COURT OF APPEALS
DECISION
DATED AND FILED

September 5, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2012AP1703
2012AP2812

Cir. Ct. No. 2007CV4

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

DONALD L. BRANDL AND PATRICIA J. BRANDL,

PLAINTIFFS-APPELLANTS,

V.

CHRIS D. HOWER, DEBORAH J. HOWER, DALE O. PINO, RANDALL D. BLASK, LORIS A. BLASK, PAUL BECKER, THOMAS M. HAWLEY AND KIRIN B. HAWLEY,

DEFENDANTS-RESPONDENTS.

APPEALS from orders of the circuit court for Sawyer County: ROBERT E. EATON, Judge. *Affirmed*.

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

¶1 BLANCHARD, P.J. This case involves an express easement over a private road that provides lake access. The easement runs across five adjoining

lots and terminates at the property line of a sixth lot. The owners of one of the lots, Donald and Patricia Brandl, appeal circuit court orders resolving several disputed issues relating to the easement.

¶2 The Brandls raise five issues on appeal. They argue that the circuit court erred by: (1) concluding that lot owner Paul Becker has a right to use the easement; (2) determining the exact location of the easement to be different from that depicted on a 1985 certified survey map; (3) concluding that each lot owner has the right to use the entire length of the lake access road; (4) concluding that certain existing structures on or near the easement need not be removed; and (5) requiring that dominant estate owners provide two weeks' notice to servient estate owners before performing extraordinary maintenance on the easement. We reject each of the Brandls' arguments and affirm the circuit court's orders.

BACKGROUND

¶3 We have been unable to locate a document in the record that clearly shows all pertinent aspects of the six lots, the lake access road, and the easement over that road. However, we gather from the briefing and the record, including various exhibits, that the following facts are undisputed.

¶4 The series of six lots abuts a lake, with the lake lying to the north. If the lots were numbered from one to six, running east to west, the Brandls own number five and respondent Becker owns number six, the westernmost lot. Additional respondents include all but one of the other lot owners.[1]

[1] Respondents Becker, Thomas Hawley, and Kirin Hawley filed a combined response brief. Respondents Chris Hower, Deborah Hower, Dale Pino, Randall Blask, and Loris Blask filed a separate combined response brief. Because there appear to be no disputes among the (continued)

¶5 The lake access road and easement run from a town road at the easternmost lot to the eastern property line of the westernmost lot. In other words, the lake access road and easement run from an entry point at the easternmost lot to the boundary line between the Brandls' lot and Becker's lot. The road as it has actually been traveled runs roughly parallel to, and very near, the shoreline. The parties are able to access the dwellings on their lots using a separate road that runs along the southern edge of their lots, further from the lakeshore.

¶6 The Brandls initiated the underlying action. They sought a variety of forms of relief, including declaratory relief clarifying the lot owners' rights relating to the easement. The parties were unable to reach agreement on a number of issues, and the circuit court held a bench trial that led to a series of orders resolving against the Brandls several disputed issues. The Brandls appealed.

¶7 We reference additional facts, including pertinent aspects of the circuit court's reasoning, as needed in discussion below.

DISCUSSION

¶8 "An easement 'is a permanent interest in another's land, with a right to enjoy it fully and without obstruction.'" ***Konneker v. Romano***, 2010 WI 65, ¶25, 326 Wis. 2d 268, 785 N.W.2d 432 (citations omitted). The "'dominant estate' enjoys the privileges granted by the easement, and the 'servient estate' permits the exercise of those privileges." ***Id.***

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respondents, we refer to them collectively as the "respondent lot owners" or simply the "respondents."

¶9 There are many types of easements, including express easements, prescriptive easements, easements by necessity, and easements by implication. ***AKG Real Estate, LLC v. Kosterman***, 2006 WI 106, ¶15 n.4, 296 Wis. 2d 1, 717 N.W.2d 835. The easement we address here is an express easement, that is, an easement created by a written grant or reservation of property rights. *See* ***id.***, ¶15 (equating "express easements" with "easements by written grant or reservation").

¶10 The Brandls present five issues, listed above, which we now address in turn.

1. Becker's Right to Use the Easement

¶11 The Brandls argue that the circuit court erred in concluding that Becker has a right to use the easement. As explained in more detail below, the court concluded that the deeds are ambiguous on this issue and resolved that ambiguity based on evidence extrinsic to the deeds.

¶12 The question of whether a deed is ambiguous is a question of law for de novo review. ***Konneker***, 326 Wis. 2d 268, ¶23. We begin by examining any pertinent terms in the deeds, and if the deeds are unambiguous, we proceed no further. ***Grygiel v. Monches Fish & Game Club, Inc.***, 2010 WI 93, ¶20, 328 Wis. 2d 436, 787 N.W.2d 6. If the deed terms are ambiguous, then the court may resort to extrinsic evidence to determine the intent of the parties. ***Id.*** The intent behind ambiguous deed terms presents a question of fact. ***Konneker***, 326 Wis. 2d 268, ¶23. We uphold circuit court fact findings unless those findings are clearly erroneous. ***Lessor v. Wangelin***, 221 Wis. 2d 659, 667, 586 N.W.2d 1 (Ct. App. 1998). In addition, when the circuit court acts as fact finder, as here, the court is the final arbiter of witness credibility. *See* ***id.*** at 668.

¶13 As an initial clarification, we note that most of the pertinent deeds make reference to a 1985 certified survey map or a 1991 certified survey map. It is apparent from the parties' arguments that they agree that the maps are not extrinsic evidence but instead should be considered to be among the terms of the deeds for purposes of determining whether the deeds are ambiguous. Thus, we consider the maps referenced in the deeds to be deed terms.

¶14 The circuit court concluded that a 1962 deed to the Becker lot reserved an easement for the Becker lot's use, but that this deed is ambiguous as to whether the easement runs over the lake access road. The 1962 deed obviously does not reference the survey maps that post-date it.[2] The court also concluded that other lot owners have deeds that are ambiguous as to Becker's right to use the easement because those deeds reference a "non-exclusive" easement over the lake access road without specifying which lots have a right to use that easement.

¶15 The circuit court resolved these ambiguities based on the testimony of Arthur Moe. Moe testified, in part, as follows. The Becker family previously owned all of the property that now constitutes the six lots, and the lake access road had existed on that property since the 1930s. From 1965 to 1991, however, Moe owned the property that now constitutes the five lots east of the current Becker lot. During the years that Moe owned that property, the owner of the Becker lot regularly traveled on the lake access road. Moe commissioned the 1985 and 1991 certified survey maps. When he had his property surveyed and then subdivided it into the five lots and sold those lots, he intended that the Becker lot have an

[2] It appears from the trial exhibits that the court's reference to the 1962 deed may in fact have been intended as a reference to a 1960 deed. This discrepancy is not material to our decision.

easement over the lake access road. Based on this testimony, the circuit court found that Moe intended that the owner of the Becker lot have a right to use the easement over the lake access road.

¶16 The Brandls do not argue, and could not seriously argue, that the circuit court made an erroneous fact finding in crediting Moe's testimony to establish his intent as to the Becker lot. Rather, the Brandls' principal argument is that there is no ambiguity in the deeds, and therefore, the court should not have considered Moe's testimony. The Brandls rely on three aspects of the deeds.

¶17 First, the Brandls point out that the 1985 survey map shows that the western terminus of the lake access road and easement is at the Brandl-Becker property line. This terminus is undisputed. In the Brandls' view, this is a clear indication that the easement was not intended for use by the Becker lot's owner. We disagree that this is a clear indication. Obviously, the owner of the Becker lot has the right to pass over his or her own lot, regardless of any easement. Thus, as a matter of basic logic the easement here would not need to extend into the Becker lot in order in indicate an intent that the Becker lot's owner be able to use it. The Brandls fail to explain why we should conclude that it is not at least as reasonable to construe the terminus as indicating that the owner of the Becker lot may use the easement.

¶18 Second, the Brandls point out that the 1985 survey map depicts only the lots east of Becker's lot, and states that "[*s*]*aid lots* are subject to the joint use of the … Lake Access Road as shown." (Brandls' emphasis.) The Brandls argue that this language clearly indicates that the owner of the Becker lot has no easement rights over the road because Becker's lot is not one of "said lots." Even assuming, without deciding, that this is one reasonable interpretation of the "said

lots" language, it is not the only reasonable interpretation. The statement does not unambiguously show that those lots are the *only* lots with such rights, at least not when the map as a whole is considered. As already suggested, the terminus can be reasonably interpreted as indicating that the lot to the west of the Brandls' lot, although not depicted on the map, has a right to use the lake access road. In addition, the map contains an additional provision stating that "said lots" are subject to all "easements and reservations of record."

¶19 Third, the Brandls assert that the deeds to the Becker lot do not reference the lake access road. We reject this argument because the Brandls rely only on deeds dating to 1972. They fail to address the circuit court's determination that the Becker deed from 1962 (or 1960, as footnoted above) reserves an easement and is ambiguous as to whether that easement is over the lake access road. The Brandls also fail to develop an argument why the silence as to any easement in subsequent deeds would necessarily dictate a result in their favor. If anything, our research suggests that the contrary may be true. *See* ***Krepel v. Darnell***, 165 Wis. 2d 235, 245, 477 N.W.2d 333 (Ct. App. 1991) ("An easement passes by a subsequent conveyance of the dominant estate without express mention in the conveyance.").

¶20 The Brandls appear to make an alternative, secondary argument that, even if the deeds are ambiguous, Becker does not have an easement over the lake access road because Wisconsin has "rejected the rule of implied easements" and because Becker does not "need" an easement over the lake access road in order to access his lot.[3] This argument misses the mark. The circuit court plainly

[3] "An easement by implication arises when there has been a 'separation of title, a use before separation took place which continued so long and was so obvious or manifest as to show (continued)

concluded that Becker has an express easement, that is, an easement by written grant or reservation. The circuit court did not conclude that Becker has an implied easement or easement by necessity. Indeed, in other portions of their arguments, the Brandls acknowledge that the court concluded that Becker has an easement "by grant." If there is some reason why the rules for easements by implication or by necessity should matter here, the Brandls fail to sufficiently develop this part of their argument to explain.

2. Location of the Easement

¶21 The Brandls argue that the circuit court erred in determining the easement's location, because it is different from the location shown on the 1985 survey map. To be clear, there is no dispute as to the easement's easternmost or westernmost point. Rather, the parties' dispute is limited to whether the easement, as it runs east to west, should generally be over the traveled portion of the roadway as the circuit court determined, or instead in some other location.

¶22 The circuit court made its determination after concluding that the easement is not delineated by metes and bounds, and that it is unclear whether the 1985 and 1991 survey maps depict the easement in the same location. The court also found that, if the easement were located as shown in the 1985 map, anyone

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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.'" ***Schwab v. Timmons***, 224 Wis. 2d 27, 36-37, 589 N.W.2d 1 (1999) (citation omitted). An easement by necessity is established when the party seeking the easement proves "(1) common ownership or unity of title of the two parcels; and (2) that the property is 'landlocked,' meaning that a piece of land is surrounded by land belonging to other persons so that it cannot be reached by a public roadway." ***Richards v. Land Star Group, Inc.***, 224 Wis. 2d 829, 845-46, 593 N.W.2d 103 (Ct. App. 1999).

using the easement would lose the advantage of the cleared, traveled portion of the existing roadway.

¶23 "When the location of an easement is not defined, the court has the inherent power to affirmatively and specifically determine its location, after considering the rights and interests of [the] parties." ***Spencer v. Kosir***, 2007 WI App 135, ¶13, 301 Wis. 2d 521, 733 N.W.2d 921. This determination as to the location of an easement is ordinarily reviewed for an erroneous exercise of discretion. ***Id.*** However, the Brandls' arguments on this topic are related to the threshold question of whether the "location of [the] easement is not defined" in the deed documents, *see* ***id.***, as opposed to the latter question of whether the circuit court reasonably exercised its discretion to determine the easement's location. Further, the Brandls' arguments are all based on the terms of the deeds. We therefore apply de novo review. *See* ***Konneker***, 326 Wis. 2d 268, ¶23 (both the construction of unambiguous deed terms and the question of whether a deed is ambiguous present issues of law).[4]

¶24 In their principal brief, the Brandls focus on the 1985 map and repeatedly assert that the location of the easement is clear because it is described by metes and bounds on that map. We reject this argument because we agree with the circuit court and the respondent lot owners that there is not a metes and bounds description of the easement on the 1985 map.

[4] Neither the Brandls nor the respondents rely on testimony by Moe in their arguments regarding the location of the easement. We take this as an implicit agreement that Moe's testimony does not resolve any ambiguity in the deeds regarding the location of the easement.

¶25 In their reply brief, the Brandls appear to make a subtle shift in position. They suggest that, even if the 1985 map lacks a metes and bounds description, it shows enough detail in order to derive a metes and bounds description. The Brandls also address for the first time in their reply brief the circuit court's conclusion that, when both the 1985 and 1991 maps are considered, it is unclear whether the maps depict the easement in the same location. These arguments come too late and we reject them on this basis. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998) (court need not address arguments raised for the first time in a reply brief).

¶26 Moreover, even if we were to consider the Brandls' untimely arguments, we would reject them. Those arguments are insufficient to persuade us that the circuit court was wrong to conclude that the easement's exact location is not clear on the survey maps. The Brandls rely on statements in the 1991 survey map that might be read as incorporating the 1985 map.[5] However, assuming without deciding that the 1991 map incorporates the 1985 map, this does not explain whether the 1985 map is sufficiently detailed to conclusively establish the easement's location, absent a metes and bounds description. Without further explanation from the Brandls, we decline to conclude that the 1985 map is clear as to the easement's exact location.

[5] The 1991 survey map statements on which the Brandls rely are the statement that the lots on the 1991 map are "subject to any easements or restrictions of record" and a statement that the "existing road easement …. are [sic] to stay in place."

3. Lot Owners' Right to Use the Entire Length of the Road

¶27 The Brandls argue that the circuit court erred in concluding that all the lot owners have the right to use the entire length of the lake access road.[6] The Brandls make a number of assertions that collectively equal a concession that the deeds are ambiguous on this point. Specifically the Brandls assert that: (1) the pertinent deeds reference the 1985 survey map, which refers to "joint use" of the lake access road; (2) the map does not identify which owners are dominant or servient in respect to which other owners; and (3) testimony by Moe is relevant to show the purpose of the easement. The Brandls argue that allowing lot owners to use portions of the road to the west of each respective lot does not serve the easement's purpose, because such uses would not facilitate access to the lake.

¶28 The respondent lot owners do not appear to dispute that the purpose of the easement is to facilitate lake access, and they agree that the deeds are ambiguous. However, they argue that the deeds' reference to "joint use," along with a different part of Moe's testimony, support the circuit court's conclusion. We agree.

¶29 As to the term "joint use," the parties provide no authority, and our admittedly non-exhaustive research has revealed no authority, explaining whether this language should generally be construed to mean that, when there are three or more easement holders, each has the right to use the entire easement. However, it

[6] We take this issue out of order from the presentation in the Brandls' briefing because it depends on some of the same aspects of the deeds already discussed for purposes of the first and second issues. Separately we note that this issue directly affects only the lot owners east of Becker because Becker's right to use the easement would necessarily include use of the entire easement, even under the Brandls' theory.

seems apparent that the term "joint use" supports the circuit court's conclusion. The term either creates ambiguity on this point or suggests that all easement holders have the right to use the entire easement. Nothing about the term "joint use," without more, suggests that an easement holder has the right to use only part of the easement.

¶30 As to Moe's testimony, the portion of that testimony on which the respondent lot owners rely is as follows:

> THE COURT: When you recorded the certified survey map [subdividing Moe's property into the non-Becker lots] with the easement noted …
>
> [MOE]: Um-hum.
>
> THE COURT: ..[.] [W]ho was supposed to be able to use the easement?
>
> [MOE]: An easement is for everybody to use it. That's what I understood under the law. At least that's what I was told by the surveyor, an easement gives access to everybody or anybody.

Further, Moe separately testified in regard to the easement that he expected that all the lot owners would be good neighbors, would "help out each other," and would "[not] fight with each other." This testimony could support more than one reasonable inference as to Moe's intent. We conclude, however, that one reasonable inference is the one that the circuit court drew, namely that Moe intended for all of the lot owners to use the entire length of the lake access road.

¶31 What remains is the Brandls' argument that the circuit court's conclusion does not serve the easement's purpose. We disagree with the Brandls that the purpose of the easement cannot be served by allowing all of the lot owners to use the entire length of the lake access road. The Brandls appear to interpret the easement's purpose of "lake access" narrowly, to mean nothing more than each lot

owner's ability to drive a vehicle to and from the shoreline on that owner's lot. However, the purpose of "lake access" could be reasonably viewed more broadly as including a lot owner's ability to install or remove a dock or boat lift, to maneuver a relatively large vehicle or a boat trailer along the lake access road, or to otherwise enjoy the use of that owner's lakefront property. It is not difficult to see how such activities might be facilitated by a lot owner's occasional use of portions of the easement west of that owner's lot.[7]

¶32 The Brandls provide no convincing reason to conclude that the purpose of the easement is limited to the narrower interpretation of "lake access," meaning only that access strictly necessary for a lot owner to drive a vehicle to and from the shoreline on that owner's lot. The only support they provide is a different part of Moe's testimony in which he stated that the easement was "to get down to the lake." This testimony, like Moe's other testimony, may support more than one reasonable inference, but the circuit court could have reasonably inferred from it that Moe intended the purpose of the easement to be broader than the Brandls suggest. Moe conveyed the idea that the purpose was to allow owners to enjoy the lake through use of the easement, and did not clearly state that this enjoyment was limited to an owner's ability to drive a vehicle to and from the shoreline on that owner's lot.

4. Existing Structures

¶33 The Brandls argue that the circuit court erred in concluding that the respondent lot owners need not remove various existing permanent and temporary

[7] Indeed, the briefing and record, including photographic exhibits, show that lot owners in fact engage in such activities as installing docks or boat lifts and using boats.

structures alleged to be intruding on the easement. The Brandls assert that these structures include stone steps, concrete slabs, a cabin addition, a deck, a fire ring, stair steps, retaining walls, boats, docks, boat lifts, and piled snow. They argue that the existing structures impede their ability to use the easement and render the easement too small for emergency vehicles to pass over it. We reject the Brandls' argument for two related reasons.

¶34 First, the Brandls' more detailed arguments appear to assume that the easement is located not where the circuit court determined but instead as shown on the 1985 survey map. The Brandls' more detailed arguments therefore fail to make apparent to us how or why any structure might encroach on the Brandls' ability to use the easement in the location determined by the circuit court.

¶35 Second, the circuit court made implicit fact findings that the structures do not encroach into the easement in a way that impedes the Brandls' use of it. The Brandls fail to develop an argument showing that this fact finding is clearly erroneous. On the contrary, some of the evidence they cite *supports* this fact finding, including evidence that other lot owners have "no trouble" driving a large sport utility vehicle on the traveled portion of the easement. While there may be other, contrary evidence to support the Brandls' arguments, the presence of such evidence is not a reason to overturn the circuit court's fact findings. *See* ***Royster-Clark, Inc. v. Olsen's Mill, Inc.***, 2006 WI 46, ¶12, 290 Wis. 2d 264, 714 N.W.2d 530 (when reviewing fact findings, appellate courts search the record for evidence supporting the circuit court's decision, not for evidence opposing it).

5. Notice Before Performing Extraordinary Maintenance

¶36 The Brandls' final argument is a challenge to the circuit court's determination that a dominant estate owner must provide a servient estate owner

with at least two weeks' notice before undertaking any "extraordinary maintenance" on the easement. The circuit court defined "extraordinary maintenance" as including but not limited to the "removal of trees" and the addition of gravel.

¶37 There is no dispute that the deeds are silent on the issue of easement maintenance and that such maintenance is generally the responsibility of the dominant estate in such a situation. *See* ***Koch v. Hustis***, 113 Wis. 599, 604, 87 N.W. 834 (1901) ("As a general proposition, the owner of the easement upon another's land is bound to make all necessary repairs, and may enter for that purpose at all reasonable times."). The dispute is limited to whether the circuit court reasonably exercised its discretion in imposing the two-week notice requirement.[8]

¶38 The Brandls do not argue that the court was without authority to impose a notice requirement of any kind. Instead, they question the length of the notice requirement the court imposed, arguing that it is impractical and interferes with the dominant estate owners' "right to enjoy [the easement] fully and without obstruction." *See* ***Krepel***, 165 Wis. 2d at 244. They offer the following example in support: If a "strong wind causes a tree limb to block a portion of the easement, the easement in theory could be unusable for two weeks."

[8] The Brandls do not address our standard of review for the notice requirement. The respondent lot owners' arguments assume that we should apply the discretionary standard of review. The Brandls do not suggest otherwise in their reply, and we take this as a concession that the discretionary standard is appropriate. Moreover, given our reasoning for rejecting the Brandls' limited argument on this final issue, we conclude that it would not matter which standard of review we applied.

¶39 The Brandls' example does not persuade us that the two-week notice requirement is unreasonable. The circuit court's reference to "tree removal" is most reasonably read as referring to the removal of standing trees that encroach on the easement over time, not to isolated, unexpected events such as a downed tree or tree limb that suddenly blocks all access to the easement and requires immediate attention for safety or other pressing reasons. The Brandls' example would seem to stand for an argument against any notice requirement whatsoever, but the Brandls provide no authority for the proposition that courts may not fashion reasonable notice requirements in this context.

CONCLUSION

¶40 For all of the reasons stated, we affirm the circuit court orders that denied the Brandls the relief they sought relating to the easement.

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.