COURT OF APPEALS DECISION DATED AND RELEASED

MARCH 19, 1996

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

NOTICE

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

No. 95-2287

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

MICHAEL H. BAARTS
and LENNETTA F. BAARTS,

Plaintiffs-Respondents,

v.

BARBARA HAMMERBERG,

Defendant-Appellant,

PATRICIA MCCOY, Individually,
and d/b/a CENTURY 21 OLYMPIA REALTY,

Defendant-Respondent,

JANIE B. CROKER,

Defendant.

APPEAL from a judgment of the circuit court for Outagamie County: JOSEPH M. TROY, Judge. *Modified and, as modified, affirmed and cause remanded*.

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Barbara Hammerberg appeals a summary judgment declaring that Michael and Lennetta Baarts, their successors and assigns, have an easement for ingress and egress across property now owned by Hammerberg. The trial court concluded that documents involved in the property transaction were ambiguous and that, in light of the parties' circumstances at the time of the transaction, no reasonable jury could find that the Baartses' predecessors in title intended to give away the only driveway that provided access to their house. In the alternative, the court concluded that the Baartses were entitled to an easement by necessity. Because we conclude that the record establishes an easement by implication, we modify the judgment to reflect that conclusion and remand the cause for the trial court to create a new judgment consistent with this opinion.

The Baartses' predecessors in title were Hammerberg's mother-in-law and father-in-law. Their house is located on the top of a twenty-foot cliff or ledge. In 1969, Barbara and Barry Hammerberg and Barbara's in-laws constructed a shared, winding driveway that traversed the ledge on the in-laws' 4.44 acre lot. In 1986, Barbara and Barry divorced and Barbara was awarded the property interests involved in this dispute. In 1988, Hammerberg and her former in-laws exchanged deeds pursuant to a sales agreement substantially reconfiguring the lot lines. In addition to selling Hammerberg their half interest in property surrounding the lots, the former in-laws reduced the size of their lot to three acres and redrew the boundaries on three sides. As a result of the sale, the part of the driveway that traverses the ledge was deeded to Hammerberg. Hammerberg contends that her former in-laws sold their right to use the driveway, the only existing means of access to their residence.

Although this matter was argued to the trial court and on appeal as a case involving alleged ambiguity in the deeds or the existence of an easement of necessity, we conclude that the correct theory of law to be applied is that of easement of implication. Although an easement by implication and an easement of necessity are similar, they are legally distinguishable. An easement of necessity arises where the owner severs a land-locked portion of his property by conveying a parcel to another. It exists only where one cannot reach the highway over his own property. *See* ***Backhausen v. Mayer***, 204 Wis. 286, 288, 234 N.W. 904, 905 (1931). An easement by implication, on the other hand, arises

where there has been a separation of title, a use before separation took place that continued so long and was so obvious or manifest as to show that it was meant to be permanent, and it must appear that the easement is necessary to the beneficial enjoyment of the land granted or retained. *See* ***Bullis v. Schmidt***, 5 Wis.2d 457, 460-61, 93 N.W.2d 476, 478 (1958). Under these circumstances, the law implies an easement based on the assumed intention of the parties at the time the property was severed, even though they did not express their intentions. 1 THOMPSON, REAL PROPERTY § 390 at 630 (perm ed.).

Here, because the closely related issue of easement by necessity arose in the trial court, the parties have provided this court with all of the information necessary to determine that an easement by implication exists. The property transaction involved both parties deeding property to the other and reconfiguring their boundaries. The undisputed evidence shows that the only access to the former in-laws' property was by the driveway that existed for nineteen years, and it was obvious that the driveway was meant to be permanent. At the time of the sale, Hammerberg's former in-laws were elderly, her ex-mother-in-law confined to a wheelchair. Because there was no other means of traversing the twenty-foot ledge, use of the driveway was necessary to the beneficial enjoyment of that lot. Under these circumstances, in the absence of a specific statement disclaiming any desire to retain the driveway easement, the law will imply that the parties intended that the former in-laws would retain an easement over the driveway.

In ***Bullis***, the court concluded that sufficient necessity was not shown where the expenditure of $490 in 1958 could have remedied the problem. Here, the estimated cost of creating a new driveway to traverse the ledge is $12,000 to $42,000, the lower figure relying on free fill that Hammerberg offered.[1] We conclude that the expense of creating a new driveway is sufficient to establish that using the existing driveway was necessary to the beneficial enjoyment of the land even if the lower figure is used. On remand, the trial court shall enter an amended judgment awarding the Baartses an easement by implication over the driveway.

---

[1] The estimate of $28,800 for fill does not differentiate between the cost of the material and the cost of delivering the material to the appropriate location.

By the Court.—Judgment modified and, as modified, affirmed and cause remanded.

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