COURT OF APPEALS
DECISION
DATED AND FILED

November 9, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

Appeal No. 2015AP1068 **Cir. Ct. No. 2013CV2766**

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

LEVENTI TRUST, ELIZABETH DOUCAS, TRUSTEE,

PLAINTIFF-APPELLANT,

MICHAEL WOODS, M.D. AND SUSAN WOODS, M.D.,

PLAINTIFFS,

V.

BRYAN M. WALTERSDORF AND NICOLE L. WALTERSDORF,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Waukesha County: PATRICK C. HAUGHNEY, Judge. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

¶1 HAGEDORN, J. In 2007, Bryan and Nicole Waltersdorf purchased a home in the sightly Village of Oconomowoc Lake. Originally platted over 100 years ago, the Beachmont subdivision included multiple properties connected to each other and to the main road via an easement. The precise location of the easement, however, was not so clear. All this became plain when, in 2012, the Waltersdorfs purchased an adjacent property with the hopes of building a new home on the combined properties. One of the casualties of this plan was one leg of the then-existing oval drive, which was removed. The neighbors sued.

¶2 After a seven-day trial featuring experts opining on deeds and surveys, childhood stories of what the area looked like in the 1940s, and a personal visit to the property by the judge himself, the circuit court determined that the easement was—as the Waltersdorfs hoped—located on the remaining leg of the oval drive. The neighbors appeal, raising two arguments. First, they challenge the location of the express easement, arguing it included the whole oval drive. In the alternative, they argue that the now-destroyed leg of the oval drive, in use for generations, established an easement by prescription. Resting on our deference to the circuit court's factual findings, we affirm.

I. Background

¶3 The Beachmont subdivision in Oconomowoc Lake was first created in 1908 and originally included seven lots. The four properties at issue here—4508, 4510, 4511, and 4512—contain various parts of these seven lots. All parties agree that the deeds for the lots reserved a reciprocal right of way to access the main road: Hewitts Point Road.

¶4 The Waltersdorfs own two properties in the subdivision: 4508 and 4510. They purchased the 4508 property in 2007 and then acquired the 4510

property in 2012 with the intent of building a new home across both properties. At the time this case began, the Leventi Trust owned 4512, and Michael and Susan Woods owned 4511. Later, the Woods sold the 4511 property to the Trust; the Woods are no longer a part of this appeal.

¶5 When the Waltersdorfs moved into the subdivision, a paved oval drive connected all four properties to each other and to Hewitts Point Road. The drive began in the western corner of the subdivision with the first leg heading southeast. It then turned briefly to the northeast on the Trust property, and headed back northwest over what are now the Waltersdorfs' combined lots, before curving to finish roughly where it started. In practical effect, the two longer portions of the drive crossed through the Waltersdorfs' property twice. For the sake of clarity, the parties referred to the initial southeastward portion of the drive as the "southern drive," and the northwestward heading portion of the drive as the "northern drive"—though, as the Trust would no doubt wish to emphasize, it was all one oval-shaped drive. Nonetheless, we will also employ this nomenclature.

¶6 After purchasing the second, neighboring property, the Waltersdorfs began to tear up the northern drive that crossed their combined properties to make way for their new home. The Trust filed suit to stop the Waltersdorfs' planned construction and restore the drive to its previous state.[1] The Woods later joined the lawsuit as well. The plaintiffs filed a lis pendens[2] and sought a temporary restraining order to stop the Waltersdorfs' construction. The circuit court denied

[1] The Waltersdorfs responded with counterclaims that are not a part of this appeal.

[2] A lis pendens is a notice recorded in the chain of title for a property warning all persons that the property is the subject of litigation and any interests acquired in that property are subject to the outcome of the litigation. *Lis Pendens*, BLACK'S LAW DICTIONARY 1073 (10th ed. 2014).

the request. The plaintiffs and defendants both filed motions for summary judgment, which the circuit court also denied.

¶7 The case proceeded to a seven-day bench trial conducted over the course of three weeks. The parties submitted hundreds of exhibits, and the court heard testimony from close to twenty witnesses. The judge even personally visited the Beachmont subdivision. We begin a brief survey of this extensive record with the documents creating the easement.

¶8 The original 1908-1911 deeds for the subdivision described a "perpetual right of way" over all of the lots but did not indicate where the right of way was located. The original plat map only shows the word "drive" between two dotted lines extending a short way into the southwestern corner of the subdivision. The parties agree that these deeds created an express easement; their dispute centers on its location.

¶9 The first mention of any location for the easement appeared in a 1925 conveyance from an original owner. The 1925 deed conveyed part of a lot "lying south of the center line of the right of way or driveway as now laid out and running" across the lot. The deed also contained a metes and bounds description of the land conveyed. Along with the land, it also reserved a "right of way" for the benefit of the other lots. The deed did not include a precise description of the right of way, but one of the experts—later credited by the circuit court—testified that the deed's description put the right of way in the "southerly end" of the lot, roughly where the southern drive is located.

¶10 Two 1946 indentures[3] also give at least a partial description of the easement's location. The whereas clauses of both indentures explained that the parties "desired to relocate a portion" of the easement, and the operative language included a precise legal description roughly corresponding to the southern drive. These descriptions, however, stopped the southern drive short of what would be necessary to reach all of the lots. Neither indenture described any part of the northern drive.

¶11 None of the post-1946 conveyances involving the Waltersdorfs' properties describe the easement's location. Instead, they describe the easement (1) by reference to the 1925 deed or the 1946 indentures or (2) as the drive "as now laid out and running" or similar language.[4] The Trust does not identify any additional conveyances in the subdivision that identify the easement with more specificity.[5]

¶12 The parties also presented multiple surveys of the properties. These surveys included several that showed an express easement over the southern drive but no such easement over the northern drive. A 1982 certified survey map (CSM

[3] An "indenture" is a deed signed by two parties. *See Indenture*, BLACK'S LAW DICTIONARY 887 (10th ed. 2014).

[4] The post-1946 chain of title for the 4508 property includes deeds from 1954, 1989, and 1996 that refer back to the 1925 deed; a 1964 deed that refers to the right of way "as now laid out"; and a 2007 deed citing both the 1925 deed and one of the 1946 indentures. The post-1946 chain of title for the 4510 property includes 1953, 1962, 1996, and 2007 deeds describing the easement as a "right of way … as appears of record and is laid out and used"; and a 2012 deed referring to one of the 1946 indentures and one of the original Beachmont deeds.

[5] The Trust draws our attention to five other conveyances: a 1926 warranty deed, a 1930 warranty deed, two deeds from 1940, and a 1946 warranty deed. But these documents only refer to the easement generically and do not specify a location other than the right of way "as now laid out."

5047) highlighted by the Trust did include a separate section precisely describing the entire oval drive. It did not, however, describe the drive as an easement but simply a "travelled roadway."

¶13 Multiple experts testified concerning the easement's location, the import of the various surveys of the properties, and the proper interpretation of the title documents. One of the Waltersdorfs' experts, Donald Murn, summarized and explained his opinion that the documents only described the southern drive:

> [M]y opinion is that the [original] parties very clearly understood at some point, first time I think in '25, and then in '46, that they had a problem, in that the 1908 to 1911 deeds were not specific enough to call a travelled way with particularity so to give notice to subsequent titleholders. I believe they tried to establish the southern route with the '25 document, which was a grant from the original servient owner, I might add. And then in '46 further described that southern route, which then each of the grantors subsequent to that picked up in the chain of title and transferred to their subsequent grantees.

Although the indentures incompletely described the southern drive, Murn testified that the easement was best read as extending all the way to the 4512 property line. Murn also considered CSM 5047 but indicated that it did not change his opinion. The circuit court "accepted" Murn's account of the documents and the easement's location.

¶14 Various witnesses also testified concerning the existence and use of the drive. Notably, George Meyer testified that as a child he spent significant time in the Beachmont subdivision as far back as 1940. The drive existed, he recalled, in more or less its current form, noting that he would ride his bike around the full oval drive and did not ask anyone for permission to do so.

¶15 Accepting Murn's testimony, the circuit court concluded that there was an express easement, but that it existed only over the southern drive, not the full oval drive.[6] Although the 1908-11 deeds did not indicate a location, the court found that the 1925 deed and the 1946 indentures reflected that the parties subsequently agreed upon the southern drive as the easement's location. The court further determined that the southern drive served the easement's purpose of ingress and egress and provided sufficient access for all of the properties. The court also rejected the plaintiffs' prescriptive easement claim based on its finding that any use of the northern drive was permissive. Finally, the circuit court also found that even if the express easement included the northern drive, it was not enforceable against the Waltersdorfs because they were bona fide purchasers and lacked notice that the easement extended over the full loop. The Trust appeals this judgment.

II. Discussion

¶16 We hold that the circuit court did not err in its conclusions that the express easement only covered the southern drive and that no prescriptive easement over the northern drive was established.[7] The 1908-11 deeds establish an express easement, but not its location. This means the easement's location is subsequently fixed by the parties. Ordinarily this would be reduced to writing in subsequent deeds. But other than describing the drive then-existing and being

[6] The court initially ruled that the Waltersdorfs had no right to use the easement. After further briefing, the court changed course and held that the Waltersdorfs were free to access their property by way of the southern drive.

[7] Because we affirm the circuit court's determination as to the easement's location, we need not address the bona fide purchaser issue.

used, the parties admit that no document describes the easement with particularity as including the northern drive, the full southern drive, or, for that matter, the entire oval drive. We conclude that the documents are ambiguous regarding the easement's location. Accordingly, the circuit court permissibly considered extrinsic evidence to determine the easement's intended location, and the interpretation of these ambiguous documents is a question of fact. The court weighed the voluminous testimony at trial, specifically credited one of the defendants' experts, and personally visited the subdivision. We hold that the court's finding locating an express easement over the southern drive and not the northern—resting largely on the 1925 deed and 1946 indentures—was not clearly erroneous.[8] Similarly, the circuit court rejected the Trust's prescriptive easement claim in part on its factual finding that the use of the northern drive was

[8] The Trust mischaracterizes the court's ruling in two respects. First, it argues that the circuit court equitably relocated the easement after its location had been set by continuous use. We do not read the circuit court this way. Rather, the court's decision was based on its consideration of the extrinsic evidence of the easement's location subsequently fixed by the original owners and documented in the 1925 deed and the 1946 indentures. It did not move the easement. Therefore, although the Trust is correct that the circuit court had no power to relocate an established easement, *see, e.g.*, ***Berg v. Ziel***, 2015 WI App 72, ¶¶17-18, 365 Wis. 2d 131, 870 N.W.2d 666, that is of no moment here.

The Trust also complains that the circuit court erroneously relied on the statute of frauds. This too is a mischaracterization of the court's ruling. The Trust's confusion appears rooted in a solitary statement by the court that "there is no document that satisfies the statute of frauds and purports to create an easement over the northern drive." In context, the circuit court was simply observing that none of the grant documents purported to create an easement over the northern drive. In fact, the court implicitly found that the grant documents satisfied the statute of frauds because it expressly found the documents sufficiently described an express easement over the southern drive. *See* WIS. STAT. § 706.02 (2013-14) (providing that a conveyance of an easement is not "valid" unless it is evidenced by a writing that satisfies the statutory requirements).

All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

permissive. The Trust advances no plausible claim that this finding was clearly erroneous. Therefore, we must affirm.

A. Express Easement

¶17 An easement is a nonpossessory interest allowing the owner of one property (the dominant estate) to use another property (the servient estate) in some way—for example, the right to use a driveway. ***AKG Real Estate, LLC v. Kosterman***, 2006 WI 106, ¶¶2-3, 296 Wis. 2d 1, 717 N.W.2d 835. Various types of easements exist, including express easements, prescriptive easements, easements by necessity, and easements by implication. ***Id.***, ¶15 n.4.

¶18 An express easement is created by a written grant or deed. ***Id.***, ¶15. We review the language creating the easement to determine the parties' intent. ***Berg v. Ziel***, 2015 WI App 72, ¶14, 365 Wis. 2d 131, 870 N.W.2d 666. If the language is unambiguous, then we apply the language and do not consider extrinsic evidence of the parties' intent. ***Gilbert v. Geiger***, 2008 WI App 29, ¶10, 307 Wis. 2d 463, 747 N.W.2d 188. Only if the language is ambiguous may courts look to extrinsic evidence. ***Id.*** ("Resort to extrinsic evidence is proper to show the intent of the parties only if we conclude there is ambiguity within the four corners of the documents."). A grant is ambiguous if the language is susceptible to more than one reasonable construction. ***Grygiel v. Monches Fish & Game Club, Inc.***, 2010 WI 93, ¶20, 328 Wis. 2d 436, 787 N.W.2d 6.

¶19 When the location of the easement is specified in the grant, then the grant will usually control the easement's location. *See* 25 AM. JUR. 2D *Easements and Licenses* § 54 (2014), *cited with approval in* ***Berg***, 365 Wis. 2d 131, ¶16. "When an easement is granted without defined limits … the location may be subsequently fixed by an express agreement of the parties[] or by an implied

agreement arising out of the use of the easement." 25 AM. JUR. 2D *Easements and Licenses* § 56 (2014).[9] Once the location has been fixed by practice or agreement, however, "a court … has no equitable power to subsequently determine the location." ***Berg***, 365 Wis. 2d 131, ¶16.

¶20 The interpretation of an unambiguous grant is a question of law we review independently. ***Konneker v. Romano***, 2010 WI 65, ¶23, 326 Wis. 2d 268, 785 N.W.2d 432. Whether a document is ambiguous is likewise a question of law. ***Id.*** When the language is ambiguous, however, the intent behind the language—as established by the extrinsic evidence—is a question of fact. ***Id.*** In other words, the location of an express easement will ordinarily rest on the easement language itself and be a question of law we review de novo. But when the language is ambiguous—itself a legal question we review de novo—it transforms the question of the location of the easement to a question of fact. Our circuit courts—not this court—are tasked with finding facts; we may not upset those findings unless they are clearly erroneous. WIS. STAT. § 805.17(2); ***Gilbert***, 307 Wis. 2d 463, ¶21 ("We will not substitute our judgment for that of the trial court because, when it acts as the finder of fact, it is the ultimate arbiter of witness credibility and the weight to be given to each witness' testimony.").

1. The Grant Documents Are Ambiguous

¶21 We conclude that the various title documents are ambiguous. The original 1908-11 deeds did not specify a route; no party suggests otherwise. This means the route was left to be set by subsequent agreement by the parties.

[9] American Jurisprudence refers to such an undefined easement as a "floating easement." *See* 25 AM. JUR. 2D *Easements and Licenses* § 56 (2014).

¶22 The first time an actual location was described or hinted at was in the 1925 deed, which refers to a right of way "as now laid out and running." The deed also contained a metes and bounds description approximating the general location of the southern drive. The Waltersdorfs argue this shows where the easement was determined to run, while the Trust argues that this clearly describes only a portion of the easement, and that it refers to the roadway currently being operated—i.e., the whole loop. The circuit court saw it the Waltersdorfs' way, which is a reasonable construction of the language of the deed.

¶23 The 1946 indentures yield no additional clarity. The parties agree the indentures precisely describe only a portion of the southern drive. The Waltersdorfs contend the general description of the southern drive makes clear that the southern drive alone is the location of the easement and that logic suggests it extends to connect all the properties. The Trust contends this incomplete description shows the deed transferred only a portion of the whole easement, and the easement included the whole loop "as now laid out and running." Again, the circuit court saw it the Waltersdorfs' way, which is a reasonable interpretation of the language.

¶24 Every other deed refers to the above documents or to the existing easement as currently being used. The Waltersdorfs correctly point out that no deed or other document describes with particularity any portion of the northern drive as part of the easement. The Trust submits that no deed describes the whole southern drive either. The Trust further argues that the references to the drive existing and being used shows with sufficient precision that the whole oval drive is the easement. The Waltersdorfs argue that the documentary descriptions of the roadway now laid out and running all refer back to the 1925 deed and 1946 indentures, which fix the southern drive as the easement. In short, the documents

themselves do not clearly and unambiguously state where the easement is located. Accordingly, the circuit court properly considered extrinsic evidence to interpret the documents and determine the easement's location. And we must uphold the circuit court's findings unless they are clearly erroneous.[10]

2. The Circuit Court's Findings Were Not Clearly Erroneous

¶25 Though the circuit court relied on multiple grounds, including finding the Waltersdorfs bona fide purchasers, the court made a finding that the 1925 grant and the 1946 indentures established an express easement over only the southern drive. This conclusion was not, as the Trust charges, "a manufactured decision … not based on any grant language." It finds support in the record and is not clearly erroneous.

¶26 The court was confronted with multiple expert witnesses. Deciding whose testimony to credit among the differing opinions, the court accepted Murn's opinion that, although the documents did not fully describe the easement, the most reasonable reading was that they intended to refer to the southern drive alone. The court similarly credited Murn's testimony that any imprecision in the documents' descriptions was the result of unartful drafting. The experts were also questioned

[10] Rather than relying strictly on the grant documents, the Trust builds its case on the extrinsic evidence of the easement's use. It starts with the language in the various deeds and conveyances referring to the roadway as it was laid out and running. Relying heavily on Meyer's testimony, the Trust claims the "undisputed" evidence shows the entire drive existed in its current state for at least half a century. It also points to CSM 5047 showing the entire loop as a "travelled roadway." Thus, the Trust reasons, the location of the easement was the full loop.

Though the Trust never explicitly admits the grant documents are ambiguous, it does admit that the court may consider extrinsic evidence if the grant language is ambiguous. Given its reliance on extrinsic evidence to make its case, the Trust appears to tacitly concede ambiguity. *See* ***Gilbert v. Geiger***, 2008 WI App 29, ¶10, 307 Wis. 2d 463, 747 N.W.2d 188 (explaining that extrinsic evidence may only be considered if the grant documents are ambiguous).

about CSM 5047. Although the survey described the full loop as a "travelled roadway," two of the experts opined that they did not think the phrase indicated the full loop was an easement.[11]

¶27 Three separate surveys concerning the 4508 and 4510 properties also support the circuit court's ruling.[12] All three indicated an easement over the southern drive but not the northern drive. One of these surveys—prepared by Stephan Southwell for the 4510 property—even specifically referenced CSM 5047, but still depicted the easement as only covering the southern drive consistent with the expert testimony that "travelled roadway" is not indicative of an easement. These surveys show that multiple professionals looked at the ambiguous documents and concluded that they created an easement over the southern drive only.

¶28 The circuit court also considered the testimony from the various witnesses concerning historical use of the roadway. However, it observed that such testimony was of limited probative value, reasoning that it did not matter whether the whole paved drive existed in the 1940s and that more was needed to establish an easement. Even assuming the loop existed and was generally used in

[11] Stephan Southwell and Donald Murn rejected the suggestion that CSM 5047 described the entire oval drive as an easement. Southwell said he did not think "travelled roadway" described an easement, and Murn stated the survey did not contain "any language that would indicate a claim" that the easement covers the whole loop. Don Chaput testified more agnostically that he could not make any legal judgment about whether the phrase "travelled roadway" indicated an easement.

[12] Chaput prepared a survey of the 4508 property in 1996. He testified at trial that "[t]here was no recorded—plottable easement across the northerly" route. The Waltersdorfs reviewed this survey before purchasing the 4508 property, and also had a new survey done which similarly showed an easement over the southern drive only. Before purchasing the 4510 property, the Waltersdorfs arranged for Southwell to conduct a survey of that property as well. Like the other two, this survey did not show an easement over the northern drive, only the southern.

1946 at the time of the indentures, its mere existence did not, for the circuit court, overcome the lack of any grant document specifically describing the northern drive.

¶29 The Trust makes no credible argument that the circuit court's findings are clearly erroneous. An alternative view of the evidence is not enough for us to disturb the circuit court's findings. ***State v. Wenk***, 2001 WI App 268, ¶8, 248 Wis. 2d 714, 637 N.W.2d 417 ("[A] factual finding is not clearly erroneous merely because a different fact-finder could draw different inferences from the record.").

B. Prescriptive Easement

¶30 Even granting that the easement does not include the northern drive, the Trust proposes that the full oval loop is an easement by prescription. *See* ***Kosterman***, 296 Wis. 2d 1, ¶15 n.4. A prescriptive easement claim requires proof of the following elements: "(1) adverse use hostile and inconsistent with the exercise of the titleholder's rights; (2) which is visible, open and notorious; (3) under an open claim of right; (4) and is continuous and uninterrupted for twenty years." ***Ludke v. Egan***, 87 Wis. 2d 221, 230, 274 N.W.2d 641 (1979). Use is hostile if it is inconsistent with the right of the owner. ***Id.*** If the use is permissive, then it is not hostile. ***Id.*** "To establish a prescriptive easement the evidence must be positive and every reasonable presumption must be made in favor of the owner of the estate." ***Id.*** at 232. Any evidence must be strictly construed against the claimant—here, the Trust. ***Id.*** at 231.

¶31 The existence of a prescriptive easement involves both questions of law and fact. ***Perpignani v. Vonasek***, 139 Wis. 2d 695, 728, 408 N.W.2d 1 (1987). Factual determinations will not be overturned unless they are clearly

erroneous, WIS. STAT. § 805.17(2), and the party claiming a prescriptive easement bears the burden to prove the prescriptive easement. ***Perpignani***, 139 Wis. 2d at 728. Whether use is hostile is a question of fact. ***Harwick v. Black***, 217 Wis. 2d 691, 703, 580 N.W.2d 354 (Ct. App. 1998) ("The question[] of whether the adverse claimant's possession of the disputed land was … hostile [is a] question[] of fact."). The question of whether the facts as found are sufficient to constitute adverse possession is a question of law. ***Perpignani***, 139 Wis. 2d at 728.

¶32 The court's decision was based on its factual finding that any use of the northern drive was permissive. The Trust takes issue with this finding of fact. It claims that the evidence supports only a finding of adverse, not permissive, use. It maintains that "every fact witness" testified to using the whole drive, denied ever asking for permission to do so, and testified that they believed they had a right to do so. The Trust also mentions that the previous owners of 4508, 4510, 4511, and 4512 jointly paid to repave the entire oval drive.

¶33 The court saw the evidence differently. It reasoned that simple use of the northern drive was insufficient to show hostile use. The court observed that the Waltersdorfs at times blocked the northern drive with cones while their children were playing, and later with construction equipment—an action consistent with ownership—and specifically noted that this should have tipped off the plaintiffs that the Waltersdorfs thought they owned that part of the drive. The court even considered evidence taken from trail cameras set up to view the drive.

¶34 While the evidence may be viewed multiple ways, again, the circuit court's findings are not clearly erroneous. The circuit court reasonably concluded the use was consistent with permission—to which the presumption falls anyway.

The Trust asks this court to draw favorable inferences from the evidence and disregard the circuit court's chosen inferences. We cannot do that. Therefore, the Trust's prescriptive easement claim fails.

III. Conclusion

¶35 This case requires us to defer to the circuit court's factual findings. The circuit court found as a factual matter that (1) the evidence established an express easement over only the southern drive, and (2) any use of the northern drive was permissive—thus defeating the prescriptive easement claim. Because we cannot say that these findings are clearly erroneous, and the Trust fails to identify any legal errors, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.