COURT OF APPEALS
DECISION
DATED AND FILED

July 11, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1287 **Cir. Ct. No. 2013CV165**

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

RONALD BERG REVOCABLE TRUST,

PLAINTIFF-APPELLANT,

V.

THOMAS R. ZIEL AND SHAWN A. NEWHOUSE,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Trempealeau County: ANNA L. BECKER, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. The Ronald Berg Revocable Trust (Trust) appeals an order determining that a recorded, non-exclusive easement formerly held by Ronald Berg (Berg)[1] over undeveloped property owned by Thomas Ziel and Shawn Newhouse (collectively, the Ziels) was limited to twelve feet in width. The Trust argues the circuit court erred by: (1) exceeding the scope of this court's remand order in a prior appeal of this case;[2] and (2) awarding the Trust only a twelve-foot wide easement rather than a thirty-three-foot wide easement. We conclude the circuit court properly exercised its discretion under the remand order and in determining the easement width. Accordingly, we affirm.

BACKGROUND

¶2 The Trust holds an express easement over the Ziels' property, which is approximately 146 acres, to access its 120-acre parcel from a county road. Prior to the Trust obtaining the easement, the easement was granted to Berg under a deed when Berg purchased his property. In relevant part, the deed described the easement as:

> A non-exclusive easement for the benefit of Tract I, being a right of way for ingress and egress for vehicular traffic, created by deed from Howard Hammer and Colleen Hammer, as his wife, and in her own individual right to Stanley Campbell, … from the Public highway passing through said Section 13 ...."

The deed did not specifically designate where the easement was located on the Ziels' property, nor did it specify the width of the easement. However, Berg's

[1] Ronald Berg passed away during the pendency of this appeal. We subsequently granted the Estate of Berg's motion to substitute the Ronald Berg Revocable Trust as the plaintiff-appellant in this appeal upon a showing that the property and easement in question were conveyed to the Trust by the Estate.

[2] *See* ***Berg v. Ziel***, 2015 WI App 72, ¶¶1, 27, 365 Wis. 2d 131, 870 N.W.2d 666 (***Berg I***).

predecessors in interest established an access road through the middle of the Ziels' property, which has been used continuously for decades to access what is now the Trust's property.

¶3 The Ziels purchased their property in 2006 and later sought to unilaterally close the existing road Berg used to access his property. Instead, the Ziels wanted to require Berg to access his property from a different location on the Ziels' property. In response, Berg filed this action seeking a declaration of his easement rights in the area on and adjacent to the existing access road. The circuit court granted Berg's motion for a temporary injunction prohibiting the parties from modifying or obstructing the existing road pending further order of the court.

¶4 Berg filed an amended complaint specifically asking for a "definite metes and bounds description of the presently laid and traveled driveway, including a width of two rods." A "rod" is a linear measure of sixteen-and-one-half feet.[3] Thus, Berg's reference to "two rods" meant thirty-three feet.

¶5 After a bench trial, the circuit court effectively extinguished Berg's easement over the existing road and instead granted Berg an easement in the location of a new road along the edge of the Ziels' property. *See* ***Berg v. Ziel***, 2015 WI App 72, ¶1, 365 Wis. 2d 131, 870 N.W.2d 666 (***Berg I***).

¶6 Berg appealed the circuit court's order and this court reversed the order. ***Id.*** We concluded that Berg's predecessors in interest had "selected the location of the general easement decades ago, thereby establishing the location of [Berg's] easement." ***Id.*** We remanded the matter back to the circuit court with

[3] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1967 (unabr. 1993)

directions to "grant Berg a specific easement in the location of the existing access road." ***Id.***, ¶27.

¶7 On remand, the Ziels substituted the circuit court judge pursuant to WIS. STAT. §§ 801.58(1), (7). The Ziels then filed a motion requesting the circuit court grant Berg "a specific easement consistent with the terms of the prior easement language as determined by the Court of Appeals." Specifically, the Ziels requested that the court determine the easement's location to be "the existing one-lane road, non-exclusive, and for ingress and egress." In contrast, Berg requested that the circuit court grant him a specific easement thirty-three feet in width because the deed describing the easement did not restrict: (1) the type of vehicle that could use the easement; and (2) the width of the easement.

¶8 A hearing was held on the Ziels' motion. The circuit court asked the parties if there was a need for an evidentiary hearing. The parties declined. The matter was then submitted on briefs and oral argument, with the parties citing testimony from the transcript of the original trial.

¶9 The circuit court granted Berg an easement in the location of the existing road, but denied Berg's request for an easement thirty-three feet in width. Subsequently, the court issued a written order stating:

> Berg argues that the court should now grant an easement 33 feet in width across the servient (Ziel) estate. The court reviewed the appellate court order as well as the remand briefs and heard arguments of counsel. The court finds that this request would unduly burden the servient estate and is inconsistent with Berg's prior testimony and requests as well as the directive of the Court of Appeals. The easement has been historically this way for many years and the ultimate use of the dominant (Berg) estate has not significantly changed. The width of an easement for ingress and egress should not be extended beyond what was originally granted or what is more than reasonable to

> provide access. The test is whether the owner of the dominant estate (Berg) can reasonably use the property as intended. [Ziels'] Reply Brief on Remand specifically cites sworn trial testimony that indicates the road as presently (and as historically) maintained and traveled is sufficient to meet this test. Berg's request to expand the easement is well beyond the historical use of the easement, beyond what he asked for at trial, and beyond what the Court of Appeals ordered. The trial testimony cited by Ziel in his brief was abundantly clear to this court that an easement the width of the widest portion of the road as traveled is sufficient for purposes of ingress and egress.

The circuit court order then described the easement to be twelve feet in width and in relevant part provided:

> A non-exclusive easement … being a right of way for ingress and egress for vehicular traffic over the existing road as presently traveled and being *twelve feet in width* (six feet on either side of the middle of the driveway as presently traveled) from the public highway passing through said Section … as well as the right to a reasonable and usual enjoyment thereof. The Plaintiff [Berg], his successors and assigns, are also granted the right to provide usual and reasonable upkeep to said driveway to maintain it in a fully drive-able condition and to continue to allow reasonable driving access to said property.

(Emphasis added). The Trust now appeals.

DISCUSSION

¶10 Before addressing the merits of the circuit court's decision on the width of the easement, we first discuss two threshold issues the parties raised: (1) our applicable standard of review regarding the circuit court's factual findings; and (2) whether the circuit court exceeded its authority from our remand order in ***Berg I***.

I. Standard of review

¶11 Berg and the Ziels disagree on the standard of review applicable here concerning the circuit court's factual findings. Ordinarily, a circuit court's factual findings will "not be set aside unless clearly erroneous" WIS. STAT. § 805.17(2).[4] However, the Trust argues that we may review the court's factual findings de novo, citing ***Racine Education Association v. Board of Education for Racine Unified School District***, 145 Wis. 2d 518, 521, 427 N.W.2d 414 (Ct. App. 1988). In ***Racine***, the court held "we need not give any special deference to the [circuit] court's [factual] findings" when the second circuit court judge did not "observe the witnesses first-hand" and that judge "had only documentary evidence." ***Id.*** Here, the Trust observes that the factual findings in the original trial were made by one judge, but, after remand, findings were made on the basis of the trial transcript by a different judge. The second judge did not have the opportunity to observe the witnesses' demeanor, assess their credibility, and determine the weight to be afforded the testimony. Therefore, the Trust argues we should review the factual findings by the second judge de novo. However, the "documentary evidence exception" to the clearly erroneous standard of review only applies to the inferences a circuit court draws from undisputed facts based on documentary evidence; the exception does not apply when the underlying facts are disputed. *See* ***Phelps v. Physicians Ins. Co. of Wis., Inc.***, 2009 WI 74, ¶38 n.10, 319 Wis. 2d 1, 768 N.W.2d 615. Here, the parties dispute the underlying facts, and the circuit court was not merely relying upon documentary evidence to find facts and draw inferences. Therefore, we review the factual findings of the circuit court under the clearly erroneous standard.

[4] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

II. The remand order

¶12 In ***Berg I***, we remanded the case to the circuit court with directions to "grant Berg a specific easement *in the location* of the existing road." ***Berg I***, 365 Wis. 2d 131, ¶27 (emphasis added). The Trust contends the circuit court incorrectly interpreted our remand order to require the court to restrict the easement only to the width of the visibly traveled portion of the road. The Trust bases its argument upon the circuit court's statement that: "The Court of Appeals gave a decision saying, order the road in the existing place. The easement [is] where the road is. And that's what the Court is doing."

¶13 On remand, a circuit court may exercise its discretion to take any actions wise and proper under the circumstances, as long as these actions are not inconsistent with the remand order of the appellate court. *See* ***Lingott v. Bihlmire***, 38 Wis. 2d 114, 129, 156 N.W.2d 439 (1968). A circuit court may exercise its discretion in determining an issue left open after appeal. ***Id.***

¶14 In ***Spencer v. Kosir***, 2007 WI App 135, ¶¶13-14, 301 Wis. 2d 521, 733 N.W.2d 921, we determined:

> The easement is described as "a right of way for road purposes." The easement does not have a specified width or location. When the location of an easement is not defined, the court has the inherent power to affirmatively and specifically determine its location, after considering the rights and interests of both parties. *See* ***Werkowski v. Waterford Homes, Inc.***, 30 Wis. 2d 410, 417, 141 N.W.2d 306 (1966).

Because Berg's easement did not specify any particular easement width, the issue was left open after our remand in ***Berg I***. Thus, the circuit court here had discretion and inherent authority to specifically determine the easement's width after considering the rights and interests of both parties. ***Spencer***, 301 Wis. 2d 521, ¶¶13-14. If on remand the circuit court had left the easement width

undetermined, it would have relegated the parties to possible continuing disputes in the future. The width determination was therefore a wise and proper exercise of the court's discretion and not inconsistent with our remand order.

III. Determination of the easement width

¶15 On remand, the parties requested that the circuit court determine the precise location of the easement, including its width. As previously mentioned, "[w]hen the location of an easement is not defined, the court has the inherent power to affirmatively and specifically determine its location, after considering the rights and interests of both parties." ***Spencer***, 301 Wis. 2d 521, ¶13. We review such a decision for an erroneous exercise of discretion. *See* ***id.*** (citing ***Mulder v. Mittelstadt,*** 120 Wis. 2d 103, 352 N.W.2d 223 (Ct. App. 1984)). "The circuit court properly exercises its discretion if it applies the appropriate law and the record shows there is a reasonable factual basis for its decision." ***Id.*** (citation omitted).

¶16 "The owner of an easement may make changes in the easement for the purpose specified in the grant as long as the changes are reasonably related to the easement holder's right and do not unreasonably burden the servient estate." ***Hunter v. Keys***, 229 Wis. 2d 710, 715, 600 N.W.2d 269 (Ct. App. 1999). However, "a broad grant of an access easement [does not mean] that all accommodations which serve the purpose of the easement must be allowed." ***Atkinson v. Mentzel***, 211 Wis. 2d 628, 645, 566 N.W.2d 158 (Ct. App. 1997). In ***Atkinson***, we determined:

> Rather, the test is whether the owner of the dominant estate can reasonably use the property as intended. Stated differently, but to the same effect, the easement must be interpreted so as to accomplish its purpose bearing in mind the reasonable convenience of both parties. Once this purpose is served, further expansion of the easement is neither necessary nor warranted.

Id. at 645-46 (citation omitted).

¶17 The Trust makes several arguments for why the circuit court erroneously exercised its discretion by granting an easement of twelve feet rather than thirty-three feet in width.[5] First, the Trust argues the twelve-foot wide easement is inconsistent with the language describing the easement. However, because the language in the deed describing the easement did not specify the easement's location or width, an easement that is twelve feet wide can hardly be viewed as "inconsistent" with the language describing the easement. In addition, it would be unreasonable to interpret "a right of way for ingress and egress for vehicular traffic" to have unlimited width, since the main purpose is travel by vehicles, which themselves have limited widths. We therefore reject the Trust's argument.

¶18 Next, the Trust argues the easement the circuit court granted is inconsistent with the trial testimony. On remand, the circuit court found that the access road's width was "between 11 and 13 feet" and that "the width of the

[5] The Ziels argue the Trust forfeited the right to cite certain testimony contained in the trial transcript on appeal regarding this argument by it not first bringing that specific testimony to the circuit court's attention on remand in either its brief or at oral argument before the circuit court. We disagree. First, the circuit court had access to the entire trial transcript, which contains the testimony the Trust mentions on appeal. Second, the Trust only cites the objected-to testimony in the context of arguing the circuit court's factual findings are not supported by the record—i.e., are clearly erroneous. Because a finding of fact is clearly erroneous only if it is unsupported by the record or is against the great weight and clear preponderance of the evidence, *see* ***Royster-Clark, Inc. v. Olsen's Mill, Inc.***, 2006 WI 46, ¶11-12, 290 Wis. 2d 264, 714 N.W.2d 530, the Trust is entitled to cite portions of the record it believes demonstrates the circuit court's factual findings are clearly erroneous. It did not forfeit the right to cite testimony on appeal that was not first brought to the circuit court's attention on remand in either its brief or at oral argument before the circuit court.

At times, the Ziels use the term "waiver." However, the Ziels' argument is plainly a matter of forfeiture. *See* ***State v. Ndina***, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612 (explaining that "forfeiture is the failure to make the timely assertion of a right" and "waiver is the intentional relinquishment or abandonment of a known right").

widest part of the road traveled is sufficient for purposes of ingress and egress." The court's factual findings were supported by the testimony adduced at trial, including Berg's own testimony that the current road was approximately eleven or twelve feet wide. Berg's excavator/road builder, Michael Marsolek, testified most vehicles are approximately six-and-one-half to seven feet wide. The reasonable inference is that a twelve-foot easement is wide enough for travel by most vehicles.

¶19 As to wider vehicles, Howard Hammer, who previously owned what is now Berg's property, testified the existing road was used for agricultural, logging, and hunting traffic. Stanley Campbell also owned what is now Berg's property and rented out part of the acreage to farmers. He testified the farmers traveled the road with their farm machinery without problem. Campbell testified there was no need to change or improve anything with the road. Another former owner, Steven Schaefer, used the road for recreational and logging purposes. He testified that logging trucks used the road to take out tens of truckloads of trees using thirteen-foot-wide logging trucks "just fine." Schaefer stated you could drive on the road with "I guess about everything" and "[i]t could be any vehicle."

¶20 Berg testified that since he owned the property, the road has been used to access his property by all types of vehicles, including automobiles, logging trucks, semi-trucks, agricultural equipment and fire trucks. When asked why he had not proposed that the existing road be extended to sixteen feet as he had proposed for the "new" road to the property if the easement location changed, Berg testified, "You don't need to go quite that extensive…." We conclude the record supports the court's exercise of discretion in determining a twelve-foot easement for vehicular travel provides for safe and meaningful access for all vehicles.

¶21 The Trust next argues it needs more than twelve feet to properly maintain the access road. Specifically, the Trust asserts twelve feet does not provide enough room for plowing snow and performing other necessary road maintenance without trespassing on the Ziels' property. The Trust must be able to make full and meaningful use of the easement without having to trespass on the Ziels' property. *See* ***Atkinson***, 211 Wis. 2d at 644.

¶22 With regard to plowing snow on the access road, we first note this is undisputedly a one-lane road. Second, the trial testimony supported a finding that most vehicles are six-and-one-half to seven feet wide. This means there is at least a combined five feet of space on the sides of the road for plowed snow to be stored, while still permitting most vehicles to utilize the road. Berg has failed to demonstrate that plowing snow on the road would result in trespassing on the Ziels' property.

¶23 In addition, the Trust fails to establish it will have problems maintaining the road without trespassing on the Ziels' property. Berg testified that maintenance was minimal and the testimony of other witnesses showed minimal maintenance difficulty. Hammer testified that when he owned the property there were no problems with the use or maintenance of the existing road. Campbell testified that maintaining the road was not a problem and that farmers he knew had no problem using the road for travel. Schaefer testified he had experienced no problems with maintaining the road, including trimming some trees so they would not scrape wide logging trucks. Fire Chief Matthew Franson testified that if trees along the existing access road were to fall down, his path would be blocked and he would not be able to get fire trucks through on the one-lane road. However, even if the easement was thirty-three feet wide, most trees falling across the road would presumably present the same problem.

¶24 The circuit court determined that Berg could cut the trees, brush and branches that he could physically reach while on the edge of the access road. The Trust argues it will be physically impossible for it to have someone brush-hog on either side of the road if that person cannot go on either side of the access road without trespassing. However, the Trust ignores the testimony that no prior owner had any significant travel problems on the road and that maintenance of the road was minimal.

¶25 The Trust next argues the circuit court's decision was based on an "error of law" because the court believed the Trust would be able to do anything it wanted within its requested thirty-three foot easement. However, the Trust identifies no legal error. Instead, we construe the Trust's argument as questioning the circuit court's exercise of discretion by finding a thirty-three foot easement would unduly burden the Ziels' servient estate. At the hearing on remand, the court stated:

> And if [Berg] says, "I can't plow my snow. I need to have 33 feet wide to plow. In theory, he can clearcut 33 feet because he needs to get his plow there. … But he could legally do that if he gets a 33 foot wide easement…. He can argue, I needed to clearcut every tree for 33 feet in the middle of this place here because I can't get my plow to push off to the side. Or name a million different arguments.

In its written decision, the circuit court considered the rights and interests of the parties and determined that a twelve-foot easement provided reasonable access to the Trust's property. *See* ***Atkinson***, 211 Wis. 2d at 645 (explaining "the easement must be interpreted so as to accomplish its purpose bearing in mind the reasonable convenience of both parties. Once this purpose is served, further expansion of the easement is neither necessary nor warranted."). Here, the court considered the relevant facts and applied a proper standard of law in determining a twelve-foot

wide easement accomplished the purpose of ingress and egress, and therefore further expansion of the easement was neither necessary nor warranted. That finding was not clearly erroneous. *See* WIS. STAT. § 805.17(2) (requiring that a circuit court's factual findings will "not be set aside unless clearly erroneous").

By the Court.—Order affirmed.

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