COURT OF APPEALS
DECISION
DATED AND FILED

March 19, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1136 **Cir. Ct. No. 2011CV1373**

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

JESS DYNEK AND LINDA DYNEK,

PLAINTIFFS-RESPONDENTS,

V.

ESTATE OF ODILIA ZIELINSKI,

DEFENDANT-THIRD-PARTY PLAINTIFF-APPELLANT,

V.

MICHAEL R. FEHRER AND LOIS GILLESPIE-FEHRER,

THIRD-PARTY DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Walworth County: PHILLIP A. KOSS, Judge. *Affirmed*.

Before Higginbotham, Sherman and Kloppenburg, JJ.

¶1 KLOPPENBURG, J. This is a dispute over the use of two easements that cross or affect the properties of Jess Dynek and Linda Dynek and Michael Fehrer and Lois Gillespie-Fehrer. The Estate of Odilia Zielinski argues that the circuit court erred when it enjoined the Estate from: (1) trespassing on the newer easement shown on the 1996 Itsa Little Subdivision Plat because that easement is not for the benefit of the Estate, whose property lies outside the subdivision; and (2) widening a driveway that lies within the older easement created in 1974 because widening the driveway would unreasonably harm the Dynek and Fehrer properties. The Estate argues that the 1996 easement is for the benefit of the Estate property and therefore can be used by the Estate, and that widening the driveway is reasonably necessary for the Estate property's full enjoyment of the 1974 easement. For the reasons set forth below, we reject the Estate's arguments and affirm the judgment.

BACKGROUND

¶2 The parties own property on Lake Beulah in the Town of East Troy, Wisconsin. The Dynek property is part of the Itsa Little Subdivision. The Fehrer property lies outside the subdivision property, adjacent to the western side of the Dynek property. The Estate property lies outside the subdivision property to the south and east of the Dynek property.[1]

¶3 During the 1960s or 1970s, the Zielinski family built a 12-foot wide driveway that started at a public road, crossed what became the Fehrer and Dynek properties, and ended on the current Estate property.

[1] Between the Dynek property and the Estate property is another lot belonging to another landowner, who is not part of this lawsuit.

¶4 In 1974, Odilia Zielinski obtained and recorded a 30-foot wide easement "for joint driveway purposes" and "ingress and egress," which followed the existing path of the driveway from the public road, across what became the Dynek and Fehrer properties, to the Estate property. We will generally refer to the 12-foot wide driveway within the 30-foot wide easement as the easement driveway.

¶5 In 1996, the Itsa Little Subdivision, comprising land to the north of the Estate property, was platted.[2] The 1996 plat shows the 1974 30-foot wide easement and a new easement for "ingress and egress" that varies between 45 feet and 50 feet in width. We will generally refer to the 30-foot wide easement as the 1974 easement, and the platted easement as the 1996 easement. The 1974 easement lies within the 1996 easement. In 2000, the Fehrers and Dyneks purchased their respective properties.

¶6 In 2011, the Dyneks learned that the Estate intended to develop the Estate property and to widen the easement driveway. The Dyneks filed a complaint seeking to enjoin the Estate from trespassing across their property and from widening the easement driveway. That action was consolidated with a separate action by the Estate against the Fehrers concerning use of the 1974 easement over the Fehrer property. The matter was tried to the circuit court,

[2] A "plat" is "a map of a subdivision." WIS. STAT. § 236.02(8) (2013-14).

All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

which enjoined the Estate from trespassing on the Dynek and Fehrer properties "outside of the [easement] driveway" and from widening the easement driveway.[3]

DISCUSSION

¶7 As noted in the introductory paragraph, the Estate argues that the 1996 easement is for the benefit of the Estate property, and that widening the easement driveway is reasonably necessary for the Estate property's full enjoyment of the 1974 easement. In the sections below, we first review pertinent principles of easement law, then state the applicable standard of review, and finally analyze each of the Estate's arguments consistent with the applicable law and standard of review.

A. Whether the 1996 Easement is for the Benefit of the Estate

¶8 The issue whether the 1996 easement is for the benefit of the Estate is significant because, if the 1996 easement is for the benefit of the Estate, then the Estate is the dominant estate with respect to that easement. If it is not for the benefit of the Estate, then the Estate is the dominant estate only with respect to the narrower 1974 easement.

¶9 "An easement is an interest in land which is in the possession of another, creating 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." ***Gallagher v. Grant-Lafayette Elec.***

[3] The circuit court also allowed the Estate to pave the entire length of the 12-foot wide easement driveway, and to widen one section of the easement driveway to 16 feet "so that two vehicles can pass each other." These parts of the judgment are not challenged on appeal.

Coop., 2001 WI App 276, ¶16, 249 Wis. 2d 115, 637 N.W.2d 80. "An easement may be created in a number of ways, including by a written grant ...." ***Id.*** An easement may also be created by a plat. Jon W. Bruce and James W. Ely, Jr., ***The Law of Easements and Licenses in Land*** § 3:5 (2011) ("a plat map may create an express easement"). The dominant estate "has the right to use the easement in accordance with the express terms of the easement grant." ***Grygiel v. Monches Fish & Game Club, Inc.***, 2010 WI 93, ¶19, 328 Wis. 2d 436, 787 N.W.2d 6.

¶10 In order to determine whether the Estate is the dominant estate with respect to the 1996 easement – that is, whether the 1996 easement is for the benefit of the Estate – we must construe the meaning and scope of the 1996 easement. "The proper construction of an easement is a question of law that we review de novo." ***Borek Cranberry Marsh, Inc. v. Jackson Cnty.***, 2010 WI 95, ¶12, 328 Wis. 2d 613, 785 N.W.2d 615. "When the evidence is documentary, an appellate court may interpret such evidence for itself and is as equally competent as the [circuit] court to do so." ***Zurbuchen v. Teachout***, 136 Wis. 2d 465, 471, 402 N.W.2d 364 (Ct. App. 1987). We construe the written instrument granting the easement as we do other written instruments, and the purpose is to ascertain the intent of the parties. ***Rikkers v. Ryan***, 76 Wis. 2d 185, 188, 251 N.W.2d 25 (1977). We look first to the language of the easement to determine the parties' intent and, if that is unambiguous, we apply that language. ***Id.*** If there is an ambiguity, the court may consider extrinsic evidence, but the purpose remains that of determining the parties' intent at the time of the grant. *See* ***id.***

¶11 The question here is whether the developer of Itsa Little Subdivision intended, through the plat, to grant to the Estate the new and wider 1996 easement. The Estate asserts that the circuit court erred in concluding that the 1996 easement shown on the Itsa Little Subdivision Plat does not grant the benefit of such

easement to the Estate property. The Estate makes several arguments why the 1996 easement must be for the benefit of the Estate's property. We address and reject each argument as follows.

¶12 The Estate argues that the 1974 easement "created a legal interest in the subdivision property for the benefit of the Estate's property." The Estate seems to be asserting that its undisputed interest in the 1974 easement automatically extends to the 1996 easement. To the extent that the Estate makes such an argument, the Estate does not develop it and we do not consider it further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (we may decline to review arguments that are undeveloped).

¶13 In what appears to be a variation of this undeveloped argument, the Estate contends that the fact that the 1996 easement runs along the same path as the 1974 easement, and the fact that the 1996 easement runs up to the border of the Estate property, must mean that the 1996 easement was intended for the benefit of the Estate property. The Estate does not support this inference with any law, and instead attempts to bolster its inference by stating that it is dictated by a "common sense reading." We are not persuaded. The Estate does not explain why it is not a "common sense reading" that because there are two distinct easements overlapping each other, the two easements must have different purposes: the 1974 easement benefiting the Estate, and the 1996 easement benefiting the subdivision lot owners.

¶14 The Estate also argues that the Itsa Little Subdivision Plat, on its face, grants the 1996 easement for the benefit of the Estate property. However, the Estate identifies, and our independent review of the plat reveals, nothing demonstrating an express grant of the 1996 easement to the Estate property.

¶15 The 1996 plat shows both the 1974 easement and the 1996 easement. As to the former, the plat identifies a "30' Wide Ingress & Egress Easement as recorded on C.S.M. 979, Vol. 4 Pg. 242." C.S.M. # 979, which is found on page 242 of Vol. 4 of Certified Survey Maps and was recorded in 1979, is a certified survey map of the Estate property presented at trial. This survey map of the Estate property specifies that at the border of the Estate property is the "End of 30' Wide Easement." This survey map makes no reference to the later 1996 easement.

¶16 The 1996 plat refers to the "30' Wide Ingress & Egress Easement as recorded on C.S.M. 979, Vol. 4 Pg. 242," as it traces the 1974 easement from the public road across the Fehrer and Dynek properties to the Estate property, also as the "Existing 30' Wide Ingress & Egress Easement." Again, as noted, that easement was granted to the Estate property in 1974.

¶17 The plat separately identifies the 1996 easement, across the Dynek property to the subdivision boundary at the Estate property line, as a "50' Wide Ingress & Egress Easement" and a "New 45' Wide Ingress & Egress Easmnt [sic]." Unlike the notation for the 1974 30-foot wide easement, the new easement notation does not refer to any additional recorded document. Thus, nowhere on the face of the plat does it indicate, either expressly on the plat or by explicit reference to another document, that the new easement is intended for the benefit of the Estate.

¶18 The Estate further argues that "[t]he absence of [qualifying] language regarding the new easement implies it was not limited to benefit only the lots in the subdivision." To support this contention, the Estate analogizes easements to "roads or streets shown on the plat" as used in WIS. STAT. § 236.20(4)(c), which provides, "All roads or streets shown on the plat which are

not dedicated to public use shall be clearly marked 'Private Road' or 'Private Street' or 'Private Way.'" It appears that the Estate did not raise this argument during trial. Moreover, the Estate fails to provide any legal authority supporting its contention that the final plat requirements governing private "roads or streets" also apply to easements. *See* ***Pettit***, 171 Wis. 2d at 646 ("Arguments unsupported by references to legal authority will not be considered.").

¶19 The Estate also argues that "the new easement shown on the plat cannot be limited to benefit only the lots in the subdivision because it must have been required by the approving authorities." To the extent that we can discern the Estate's argument, it is that the new easement was required by a governmental authority, and, therefore, the new easement benefits the governmental authority. The Estate did not make this argument at trial, but rather, raised it for the first time in a post-judgment motion to reconsider, which the circuit court denied. Assuming without deciding that the Estate preserved the argument for appeal and that the Estate recites the correct law on the matter, the Estate nevertheless fails to demonstrate that the grant of the new easement was in fact required by a governmental authority, and fails to explain how an easement benefiting a governmental authority would also benefit the Estate property.

¶20 The Estate next argues that historic facts do not support the position that the new easement is only for the benefit of lot owners in Itsa Little Subdivision. The Estate seems to contend that because the grantor of the original 1974 easement did not own Lots 1, 3, and 5 of the Itsa Little Subdivision, the "owners of Lots 1, 3 and 5 cannot have any rights to the new easement." We discern no reason why it matters, for the purpose of determining the Estate property's rights to the new 1996 easement, whether the grantor of the original 1974 easement owned all of the lots that subsequently became Itsa Little

Subdivision. Nor are the rights of the owners of Lots 1, 3, and 5 to the 1996 easement at issue in this case.

¶21 Finally, the Estate cites to case law regarding a property owner's right to use streets and highways upon which her or his land abuts, but that case law is inapposite because, here, the issue is an easement, not a street or highway.

¶22 To summarize, we reject the Estate's arguments challenging the circuit court's conclusion that the 1996 easement is not for the benefit of the Estate.

B. Whether Widening the Easement Driveway is Reasonably Necessary for the Full Enjoyment of the 1974 Easement

¶23 "The owner of an easement may make changes in the easement for the purpose specified in the grant as long as the changes are reasonably related to the easement holder's right and do not unreasonably burden the servient estate." ***Hunter v. Keys***, 229 Wis. 2d 710, 715, 600 N.W.2d 269 (Ct. App. 1999). However, it is well settled that "'the dominant estate cannot be enlarged.'" ***Grygiel***, 328 Wis. 2d 436, ¶16 (quoted source omitted). Specifically, "a broad grant of an access easement [does not mean] that all accommodations which serve the purpose of the easement must be allowed." ***Atkinson v. Mentzel***, 211 Wis. 2d 628, 645, 566 N.W.2d 158 (Ct. App. 1997). "Rather, the test is whether the owner of the dominant estate can reasonably use the property as intended. Stated differently, but to the same effect, the easement must be interpreted so as to accomplish its purpose bearing in mind the reasonable convenience of both parties. Once this purpose is served, further expansion of the easement is neither necessary nor warranted." ***Id.*** at 645-46 (citation omitted).

¶24 The question here is whether widening the easement driveway is reasonably necessary for the Estate property's full enjoyment of the 1974 easement. This is a mixed question of law and fact. "When reviewing questions of law, we owe no deference to the [circuit] court." ***Mentzel v. City of Oshkosh***, 146 Wis. 2d 804, 808, 432 N.W.2d 609 (Ct. App. 1988). When dealing with questions of fact, we apply the following standards:

> Findings of fact made by a [circuit] court sitting without a jury shall not be set aside unless they are clearly erroneous. When more than one inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact. The appellate court will search the record for evidence to support the [circuit] court's findings of fact.

Id. at 808 (citations omitted). "As part of our analysis, we will accept the circuit court's determination as to weight and credibility." ***Jacobson v. American Tool Cos., Inc.***, 222 Wis. 2d 384, 390, 588 N.W.2d 67 (Ct. App. 1998).

¶25 The easement driveway consists of dirt and gravel. It has not been re-graveled in approximately twenty years, but certain portions have been paved. Additional pertinent trial testimony is summarized as follows.

¶26 The Dyneks testified at trial that when they were looking to purchase their property, they learned that the area they were purchasing in was a "conservation area, and that it had designated that there was one house per five acres, and that the purpose was to maintain, restore, [and] enhance the land."

¶27 The Dyneks presented photos they had taken of several homes around Lake Beulah as well as the driveways that service those homes. They testified that many of the driveways were of similar width as the easement driveway in this case and serviced more than three houses.

¶28 The Dyneks further testified that emergency vehicles are able to reach their and their neighbors' properties by way of a public road, the Dynek property, and the easement driveway. They testified that they observed two emergency vehicles go to a neighbor's residence using the easement driveway. They testified that, in their opinion, the emergency vehicles did not have any trouble getting to or exiting from the properties.

¶29 The Dyneks also presented testimony from an expert witness who was a civil engineer. The engineer testified that widening the easement driveway from 12 feet to 20 feet, within the 1974 30-foot wide easement, would adversely affect the Dyneks and Fehrers in three particular ways: (1) the Dyneks' garage driveway slope would become steeper, possibly becoming unsafe for vehicles or people to travel up and down the slope; (2) several trees would have to be removed, potentially increasing stormwater runoff and erosion on the Dynek and Fehrer properties; and (3) the distance between the front door of the Fehrers' house and the widened driveway pavement would be reduced to three or four steps.

¶30 The Fehrers testified that they were concerned excessive development of the easement would adversely impact the wildlife on their property. They also testified that they have never chopped down any trees on their property, except one that was dead. They testified that the area of the easement driveway near the front of their house is wide enough for two, maybe even three, cars to pass in opposite directions. The Fehrers also presented photos taken of the front area of their house showing a large blue truck passing the front of their house, where their red car was parked. The Fehrers testified that there was room for the truck to pass in front of their house.

¶31 The Estate presented four witnesses: Alan Zielinski (Odilia's son), Mary Zielinski (Odilia's daughter), a land surveyor who was familiar with the properties in the area since the 1980s, and the chief of the fire department.

¶32 Alan Zielinski testified that he traversed the easement driveway numerous times, and that he feels the driveway is not safe for him to travel in less than perfect conditions. He testified that at the time of his deposition, he had never encountered another vehicle while traversing the driveway, but that he has since his deposition.

¶33 Mary Zielinski testified as to the terrain of the easement driveway. Specifically, she testified that there is a hill and a cliff, such that when it is "wet or a little bit slippery, … it's very difficult to just go straightforward without sliding." In her opinion, "[t]rying to back up … you'd end up in, over the cliff." She further testified that certain areas along the easement driveway have steep slopes and that the driveway is not wide enough to turn around on. Mary testified that she wants to widen the easement driveway and to "make it safe for people coming in and going out." She explained: "[S]afe means that I can get on the road, I can get to my property, without having to worry about running off the side going off a cliff, trying to back up in the dark, to let someone get around me…. I mean, being able to get emergency vehicles there if we need [them]." On cross examination, Mary acknowledged that she never approached the Fehrers to inquire about making some areas of the easement driveway on their property wider so that cars could pass.

¶34 The land surveyor testified that he traversed the easement driveway more than twenty to thirty times. He described it as "a gravel driveway" that has always been "in fairly good condition." He stated that the driveway is "not real

wide, but it's a passable driveway." He further testified that there are many locations along the driveway where two cars could pass by having one car pull off and the other car pass, but that he has never encountered another car coming in the opposite direction.

¶35 The chief of the fire department testified that he believed the width of the easement driveway to the Estate property is adequate for his emergency vehicles.

¶36 The Estate argues that the circuit court erroneously relied on the analysis conducted by the Dyneks' expert witness, because that analysis was erroneously premised on the assumption that the Estate would widen the driveway within the 1974 30-foot wide easement rather than the wider 1996 easement. As we have concluded in the previous section, only the 1974 30-foot wide easement is for the benefit of the Estate. Accordingly, if the Estate were to widen the driveway, it would have to do so within the boundaries of the 1974 30-foot wide easement. Therefore, the circuit court did not erroneously rely on the expert witness's analysis, which properly assumed that the Estate would widen the easement driveway within the boundaries of the 1974 30-foot wide easement.

¶37 The Estate also argues that the circuit court ignored "applicable principles including that an unrestricted grant of an easement gives the grantee all rights that are incident or necessary to the reasonable and proper enjoyment of the easement." The Estate contends: "Applying these principles to the instant case results in the conclusion that the [circuit] court should have allowed the minor addition of width to the existing [easement driveway] for the full and proper enjoyment of the entire length of the original [1974] easement." We disagree.

¶38 As we noted in our overview of applicable easement law at the start of this section, "a broad grant of an access easement [does not mean] that all accommodations which serve the purpose of the easement must be allowed." ***Atkinson***, 211 Wis. 2d at 645. "The owner of an easement may make changes in the easement for the purpose specified in the grant as long as the changes are *reasonably* related to the easement holder's right and do not *unreasonably* burden the servient estate." ***Hunter***, 229 Wis. 2d at 715 (emphasis added). By the Estate's own terms, "an unrestricted grant of an easement gives the grantee all rights that are *incident or necessary* to the *reasonable* and proper enjoyment of the easement." (Emphasis added.) In sum, as the circuit court correctly noted, whether the Estate is entitled to the right to widen the easement driveway ultimately "comes down to reasonableness."

¶39 The circuit court found that the area that includes the Estate property, the Dynek property, and the Fehrer property is zoned for conservation. The court found that both the Dyneks and the Fehrers were concerned with conservancy when they purchased their properties.

¶40 The circuit court found that the Estate had concerns regarding safety and emergency vehicles traveling on the easement driveway, and that the Estate wished to use the Estate property year-round. The court found that there is a "history and usage of [the easement driveway], but also that the [Estate is] entitled to reasonably improve it; … as time goes on, we don't expect people to just use dirt roads … or even gravel roads for the remainder [of their life]." Thus, the court allowed the Estate to pave the entire length of the existing easement driveway.

¶41 The court relied on the unrebutted testimony of the Dyneks' expert and found that widening the easement driveway "would clearly result in many trees being cut down, including a large one in front of [the Fehrers'] home," and that "[t]here would be water issues." The court found that similar driveways exist throughout the county, and that many driveways of similar width service more homes than in the present case. And the court found that nothing from the current litigation was preventing the Estate from making the easement driveway wider in the portions where the Estate has complete ownership.

¶42 Taking all the evidence into consideration, we agree with the circuit court's conclusion that the easement driveway, at its current 12-foot width, "satisfies the purpose of the [original 1974] easement which was a joint driveway to permit ingress and egress, not a roadway to service potentially more homes," and that widening the easement driveway would unreasonably and irreparably "harm the Dyneks and Fehrers." In so concluding, the circuit court weighed more heavily the evidence that widening the easement driveway would cause harm to the Dynek and Fehrer properties. We accept the circuit court's determination as to the weight and credibility of the evidence. *See* ***Jacobson***, 222 Wis. 2d at 390. Accordingly, we affirm the circuit court's conclusion that widening the easement driveway is not reasonably necessary for the Estate's full enjoyment of the 1974 easement for ingress and egress.

CONCLUSION

¶43 For the reasons set forth above, we conclude that the 1996 easement is not for the benefit of the Estate property, and that widening the easement driveway is not reasonably necessary for the Estate property's full enjoyment of the 1974 easement for ingress and egress. Accordingly, we affirm.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.