COURT OF APPEALS DECISION DATED AND FILED

May 21, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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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. 97-2399

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

LORRAINE SCHRAM,

PLAINTIFF-RESPONDENT,

V.

BARBARA F. ADAMS,

DEFENDANT-APPELLANT,

VALLEY BANK SOUTHWEST,
N/K/A M&I BANK SOUTHWEST,

DEFENDANT.

APPEAL from a judgment of the circuit court for Richland County: KENT C. HOUCK, Judge. *Affirmed.*

Before Eich, C.J., Vergeront and Deininger, JJ.

EICH, C.J. While, as Robert Frost observed, "[g]ood fences make good neighbours,"[1] abandoned alleys, apparently, do not.

Lorraine Schram and Barbara Adams own adjacent properties in the Village of Lone Rock. Their lots, as platted, are separated by an alley. The alley was never developed or opened, however, and the village eventually abandoned the right-of-way, awarding Adams and Schram ownership of the vacated land extending to the alley's center line. Because the actual measurements of the block in which the lots are located differed by four or five feet from the measurements shown on the plat, a dispute soon arose over the vacated land and, eventually, Schram sued Adams, claiming that she was encroaching on Schram's property.

The surveyors retained by the parties put forth differing methods of ascertaining the location of the vacated land and apportioning it. The trial court adopted Schram's surveyor's method and granted judgment in her favor. The effect of the court's ruling was to divide the excess footage evenly between Schram and Adams. Adams appeals, maintaining that, as her surveyor testified, the alley "ran off-center" through the block and the additional footage was located on her side. She argues that the trial court erred in its ruling because her surveyor's method is the only legally accepted means of dividing land in such circumstances. We disagree and affirm the judgment.

The plat shows the block in which the lots are located to be 300 feet wide; the lots are each 140 feet wide, and a 20-foot alley separates them. Both parties' surveyors, however, found that the actual width of the block was slightly more than 300 feet. Schram's surveyor, Greg Jewell, measured it as 306 feet;

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[1] ROBERT FROST, *Mending Wall, in* NORTH OF BOSTON 11, 13 (1914).

Adams's surveyor, James Logan, found it to be 304 feet. The question for the trial court was how to apportion the extra four to six feet between the parties, and the answer first depends on the true location of the alley.

Logan testified that the center line of the vacated alley should be determined by considering evidence of occupation and use of the Schram and Adams properties and of the alley's conformity with alleys laid out in other blocks in an adjacent plat. From this evidence, he concluded that the alley ran off-center through the block and the excess footage was on Adams's side of the alley. Jewell's method, which he called "proportioning," was to determine the actual exterior boundaries—which he did by locating three of the four corner monuments—and then to divide the excess footage equally between the parties. Treating the issue as "a dispute between two surveying methods," the trial court concluded that Schram's position should prevail because Jewell based his survey on the plat itself—which the court found to be unambiguous—rather than on the extrinsic information Logan relied on—and granted judgment accordingly.

A trial court may, in its discretion, adopt the survey method of one expert over another. ***Perpignani v. Vonasek,*** 129 Wis.2d 478, 484, 386 N.W.2d 59, 63 (Ct. App. 1986), *rev'd on other grounds,* 139 Wis.2d 695, 408 N.W.2d 1 (1987). In ***Perpignani*** we said, "In the absence of a showing that ... [one survey] method is the only one recognized in surveying practice and is the only result possible, it is within the province of the trial court to determine the weight and credibility of the testimony of the[] … expert witnesses and to choose which method to follow." ***Id***. Thus, a trial court's choice of surveying methods in a boundary dispute will be affirmed if "it is based upon a proper view of the law." ***Perpignani,*** 139 Wis.2d at 712, 408 N.W.2d at 8 (citation omitted).

It is a rule of long standing in Wisconsin that when a plat contains either more or less land than originally indicated, the excess (or the deficiency) is to be divided equally among the lot owners in proportion to their frontages.

> This court has repeatedly held, in effect, that where a piece of land is subdivided into lots, and a plat of the subdivision [is] recorded, and the actual aggregate frontage of such lots is *less* than is called for by the plat, the deficiency must be divided among the several lots in proportion to their respective frontage, as indicated by the plat. The same principle maintains where the actual measurements are in excess of the dimensions specifically designated upon the plat, as in the case of a deficiency.

Pereles v. Magoon, 78 Wis. 27, 31, 46 N.W. 1047, 1049 (1890) (citations omitted). The rule—which the cases describe as "apportionment"—has continuing vitality in Wisconsin. *See* ***Van Deven v. Harvey,*** 9 Wis.2d 124, 130, 100 N.W.2d 587, 590 (1960); *see also* ***Pavela v. Fliesz,*** 26 Wis.2d 710, 715, 133 N.W.2d 244, 247 (1965).

Adams argues, however, that the apportionment rule is inappropriate in this case as a matter of law, and that the trial court's failure to consider her surveyor's "occupational" and other evidence requires reversal. According to Adams, the cases hold that occupational evidence is "preferred to measurements" in this case. We agree with Schram, however, that the cases are inapposite inasmuch as they all involved situations in which the plat dimensions were grossly erroneous and no monuments or markers existed from which accurate

measurements could be obtained.[2] If any rule of law can be gleaned from Adams's cases it is that, in ascertaining boundaries where there is a discrepancy between the recorded plat or survey and actual measurements, the analysis proceeds as follows:

> "In ascertaining the true location of the streets, lots, and blocks in a city, according to the plat and survey thereof, regard is to be had (1) to the natural monuments referred to therein, and (2) to the artificial monuments placed by the surveyor to mark lines or boundaries …. If no monuments are … in existence, evidence of long-continued occupation … is admissible."

City of Madison v. Mayers, 97 Wis. 399, 411, 73 N.W. 43, 46 (1897) (quoted source omitted).

In this case, Jewell located three of the four corner boundary markers of the block. And while it appears that these were not the "original"

[2] In ***City of Racine v. J. I. Case Plow Co.***, 56 Wis. 539, 14 N.W. 599 (1883), the city sued to restrain a landowner from encroaching on a city street. No monuments or other markers were present and it was apparent that the street as platted was nearly 100 feet in error. In this context, the court considered occupational evidence. The court, however, stated the rule that, in ascertaining the true location of the street, the first recourse is to either natural boundaries or the way "the lines actually run and corners [are] actually marked on the ground." A court should consider extrinsic evidence only if no such indicia are present, and distances and locations are not ascertainable from the plat itself. ***Id***. at 542, 14 N.W. at 600. In ***City of Madison v. Mayers***, 97 Wis. 399, 73 N.W. 43 (1897), another case in which the city sued to enjoin a street encroachment, the plat located the street more than 200 feet north of where it actually ran, and "there were no original monuments, either natural or made," to help locate the right-of-way. ***Id***. at 408, 73 N.W. at 45. The rule stated in ***Mayers*** and noted in the text of this opinion that natural monuments and artificial monuments take precedence over occupational evidence echoes the hierarchy of evidence set forth in ***J. I. Case***.

Village of Galesville v. Parker, 107 Wis. 363, 83 N.W. 646 (1900), and ***Lawler v. Brennan***, 150 Wis. 115, 136 N.W. 1058 (1912), are to similar effect. In ***Galesville***, another street-encroachment case, the court, citing ***J. I. Case*** and ***Mayers***, considered "occupational" evidence because the street's boundaries could not be ascertained by natural boundaries or monuments. The ***Brennan*** court also allowed occupational evidence—but only after determining that no markers or monuments existed for the road, which had been laid out in 1839 and had undergone "radical" changes over the years. ***Brennan***, 150 Wis. at 132, 136 N.W. at 1060.

monuments set down when the plat was first drawn, Adams does not dispute that "three of the four corners for the exterior of [the] block … had been reasonably well-established" by the markers. We conclude, therefore, that the trial court did not err in adopting Jewell's testimony and in rejecting the survey and other evidence of occupation and use offered by Adams.[3]

By the Court.–Judgment affirmed.

Not recommended for publication in the official reports.

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[3] Adams also argues briefly that the absence of actual monuments marking the alley boundaries renders Jewell's testimony irrelevant and the court's ruling erroneous. We disagree. As indicated, the parties do not dispute the accuracy of the boundary markers in Jewell's survey, and Adams's and Schram's lots are of equal width—140 feet—separated by a 20-foot platted alley. In these circumstances—even in the absence of actual monuments marking the alley—it makes sense to us that, where a few feet of "additional" land results from a mismeasurement of the block, each owner should share equally in the gain. That is the result of Jewell's survey and the trial court's ruling.