COURT OF APPEALS
DECISION
DATED AND RELEASED

February 28, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-0712

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

SAMUEL BONANNO, MARILYN BONANNO and EILEEN ROTHSTEIN,

Plaintiffs-Respondents-Cross Appellants,

v.

LEWIS BORSELLINO and DIANNE BORSELLINO,

Defendants-Appellants-Cross Respondents,

AL ARMONDO, LOUIS C. KOLE, EDNA KOLE, GREENWALD, MAIER, HUDEC & GRAY, P.C., n/k/a THOMAS E. GREENWALD, P.C., and COLUMBIA NATIONAL BANK OF CHICAGO,

Interested Parties.

APPEAL and CROSS-APPEALS from an order of the circuit court for Walworth County: JOHN R. RACE, Judge. *Reversed*.

Before Anderson, P.J., Brown and Snyder, JJ.

SNYDER, J. This action commenced when Samuel and Marilyn Bonnano and Eileen Rothstein sought a declaratory judgment to confirm their rights to retain a shared pier. The pier extended from a twelve-foot wide strip of land utilized by their respective properties to access Lake Geneva. The strip of land runs adjacent to a third lot owned by Lewis Borsellino. Following a motion for summary judgment, the trial court found that the access strip was owned in fee simple by Borsellino, but was subject to a permanent easement and right-of-way shared by the Bonnanos and Rothstein, giving them riparian rights to the lake.

Borsellino appeals that part of the order granting the Bonnanos and Rothstein riparian rights from the easement. The Bonnanos cross-appeal from the trial court's holding that Borsellino owns the access strip in fee simple. Rothstein cross-appeals from Borsellino's standing to contest the use of a boat lift. Because we conclude that the Bonnanos are the fee simple owners of the access strip, we reverse.

The three lots, Lot A (Borsellino's),[1] Lot B (the Bonnanos')[2] and Lot C (Rothstein's), were originally owned as a single parcel by Paul and

[1] When this action commenced, the complaint stated that Lewis Borsellino was the owner of Lot A. Because the Borsellinos were in the process of obtaining a divorce, Dianne Borsellino was also named as a party because of an interest in Lot A.

Catherine Wurtz. In 1966, the Wurtzes subdivided their property and recorded a certified survey map delineating three lots. On its southern border, Lot A fronts on Lake Geneva. Lot B is directly upland from Lot A. The third lot, Lot C, is also upland and directly east of Lot B.

The certified survey map also labels a twelve-foot "right-of-way," which is made up of twelve feet of property running the length of the eastern edge of Lots A and B. This right-of-way extends from the lake on the south to the northern edge of Lot B, where it connects with a private road. The northern portion of the access strip, contiguous with Lot B, is a shared driveway which is utilized by all three lots. Use and ownership of this portion of the access strip are not in dispute.

The southern portion of the access strip, extending south from the southern edge of Lot B to Lake Geneva, provides the means for Lots B and C to access the lake. Prior to the commencement of this action and for the past twenty-four years, the owners of Lots B and C had placed a shared pier in the lake at this point of access. A pier agreement entered into in 1968 by the owners of Lots B and C, Wurtz and Thomas Moorhead, documents the shared nature of the pier.[3]

(..continued)

[2] Lot B has been deeded to the "Samuel and Marilyn Bonnano Revocable Trust." For purposes of simplicity, the owners will be referred to as the Bonnanos even though Lot B is trust property.

[3] This agreement stated that the owners of Lots B and C would have the equal and coexisting right to the use of the pier, and that the expense of the maintenance, repair or replacement of the pier would be shared equally between Lots B and C. This agreement was made binding upon the parties, their executors, administrators and assigns.

Following a dispute with Borsellino over the placement and use of the shared pier, the Bonnanos and Rothstein commenced an action requesting a declaratory judgment to confirm their riparian rights. They based this upon a belief that (1) one or both of the Bonnanos and/or Rothstein are the fee simple interest owners of the access strip or (2) their interest is an easement protected under § 30.131, STATS. Borsellino's counterclaim requested relief in the form of a quiet title action to the disputed twelve-foot strip, as well as various claims related to the use of the access strip and pier by Lots B and C.

The trial court entered summary judgment, finding that the disputed portion of the access strip is owned in fee simple by Borsellino (Lot A), but is encumbered by a permanent right-of-way and shared easement for Lots B and C. The trial court also granted Lots B and C riparian rights through estoppel. Borsellino now appeals, and the Bonnanos and Rothstein cross-appeal from the order of the trial court.

DISCUSSION

In an appeal from a grant of summary judgment, this court applies the same standards as the trial court. *See* ***Green Spring Farms v. Kersten,*** 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). When evidence is documentary, this court may interpret such evidence de novo and is as equally competent as the trial court to do so. ***Zurbuchen v. Teachout,*** 136 Wis.2d 465, 471, 402 N.W.2d 364, 368 (Ct. App. 1987).

A determination of the relative rights of the three lot owners first requires an examination of their respective deeds. The first step in construction

of a deed is to ascertain what is written within the four corners of the deed, as this is the primary source of the intent of the parties. ***Rikkers v. Ryan,*** 76 Wis.2d 185, 188, 251 N.W.2d 25, 27 (1977). If the language of the deed is unambiguous, then its construction is purely a question of law. ***Id.*** Where a deed is unambiguous, extrinsic evidence may not be referred to in order to show the intent of the parties. ***Id.***

We begin the discussion by noting that each of the lots has been conveyed multiple times since the original subdivision, but the deeds and description of the property conveyed have remained consistent for each individual lot. Therefore, only those conveyances which are necessary to a determination of the rights of the various parties to the disputed portion of the access strip will be included in the opinion.

Conveyance of Lot C

After subdividing the original property into three lots, Wurtz sold Lot C on July 18, 1966, to Moorhead. The relevant portions of the deed read as follows:

> Lot "C" of Certified Survey No. 22 as recorded in the Office of the Register of Deeds ....
>
> Also, an equal undivided 1/2 interest in and to the following described right-of-way described as follows, to-wit:
> [legal description of the entire access strip, both north and south].

A plain reading of this first deed shows that Lot C was given an undivided one-half interest in a right-of-way, which ran the length of Lots B and A. This

conformed with the survey map's description of a "Right-of-way for owners of Lots A-C."

Conveyance of Lot A

The next lot conveyed was Lot A, which Wurtz sold to Paul and Stephanie Diekelman on October 22, 1966. That deed recited in relevant part:

> Lot A of Certified Survey No. 22 as recorded in the Office of the Register of Deeds ... *with the exception of that portion of said lot [Lot A] shown on the plat as "Right-of-way for owners of Lots A-C" being 12 feet in width*,
>
> together with an equal undivided one-half interest in common with the owner of Lot B ... *in the north 283.12 feet of the following described parcel of land, to-wit*:
>
> [legal description of the entire access strip, both north and south].
>
> It is understood that the above described parcel is a driveway to provide access to the lands owned by the owners of Lots A, B and C, and that the remaining equal undivided one-half interest has been conveyed to the owner of Lot B and none other and shall be appurtenant to such Lot B. The owners of Lots A and B ... do hereby each grant to the other a perpetual easement and right-of-way over and across such premises to provide access to their respective parcels of land. [Emphasis added.]

A determination of the precise property conveyed by this deed to Lot A requires the construction of the clause "with the exception of that portion of said lot shown on the plat as 'Right-of-way for owners of Lots A-C.'"

The issue presented is whether the phrase "with the exception of that portion of said lot" operated as an exception to the grant of Lot A, or a grant in fee simple of the strip, with a reservation. In the construction of a deed,

a part excepted is held to be something not granted, which does not pass from the grantor, while a reservation is the taking back of something included in the grant. ***Traeger v. Traeger,*** 35 Wis.2d 708, 712, 151 N.W.2d 681, 683 (1967). If this language is an exception, then the ownership of Lot A does not include fee simple ownership of the disputed access strip. If, however, the above language merely reserved an easement in the access strip, then the owners of Lot A also own the southern portion of the access strip.

While there is a technical legal distinction between an exception and a reservation, the determination as it pertains to a particular clause in a deed depends more upon the nature of the thing excepted or reserved than upon the actual language employed. ***Id.*** at 712-13, 151 N.W.2d at 683. The court must attempt to ascertain the true intent of the parties from the instrument as a whole. *See* ***id.*** at 713, 151 N.W.2d at 683.

In this case, because of the initial subdivision of the three lots and the fact that each was initially conveyed by the same grantor, the construction of the exception clause requires an examination of the conveyance of Lot B. *See* ***id.*** at 714, 151 N.W.2d at 684 (stating that consideration of the whole transaction was proper in order to ascertain the intent of the parties). We turn next to the subsequent conveyance of Lot B in order to ascertain whether the exception clause in the deed for Lot A withheld the grant of the contiguous portion of the access strip, or merely reserved an easement in the strip.

Conveyance of Lot B

On November 8, 1968, Wurtz conveyed the third lot, Lot B, to William and Irene Sannwald. The deed described the property conveyed as follows:

> *Lot B of Certified Survey No. 22* as recorded in the Office of the Register of Deeds ... with the exception of that portion of said lot [Lot B] shown on the plat as "Right-of-way for owners of Lots A-C" being 12 feet in width; *and commencing at the [legal description of the entire access strip, both north and south]*, with the exception of that interest in said Lot B conveyed to Paul Diekelman by deed dated October 22, 1966 ... and subject to the right of way conveyed to Thomas Moorhead dated July 18, 1966 .... [Emphasis added.]

This deed begins with language similar to the deed for Lot A, with an exception for that portion of the right-of-way that is contiguous to the lot conveyed. However, unlike the Lot A deed, after excepting the contiguous portion of the access strip,[4] the Lot B deed then goes on after the semicolon with

[4] In the case of the Lot B deed, the excepted portion of the lot is the northern portion of the access strip, which is the shared driveway allowing all three lots to reach the private road north of the property.

a continuing description of the property conveyed when it recites "and commencing at ...." This is the only deed of the three lots to include this provision.

The continuing description of the property conveyed recites the legal description of the entire access strip, north and south, and then immediately notes that this grant is subject to "that interest in said Lot B conveyed to Paul Diekelman [the equal undivided one-half interest in the *northern* 283.12 feet of the strip] ... and subject to the right of way conveyed to Thomas Moorhead [an equal undivided one-half interest in and to the entire access strip] ...."

A plain reading of the legal description of Lot B leads us to conclude that Lot B was granted a fee simple interest in the southern portion of the access strip. The deed to Lot B does not include a specific interest or easement in this portion of the access strip. If Lot A owned the disputed strip, this omission would leave Lot B without a protected interest in the lake access.[5]

Having concluded that Lot B holds the fee simple interest in the southern portion of the access strip, it therefore follows that the clause in the Lot A deed excepting the contiguous portion of the right-of-way strip was an

[5] We note that the deed language for each lot carefully defines that property owner's rights in relation to the other two lots. In Wurtz's deposition, he stated that as the grantor it was his intent that the back lots have lake rights and that the property division was meant to give Lots B and C "12 feet of frontage."

exception, rather than a reservation. If it is possible, construction of a deed should give effect to all provisions. ***Joseph Mann Library Ass'n v. City of Two Rivers,*** 272 Wis. 441, 445, 76 N.W.2d 388, 391 (1956). The exception clause withheld the fee simple interest to the contiguous portion of Lot A. It then follows that the identical exception clause in Lot B's deed also withheld the fee simple interest in that portion of Lot B to which Lots A and C held an equal undivided one-half interest.[6]

Although the Lot A deed withheld the fee simple interest in the southern portion of the access strip, the grant of the one-half interest in the northern portion of the access strip recognized Lot A's need for protected access to the shared driveway.[7] Because Lot A was situated on the shoreline of Lake

[6] Borsellino contends that "the identical language in the Borsellino and Bonanno deeds 'with the exception of ... right of way ...' proves that the Bonannos bought the entire Lot B subject to the Borsellino and Rothstein easement. ... Likewise, the Borsellinos bought the entire Lot A subject to the Bonanno and Rothstein easement to the lakeshore over Lot A." Borsellino's broadly-worded argument overlooks the very detailed language in each of the three deeds, which is very specific as to the various interests conveyed to particular portions of the access strip.

[7] We further note that Lot A's deed grants a one-half interest in the northern 283.12 feet of the access strip. From the survey map, that part of the access strip which lies directly along the eastern property line of Lot B is 247.96 feet long. By granting Lot A the interest in 283.12 feet of the strip, Lot A is granted a right-of-way which extends 35.16 feet south of its property line in order to access

Geneva, Lot A's deed does not confer any protected interest in the southern portion of the access strip.

A reading of all subsequent deeds after the first conveyance of each lot shows that the individual properties were conveyed to each subsequent owner with matching property descriptions. We therefore conclude that the current owners of Lot B, the Bonnanos, own the southern portion of the twelve-foot access strip, subject only to the aforementioned interests.

Because we have concluded that the Bonnanos own the disputed portion of the access strip in fee simple, they therefore hold the riparian rights to their twelve-foot portion of lake frontage, subject to the right-of-way granted to Lot C and the shared pier agreement. Consequently, all other issues raised by the parties in the appeal and cross-appeals are moot. A matter is moot if any determination sought cannot have a practical effect on an existing controversy. ***City of Racine v. J-T Enters. of Am.,*** 64 Wis.2d 691, 700, 221 N.W.2d 869, 874 (1974). A reviewing court will usually decline to address such issues. *See* ***State ex rel. Wis. Envtl. Decade v. Joint Comm'n for Review of Admin. Rules,*** 73 Wis.2d 234, 236, 243 N.W.2d 497, 498 (1976).

Because we deny Borsellino's appeal on the merits, his motion for costs, fees and attorney's fees pursuant to § 809.25(3), STATS., is also denied.

(..continued)

the shared driveway. If Lot A were the fee simple owner of the disputed portion of the access strip, such a right-of-way would be unnecessary to access the driveway.

By the Court. – Order reversed.

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