" as County Highway I, and he opined that the legal description in Logghe's deed refers to what is now 108th Avenue. Charles Hebert stated, "I can attest that the reference to County Trunk Highway 'I' in the deed to Peter G. Logghe and the reference to Chippewa City Drive in my deed are one and the same as current day 108th Avenue …."

¶22 Simple enough, but for the fact the foundation for these statements is entirely lacking. "Affidavits in support of and in opposition to a motion for summary judgment 'shall be made on personal knowledge and shall set forth such evidentiary facts as would be admissible in evidence.'" ***Palisades Collection LLC***, 324 Wis. 2d 180, ¶10 (quoting WIS. STAT. § 802.08(3)). Portions of affidavits made by persons who do not have personal knowledge or which contain allegations of ultimate facts, conclusions of law, or anything other than evidentiary facts do not meet the statutory requirements and will be disregarded. ***Hopper v. City of Madison***, 79 Wis. 2d 120, 130, 256 N.W.2d 139 (1977).

¶23 Larry's affidavit does not demonstrate personal knowledge of the location of County Trunk Highway I as it was traveled in 1938. Larry acknowledged he is neither an attorney nor a surveyor. Instead, he generically claimed that because of his own personal knowledge, educational background, and experience (all unspecified), he "can read and apply the cardinal directions and their variations to deeds and other legal descriptions as a matter of common sense." Although he claimed to have grown up in the "immediate vicinity of this lot line dispute," Larry did not state his age or assert he was personally familiar with the road as traveled in 1938. To the extent Larry's affidavit can be viewed as an attempt at expert testimony regarding the location of County Trunk Highway I in 1938, it is evident Larry is not qualified to give such an opinion because he has

"no superior knowledge in the area in which the precise question lies." *See* ***Tanner v. Shoupe***, 228 Wis. 2d 357, 370, 596 N.W.2d 805 (Ct. App. 1999).

¶24 Charles' affidavit suffers from similar defects. He merely stated that his knowledge is based upon his review of unspecified records and the fact that he "lived most of [his] life on either side of O'Neil Creek at the locations in question …." Nothing in Charles' affidavit establishes knowledge of the specific location of County Trunk Highway I in 1938 such that he is now competent to opine that it was in the same precise physical space that the present-day 108th Avenue right of way occupies. Whether Larry and Charles may, in fact, possess personal knowledge is not the issue; their affidavits must demonstrate such knowledge, but they fail to do so.

¶25 As a result, the circuit court erred when it relied on Larry's and Charles' affidavits to find that the northern boundary of the 108th Avenue right of way defines the scope of Logghe's property rights. There is no basis in the Heberts' summary judgment materials to conclude, as the circuit court did, that "County Trunk Highway 'I' in 1938 is currently 108th Avenue" and that "[t]he Westerly line of County Trunk Highway 'I' is the same as the westerly right-of-way line of present day 108th Avenue." Those findings are erroneous as a matter of law given the existing record.

¶26 Similarly, the order, stipulations, and survey that concluded the litigation in Chippewa County case Nos. 2007CV147 and 2007CV437 have no bearing upon this case in its present procedural state. The order resulting from that litigation merely established the width of the public easement over the 108th Avenue right of way, with the precise location to be determined pursuant to the main and side stipulations of the parties. The main stipulation established the

public easement over "the highway as it exists as of the date of this stipulation," while the side stipulation was intended to locate the right of way from the end of the road to the shoreline of O'Neil Creek. The Ty Dodge survey used aerial photos of the area from 1980 to locate the former bridge and road. The documents finalizing the earlier litigation reveal nothing about where County Trunk Highway I was located in 1938, nor do they purport to determine who owns the land underlying the public right of way.[10]

¶27 The circuit court circumvented this evidentiary gap by observing that "[n]o evidence has been submitted to the Court that the location of 108th Avenue, a/k/a Chippewa City Drive, CTH I[,] or STH 178 has been physically moved since … 1938." In effect, the court shifted the burden of production to Logghe, improperly requiring him to present evidence that the location of the road had changed since 1938. Rather, the burden of showing the location of the road under the relevant deeds—i.e., County Trunk Highway I as it was traveled in 1938—rested with the Heberts, as it was their motion for summary judgment. "To make a prima facie case for summary judgment, a moving defendant must show a defense which would defeat the claim." ***Preloznik v. City of Madison***, 113 Wis. 2d 112, 116, 334 N.W.2d 580 (Ct. App. 1983).

¶28 Attorney Thiel's affidavit, submitted with the Heberts' summary judgment reply brief, does not remedy the defects in their initial submission. The Heberts essentially concede Thiel's affidavit does not contain averments of

[10] In their reply brief on their summary judgment motion, the Heberts conceded case Nos. 2007CV147 and 2007CV437 "had nothing to do with determining the exact location of the common line between the Logghe and Hebert properties …." Indeed, the stipulation uses the plural "owners" in the section concerning reversionary interests if the right of way is abandoned, indicating that multiple people may have an ownership interest in the underlying land.

evidentiary fact, noting the affidavit "relates to a matter of legal interpretation of the deeds in question" and is "collateral" to the supposedly fact-based affidavits of Charles and Larry Hebert. Affidavits consisting solely of legal conclusions are not entitled to consideration on a motion for summary judgment. ***Dawson v. Goldammaer***, 2006 WI App 158, ¶32, 295 Wis. 2d 728, 722 N.W.2d 106. In fact, in response to Logghe's motion for reconsideration, the Heberts themselves proposed that the Thiel affidavit be disregarded.

¶29 The only "fact" the Thiel affidavit arguably introduces is the original 1849 land survey, which Thiel then compares to the 1938 LeDuc deed, the 1943 Hebert deed, and the 2011 survey location of 108th Avenue. The Heberts claim they submitted the affidavit "to provide an explanation of the overlay of the government lots identified on the Hebert Deed as being in Section 16 in relationship to the description in the LeDuc Deed, tied solely to the NE 1/4 of Section 16." The Heberts do not claim on appeal that the affidavit has any significance to the dispositive factual issue in this case—namely, the location of County Trunk Highway I in 1938.[11] Indeed, they contend Thiel's affidavit was unnecessary because the court could simply have taken judicial notice of the 1849

[11] The Heberts did argue below that the 1849 survey map, when considered alongside the relevant deeds, demonstrated they owned "all that portion of County Trunk Highway 'I' as it existed in 1938." They have apparently abandoned that argument on appeal, and rightly so. Nothing in the record demonstrates where County Trunk Highway I was located in 1938, so the 1849 survey cannot possibly have established ownership rights to the underlying land.

land survey,[12] and they otherwise argue the affidavit did not affect the outcome of the case.

¶30 Logghe also contends Thiel's testimony would be inadmissible at trial because Thiel was not qualified as an expert to testify as to the location of a metes and bounds description, and because Thiel is entitled to receive compensation contingent on the outcome of the case, contrary to WIS. STAT. § 907.02(2).[13] We need not determine whether the court properly considered Thiel's affidavit because we have already concluded the Heberts' summary judgment materials fail to establish a prima facie case. *See* ***Leszczynski v. Surges***, 30 Wis. 2d 534, 539-40, 141 N.W.2d 261 (1966) (If the movant has not made a prima facie case, "we need go no farther."). In general, we decide cases on the narrowest possible grounds. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997). However, two additional arguments, one each by Logghe and the Heberts, merit extra scrutiny.

¶31 Logghe challenges the circuit court's finding that the Ty Dodge survey identified 108th Avenue as being in Government Lot 5 of Section 16, Township 28 North, Range 8 West. To the extent this finding had any bearing on

[12] The Heberts correctly observe that judicial notice may be taken of government surveys. *See* ***Atwater v. Schenck***, 9 Wis. 160, 164 (1859); *but see* ***Robison v. Borkenhagen***, 25 Wis. 2d 408, 410, 130 N.W.2d 770 (1964) (declining to take judicial notice of a recorded plat that established the width of a street in a tort action, reasoning that "[w]hile records in any of the state offices in Madison are readily accessible to this court, this is not true of records in the courthouse at Kenosha").

[13] As an evidentiary matter, lawyers are not generally prohibited from testifying for their clients. ***Peck v. Meda-Care Ambulance Corp.***, 156 Wis. 2d 662, 670, 457 N.W.2d 538 (Ct. App. 1990). "There is, however, a longstanding ethical prohibition against an attorney testifying for his or her client in most cases." ***State v. Foy***, 206 Wis. 2d 629, 643, 557 N.W.2d 494 (Ct. App. 1996) (citing ***Peck***, 156 Wis. 2d at 671; SCR 20:3.7).

the court's ultimate determination, we agree it was in error. The Ty Dodge survey plainly states that 108th Avenue is "[a] 40-foot-wide town road right-of-way, located within Government Lots 4 and 5 of Section 16, T29N, R8W, Town of Eagle Point, Chippewa County, Wisconsin …."

¶32 Finally, the Heberts assert Logghe's complaint filed in this action is deficient based on ***Stone Bank Improvement Co. v. Vollriede***, 11 Wis. 2d 440, 105 N.W.2d 789 (1960). They assert Logghe is improperly claiming their title to be defective, rather than claiming he owns the land in question. It is true that a party claiming title to land "must recover upon the strength of his own title, rather than upon the weakness of the title of his adversary." ***Id.*** at 444 (citing ***Slauson v. Goodrich Transp. Co.***, 90 Wis. 20, 23, 74 N.W. 574 (1898)). As the Heberts acknowledge, however, this is an "unusual case." The deeds are structured such that the scope of Logghe's property rights directly implicates the scope of the Heberts' property rights. Accordingly, we conclude Logghe's complaint satisfactorily stated a claim for relief.

¶33 Ultimately, Logghe may or may not own all or even some of the land underlying what is now 108th Avenue and the continuing right of way to the shoreline of O'Neil Creek. At this stage of the proceeding, we cannot determine whether the Heberts' corrected deed infringes upon Logghe's property interest. Because the Heberts have failed to establish a prima facie case for summary judgment, we must reverse the order and remand for a factual determination regarding the location of County Trunk Highway I circa February 7, 1938. This determination must be based on admissible evidence, and it will likely require expert testimony from surveyors or other experts. *See* ***State v. Kandutsch***, 2011 WI 78, ¶28, 336 Wis. 2d 478, 799 N.W.2d 865 (expert testimony required when underlying issue is "not within the realm of the ordinary experience of mankind").

By the Court.—Order reversed and cause remanded for further proceedings.

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