COURT OF APPEALS
DECISION
DATED AND FILED

September 19, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2293

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

AMY JO HUMPHREYS,

PLAINTIFF-APPELLANT,

v.

ROY G. BRIDGEMAN AND JILL C. BRIDGEMAN,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Washburn County: EUGENE D. HARRINGTON, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

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

¶1 HOOVER, P.J. Amy Jo Humphreys[1] appeals a judgment reforming the deed that conveyed a portion of her property to Roy and Jill Bridgeman. Humphreys contends that the description of part of the property did not adequately identify the land conveyed for purposes of the statute of frauds, WIS. STAT. § 706.02,[2] and the deed to that property should thus have been voided, not reformed. She also argues that even if we conclude that the statutory requirements have been met, she argues that the record does not support the reformation ordered.

¶2 We hold that the deed's reference to property identified in a judgment adequately described the land conveyed. We therefore affirm the trial court's determination that the statute of frauds requirements were satisfied. Its decision to reform the deed in the manner it did, however, is reversed because the record does not support the court's findings relative to the parties' intent. Accordingly, the judgment is affirmed in part, reversed in part and remanded for entry of a new judgment consistent with this opinion.

BACKGROUND

¶3 Humphreys owned property on Long Lake in Washburn County. At one time, both Humphreys' property and the non-riparian[3] parcel immediately west

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[1] Amy Jo Humphreys, now known as Amy Verfaillie, will be referred to as Humphreys.

[2] All references to the Wisconsin Statutes are to the 1997-98 version.

[3] The parties at times refer to this parcel as "non-riparian."

> Strictly speaking, a riparian owner is one whose land abuts upon a river and a littoral owner is one whose land abuts upon a lake. 78 Am. Jur. 2d *Waters* sec. 260 (1975). However, most Wisconsin cases make no distinction in applying the terms "littoral" and "riparian." ***Mayer v. Grueber***, 29 Wis. 2d 168,

(continued)

of her land had common ownership and was originally designated as lot eleven and part of lot twelve in the plat of Alvern. To the immediate north of lot eleven was a public right-of-way known as "The Indian Trail" that provided access to Long Lake. In 1993, the owners of the non-riparian parcel asked Humphreys if she was interested in buying their property. She was interested, but could not afford it.

¶4 Humphreys met and eventually befriended the Bridgemans while she was working at a local resort. The Bridgemans expressed interest in acquiring property on or near Long Lake. Humphreys informed them of the possible availability of the land adjacent to hers. The parties did not know if the owners would sell to the Bridgemans at the same price quoted to Humphreys, so they agreed that Humphreys would purchase the property in her name. The Bridgemans put up the money secured by a mortgage on the property. The mortgage used the same metes and bounds description contained in the deed conveying the property to Humphreys (the "non-riparian parcel"). The parties contemplated that Humphreys would convey the land to the Bridgemans if she could not pay the mortgage. The parties further agreed it was very unlikely that she could pay the mortgage.

¶5 Humphreys acquired the non-riparian parcel and then owned all of lot eleven. She then obtained a circuit court judgment vacating the thirty-three-foot right-of-way denominated "Indian Trail" that abutted lot eleven. As a result

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174, 138 N.W.2d 197 (1965). In Wisconsin the term "riparian" is acceptable as to land abutting upon either rivers or lakes.

Stoesser v. Shore Drive Partnership, 172 Wis. 2d 660, 665-66 n.1, 494 N.W.2d 204 (1993).

of vacating the “Indian Trail,” she acquired a 16.5-foot strip along the northerly border of her two parcels.

¶6 Later that year, she conveyed the non-riparian lot to the Bridgemans. The deed conveyed the non-riparian parcel to the Bridgemans using the same metes and bounds description used to convey that parcel to Humphreys. The deed also provided that the conveyance included additional property, as described in the judgment vacating the right-of-way. The deed further stated that it was in satisfaction of the Bridgemans' “note [sic] and mortgage.”

¶7 Humphreys later discovered that she had conveyed the entire 16.5-foot strip that attached to both parcels she had owned. She brought this action to declare that portion of the deed invalid. Humphreys alleged that the description of the 16.5-foot strip did not comply with the statute of frauds and was therefore void. Alternatively, she asserted that the description was the result of mutual mistake and that the deed should be reformed. The Bridgemans responded that Humphreys was equitably estopped from raising the statute of frauds. They further claimed that there was no mistake and, accordingly, the deed could not be reformed.

¶8 After hearing the evidence, the trial court first determined that the property conveyed was described with sufficient clarity and included the entire 16.5-foot strip of land attached to lot eleven by the judgment vacating "The Indian Trail." The court also decided that the deed was ambiguous as a whole because it claimed to be in satisfaction of the Bridgemans' note and mortgage, which were not secured by the 16.5-foot strip of land. The court found that the deed did not represent the parties' intent and that equity required its reformation. The court noted that "[i]t appears the parties did not reach a 'mutual' intent." It concluded

that Humphreys would not have landlocked herself or incurred the cost of proceedings to vacate the right-of-way and then gift it to the Bridgemans. Similarly, the Bridgemans would not have wanted the property absent a means of lake access.

¶9 The court reformed the deed, awarding Humphreys fee ownership of that portion of the strip adjacent to her remaining parcel and the Bridgemans fee ownership of the portion of the strip adjacent to their parcel. The court also awarded each party easements across that portion of the strip belonging to the other. The Bridgemans' easement included riparian rights, *i.e.*, their access included not only foot travel, but also the right to place a dock, boatlift and other recreational facilities. Humphreys appealed the trial court's decision; the Bridgemans did not.

DISCUSSION

1. Statute of Frauds

¶10 The parties dispute whether the deed and its reference to the judgment adequately described the disputed parcel. Humphreys, in support of her claim that the description fails to satisfy the statute of frauds, contends that the deed's reference to "*that portion* of the easement vacated" is "completely uncertain" because it does not describe which portion of the easement vacated is being conveyed. We disagree.

¶11 Because the relevant facts are undisputed, the application of WIS. STAT. § 706.02, the statute of frauds, is a question of law. *See* ***Padgett v. Szczesny***, 138 Wis. 2d 150, 154, 405 N.W.2d 714 (Ct. App. 1987). We review questions of law independently of the trial court's decision. ***Id.***

¶12 WISCONSIN STAT. § 706.02 provides in relevant part:

> (1) Transactions under s. 706.01 (1) [governing transactions in land] shall not be valid unless evidenced by a conveyance which:
>
> (a) Identifies the parties; and
>
> (b) Identifies the land; and
>
> (c) Identifies the interest conveyed, and any material terms…
>
> (2) A conveyance may satisfy any of the foregoing requirements of this section:
>
> (a) By specific reference, in a writing signed as required, to extrinsic writings in existence when the conveyance is executed ….

To satisfy subparas. (1)(b) and (c), the contract must describe the land with "reasonable certainty." ***Wiegand v. Gissal***, 28 Wis. 2d 488, 492, 137 N.W.2d 412 (1965). "Failure to comply with the statute renders the transaction void." ***Padgett***, 138 Wis. 2d at 153-54.

¶13 In ***Wadsworth v. Moe***, 53 Wis. 2d 620, 624-25, 193 N.W.2d 645 (1972), the supreme court summarized the principles relevant to whether the statute of frauds may be met by the use of extrinsic evidence:

> [T]o consider extrinsic evidence not found on the face of the contract there must be something in the document that furnishes some foundation, link, or key to the oral or extrinsic testimony which identifies the property. … The function of the extrinsic evidence must be limited to the identification of the real estate. That evidence cannot be used to supply a portion of the description or to establish the intent of the parties. (Footnotes and quotation marks omitted.)

Therefore, extrinsic evidence regarding the parties' intent is not relevant to our analysis whether the statute of frauds has been met. "Failure to comply with the statute renders the contract void. The question in such a case is not what

reasonable men intended to convey, or what the parties know; rather, the question is what the parties to the contract in fact described in their contract or memorandum." ***Zapuchlak v. Hucal***, 82 Wis. 2d 184, 191, 262 N.W.2d 514 (1978) (citations omitted).

¶14 With these principles in mind, we examine the deed and its link to extrinsic evidence. The deed provided:

> This deed includes that portion of the easement vacated by the Washburn County Circuit Court on August 4, 1993, said Judgment filed in the Washburn County Register of Deeds at Vol. 318 of Records, P. 74, Document #229890.

The Washburn County judgment referenced in the deed states in relevant part:

> (A) That portion of the "street," "lane," "public right-of-way," known as "The Indian Trail," lying east of the east line of "Union Lane," now known as "Fristad Road", lying between Lots Ten (10) and Eleven (11) of the Plat of Alvern, is hereby vacated.
>
> (B) The Plat of Alvern is hereby altered in part by attaching the north sixteen and one/half (16.5') feet of the vacated portion of "The Indian Trail" to Lot Ten (10) and the south sixteen and one/half (16.5') feet of the vacated portion of "The Indian Trail" to Lot Eleven (11).

¶15 Humphreys contends that this case is governed by the result in both ***Stuesser v. Ebel***, 19 Wis. 2d 591, 120 N.W.2d 679 (1963), and ***Thiel v. Jahns***, 252 Wis. 27, 30 N.W.2d 189 (1947). In each case, the supreme court voided a conveyance because it did not adequately describe the property conveyed. ***Stuesser*** and ***Thiel***, however, are inapposite to the present case.

¶16 In ***Stuesser***, the contract identified "the real estate owned by the Sellers and located in the Town of Oak Grove, now known as the 'Dobie Inn' and used in the business of the Sellers." ***Id.*** at 592. The building was located on the

east sixty-two feet of two separate lots. *See* ***id.*** at 592-93. The sellers owned the entire lots. *See* ***id.*** The court determined that it could not determine from the description given in the deed whether the property conveyed included only the east sixty-two feet of both lots, the entirety of the two lots or something in-between. *See* ***id.*** at 596-97. There was no extrinsic writing referenced in the deed to clarify or define the property contemplated. The court therefore voided the deed. *See* ***id.***

¶17 Similarly, in ***Thiel***, the supreme court held inadequate a description identifying the land conveyed as the "house at Little Chicago." ***Id.*** at 30. The seller not only owned a house enclosed by a fence but also additional land adjacent to it. *See* ***id.*** at 28. The court concluded that the description did not sufficiently describe the property to be conveyed with the house. *See* ***id.*** at 30-31. The court stated: "'house' could include the inclosed lawn and garden or even less than that or that it could include the balance of the acreage." ***Id.*** at 30. There was no link in the deed to extrinsic evidence that would permit a person to determine the property's boundaries. *See* ***id.***

¶18 Although in both cases a landowner conveyed only a portion of the land owned, in neither case did the deed adequately describe the land to be conveyed nor did it contain a link to extrinsic evidence that would enable a reader to ascertain the property conveyed. That is not the case here. The land conveyed is identified by reference to the circuit court judgment. The referenced judgment explains what "that portion of the easement vacated" means.

¶19 Humphreys would have the court interpret the deed to read, "that portion of the vacated easement," indicating that the deed could include a subsection of the area vacated by the judgment. However, the deed is not written that way; it conveys "that portion of the easement vacated." The judgment

referred to in the deed did not vacate all of "The Indian Trail." It only vacated that portion of "The Indian Trail" between lots ten and eleven of the plat of Alvern. Thus, in the phrase "that portion of the easement vacated by the … Judgment," the words "that portion" identifies the specific part of the Indian Trail conveyed.[4]

¶20 Viewed alternatively, although reaching the same result, "that portion of the easement vacated" refers to that portion transferred to Humphreys; *i.e.*, the southern sixteen and one-half feet of the vacated area. *See* ***Roberts v. Decker***, 120 Wis. 102, 113, 97 N.W. 519 (1903) (the property owned by an individual can be used to identify the land conveyed). Here, Humphreys owned the south 16.5 feet of the vacated portion of the Indian Trial.[5] The deed thus conveyed all of her interest in the land that had been the Indian Trail between lots ten and eleven of the plat of Alvern. The deed read in conjunction with the judgment adequately identifies the land conveyed for purposes of WIS. STAT. § 706.02.[6]

2. Reformation

¶21 At oral argument, Humphreys refined her argument to agree that the trial court could reform the deed. *See* ***Spitz v. Continental Cas. Co.***, 40 Wis. 2d 439, 446-47, 162 N.W.2d 1 (1968) (appellate court need not address arguments

[4] To achieve the uncertainty that Humphreys claims is present, we would have to rewrite the deed. The word "a" would have to replace "that" so the deed would state "This deed includes *a* portion of the easement vacated …."

[5] Neither party disputes the self-evident proposition that a grantor can convey only that property the grantor owns.

[6] Because we conclude that the conveyance satisfied the statute of frauds, we need not decide whether only a portion of a deed may be declared void as opposed to the entire conveyance.

abandoned at oral arguments). The Bridgemans did not appeal the judgment and have not otherwise challenged the trial court's authority to reform the deed. Humphreys submits, nonetheless, that the trial court erred by imposing an agreement that neither party ever claimed to have reached. We agree. Humphreys asks this court to reform the deed in accordance with the facts or void the contract. The court of appeals is not in the position to supply this remedy. Therefore, we remand the case to the trial court for reformation based on the evidence.

¶22 An action for reformation is an action in equity, and the test on review is whether the findings made are contrary to the great weight and clear preponderance of the evidence. *See* ***First Nat'l Bank v. Scalzo***, 70 Wis. 2d 691, 700, 235 N.W.2d 472 (1975). The evidence does not support a conclusion that either party intended the split of the property with cross easements, as accomplished by the trial court's reformation.

¶23 Humphreys asserted that she never intended to convey the 16.5-foot strip in fee simple. Her attorney in the matter, John Lang, drafted the deed and testified similarly. She testified that Roy Bridgeman acknowledged as much, but refused to correct the deed because he needed the land to protect his house (in the midst of being built) from setback restrictions. She also testified that she was willing to give the Bridgemans a verbal easement (technically a license as she later argues under ***PSC v. Marathon County***, 75 Wis. 2d 442, 447, 249 N.W.2d 543 (1977)), to cross her property to access their land and the lake. Lang stated that he intended to draft the deed so that the Bridgemans would have an easement to access their parcel, but the deed easement was to end at Humphreys' north-south lot line and was not intended to extend to the lake. Humphreys acknowledges that Bridgeman paid the attorney fees to transfer the non-riparian parcel, but insists

that she shared the fees for vacating the strip of land between the lake and Union Lane with the owner of lot ten.

¶24 The Bridgemans testified that they understood they were to receive the entire strip in fee simple. Roy testified that he would not have purchased the property without lake frontage. He told the court that Humphreys promised him lake access if "the property was ever vacated." He asserted that she promised him "fifty percent of that particular property, including lakefront property" and that he understood that statement to mean fifty percent of thirty-three feet. Although acknowledging that he paid nothing for the land strips, he contends that he paid the attorney fees for the transfer of the non-riparian parcel as well as those for vacating the strip.

¶25 None of this evidence supports the conclusion that the parties intended to split the vacated strip of property and give cross easements. Therefore, we reverse the trial court and remand the case for a reexamination of the evidence, witnesses' credibility, appropriate findings and a new judgment consistent with this opinion.

CONCLUSION

¶26 We determine that the deed's reference to property identified in the judgment adequately described the land conveyed. The trial court's determination that the deed satisfied the statute of frauds is sustained. Its reformation of the deed is, however, reversed because it is not supported by the evidence.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions. No costs on appeal.

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