COURT OF APPEALS
DECISION
DATED AND FILED

January 10, 2012

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP3030 **Cir. Ct. No. 2005CV271**

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

ROBERT BERKEN AND KATHRYN BERKEN,

PLAINTIFFS-APPELLANTS,

V.

LITTLE CHUTE LAND CO. AND LAST KNOWN OFFICERS, DIRECTORS OR SHAREHOLDERS OF LITTLE CHUTE LAND CO.,

DEFENDANTS,

MARGARET A. SALM,

INTERVENOR-DEFENDANT,

VILLAGE OF LITTLE CHUTE, ADAM KILGAS AND DANA KILGAS,

INTERVENORS-DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Outagamie County: MARK J. MCGINNIS, Judge. *Affirmed*.

Before Hoover, P.J., Peterson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Robert and Kathryn Berken appeal a summary judgment in favor of the Village of Little Chute and Adam and Dana Kilgas. The Berkens, the Village, and the Kilgases all own property in a part of the Village known as the Fairview Heights subdivision. The Village and the Kilgases argue that the southern boundary of the subdivision is concurrent with the northern boundary line of government land located to the subdivision's south. The Berkens contend, however, that the subdivision's southern boundary lies about fifty feet north of the government lot line, leaving an approximately fifty-foot-wide strip of unplatted "no man's land" between the subdivision and the government land. Based on the undisputed facts, we agree with the circuit court that the land company that owned, subdivided, and sold the subdivision land between 1915 and 1932 intended the lots along the subdivision's southern edge to extend all the way south to the government lot line and did not intend to retain ownership of a narrow strip of land between the subdivision and the government property. We therefore affirm.

BACKGROUND

¶2 The parties own property located in Block 68 of the Fairview Heights subdivision's First Addition. Block 68 is bordered by Roosevelt Street to the east, Bluff Avenue to the north, and Grant Street to the west. A canal owned by the United States lies to the south. The block is subdivided into seven lots. The Village owns Lot 1, which comprises the easternmost portion of the block. Lot 1 is fifty feet wide and spans the block's entire north-south length. The Berkens own Lots 2, 3, 4, 5, and 6. Lots 2 and 3 are located to the west of Lot 1. Like Lot 1, they are fifty feet wide and span the entire north-south length of the

block. Lots 4, 5, and 6 are west of Lot 3 and are also fifty feet wide, but they do not span the entire length of the block. Instead, they run one-hundred-fifty feet south from Bluff Avenue to the northern border of Lot 7, which is owned by the Kilgases. Lot 7 is 150 feet wide, and its length extends from the southern border of Lots 4, 5, and 6 to the southern border of Block 68.

¶3 The history of the Fairview Heights subdivision goes back to 1899. In that year, a government surveyor made a survey to establish the boundaries of the canal that runs along what is now the subdivision's southern edge. The survey established a government lot line running along the canal's northern bank. According to the survey, the government owned the land south of the government lot line, while the Green Bay and Mississippi Canal Company owned the property to the north.

¶4 On April 20, 1915, the Green Bay and Mississippi Canal Company conveyed the property north of the government lot line to the Little Chute Land Company. On June 11, 1915, the Little Chute Land Company recorded a plat map entitled "Fairview-Heights Plat," which subdivided the property into ten blocks. The surveyor's certificate on the 1915 map states that the map was made at the direction of Arnold, Benjamin, and Henry Gloudemans, who were the owners or shareholders of the Little Chute Land Company. The property description in the surveyor's certificate states that the subdivision's boundary extends "to the North line of the U.S. Canal, thence Easterly along the Gov'nt. line of the aforesaid Canal, to the East line of the aforesaid ¼ Section …." On the 1915 map, what is now Block 68 of the subdivision was part of a larger block called Block 10. The map shows the southern boundary of the subdivision, including the southern boundary of Block 10, as being concurrent with a line labeled "Government Line." However, the location of the government lot line on the map is incorrect; the

government lot line is actually located to the south of the location shown on the plat map.

¶5 In 1917, the Village adopted an assessor's plat for the Fairview Heights subdivision. On the 1917 map, Block 10 from the "Fairview-Heights Plat" is subdivided into Blocks 63, 64, 65, 66, 67, and 68, with Blocks 67 and 68 being those closest to the canal. According to the 1917 map, the government lot line is not concurrent with the southern boundary of Blocks 67 and 68. Instead, the government lot line lies to the south of Blocks 67 and 68, creating a strip of land between the government land and the subdivision that does not appear to be a part of either.

¶6 On July 11, 1918, the Little Chute Land Company recorded a plat map entitled "First Addition to Fairview Heights Plat." Unlike the 1917 assessor's map, the 1918 map shows that the southern boundary of Blocks 67 and 68 is concurrent with a line marked "Gov'nt Line." The surveyor's certificate states that the First Addition's boundary runs "south along the east line of said lot, eleven hundred (1100) ft. to the N. line of U.S. Gov'nt Canal Property thence Southwesterly along said Canalroperty six hundred seventy and nine tenths (670.9) ft. …" This description is problematic, though, because while it states that the First Addition's eastern boundary runs all the way south to the government lot line, it also states that the eastern boundary is only 1,100 feet, which is not long enough to extend to the government lot line.

¶7 The Little Chute Land Company dissolved in 1932. On June 8, 1932, the Company disposed of its remaining properties in the Fairview Heights subdivision by deeding them to Arnold Gloudemans and his wife, Mary. This included Lots 1, 2, 3, 4, 5, 6, and 7 of Block 68. There are no real estate records

showing any conveyance since 1932 from the Little Chute Land Company to any grantee. In 1963, the Village acquired Lot 1 of Block 68. The Berkens purchased Lots 2, 3, 4, 5, and 6 in 1992. The Kilgases purchased Lot 7 in 1998.

¶8 On February 24, 2005, the Berkens commenced this case as an adverse possession action against the last known officers, directors or shareholders of the Little Chute Land Company. The Berkens argued that the 1918 plat map recorded by the Little Chute Land Company "did not include all land referenced in the legal description accompanying said plat map, but rather left a strip of land between the U.S. government property line and the platted lot line." Therefore, the Berkens alleged that the Company, or its successors in interest, still owned a strip of land to the south of the subdivision. The Berkens contended that they, or their predecessors in title, had been in uninterrupted adverse possession of a portion of that strip of land for more than twenty years. Specifically, they claimed they had adversely possessed land south of Lots 1, 2, 3, and 7, as well as land south of the terminus of Roosevelt Street.

¶9 The Berkens accomplished service of their summons and complaint by publication, but no defendants responded. Accordingly, the circuit court granted a default judgment in the Berkens' favor.[1] However, in March 2007, the court granted the Kilgases' motion to intervene and reopen the default judgment. The Kilgases argued that the Berkens were not entitled to a judgment of adverse possession for any land lying to the south of the Kilgases' property, Lot 7. After

[1] Four other owners of land along the southern boundary of Fairview Heights also brought adverse possession lawsuits against the Little Chute Land Company's last known officers, directors, or shareholders. Each of these lawsuits ended in a default judgment in favor of the landowner.

the default judgment was reopened, the Berkens and Kilgases entered into a settlement agreement, and, as a result, the pending lawsuit between them was dismissed.

¶10 Subsequently, the court granted the Village's motion to intervene and reopen the Berkens' default judgment. The Village then answered the Berkens' complaint, counterclaimed, and asserted cross-claims against the Kilgases and the Little Chute Land Company. The Village argued that the lots along the southern edge of the Fairview Heights subdivision actually extended all the way south to the government lot line and that the Little Chute Land Company had not retained any land between the subdivision and the government lot line. Accordingly, the Village sought a judgment "declaring that the Village … is a true and lawful owner of all property encompassed by extending the boundary lines of Lot 1, Block 68, and Roosevelt Street to the true government lot line[.]" In addition, the Village sought to have the boundaries of all the lots along the southern edge of the Fairview Heights subdivision corrected, pursuant to the assessor's plat procedure under WIS. STAT. § 70.27.[2]

¶11 Thereafter, Margaret Salm intervened in the case, alleging that she was the great-granddaughter of Arnold and Mary Gloudemans and, consequently, was the successor to the last known officers, directors, or shareholders of the Little Chute Land Company. Salm contended the disputed strip of land between Fairview Heights and the government lot line was still titled in the name of the Little Chute Land Company and, therefore, rightfully belonged to her.

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶12 The Village moved for summary judgment. It argued, based on the 1915 and 1918 plat maps, that when the Little Chute Land Company platted the Fairview Heights subdivision, it intended the lots on the southern edge of the subdivision to extend all the way to the government lot line. It contended the Company did not intend to reserve a strip of unplatted land between the subdivision and government lot line for itself. Therefore, the Village argued that, regardless of the incorrect placement of the government lot line on the 1915 and 1918 plat maps and the incorrect distance given on the 1918 map, the subdivision lots should extend to the true government lot line. The Kilgases subsequently "join[ed] the Village's motion that the Court declare … that the Little Chute Land Co. conveyed all of its property south, to the northern government lot line … such that Little Chute Land Co. no longer owns any property in the Fairview Heights subdivision."

¶13 In response, the Berkens contended that the distance given on the 1918 plat map should control the location of the subdivision's boundary, regardless of the 1915 and 1918 maps' references to the government lot line. The Berkens pointed out that, at the time the Little Chute Land Company sold the subdivision lots, it had staked out the boundaries of those lots. The Berkens argued that the stakes along the southern lot lines corresponded to the distance given on the 1918 plat map, rather than to the actual location of the government lot line. The Berkens claimed this showed that, whatever the Company's intent, the Company did not actually sell all of its land and instead retained a narrow strip south of the subdivision.

¶14 Following a hearing, the circuit court granted summary judgment in favor of the Village and the Kilgases. The court concluded that the Little Chute Land Company intended the lots along the southern edge of Fairview Heights to

extend all the way south to the government lot line and did not intend to retain a strip of unplatted land south of the subdivision. Accordingly, the court concluded that the boundaries of the lots along the subdivision's southern edge should be concurrent with the government lot line. The court therefore "declar[ed] that the Village of Little Chute may exercise its authority under [WIS. STAT. § 70.27] to create one or more assessor's plats in accordance with the terms of this judgment." However, the court "noted for reference that the open issue of adverse possession claims existing by Berkens against properties claimed by the Village of Little Chute remain subject to further adjudication in this action." The court also recognized that the "written stipulation between Berkens and defendants Kilgas regarding the lot lines affecting their properties shall be honored[.]"

¶15 Margaret Salm subsequently assigned to the Berkens "all rights, title and interest in … lands located in the Village of Little Chute that the Little Chute Land Co. has owned in the past." The Berkens then filed a notice of appeal from the summary judgment, both on their own behalf and as "assignees of the rights of the Little Chute Land Co. and Margaret A. Salm[.]" (Capitalization omitted.) Two months later, the Berkens stipulated to the dismissal of their adverse possession claim against any land owned by the Village.

DISCUSSION

¶16 "We review a grant of summary judgment independently, using the same method as the circuit court." ***Pinter v. American Family Mut. Ins. Co.***, 2000 WI 75, ¶12, 236 Wis. 2d 137, 613 N.W.2d 110. Summary judgment is appropriate when there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶17 To determine whether the Village and the Kilgases were entitled to summary judgment, we must construe the 1918 plat map of the First Addition to the Fairview Heights subdivision.[3] When we construe a written instrument, our purpose is to determine the parties' intent. ***Konneker v. Romano***, 2010 WI 65, ¶26, 326 Wis. 2d 268, 785 N.W.2d 432. If the language of the instrument is unambiguous, we ascertain the parties' intent from that language alone without resorting to extrinsic evidence. ***Id.*** "However, if the language of the [instrument] is ambiguous, meaning it is susceptible to more than one reasonable interpretation, then the parties may introduce other evidence to demonstrate the intent behind the language." ***Id.***

¶18 Here, the 1918 plat map is ambiguous with respect to the location of the First Addition's southern boundary. The surveyor's certificate states that the First Addition's boundary runs "south along the east line of said lot, eleven hundred (1100) ft[.]" This distance is not long enough for the boundary to extend all the way to the government lot line. However, the surveyor's certificate also states that the First Addition's boundary extends "to the N. line of U.S. Gov'nt Canal Property thence Southwesterly along said Canal Property …." According to this language, the First Addition's southern boundary should be concurrent with the government lot line. Moreover, the 1918 plat map itself shows that the government lot line is also the First Addition's southern boundary. Yet, the parties' experts agree that the location of the government lot line is incorrect and should be farther to the south.

[3] We construe the 1918 plat map, rather than the legal descriptions in the various deeds to the lots in Block 68, because the deeds simply give the lot and block number and then refer to the 1918 plat map.

¶19 Based on these discrepancies, the 1918 plat map is susceptible to more than one reasonable interpretation. One could reasonably conclude that the First Addition extends all the way to the government lot line, but one could also reasonably conclude that the First Addition only extends 1,100 feet south, which is about fifty feet short of the government lot line. Consequently, the 1918 plat map is ambiguous, and we must look to extrinsic evidence to determine the parties' intent. Specifically, we must determine whether the Little Chute Land Company, which approved and recorded the 1918 plat map, intended the First Addition's boundary to extend all the way to the government lot line. Conversely, we must determine whether the Company intended the southern boundary to be located about fifty feet north of the government lot line so that, when the Company sold the subdivision lots, it would retain ownership of a narrow strip of land south of the subdivision.

¶20 We conclude the Little Chute Land Company intended to sell off all of its property north of the government lot line and did not intend to retain ownership of any land south of Fairview Heights. On June 8, 1932, the Company disposed of its remaining properties in Fairview Heights and in the First Addition by deeding them to Arnold Gloudemans and his wife, Mary. This included Lots 1, 2, 3, 4, 5, 6, and 7 of Block 68. The Little Chute Land Company dissolved the same year. Since that time, there are no real estate records showing any conveyance from the Little Chute Land Company to any grantee. Village records show no ownership of land in the Company's name since 1932 and show that the Company has not paid any property taxes on the disputed strip of land. Furthermore, the strip of land is unbuildable due to its topography, lack of street access, and noncompliance with dimensional requirements set forth in the Village's zoning and subdivision ordinances. This evidence is inconsistent with a

conclusion that the Company intended to retain ownership of the strip of land south of Fairview Heights.

¶21 Instead, the evidence suggests that, when the Company platted the subdivision and subsequently sold the subdivision lots, it intended to dispose of all of its remaining land north of the government lot line. We agree with the Village that "there was no useful or logical purpose, and none has ever been suggested, for [the Company] to maintain ownership of a long[,] narrow strip of unbuildable and unplatted land." The Berkens themselves concede that "[t]here was apparently a belief that the [C]ompany had sold everything it owned." Accordingly, we conclude the Company intended the First Addition's southern boundary to be concurrent with the government lot line, regardless of the incorrect distance given in the 1918 plat map.

¶22 The Berkens argue that we should determine the Little Chute Land Company's intent based on the stakes it placed along the First Addition's southern boundary at the time it marketed and sold the lots. The Berkens argue that the stakes that were once placed along the southern boundary corresponded to the distance given on the 1918 plat map, rather than to the actual location of the government lot line. They contend that, when there is a discrepancy between the description in a deed and monuments found on the ground, the monuments on the ground control.

¶23 In support of their argument, the Berkens cite ***Gove v. White***, 20 Wis. 425 (1866), ***Lampe v. Kennedy***, 49 Wis. 601, 6 N.W. 311 (1880), and ***Miner v. Brader***, 65 Wis. 537, 27 N.W. 313 (1886). These cases are distinguishable because, contrary to the present case, they involved legal descriptions that expressly referred to stakes in the ground. The issue in ***Gove*** was whether a

conveyance of two acres of land was inclusive or exclusive of a road. ***Gove***, 20 Wis. at 425-26. The land was described as:

> [C]ommencing on the road at the northwest corner of section eleven, in town six, north of range nineteen east, in the Milwaukee land district; thence south on the road dividing sections ten and eleven, sixteen rods; thence, at right angles with said road, and parallel with the north line of said section, twenty rods, *to a stake*; thence, at right angles, and parallel with the west line of said section, to the road leading from the first named corner to the house of said E. Gove, sixteen rods; thence west along the line of said road, twenty rods, to the place of beginning--containing two acres.

Id. at 425 (emphasis added). The court concluded, "Where the courses, distances and quantity of land contained in a grant *correspond* with the natural or artificial monuments or boundaries referred to in the description of the premises, there can be no difficulty in making a practical location of the grant." ***Id.*** at 437 (citation omitted). The court stated, "[C]ourse and distance must yield to natural or ascertained objects or bounds *called for by the grant*." ***Id.*** at 433 (emphasis added).

¶24 In ***Lampe***, there was a dispute about the location of the northwest corner of the plaintiff's lot. The legal description of the lot stated that its boundary commenced "*at a stake* at the north-west corner of Rowell's lot[.]" ***Lampe***, 49 Wis. at 604. Our supreme court concluded, "If, in fact, the stake thus referred to in the deed could be found … it would settle all dispute as to where the north-west corner of the plaintiff's lot was; for the stake would be an original monument, to which the distances marked … must yield." ***Id.***

¶25 In ***Miner***, the survey of a plat was certified to commence "at a stone planted, in the town line, forty-four rods and twenty-three links west of the south quarter stake of section 34[.]" ***Miner***, 65 Wis. at 539. Again, the court held that

fixed monuments referenced in a legal description control courses and distances. ***Id.*** at 542. However, as in ***Gove*** and ***Lampe***, the legal description in ***Miner*** specifically referred to a monument, and the original monument was located on the ground and established as a correct marker. In this case, neither the deeds nor the plat maps reference stakes in the ground. Furthermore, while the Berkens have presented evidence that the Little Chute Land Company placed stakes along the First Addition's southern boundary sometime between 1915 and 1932, they have not presented any evidence that those original stakes still exist today.

¶26 The Berkens also rely on ***Marsh v. Mitchell***, 25 Wis. 706 (1868), for the proposition that stakes in the ground outweigh the language of an instrument for purposes of determining boundaries. In ***Marsh***, a plat map showed a lot numbered 163, but there was no lot numbered 163 in the original survey and the property indicated as lot 163 in the plat was entirely occupied by other numbered lots. ***Marsh***, 25 Wis. at 706-08. The court found the property description ambiguous, and then applied the rule that monuments fixed on the land control courses and distances. ***Id.*** at 708. However, in ***Marsh***, the defendant and another witness were alive and could testify from personal knowledge that the stakes in the ground were the same stakes laid by the surveyors who created the original survey. ***Id.*** at 707-08. That is not the case here.

¶27 Moreover, as the Village points out, the ***Marsh*** court noted that "the rule that the stakes or monuments fixed on the land … must govern" should be the rule "especially … where it does not appear that the supposed lot 163 has ever been sold by the proprietors of the original plat, so that any one has ever taken actual possession of any specific part of the land as and for that lot." ***Id.*** at 708. The court reasoned:

> If any one is to suffer loss in consequence of that lot having been inserted in the plat without a survey and designation of it on the land, it is manifestly not purchasers who have bought, and with the assent of the proprietors taken possession of and improved, the lots according to the boundaries fixed by surveyors, but the proprietors themselves, who are responsible for the error, and who would otherwise deprive the purchasers of a portion of the land to which, according to the plat, they would be entitled.

Id. at 708-09. The Village argues that in this case, as in ***Marsh***, if anyone is to suffer loss because of an error about the location of the government lot line, it should not be the purchasers who bought, took possession of, and improved the lots according to the assent of the Little Chute Land Company and according to the plat map which stated that their lots extended to the government lot line. Instead, the Village contends that, under ***Marsh***, the Company should be responsible for the error. The Berkens do not respond to this contention, and we therefore deem it conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶28 The Berkens also cite ***Northrop v. Opperman***, 2011 WI 5, 331 Wis. 2d 287, 795 N.W.2d 719, for their contention that the stakes in the ground should govern. The Berkens argue, "***Northrop*** refers to the original monuments—the stakes in the ground in this case—and directs the court to make use of them, not descriptive language in the deeds." However, the ***Northrop*** court stated that "the instant case most closely approximates and is governed by the principles set forth in boundary dispute cases in which a survey is in conflict with a longstanding landmark." ***Id.***, ¶39. Here, we do not have a conflict between a survey and a longstanding landmark; instead, we have an internal conflict between two statements in the property description on the 1918 plat map.

¶29 Moreover, the ***Northrop*** court recognized, "In the survey/fence cases, a circuit court first determines whether the boundary line can be determined from the deed and original monuments or markers. If the boundary line cannot be so determined, the circuit court looks to the best evidence of the boundary line." ***Id.***, ¶42. Citing ***City of Racine v. Emerson***, 85 Wis. 80, 55 N.W.177 (1893), the court then stated:

> [M]onuments set by the original survey in the ground, and named or referred to in the plat, are the highest and best evidence. If there are no such monuments, then stakes set by the surveyor or soon thereafter are the next best evidence. Buildings, fences, and other substantial improvements built according to the stakes laid out while they were present are the next best evidence of the line.

Northrop, 331 Wis. 2d 287, ¶47 (internal quotation marks and footnotes omitted). The court concluded that, because there was no evidence of original survey monuments, stakes set by the surveyor soon thereafter, or improvements built according to the stakes, "the circuit court properly focused its analysis on what constitutes the best evidence available to establish the boundary line[,]" that is, "the long occupation of the properties by the parties to the present case, their neighbors and their predecessors in title." ***Id.***, ¶52.

¶30 In this case, as in ***Northrop***, there is no evidence of original survey monuments, stakes set by surveyors soon after, or improvements built according to the stakes. Thus, we may look to the long occupation of the properties by the parties to ascertain the correct southern boundary line. The evidence shows that the parties treated their properties as if they abutted the government lot line. The Berkens themselves have asserted that they or their predecessors in title maintained the property up to the government lot line for at least twenty years. Furthermore, there is no evidence that the Little Chute Land Company took any

action to assert an ownership interest over the disputed strip of land between 1932 and 2010, when Margaret Salm intervened in this case. The long occupation of the parties therefore supports our conclusion that the lots along the southern edge of Fairview Heights extend all the way south to the government lot line.[4]

¶31 Finally, the Berkens argue that the doctrine of acquiescence applies here because the parties have "acquiesced in the existence of a strip of 'unplatted lands' south of the platted boundar[y] of Fairview Heights …." However, as the Village points out, the doctrine of acquiescence applies in adverse possession cases, and adverse possession is not at issue in this appeal. The Berkens' adverse possession claim against the Kilgases has settled, and the Berkens stipulated to the dismissal of their adverse possession claim against the Village. The Berkens do not respond to the Village's contention that the doctrine of acquiescence is irrelevant, and we therefore deem the point conceded. *See* ***Charolais***, 90 Wis. 2d at 109.[5]

By the Court.—Judgment affirmed.

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

[4] Because we conclude that the circuit court properly granted summary judgment in favor of the Village and the Kilgases, we need not address the Village's alternative argument regarding mutual mistake. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (cases should be decided on the "narrowest possible ground").

[5] Additionally, the only case the Berkens cite in support of their contention that the doctrine of acquiescence should apply is an unpublished, per curiam opinion. Although WIS. STAT. RULE 809.23(3)(b) states that an unpublished, authored opinion issued on or after July 1, 2009 may be cited for its persuasive value, a per curiam opinion is not an authored opinion. *See* WIS. STAT. RULE 809.23(3)(b); ***State v. Funk***, 2011 WI 62, ¶39 n.18, 335 Wis. 2d 369, 799 N.W.2d 421.