COURT OF APPEALS
DECISION
DATED AND FILED

August 11, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0598

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

STEPHEN C. MAINA,

PLAINTIFF-RESPONDENT,

v.

ROBERT JAMES BLAIR,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sawyer County: NORMAN L. YACKEL, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. Robert Blair appeals a judgment declaring that Stephen Maina owns an easement for ingress and egress over land owned by Blair. This case involves the nature of the legal rights created by a quitclaim deed. Blair argues that (1) the deed creating the easement fails to state the easement's purpose, thereby failing to create any easement rights; (2) because Maina has not exercised

any rights, the terms of the written easement cannot be interpreted to confer any rights; and (3) Maina is estopped from asserting rights because of Maina's representations and Blair's reliance. We reject his arguments and affirm the judgment.

In 1992, Maina obtained an easement across property owned by Jesse and Barbara Morse. The deed from the Morses to Maina quitclaimed the following parcel:

> A one (1) rod easement running East and West across the Southeast Quarter of the Northwest Quarter (SE-1/4 NW-1/4), lying East of the Phipps Road in Section Thirty-two (32), Township Forty-two (42) North, Range Eight (8) West, Sawyer County, Wisconsin. This one-rod easement to run east and west on the northern-most part of the property.

Blair later obtained the land over which the easement runs.[1] Blair has erected gates and other obstacles to prevent Maina from using the easement. Maina brought this action for declaration of rights in order to establish his right to use the easement for ingress to and egress from his property.

Both parties moved for summary judgment. Blair contended that the easement was ineffective because it failed to state its purpose. The trial court concluded that the language created some question as to its purpose, but it considered the physical facts, such as the width of the easement and its relationship to the public road from which the easement led to Maina's property,

[1] Blair states that Maina's 16.5-foot easement currently encompasses only the northerly one-half of Blair's road, a width of about eight feet, and about eight feet of ditch. Maina does not dispute this statement.

and inferred that the parties' intent was to create an easement for access from the public road to Maina's property. The court stated:

> I am satisfied that this easement was an ingress and egress easement; that it is not void on its face; that if the court has to interpret what an easement means, then the fact that you are granting somebody a one-rod easement which is 16 and a half feet, its obviously for ingress and egress purposes.
>
> If … he has got property and there is a road on one end and he has got property on the other end, obviously the intent was to grant this guy an easement. And now, are there some questions as to what can go into that easement? Sure, I suppose there is. But I guess at this point, the purpose of the easement is for access, for ingress and egress.

"When both parties move by cross-motions for summary judgment, it is 'the equivalent of a stipulation of facts permitting the trial court to decide the case on the legal issues.'" ***Kickers of Wisconsin v. Milwaukee***, 197 Wis.2d 675, 679, 541 N.W.2d 193, 195 (Ct. App. 1995) (citation omitted). We review a summary judgment de novo. ***Id***.

"We must look to the instrument which created the easement in construing the relative rights of the landowners." ***Atkinson v. Mentzel***, 211 Wis.2d 628, 637, 566 N.W.2d 158, 162 (Ct. App. 1997). Deeds are construed as are other instruments, and thus the court is to ascertain the intention of the parties. ***Rikkers v. Ryan,*** 76 Wis.2d 185, 188, 251 N.W.2d 25, 27 (1977). "Construction of the deed to determine the grant's terms and purposes is a question of law unless there is an ambiguity requiring resort to extrinsic evidence." ***Atkinson***, 211 Wis.2d at 637, 566 N.W.2d at 162. When there is an ambiguity, the determination of the parties' intent presents an issue of fact. ***Rikkers***, 76 Wis.2d at 188, 251 N.W.2d at 27. Whether an ambiguity exists, however, is a question of law we review de novo. ***Atkinson***, 211 Wis.2d at 637, 566 N.W.2d at 162.

Here, the trial court correctly concluded that the easement's language raised questions as to its purpose. Because its purpose was unclear, the court considered extrinsic evidence of the physical layout, the width, and the relationship of the easement between the public road and the grantee's property. In consideration of these factors, the court reasonably inferred that the parties' intent was to provide a means of ingress and egress from the public road to Maina's property.

Blair does not argue that the trial court erroneously determined the issue of intent, generally an issue of fact, on summary judgment. Because he does not argue that an issue of fact precludes summary judgment, that issue is not properly preserved for appellate review. *See* ***Waushara County v. Graf,*** 166 Wis.2d 442, 451, 480 N.W.2d 16, 19 (1992) (We have no duty to consider any issues other than those presented to us.). Instead, Blair argues that the document is not ambiguous, but is silent on the issue of its purpose. Whether an ambiguity exists is a question of law we review de novo. ***Atkinson***, 211 Wis.2d at 637, 566 N.W.2d at 162. We conclude that the silence of the terms as to the purpose of the easement creates an ambiguity. Consequently, the court could properly consider extrinsic evidence to determine the parties' intent.[2]

Blair also argues that Maina has not exercised any rights under the easement and, as a result, he is entitled to none under the reasoning of ***Lehner v. Kozlowski,*** 245 Wis. 262, 13 N.W.2d 910 (1944). ***Lehner*** held that where the grant of the easement is general as to its extent, an exercise of rights with the

[2] Blair also relies on ***Miller v. Hoeschler,*** 126 Wis. 263 (1905). Because the case did not involve the interpretation of a written easement, but rather dealt with an implied easement, it is not controlling.

acquiescence of both parties limits the manner in which the easement may be enjoyed. ***Id.*** at 266, 13 N.W.2d at 912. We are unpersuaded. It is undisputed that Blair erected gates and obstacles to prevent the use of the easement. ***Lehner,*** on the other hand, dealt only with the grantee's choice of constructing drain tile instead of an open drainage ditch and being bound by his choice. ***Lehner*** does not apply.

Next, Blair argues that Maina should be bound by his own course of conduct in accepting an ambiguous deed. Blair offers no authority for his proposition that the grantee of an ambiguous deed should be deprived a remedy because he accepted an ambiguous document. As a result, we do not consider the argument further. *See* ***Barakat v. DHSS***, 191 Wis.2d 769, 786, 530 N.W.2d 392, 398 (Ct. App. 1995).

Next, Blair argues that Maina should be bound by the limitations of "hunting, walking and future logging" because Maina wrote Blair a letter stating that his use of the easement would be so limited. We are again unpersuaded. The letter stated:

> Part of our purchase included an easement on the Morse property. Although I am not building there, I will be entering that portion of the property for hunting, walking, and future logging purposes and so I ask that you remove the gate and place it back at your property line as soon as possible.

Maina's examples of intended uses of the easement are not inconsistent with the notion of access to his property. The letter contains no limitations, but rather reasons for desiring ingress to and egress from his property. As a result, we reject Blair's argument.

Next, Blair argues that Maina is equitably estopped from relief. He contends that he reasonably relied on Maina's representations that the easement would be used solely for hunting, walking and future logging, and not for ingress and egress. We are unpersuaded. Maina's request that Blair remove his gate for reasons stated did not reasonably represent that Maina did not plan to use the easement for access to his property.

We conclude that the trial court correctly determined that the deed was ambiguous, thus requiring resort to extrinsic evidence to ascertain the parties' intent. The court, in consideration of the physical facts, inferred that the parties intended that the easement be used for ingress and egress. On appeal, Blair does not contend that the parties' intent is in dispute. Because Blair does not argue that there is a dispute of fact, we do not overturn the trial court's determination of the parties' intent.

By the Court.—Judgment affirmed.

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