COURT OF APPEALS
DECISION
DATED AND FILED

May 22, 2019

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2017AP2402 **Cir. Ct. No. 2016CV880**

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

THOMAS D. SYKES, DEBORAH A. CUSTER, STEVEN ZMUDZINSKI, CATHERINE ZMUDZINSKI, DR. JOEL WALLSKOG, MEGAN WALLSKOG, DR. SABIHEH BAGHERLI, DINSHAH GAGRAT, SHOBHA GAGRAT, STEPHEN MELLONE, LISA MELLONE, ERIC WEGNER, CINDY WEGNER, MARTY MITCHELL, KAREN MITCHELL, ERICH SCHEIBNER, NANCY M. ANDREWS-FRAHM, J. SCOTT HETHERTON, MARY J. GALLAGHER-HETHERTON, DANIELA GIRALT, SANDRA GIRALT, THOMAS WITZEL, LEANNE WITZEL, JEFFREY MEYER, LOUISE MEYER, JAMES DAVIS, KATHY DAVIS, STEPHEN SCHNEIDER, JULIA SCHNEIDER, JAMES KACZMAREK, LAURIE KACZMAREK, DR. NICHOLAS P. WEBBER, PAUL ALEKSY, DENISE ALEKSY AND KAI E. COOK,

PLAINTIFFS-APPELLANTS,

JUDITH A. FITZPATRICK,

PLAINTIFF,

V.

VILLAGE OF SUMMIT, MICHAEL HARTERT CHIEF OF POLICE, WISCONSIN DEPARTMENT OF NATURAL RESOURCES AND STATE OF WISCONSIN,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Waukesha County: WILLIAM J. DOMINA, Judge. *Affirmed*.

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. Thomas D. Sykes and the other named plaintiffs (the Islanders) appeal an order granting summary judgment in favor of the Village of Summit and the Village's Chief of Police Michael Hartert (collectively, Summit) and the Wisconsin Department of Natural Resources and the State of Wisconsin (collectively, the DNR) and dismissing all of the Islanders' claims and causes of action.[1] We affirm.

¶2 The Islanders are seasonal cottage owners on Sugar Island, a forty-four-lot island in Lower Nemahbin Lake in Summit. Sugar Island Road ("the Road") runs from Sawyer Road to the lake's western edge. Summit contends the Road is a public road, as it was dedicated to and accepted by Summit in 1927 "after same had been used by the public for several years prior thereto," and, since paving the Road in the 1960s, has maintained and patrolled it at its expense.

¶3 Similarly, the Islanders or their predecessors in interest have used the mainland portion of the Road to access the lake or installed piers at its lake-edge terminus since the 1920s and have used a nearby area for parking their vehicles and mooring and storing their boats. Based on this historic usage, the

[1] The Village and Hartert jointly filed a response brief; the DNR and the State jointly filed another.

Islanders seek a judicial declaration that (1) either they own the Road or (2) if Summit does, Summit must bear the cost of building a bridge from the Road's terminus to the island; and (3) regardless of ownership, they—despite lacking riparian ownership rights—should be permitted to build piers off the end of the Road and to exclude the general public from accessing the water's edge.

¶4 This case has a history. In 1921, Lorenz Wagner, the original owner of the Island and mainland parcel through which the Road runs, began filling the lake bed to construct a causeway to the Island. A court ordered the "nuisance" fill abated and enjoined further construction. *See* ***Breese v. Wagner***, 187 Wis. 109, 112, 203 N.W. 764 (1925).

¶5 In 1927, Wagner sold the Island and mainland parcel to developer Jacob Held. Seeking town board[2] approval to construct a "highway" to facilitate Island access, Held dedicated land to the Town "for a highway from the main road to the lake," and Island property owners "offer[ed] to donate and dedicate all land required for said highway." The board authorized Held "to build roads in property heretofore dedicated to Town. And if built and approved by said Town Board; they would be accepted as Town roads." On the same day Wagner quitclaimed the mainland property to Held, Held quitclaimed it to another buyer, but excepted the portion he had dedicated to Summit for the "highway"—now Sugar Island Road.

¶6 A series of quitclaims of the roadway land to "the Public in General, Town of Summit" ensued, including by Held's heirs and executors of his estate

[2] The Village of Summit was the Town of Summit at that time.

after he died in 1928. By 1932, it had been quitclaimed several more times "[f]or the purposes of a highway" to confirm Held's parol dedication of the property. The deeds reiterated Summit's acceptance of Held's dedication of the land.

¶7 Buyers named Hagen bought the mainland property in 1943. The Hagens' attempted to curb the Islanders' use of the parking area, but a no-parking sign they erected was ignored and a barricade they placed across the entrance got toppled.

¶8 In 1955, Summit's attorney stated in a letter to the town board that even if Held initially intended the Road for the Islanders' exclusive use,[3] "the purpose of the road fail[ed]" due to the 1925 ***Breese*** decision, such that the west end of the Road remained "a dedicated town road." The attorney concluded that the Islanders "do not want it to be a town road because then the public could use it and they could not moor their boats at the end or park along the road," but they "now admit that they knew these facts all of the time."

¶9 In 1956, a sturdier Hagen barricade landed their dispute with the Islanders in court. The Islanders claimed their pattern of use entitled them to continue to use the now Hagen property as they had since 1928. The supreme court affirmed the grant of a prescriptive easement over the parking lot but twice noted that the Road was "a public road." ***Shellow v. Hagen***, 9 Wis. 2d 506, 508-09, 101 N.W.2d 694 (1960).

[3] When Held began selling the forty-four island lots in 1927, the recorded conveyances provided that the purchaser or grantee eventually would contribute 1/44th of the cost of building a "bridge and driveway," allowing the Islanders' predecessors mainland access to their island lots.

¶10 In 1962, the Islanders asked Summit for permission to make certain repairs to "this town road," and in 1966 applied to the Public Service Commission (PSC) for a permit to construct a private bridge between the island and the west shore of the lake. Summit responded that the Town would have to authorize changes affecting the Road's future utility as a public right of way because, being "dedicated to public use," it was in Summit's custody. The DNR, to which the PSC's water review functions transferred in 1967, denied the application because Summit owned the road approaching the proposed bridge and the Islanders had no riparian rights at that location.

¶11 In 1978, the DNR acquired the mainland parcel from the Hagens. Thus, in addition to jurisdiction over the lake, it held title to the properties on either side of the Road, including the parking area, which remained in use as a parking lot by the Islanders pursuant to their easement.

¶12 In the early 1990s, the DNR contacted the Islanders regarding a sign they erected seeking to prohibit access to the parking area. The DNR acknowledged the prescriptive easement, but said that the right to regulate public use rested with it as the owner. The DNR proposed an alternate sign, as it did not want the Islanders' "perception of their rights to 'grow with time.'"

¶13 When the DNR's sign led to increased public Road traffic and boat launch activity, Summit passed an ordinance in April 2016 instituting parking

regulations on the Road and reserving space for law enforcement vehicles in the lot. Upset by the impact on their lake access, the Islanders filed a declaratory judgment action seeking to prohibit Summit from enforcing the ordinance and to prohibit the public from using the boat launch. After a two-day evidentiary hearing in September 2016, the Honorable Maria Lazar granted a "compromise order" so as to maintain the status quo pending resolution of the matter.[4]

¶14 The Islanders moved for summary judgment. The Honorable William Domina denied the Islanders' motion, dismissed their claims, and granted summary judgment in favor of Summit and the DNR. The Islanders appeal.

¶15 "We review summary judgment decisions using the same standards and method as are applied by the circuit court." ***Pawlowski v. American Family Mut. Ins. Co.***, 2009 WI 105, ¶15, 322 Wis. 2d 21, 777 N.W.2d 67. "Under WIS. STAT. § 802.08(2) [2017-18],[5] a moving party is entitled to summary judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." ***Pawlowski***, 322 Wis. 2d 21, ¶15. A court may determine that a nonmoving party is entitled to summary judgment. Sec. 802.08(6); ***Seats, Inc. v. Nutmeg Ins. Co.***, 178 Wis. 2d 219, 231, 504 N.W.2d 613 (Ct. App. 1993).

[4] The ordinance would be null and void on November 1, 2016, if not reinstated.

[5] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

¶16 The Islanders did not support their motion with evidentiary material showing they were entitled to summary judgment. Instead, like the brief in support of their motion, counsel's oral argument was peppered with references to numerous[6] exhibits from the earlier injunction hearing. After again referring to an exhibit that the Islanders' counsel assumed the summary judgment court had reviewed, the court told him:

> You said that now a couple of times. I want to be very clear with you. I am not someone who goes through a record and tries to find stuff. I review motions. I review affidavits, but in the words of the Wisconsin Supreme Court this Court is not a dancing bear.[7] That means that it is not my obligation to try to find information that supports your argument. It is your obligation to present it to me, and the problem I have out of the gate with your motion is you have chosen to not make any reference to anything except what was filed during another hearing in front of another judge, and that is insufficient in terms of a request for summary judgment.
>
> I'm going to let you argue because this is important to all those people that are sitting behind you and to you as a property owner and I'm going to try to figure out what I can do to make sense out of this mess, but if you say again that I have reviewed something I'm going to cut you off if I haven't seen it. I don't know what you're talking about. I haven't looked at it, and I haven't looked at anything that you picked up so far.

¶17 Then, noting that the Islanders' summary judgment motion indicated that they "decline[d] to file, at this time, any affidavits or additional exhibits, but

[6] Over eighty exhibits were produced at the injunction hearing.

[7] *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978).

reserve[d] the right to file the same in connection with their Reply Brief," the court observed:

> I'm confused by that on a motion for summary judgment. That's not how I understand motions for summary judgment are to be brought.
>
> My understanding is you're to make assertions. There are affidavits connected in support of a summary judgment motion. I don't care that you filed it six months ago. I don't care that you litigated it in front of another judge. What I'm looking at are the materials that I have in front of me, and I am not going to go through a record and dig stuff out to try to support your claim. That's not my job. I expect you to do your job and I'll do mine. Now, I'm going to let you conclude your argument.

¶18 Affidavits or evidence are not absolutely required to support a motion for summary judgment, ***Tews v. NHI, LLC***, 2010 WI 137, ¶49, 330 Wis. 2d 389, 793 N.W.2d 860, but the moving party bears the burden of proving it is entitled to summary judgment, ***Grams v. Boss***, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980), and materials offered in support of the motion must be "evidentiary facts as would be admissible in evidence," WIS. STAT. § 802.08(3).

¶19 The Islanders' summary judgment motion did not meet that standard. The court had no obligation to sift through what the Islanders' counsel himself termed "a huge pile of papers" and "a big pile of exhibits" from a prior hearing. Its refusal to do so did not deprive them of due process, as they offhandedly contend. We need not address undeveloped assertions. *See* ***Kruczek v. DWD***, 2005 WI App 12, ¶32, 278 Wis. 2d 563, 692 N.W.2d 286 (2004).

¶20 That Held originally may have intended the Road to be "for a bridge and driveway" for the Islanders does not create a genuine issue of material fact. The issue of intent in common law dedication usually is resolved by the trier of fact. ***Cohn v. Town of Randall***, 2001 WI App 176, ¶7, 247 Wis. 2d 118, 633 N.W.2d 674. But where, as here, the grantor has long since passed away and the only evidence available to glean intent is documentary, we are in as good a position as the circuit court to make factual inferences. ***Id.*** Interpreting documentary evidence involves a question of law we review independently. ***Id.***

¶21 Record documents unmistakably show that the Road is the public property of Summit. In 1927, Held dedicated the Road to Summit and excepted the dedicated portion when he quitclaimed the property to the subsequent buyers. His heirs and executors again quitclaimed the roadway land to "the Public in General, Town of Summit" "[f]or the purposes of a highway."

¶22 Consistent with those documents, the 1960 ***Shellow*** decision stated that the road was public. The documents' mention, or lack thereof, of a bridge does not change the fact of the 1927 dedication and acceptance.[8] The Islanders note that Mrs. Hagen characterized the Road as "private" at a Town meeting. That does not

[8] The word "bridge" was not mentioned in any of the dedications or the deeds of the land to Summit. Wisconsin long has recognized that navigable waterways constitute public highways. ***A.C. Conn Co. v. Little Suamico Lumber Mfg. Co.***, 74 Wis. 652, 655, 43 N.W. 660 (1889). We conclude that choosing to use the term "highway" instead of "bridge" reflects the grantors' intent that Summit could accept the Road without building a bridge.

make it so. The Islanders have traveled the Road as members of the general public from the time they began purchasing their individual parcels on the Island. Summit's history of maintaining and policing the Road further points to the dedication to the public. *See* ***Cohn***, 247 Wis. 2d 118, ¶14.

¶23 That the parking area was private at one time likewise does not defeat summary judgment. The DNR now unarguably owns it. The Islanders are riparian owners of only their lots on Sugar Island, not of property on the mainland, even with their easement over the parking lot. *See* ***Berkos v. Shipwreck Bay Condo. Ass'n***, 2008 WI App 122, ¶¶16-17, 313 Wis. 2d 609, 758 N.W.2d 215 (holding that easement cannot grant riparian rights to nonriparian owner).

¶24 We also reject the Islanders' suggestion that they have gained ownership of the Road through adverse possession apparently because of using it as "a driveway" to get to the water's edge to enable them to boat to the Island. A party may acquire title to real property by showing that the party and/or its predecessors in interest adversely possessed the property for an uninterrupted period of twenty years. WIS. STAT. § 893.25(1). The use of the land must be "open, notorious, visible, exclusive, hostile and continuous, such as would apprise a reasonably diligent landowner and the public that the possessor claimed the land as his [or her] own." ***Pierz v. Gorski***, 88 Wis. 2d 131, 137, 276 N.W.2d 352 (Ct. App. 1979). The land must be "actually occupied" and either "[p]rotected by a substantial enclosure" or "[u]sually cultivated or improved." Sec. 893.25(2). The

party seeking to claim title through adverse possession bears the burden of proving the elements by clear and positive evidence. ***Peter H. & Barbara J. Steuck Living Tr. v. Easley***, 2010 WI App 74, ¶15, 325 Wis. 2d 455, 785 N.W.2d 631. All reasonable presumptions are made in favor of the true owner. ***Id.***

¶25 With only minimal discussion, the Islanders assert that the undisputed facts establish adverse possession against Summit's claim of superior rights to the roadway and boat launch area. Their belief or desire that the Road was private is insufficient. Further, they have not shown why it would be reasonable for us to presume that Summit is not the true owner of the Road.

¶26 Lastly, we address the DNR's role in this appeal. The Islanders' underlying case primarily sought a declaration about their rights in the Road. At summary judgment, only two of their eight requested declarations pertained to the DNR. They asked the court to declare that (1) the DNR must either "robustly" oppose Summit's interference with the Islanders' established patterns of parking, of mooring, launching, and storing boats, and of pier installation and usage or support Summit in obtaining governmental permits necessary to build a bridge and (2) the Islanders be allowed to continue the above-listed activities without Summit or DNR interference until Summit builds a bridge at its expense.

¶27 The DNR contended it should not be part of the lawsuit for two reasons. First, its ownership of the parking lot has not interfered with the Islanders'

right through the prescriptive easement to park there. Second, while also potentially a regulator, it has exercised no regulatory authority related to the Islanders' claims, as any existing piers were not maintained off the DNR's parking lot but were attached to the Road, which is Summit's. The summary judgment court agreed with the DNR and dismissed the claims against it by granting it summary judgment.

¶28 The Islanders now agree that the DNR is a bystander to the dispute, as it has neither endorsed Summit's positions nor taken or proposed any action against the Islanders. They thus concede that there currently is no justiciable issue vis-à-vis the DNR.

By the Court.—Order affirmed.

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