COURT OF APPEALS
DECISION
DATED AND FILED

June 1, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1130 **Cir. Ct. No. 2006CV1318**

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

BRIAN PSICIHULIS AND ROBERTA PSICIHULIS,

PLAINTIFFS-RESPONDENTS-CROSS-APPELLANTS,

V.

MICHAEL SAMARZJA AND JANN SAMARZJA,

DEFENDANTS-APPELLANTS-CROSS-RESPONDENTS.

APPEAL AND CROSS-APPEAL from an order of the circuit court for Waukesha County: DONALD J. HASSIN, JR., Judge. *Affirmed*.

Before Brown, C.J., Anderson and Reilly, JJ.

¶1 PER CURIAM. Michael and Jann Samarzja (Samarzja) appeal and Brian and Roberta Psicihulis (Psicihulis) cross-appeal from a circuit court order confirming the existence and scope of an easement over the Psicihulis property for the benefit of the Samarzja property. The circuit court determined that while the

easement provided Samarzja's property with access to Willow Springs Lake, Samarzja could not attach a pier to the easement. We conclude that the evidence was sufficient to support both rulings. We affirm.

¶2 Samarzja purchased Lot 28 in 1994; Psicihulis purchased adjoining Lot 29 in 2004. Lot 28 is to the north of Lot 29. The 1975 subdivision plat shows the following easement: "20.00 ft. ingress and egress eas't for lands lying to the east." The easement runs on Lot 29 to the shore of Willow Springs Lake. A prior owner of Samarzja's property attached a pier to the end of the easement, and Samarzja continued to attach a pier once he purchased the property. After purchasing Lot 29, Psicihulis sought a declaratory judgment declaring ownership rights over the easement because (1) the easement did not benefit Samarzja's property and (2) the easement did not permit Samarzja to attach a pier.

¶3 After a trial to the circuit court, the court ruled that the easement was ambiguous. The easement referred to ingress and egress for "lands lying to the east," yet only the lake lay to the east of the easement. The extrinsic evidence showed that the intent of the easement was to provide Lot 28 with ingress and egress to the lake to avoid a situation in which Lot 28 was landlocked. The easement did not refer to the right to attach a pier, and a pier was first used after the easement was created. The court could find no intent to permit Lot 28, the dominant estate,[1] to install a pier as part of the easement. The parties appeal and cross-appeal from the court's rulings.

[1] "The 'dominant estate' enjoys the privileges granted by the easement, and the 'servient estate' permits the exercise of those privileges." ***Konneker v. Romano***, 2010 WI 65, ¶25, 326 Wis. 2d 268, 785 N.W.2d 432.

¶4 We must clarify our standard of review. Samarzja argues that whether the scope of the easement includes the right to attach a pier presents a question of law, not a question of fact. We disagree. Where an easement's scope is ambiguous, the intent behind the easement's creation presents a question of fact. *Cf.* ***Konneker v. Romano***, 2010 WI 65, ¶23, 326 Wis. 2d 268, 785 N.W.2d 432 (ambiguity in deed addressed). We review whether the circuit court's findings of fact regarding intent were clearly erroneous. ***Micro-Managers, Inc. v. Gregory***, 147 Wis. 2d 500, 511, 434 N.W.2d 97 (Ct. App. 1988). It was for the circuit court to assess the credibility of the witnesses and the weight of the evidence. ***Id.*** at 512.

¶5 We agree with the circuit court that the easement's scope was ambiguous in several respects. First, the language of the easement referred to ingress and egress for lands lying to the east; however, the lake lies to the east, and Samarzja's property lies to the north. Second, the easement did not identify a purpose for the ingress and egress granted. *See* ***Konneker***, 326 Wis. 2d 268, ¶30. Finally, the easement did not refer to riparian rights, including the right to construct and maintain a pier. *See* ***id.*** These deficiencies rendered the easement ambiguous. Therefore, the circuit court properly resorted to extrinsic evidence to determine the intent behind the easement. *See* ***id.***

¶6 On review, we search the record for evidence that supports the circuit court's findings regarding the intent behind the easement, not for evidence that supports findings the circuit court could have made but did not. ***Noble v. Noble***, 2005 WI App 227, ¶15, 287 Wis. 2d 699, 706 N.W.2d 166. It was the circuit court's role to resolve conflicts in the testimony. ***Global Steel Products Corp. v. Ecklund***, 2002 WI App 91, ¶10, 253 Wis. 2d 588, 644 N.W.2d 269.

¶7 Because Psicihulis' cross-appeal addresses whether the easement actually benefits Lot 28, we will address that issue first. Psicihulis argues that the easement cannot have been intended to benefit Lot 28 because it referred to lands lying to the east, which cannot include Lot 28, which lies to the north. In order to reach an "east" means "north" result, the circuit court must have reformed the easement. Psicihulis argues that reformation is not an appropriate remedy because Psicihulis was an innocent third party and bona fide purchaser of Lot 29.

¶8 Essentially, Psicihulis argues that we should re-weigh the evidence and make our own credibility determinations. This we cannot do. Rather, it was the circuit court's province to weigh the evidence, and its findings were not clearly erroneous based on this record. The court's findings regarding intent at the creation of the easement were supported by the testimony of Ann Kuplerski Schmidt and Richard Mace. The court's findings regarding the parties' knowledge of the easement were supported by the testimony of the parties and their predecessors in title.

¶9 Ann Kuplerski Schmidt testified that she purchased Lot 27 in 1972. A dispute arose regarding the lot's lack of lake frontage. Providing lake frontage to Lot 27 would deprive Lot 28 of lake frontage, so Schmidt suggested creating an easement for Lot 28's lake access. Schmidt identified contemporaneous correspondence indicating that as part of resolving the dispute regarding her lake frontage, an easement was created over Lot 29 to provide lake access to Lot 28,[2] and that this was the intent of the easement. The court found Schmidt's testimony

[2] Schmidt managed to avoid having the easement run across her property, Lot 27.

credible regarding the history and intent of the easement shown on the 1975 subdivision plat.

¶10 Richard Mace, a Waukesha county employee, testified that he wrote a letter in August 1992 discussing the easement. In that letter, Mace advised that his office could not locate any record shedding light on the easement's purpose. Mace testified that the easement might have been explained by a driveway on Lot 28. On cross-examination, Mace discussed the lake frontage dispute described by Schmidt. Mace testified that his office approved a plat showing lake frontage for Lots 27, 28, and 29. However, that plat was never recorded, and the easement did not appear on the unrecorded plat. In the 1975 plat ultimately recorded, Lot 28 became a parcel without lake frontage, and Lots 27 and 29 retained lake frontage. The easement appeared on the recorded plat. Mace agreed that if the easement's purpose was to avoid landlocking Lot 28, then the easement made sense as a means of lake access for Lot 28. The court noted Mace's concession and did not rely upon Mace's opinion in his 1992 letter that the easement had no purpose. Mace's description of the plat record is consistent with Schmidt's description of the history and purpose of the easement.

¶11 Richard Ross, Psicihulis' immediate predecessor in title, testified that he learned of the easement shortly before he closed on his purchase of Lot 29. Ross' title policy mentioned the easement and excepted it from coverage. During his ownership, Ross saw Samarzja using the easement area. When he and Psicihulis toured the property before the closing, Ross mentioned the easement and Samarzja's use of the property to Psicihulis. The court found that Ross knew about the easement and could not credibly explain why he did not mention the easement in the property information materials he provided to his realtor.

¶12 Roberta Psicihulis testified that she had no knowledge of the easement at the time she purchased Lot 29 from Ross. She saw a pile of wood and blue barrels at the end of her property near the lake. She later learned that the materials were the components of a pier. On cross-examination, Roberta conceded that she viewed the title policy at closing and the policy referred to the easement. She did not consult the referenced document at the Register of Deeds before closing.

¶13 Brian Psicihulis testified that during a tour of the property before he purchased it, he saw a pathway, barrels and the wood pile. He did not inquire regarding their purposes or significance, and he did not investigate the property at the Register of Deeds. Brian first saw the plat map containing the easement several months after he purchased the property.

¶14 The court did not find credible the testimony of Roberta and Brian Psicihulis that they were unaware of the easement. The court noted that the title policy referred to the easement, their predecessor in title knew about the easement, and there was evidence that someone was using part of their property.

¶15 Steven Hartig, Samarzja's immediate predecessor in title, testified that he owned Lot 28 from 1978 until he sold the property to Samarzja in 1994. Hartig understood that the property benefitted from the easement because his lot had no lake frontage. Hartig's predecessor in title told him that the lot originally had lake frontage but that when the parcels were redrawn, Lot 28 lost its lake frontage but picked up an easement on Lot 29 for lake access. Hartig used the easement and installed a pier. Hartig showed Samarzja the 1975 plat map. The court found that Hartig knew about the easement.

¶16 Michael Samarzja testified that when he purchased the property from Hartig, the realtor and the property data sheet mentioned the easement. He saw a pier and a boat used by Hartig. Before Psicihulis purchased Lot 29, Samarzja had no problem using the easement. After Psicihulis purchased Lot 29, a dispute arose regarding Samarzja's use of the easement and the pier. Samarzja testified that without a pier, access to the lake would be hindered because of the inhospitable shoreline.

¶17 Psicihulis argues that he had no knowledge of the easement. We disagree. The record supports the circuit court's findings that Psicihulis knew about the easement. Psicihulis' title policy referred to the easement, the pathway, barrels and wood pile were visible, and Psicihulis' predecessor in title mentioned the easement. The circuit court's findings of fact regarding the creation and intent of the easement were not clearly erroneous. The easement over Lot 29 exists for the benefit of Lot 28 owned by Samarzja.

¶18 Psicihulis posits a second theory for the easement's purpose: the easement was for a driveway and had nothing to do with lake access. For this theory, Psicihulis cites the testimony of Richard Mace. The circuit court did not credit this testimony, and we are bound by the circuit court's credibility determinations.

¶19 Psicihulis argues that the circuit court erroneously reformed the easement. However, all of Psicihulis' arguments are premised upon testimony the circuit court did not credit and facts the circuit court did not find. For this reason, we do not address the argument.

¶20 Having held that the easement benefits Lot 28, we turn to Samarzja's argument that the easement grants riparian rights to place a pier. The circuit court determined that the easement did not include the right to place a pier.

¶21 An easement must be used in accordance with the terms and purpose of the grant. ***Konneker***, 326 Wis. 2d 268, ¶25. Although riparian rights could be conveyed via an easement prior to 1994, ***id.***, ¶27, the easement must nevertheless unambiguously provide for the use of such rights by the dominant estate. Such riparian rights could include access to the lake and pier construction. ***Id.***, ¶27, n.11.

¶22 Samarzja argues that without a pier, the easement is unusable due to the shoreline's muck and cattails. Samarzja relies upon ***Wendt v. Blazek***, 2001 WI App 91, 242 Wis. 2d 722, 626 N.W.2d 78, to argue that an easement for lake access necessarily includes the right to install a pier to gain access under the easement. The circuit court distinguished ***Wendt*** on the grounds that the use of the pier in ***Wendt*** pre-dated the creation of the easement. In this case, the opposite is true: the easement pre-dates the use of the pier. We agree with the circuit court that ***Wendt*** can be distinguished on this basis.

¶23 In ***Wendt***, the easement accompanied nonriparian property and was "for the purpose of access to Okauchee Lake on and over a strip of land…." ***Id.***, ¶2. At the time the easement was created, the owner of the servient estate, who created the easement, had a pier at the point at which the easement reached the water's edge. ***Id.***, ¶3. A subsequent owner of the servient estate sought a declaration that the easement did not include the right to use and maintain a pier. ***Id.***, ¶4. The ***Wendt*** court analyzed whether "the terms and purpose of the

easement included the right to use and maintain the pier" and examined the parties' intent. ***Id.***, ¶14.

¶24 In this case, taking the ***Wendt*** approach, the circuit court made findings about the intent behind the easement's creation. There was no extrinsic evidence that the easement was intended to include a pier. At the time the easement was added to the 1975 plat, the only concern was access to the lake, not whether the dominant estate could use a pier. In addition, unlike ***Wendt***, no pier was in place at the time the easement was created.

¶25 The circuit court did not err in holding that the easement was ambiguous, and while the easement benefitted Lot 28, the easement did not include the right to install a pier. [3] And, contrary to Samarzja's claim that without a pier, the easement is unusable, there *is* a benefit. He has access to the lake.

¶26 No costs to either party.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2009-10).

[3] To the extent we have not addressed an argument raised on appeal, the argument is deemed rejected. ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978). ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").