COURT OF APPEALS
DECISION
DATED AND FILED

January 26, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP125 **Cir. Ct. No. 2011CV71**

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

HARRY A. JOLES, JR.,

PLAINTIFF-RESPONDENT,

V.

ANTHONY M. SCIASCIA AND PENNY D. SCIASCIA,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Sawyer County: GERALD L. WRIGHT, Judge. *Reversed and cause remanded for further proceedings with directions.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Anthony and Penny Sciascia appeal an order in this property dispute between adjoining landowners. Harry Joles's property is benefitted by an easement for ingress and egress over the northernmost portion of

the Sciascias' land. Joles's residence is located very near the property boundary, and he constructed a deck and access ramp to the residence along with other improvements that partially intrude into the easement area. The Sciascias challenge the circuit court's conclusion that the deck and ramp were reasonable improvements to the easement for the purpose of ingress and egress. We reverse because Joles has failed to meaningfully address whether the improvements are consistent with the purpose of the easement grant, as required by the relevant case law. However, we remand to the circuit court to determine whether the equities demand that the improvements be removed and to consider whether either party is entitled to costs.

BACKGROUND

¶2 This case began as a boundary line dispute between Joles and the Sciascias. The parties own abutting north-south parcels near Lake Winter in Sawyer County. The southern boundary of Joles's parcel lies along the western 344 feet of the northern boundary of the Sciascias' parcel. Following a bench trial, the circuit court concluded the original boundary between the properties could not be determined based on the remaining monuments in existence. However, the court found credible the testimony of Joles's predecessor-in-interest, Greg Petit, who testified that the parties' properties originated from a common grantor, Winter Development, Inc., which was owned by Petit's parents. Petit built a house 1.5 feet north of the flag line set by the original surveyor, and the circuit court therefore concluded the common boundary between the parcels was 1.5 feet south of the southeastern corner of Joles's house. The location of the common boundary as found by the circuit court is not at issue on appeal.

¶3 It is undisputed that Petit's father, recognizing that his son could not build a driveway on his own lot, also granted a 20-foot-wide easement over what is now the Sciascias' property for ingress and egress to what is now Joles's parcel. The northern edge of the easement runs along the entire 344-foot boundary between the parties' properties. The circuit court concluded, "The driveway easement, by acquiescence of the common grantor and the first grantee of what is now … Joles'[s] property, lies exactly where it is now located."

¶4 After Joles acquired his property in 2004, he constructed a deck and entrance ramp so his disabled daughter could access the home. The circuit court concluded the deck and ramp encroached on the Sciascias' property within the easement area.[1] The court stated that, to the extent the deck "is reasonably necessary for entering and exiting … Joles'[s] residence, it is consistent with the purpose of the easement." However, the court determined it did not have sufficient information to analyze the degree to which the encroachments interfered with the Sciascias' use of the servient estate. Accordingly, the court ordered further proceedings on that issue.

¶5 Following an evidentiary hearing and briefing, the circuit court issued an oral ruling on the encroachment issue on November 17, 2014. The court made the following pronouncement:

> I find that the access deck and the ramp are improvements to the easement for ingress and egress. So the question is whether or not they unreasonably burden the servient estate. Both of those structures are of a reasonable

[1] In addition to the deck and ramp, portions of the residence's eaves also intrude into the easement area. However, the circuit court concluded the eaves were "similarly situated" to the deck and ramp. Like the parties, we do not separately address the eaves; rather, we consider them part of the deck and ramp improvements.

> size for their purposes. Neither of them is any larger than is necessary to facilitate access into the residence.
>
> In light of how close to the lot line the common grantor allowed … Joles'[s] residence to be built, he must have agreed that access ramps or decks would not be an unreasonable burden on the servient estate. Again the deck is no larger than is reasonably necessary to gain entry. The ramp is no larger than is reasonably necessary to gain entry … and does not encroach any farther than the southeast deck that was constructed on the southeast corner to gain access to that door.
>
> Accordingly I find that the entry ramp and the decks are not an unreasonable burden on the servient estate and I'm not going to order their ejectment.

The court later entered a supplemental order consistent with its oral ruling, and the Sciascias now appeal.

DISCUSSION

¶6 On appeal, the Sciascias argue the improvements Joles made within the easement area were not authorized by the easement grant. An easement's scope is established by the instrument creating the easement, and we look to that instrument in construing the rights of the relative landowners. ***Hunter v. Keys***, 229 Wis. 2d 710, 714, 600 N.W.2d 269 (Ct. App. 1999). "The meaning and scope of language created in a deed is reviewed as a matter of law without deference to the trial court's determination." ***Id.*** at 715. In this case, it is undisputed that by virtue of various grants, the Sciascias' property is burdened by an easement for "ingress and egress" that is "for the benefit of adjoining parcels."

¶7 The meaning of "ingress and egress," however, is highly contested. The Sciascias contend that Joles's right to use their property is limited to *vehicle* ingress and egress. This is too narrow a construction of the relevant deeds. The various deeds the Sciascias cite do not limit the right of access to vehicular traffic.

"Every easement carries with it by implication the right … of doing whatever is reasonably necessary for the full enjoyment of the easement itself." ***Atkinson v. Mentzel***, 211 Wis. 2d 628, 640, 566 N.W.2d 158 (Ct. App. 1997) (quoting ***Scheeler v. Dewerd***, 256 Wis. 428, 432, 41 N.W.2d 635 (1950)) (omission in ***Atkinson***). Joles may make use of the easement for ingress and egress by any reasonable means, including on foot.

¶8 The heart of the issue in this case is whether the easement grant permitted Joles to build structures within the easement area to improve access to his residence rather than for ingress to and egress from his property in general. Joles and the Sciascias agree as to the operative standard: "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. "The purpose stated in the grant defines the easement's reasonable use." ***Eckendorf v. Austin***, 2000 WI App 219, ¶12, 239 Wis. 2d 69, 619 N.W.2d 129.

¶9 The Sciascias challenge the circuit court's conclusion that the improvements Joles made within the easement area are reasonably related to the easement's purpose (i.e., ingress and egress). They argue the encroachments, which include portions of Joles's deck and access ramp to his residence, are not consistent with the purpose of the easement granted to Joles's predecessors-in-interest.[2] The Sciascias, in their brief-in-chief, also argue the encroachments

[2] The Sciascias impermissibly cite an unpublished, per curiam opinion issued by this court in 2005. *See* WIS. STAT. RULE 809.23(3). The cited authority will not be considered.

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

present an unreasonable burden to them because the improvements deprive them of their ability to use those portions of their lot for any purpose, including ingress and egress.[3]

¶10 Neither the circuit court's decision nor Joles's response brief meaningfully addresses the Sciascias' argument that the encroaching improvements are inconsistent with the easement grant's purpose, which permits the use of the Sciascias' property for "ingress and egress" by any reasonable means. As previously stated, Joles agrees with the Sciascias regarding the applicable standard, but mechanistically recites that standard as if to assume it answers the question posed. However, it is not self-evident that an easement for the purpose of "ingress and egress"—which generally ensures access to a property as a whole—authorizes construction within the easement area of, among other things, a deck and access ramp to the dominant estate owner's home. Indeed, the applicable warranty deeds speak of the easement being for the benefit of "parcels." Further, Joles does not argue the deed language establishing the easement is ambiguous, such that it would be proper to resort to extrinsic evidence to ascertain the parties' intent. *See* ***Konneker v. Romano***, 2010 WI 65, ¶26, 326 Wis. 2d 268, 785 N.W.2d 432.

¶11 Instead, Joles's primary appellate focus is the asserted lack of evidence that the encroaching improvements unreasonably burden the servient

[3] Although we need not reach this issue because we decide this appeal on other grounds, we observe that erecting structures like those in the present case within the easement area wholly deprives the servient estate owners of their ability to use a portion of their property. Generally, "an express easement must contain an affirmative statement of exclusivity in order to convey the right to exclude the fee owner." ***Garrett v. O'Dowd***, 2009 WI App 146, ¶6, 321 Wis. 2d 535, 775 N.W.2d 549.

estate. Regardless of whether the encroachments present an unreasonable burden, Joles was required to show the improvements were reasonably related to the easement's purpose (i.e., his right of ingress and egress). This required some showing—either by reference to the easement language or, if that language is ambiguous, by reference to extrinsic evidence of intent—that the contemplated access was not merely to Joles's property generally, but specifically to the home. Bald citation to case law or other legal authority is in this instance not enough; therefore, Joles's briefing on this issue is inadequate. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (arguments supported only by general statements insufficient). "Respondents on appeal cannot complain if propositions of appellants are taken as confessed which they do not undertake to refute." ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (quoting ***State ex rel. Blank v. Gramling***, 219 Wis. 196, 199, 262 N.W. 614 (1935)).

¶12 Joles briefly argues that even if the improvements fall outside the scope of the easement, the encroaching improvements should not be removed. He urges this court to consider the equities of the present circumstances and deny the Sciascias relief because "[t]he modifications provide an important and necessary benefit, with no demonstrated burden to the Sciascias." In some instances, it *is* more equitable to require a forced sale of land than to remove the encroachments. *See* ***Perpignani v. Vonasek***, 139 Wis. 2d 695, 736-37, 408 N.W.2d 1 (1987). Indeed, the general rule is that courts may apply equitable remedies as necessary to meet the needs of a particular case, ***id.*** (citing ***Prince v. Bryant***, 87 Wis. 2d 662, 674, 275 N.W.2d 676 (1979)), and a court may grant such relief as it deems appropriate, even if such relief has not been demanded, ***id.*** (citing ***Klaus v. Vander Heyden***, 106 Wis. 2d 353, 359, 316 N.W.2d 664 (1982)). However, these

equitable determinations are for the circuit court, not the appellate court. The circuit court should be given the first opportunity to exercise its equitable authority to fashion the appropriate remedy for the encroachment. We therefore remand the matter to the circuit court for that purpose.

¶13 Lastly, the Sciascias argue they are entitled to costs under WIS. STAT. § 814.03. A defendant is allowed costs under that statute if the plaintiff is not entitled to costs under WIS. STAT. § 814.01. In turn, § 814.01(1) provides that costs are allowed to the plaintiff upon a recovery. Together, these statutes contemplate an award of costs when there has been a final determination on the merits and the action ends in judgment for one party or the other. *See* ***Estate of Radley v. Ives***, 2011 WI App 144, ¶9, 337 Wis. 2d 677, 807 N.W.2d 633. "The purpose of the costs statute is 'to recompense the prevailing party for some of the cost of the vindication of his rights.'" ***Id.*** (quoting ***Finkenbinder v. State Farm Mut. Auto Ins. Co.***, 215 Wis. 2d 145, 150, 572 N.W.2d 501 (Ct. App. 1997)). Costs are payable by the defeated party only upon completion of the litigation process. ***Id.***

¶14 We conclude an award of costs is inappropriate at this juncture. Although the Sciascias correctly observe that some of Joles's claims were dismissed on summary judgment, the circuit court concluded the improvements were within the scope of the easement grant and their removal was not required. In light of our rejection of that reasoning, and our directive for the circuit court to consider whether, as an equitable matter, the encroachments should be removed or other relief granted, it is not yet clear which party, if any, has prevailed in this action. On remand, after weighing the equities to fashion an appropriate remedy, the circuit court should also determine whether either party is entitled to costs under the relevant statutes.

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

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