COURT OF APPEALS
DECISION
DATED AND FILED

January 14, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 97-0075

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

ERVIN MERTEN, PAUL MERTEN AND EARL MERTEN,

PLAINTIFFS-APPELLANTS,

ALITA MERTEN,

PLAINTIFF,

V.

CARL HOLZER, TERRANCE J. SCHWALLER, BRIAN STEINHAUS AND PETER KLABACKECK,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Sheboygan County: JOHN B. MURPHY, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Anderson, JJ.

PER CURIAM. Ervin, Paul and Earl Merten appeal from a judgment disposing of a dispute relating to a way of necessity over their property for Carl Holzer, Terrance J. Schwaller, Brian Steinhaus and Peter Klabackeck (hereafter Holzer).[1] We affirm.

In October 1989, the Mertens sued Holzer, an owner of neighboring landlocked property, claiming that Holzer had slandered the Mertens' title to their property by recording an "Affidavit as to Way of Necessity" (affidavit) across the entire Merten farm. The Mertens sought a declaration of Holzer's rights, if any, to the way of necessity across their property, removal of the affidavit from the public records and preclusion of Holzer's future use of the way of necessity. In his answer, Holzer affirmatively alleged the existence of a way of necessity across the Mertens' property and counterclaimed for a declaration of his right in the way of necessity across the Mertens' property.

At the conclusion of Paul Merten's testimony in an October 1990 trial to the court, the court called counsel into chambers and the parties thereafter entered into negotiations regarding their dispute. When proceedings resumed on the record, the court noted that the parties "have apparently reached an agreement." The court then stated: "Based upon the agreement of the parties, it is the order of this Court that a way of necessity, as that term is set forth in the case of ***Ludke v. Egan***, 87 Wis.2d 221, [274 N.W.2d 641 (1979)] be created

[1] Despite being ordered to do so, the respondents did not file a respondents' brief. Therefore, this appeal was submitted for decision without benefit of a respondents' brief. Notwithstanding the respondents' failure to brief this appeal, this court declines to summarily reverse the trial court. *See* RULE 809.83(2), STATS.

across the plaintiffs' [Mertens'] parcel of land."[2] The court described the location of the way of necessity and stated that it would be a continuing means of access for Holzer. The court ruled that vehicles could traverse the way of necessity to remove firewood or slain deer. The court anticipated that some details of the parties' agreement would have to be worked out in the future within the spirit of their agreement in court that day. The court ordered the affidavit removed from the public records. Both attorneys agreed that the court had accurately stated the parties' agreement; Paul Merten also acknowledged his understanding of the court's order. The parties were unable to agree on the proposed orders and judgment submitted to the trial court.

In April 1991, the Mertens filed a motion to reconsider the court's October 1990 ruling on the grounds that the parties never had a "meeting of the minds" regarding the details of the October 1990 access agreement and had been unable to reach an agreement (in the form of a proposed order) in the intervening months. In his affidavit in support of the motion, Paul Merten stated that notwithstanding his statement to the court that its recitation of the parties' agreement was accurate, he was not fully aware of all of the details of the negotiated agreement, did not expect to be bound by the trial court's October 1990 oral ruling, and expected to be able to review and consider a final agreement once it was reduced to writing. Earl Merten's affidavit in support of the motion stated that he did not intend to agree to a resolution of the access dispute during the October 1990 court hearing.

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[2] A way of necessity typically arises where a landlocked portion of property is conveyed to another. The law recognizes a way of necessity in the grantee over the land retained by the grantor. *See* ***Ludke v. Egan,*** 87 Wis.2d 221, 229-30, 274 N.W.2d 641, 645 (1979).

Merten's reconsideration motion was heard in February 1992. The court referred to the transcript of the October 1990 hearing and found that it entered an oral order based upon the parties' agreement after negotiations. The court found that the attorneys and Paul Merten were satisfied with the court's recitation of the parties' agreement. The court intended the parties to heed its oral order.

On its own motion, however, the court clarified portions of its October 1990 order permitting vehicle access and stated that the way of necessity runs with the ownership of Holzer's property. In November 1996, a judgment was entered based upon the court's rulings in October 1990 and February 1992. The judgment vacated the Holzer affidavit and granted Holzer a way of necessity for access on foot and by vehicle under certain conditions.

On appeal, the Mertens argue that the parties did not reach an agreement in October 1990 due to: (1) Paul Merten's equivocal response to the trial court's inquiry whether it had properly stated the parties' agreement and (2) the subsequent exchange of proposed orders and correspondence between counsel indicating points of dispute. Merten also cites the trial court's clarification of its oral order as proof that the parties did not agree on the essential details regarding use of the way of necessity.

We need not reach the issues as framed by the Mertens because we conclude that this appeal may be disposed of on other grounds. *See* ***State v. Waste Management of Wis., Inc.,*** 81 Wis.2d 555, 564, 261 N.W.2d 147, 151 (1978).

Common law motions for reconsideration permit a circuit court to correct an erroneous ruling. *See* ***Fritsche v. Ford Motor Credit Co.,*** 171 Wis.2d

280, 294-95, 491 N.W.2d 119, 124 (Ct. App. 1992).[3] Here, however, there was no erroneous ruling to correct.

At the reconsideration hearing, the trial court found that the essentials of the agreement were set forth and agreed to in October 1990 and that only extraneous details were left open, *e.g.,* use of the way of necessity for hunting, wood removal and vehicular access. The trial court clarified those points at the February 1992 hearing. However, the trial court's clarification did not mean that the parties did not have a meeting of the minds at the October 1990 court trial. Counsel and Paul Merten agreed with the court's recitation of the parties' agreement. That the parties could not reduce their agreement and the court's order to writing does not mean that the trial court erred in refusing to reconsider its oral ruling.

By the Court.—Judgment affirmed.

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

[3] We need not decide whether the Mertens sought reconsideration under § 806.07, STATS.