COURT OF APPEALS
DECISION
DATED AND FILED

May 17, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2028 **Cir. Ct. No. 2002CV221**

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

WILLIAM CHARLES SHARP, LAVONNE MARIE SHARP, KIMBERLY MARIE JACOBSEN AND BEVERLY KAY SHARP AND MICHELLE LYNN SHARP,

PLAINTIFFS-APPELLANTS,

V.

THOMAS M. HUGHES AND TAMMY L. HUGHES,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment and an order of the circuit court for Pierce County: ROBERT W. WING, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. William Sharp, LaVonne Sharp, Beverly Sharp, Michelle Sharp, and Kimberly Jacobsen[1] appeal a judgment and an order declaring that Thomas and Tammy Hughes have record title to a strip of land west of the centerline of the gravel road running between the Sharps' and Hugheses' properties. The Sharps argue the trial court erred when it concluded the Hugheses had record title to that land because the deeds were ambiguous and the court construed them incorrectly. The Sharps also argue the court erred when it determined that, even if the Hugheses did not have record title, they had acquired title by adverse possession under either WIS. STAT. § 893.25 or WIS. STAT. § 893.26.[2] The Sharps finally contend the trial court erred when it found that the Hugheses had an express easement over the graveled road in the disputed area. Because we agree the Hugheses had record title to the disputed property, we reject the Sharps' arguments and affirm the judgment and order of the trial court.

Background

¶2 During the 1940s, Charles Henry Sharp, known as C.H., owned a substantial amount of land in Pierce County, including the parcels of land involved in this case. He lived in a house on the north side of the property now owned by the Hugheses and ran a commercial fishing business on the property now owned by the Sharps.[3] A narrow sand track, referred to by the trial court as the "old road," ran immediately next to and past C.H.'s house, continuing towards the

[1] We will refer to appellants collectively as the Sharps from this point forward.

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[3] Both the Hugheses' land and the Sharps' land runs to the low water mark of the Wisconsin Channel of the Mississippi River.

Mississippi River and eventually splitting into two branches, one going east and the other going west. Evidence presented at trial indicated that the "old road" had been in place since at least the late thirties. Between 1949 and 1950, a second road was constructed to help support the Sharp fishing business by providing access for large, live fish, trucks. This road, referred to at trial as "the new road," lay thirty to forty feet east of the "old road."

¶3 When C.H. died in 1953, he bequeathed his property to his three sons, Henry, Harold and Charles Russell. In 1954, in response to instructions in C.H.'s will, Clark Weigel surveyed the property. This survey appears to have been the basis for the land descriptions in the conveyances used to transfer C.H.'s land after his death.

¶4 Charles Russell inherited the commercial fishery from his father, and later bought more land from one of his brothers, including the property now owned by the Hugheses. In 1957, Charles Russell deeded that parcel to Walter and Grace Rother, who in turn deeded it to the Thumann family. They sold the land to Robert Scoville in 1961. Sometime after that, Scoville and his family built a house south of C.H.'s original house. The Scovilles transferred the property to the Strain family by land contract in 1973. In 1983, the Hugheses bought, and began to live on, the land. They also began remodeling the house built by the Scovilles, adding a deck in 1987 and a well in 1998.

¶5 In 1965, Charles Russell deeded another parcel of property to William Sharp, one of the appellants in this case. William worked in Minnesota for a number of years and he and his family used the property for vacations until 2000 when they began living on the land full-time. After some disagreements between the Hugheses and the Sharps over the location of the boundary line

between their properties, the Sharps filed a complaint requesting they be declared record titleholders of the property west of the centerline of the "new road." The Hugheses counterclaimed, alleging they owned the property in question. In addition, both parties claimed they had easements over the "new road." After a two-day bench trial, the court made findings of fact and conclusions of law and issued a written judgment and order declaring the Hugheses owners of the disputed property. The Sharps now appeal.

Discussion

¶6 We construe deeds in the same way we construe other written instruments. If a deed's language is unambiguous, its meaning is a question of law which we review without deference. *See* ***Edlin v. Soderstrom***, 83 Wis. 2d 58, 69, 264 N.W.2d 275 (1978). When a deed is unambiguous, we do not consider extrinsic evidence. *See, e.g.,* ***Rikkers v. Ryan***, 76 Wis. 2d 185, 188, 251 N.W.2d 125 (1977). We rather rely on what is written in the instrument itself to determine meaning. *See* ***Grosshans v. Rueping***, 36 Wis. 2d 519, 528, 153 N.W.2d 619 (1967).

¶7 When a deed is ambiguous, the parties' intentions are questions of fact which may be determined by extrinsic evidence, and we will uphold the trial court's findings of fact unless they are clearly erroneous. *See* ***Edlin***, 83 Wis. 2d at 69-70. Whether a deed is ambiguous is, however, a matter of law. ***Gojmerac v. Mahn***, 2002 WI App 22, ¶24, 250 Wis. 2d 1, 640 N.W.2d 178.

¶8 The Sharps argue first that the trial court erred when it concluded that the deeds in this case were unambiguous. Indeed, they claim, the trial court's admission of extrinsic evidence on the location of a cottonwood tree and on the "old" and "new" roads conclusively demonstrates ambiguity. The Sharps also

contend that the court's findings of fact, based on that extrinsic evidence, were clearly erroneous. Thus, they conclude, the Hugheses should not have been found to have record title to the disputed land to the west of the "new road." We disagree.

¶9 The Sharps' argument suggests the trial court's resort to extrinsic evidence directly contradicts its conclusion that the deed is unambiguous. There is no necessary contradiction, however. The trial court could have found that the deeds in question were unambiguous, but determined that there was a latent ambiguity that could not be resolved without resort to extrinsic evidence. Indeed, we believe that is what the court did.[4]

¶10 Latent ambiguities in land descriptions do not appear on the face of the instrument. *See* 23 AM. JUR. 2D *Deeds* § 31 (2002). They emerge when, because of facts or circumstances external to the text, someone attempts to apply apparently clear language to a real landscape. *See* ***id.*** In such circumstances, extrinsic evidence is admissible to supply clarity to calls, names, descriptions of monuments, and other identifiers of property. *See* 12 AM. JUR. 2D *Boundaries* § 110 (1997); *see also* ***Begg v. Begg***, 56 Wis. 534, 538, 14 N.W. 602 (1883), and ***Hunter v. Neuville***, 255 Wis. 423, 431, 39 N.W.2d 468 (1949).

[4] The trial court did not explicitly use the term latent ambiguity. Even if the trial court's logic was somewhat different, however, this court has the authority to affirm a correct decision made for the wrong reasons. *See, e.g.* ***Mueller v. Mizia***, 33 Wis. 2d 311, 318-19, 147 N.W.2d 269 (1967). In construing an ambiguous finding the same rule should prevail as in "the construction of a contract or a law. … [o]ne of two or more reasonable probable meanings of the language used should be adopted which will … support the judgment rather than one which will defeat it." ***Id.***

¶11 The land description in the Sharps' deed appears to identify a point of beginning and boundary lines:

> A tract of land in Gov't Lot 3, Sec. 2, Twp. 24 N. … commencing at a point on the E. line of said Sec. 2, where the S. line of the CB&Q RR right-of-way intersects said Sec. line … thence up river of said Channel along the low water mark to the low water mark on the River side of a large cottonwood tree, a distance of 200 feet … thence N. 12° 30' E. 287 feet along the center of the road; thence N. 5° 25' W. along the center of said road 250 feet … to the SW'ly corner of William Charles Sharp Lot …

¶12 The Hugheses' deed contains similar references to a road and a cottonwood tree:

> … [T]hence W 244 feet to a stake, thence S 87° East 75 feet … to the center of the roadway running Northerly and Southerly as now travelled, for point of beginning of land herein conveyed; thence … Southeasterly along said low water mark to a 30" cottonwood tree, then N 12° 30' East 287 feet, thence North 5° 25' West to the point of beginning.…

If the road and the cottonwood tree were identifiable, the Sharps' and Hugheses' deeds would thus be unambiguous.[5] At trial, however, experts disagreed over whether the cottonwood tree was still on the property or washed away or otherwise rendered unrecognizable. Other witnesses testified that, at the time the deeds were written, both the "old road" and the "new road" were in existence and in use. The trial court could thus have concluded that difficulties locating the cottonwood tree and the road in the landscape created a latent ambiguity in the

[5] Both the Hughes' land and the Sharps' land runs to the low water mark of the Wisconsin Channel of the Mississippi. That mark thus establishes one boundary of the properties. The others are established by reference to critical landmarks: the cottonwood tree and the road.

facially unambiguous land descriptions in the deeds which extrinsic evidence could clarify.

¶13 The court concluded that the road in the deeds could not have been the "old road" for a number of reasons. According to some witnesses, the "old road" was not straight. It bent and intersected the "new road" some distance from the river. Yet a survey prepared for the Sharps indicated that the road marking part of the property boundary went straight to the alleged cottonwood tree. Based on that testimony and evidence, the trial court reasoned that neither tree proposed by the Sharps as "the cottonwood tree" could have been directly in line with the "old road." The court further concluded that the location of the cottonwood tree could not be determined with certainty. The court thus determined that the artificial monument of the "new road" was not only the road referred to in the deeds, but should be used to determine the boundary between the Sharps' and Hugheses' properties.

¶14 The Sharps argue that the trial court erred when it ignored expert testimony that one of two existing cottonwood trees was the tree referred to in the deeds in favor of the Hugheses' assertion, based on witness descriptions of the course of the "old road," that neither of the alleged trees could have been the referenced tree. The Sharps also argue that the trial court's conclusions about the "new road" were a "fundamental error" because the road in the Hugheses' deed was not the "new road," but a third road, 777th Street, while the road in the Sharp deed was the "old road." The Sharps further object that the trial court's

"adoption" of the Hugheses' surveyor's opinion ignored testimony by other expert witnesses that was more complete, comprehensive, and compelling.[6]

¶15 The Sharps' argument reiterates their claims at trial, that the Hugheses' witnesses were unconvincing. However, we will uphold the trial court's factual findings unless they are clearly erroneous. *See* ***Edlin***, 83 Wis. 2d at 69-70. The trial court, not the appellate court, is the proper body to judge the credibility of witnesses and to weigh their testimony. *See* WIS. STAT. § 805.17(2); *see also* ***In re Estate of Glass***, 85 Wis. 2d 126, 142, 270 N.W.2d 386 (1978). Our job is to search the record for evidence to support the trial court's findings, not for evidence to support findings the trial court might have made, but did not. ***Johnson v. Merta***, 95 Wis. 2d 141, 154, 289 N.W.2d 813 (1980). Under that standard, we conclude there is sufficient evidence to support the trial court's findings that the cottonwood tree referenced in the deeds cannot be located with any certainty and that the road named in the Sharp deed is the "new road" not the "old road."

[6] Rausch, the Hugheses' surveyor, testified that, after correcting for errors, he found that the point of beginning for the boundary "falls within the present gravel road and southeasterly of the cottonwood trees." He also testified that he worked backward to determine the boundaries not because he was ignoring the priority of a natural monument, the cottonwood tree, but because he felt the tree's position, near the Mississippi River, and problems with the dimensions of any of the alleged trees, made him uncertain that any of alleged trees were the referenced tree. Rausch testified finally, that everything "checked out" with the exception of the alleged natural monument, the tree; he thus used aerial photographs to check his opinion. The trial court also heard testimony from Steven Waak, who reviewed the boundary question for the Sharps; Clark Leeson, who testified about his childhood memories of cottonwood trees; and George Sheppard, a consulting forester. Despite the Sharps' assertions, the trial court here simply engaged in its ordinary work; it weighed the testimony of the witnesses, considered their credibility and found the Hugheses' witnesses more compelling. *See, e.g.,* WIS. STAT. § 807.17(2); *see also* ***Patrickus v. Patrickus***, 2000 WI App. 255, ¶26, 239 Wis. 2d 340, 620 N.W.2d 205.

¶16 Because we agree the Hugheses have record title to the disputed property, we need not address the Sharps' other arguments. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed).

By the Court.—Judgment and order affirmed.

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