COURT OF APPEALS
DECISION
DATED AND RELEASED

July 24, 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

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No. 95-1690

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

In re the Matter of a Parcel of Land Located on Geneva Lake, Town of Linn, Walworth County, Wisconsin:

LOU KREPEL and LINDA KREPEL,

Petitioners-Appellants,

v.

ESTATE OF ESTHER DARNELL, ALBERT STEFFEN and SHIRLEY STEFFEN, his wife, and SUSIE TSCHURTZ, a single person,

Respondents-Respondents,

WILLIAM SNELLGROVE and MARJORIE SNELLGROVE, his wife,

Respondents-(In T.Ct.),

ESTATE OF ESTHER DARNELL,

Cross Claimant,

v.

WILLIAM SNELLGROVE and
MARJORIE SNELLGROVE, his wife,

Cross Claimants-Respondents-(In T.Ct.).

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

Before Brown, Nettesheim and Snyder, JJ.

PER CURIAM. This case involves the question of whether the property owned by Lou and Linda Krepel enjoys a dominant interest pursuant to an easement over property owned by Esther Darnell. The trial court concluded that it does not. We disagree and reverse and remand for further proceedings consistent with this opinion.

The complicated facts relevant to this appeal are set forth in ***Krepel v. Darnell,*** 165 Wis.2d 235, 477 N.W.2d 333 (Ct. App. 1991) (***Krepel I***). We summarize these facts to provide a factual backdrop for our decision. The Krepels own property which does not abut Geneva Lake. ***Id.*** at 238, 477 N.W.2d at 335. The property was one of seven lots which were originally part of a single tract of land owned by Jerome and Emma Ingalls. ***Id.*** In 1922, the Ingalls carved out from their land an off-water parcel, Lot 6A, and conveyed it to their daughter, Edna Fassbinder. ***Id.*** This is the lot now owned by the Krepels. ***Id.*** The deed from the Ingalls to Fassbinder did not contain any language creating or granting an easement which would allow the owner of Lot 6A access to the lake over the part of the Ingalls' property which abutted the lake. ***Id.***

In 1926, the Ingalls conveyed another parcel, Lot 5, to the Snells. ***Id.*** The deed granted an easement to the Snells and their successors and assigns for purposes of access to Geneva Lake. ***Id.*** The grant was expressed as "a covenant running with the land being a right appurtenant to [Lot 5]." ***Id.*** at 238-39, 477 N.W.2d at 335. After Jerome Ingalls died, Jerome's interest in the

remaining property was awarded to his wife, Emma, and Fassbinder. In 1929, Emma and Fassbinder executed mutual conveyances concerning the inherited property. By these transactions, Lot 4 was created and Fassbinder deeded her interest in Lot 4 to Emma. In return, Emma deeded her interest in the inherited parcel to Fassbinder. This included the riparian property adjoining Geneva Lake now known as Lot 6 and owned by Darnell. ***Id.*** at 239-40, 477 N.W.2d at 335-36. The deed from Emma to Fassbinder contained easement language indicating that the grantee, her successors and assigns received certain rights appurtenant to the premises conveyed "which rights shall consist of an unrestricted use in common with other lot owners in the former Jerome Ingalls estate." ***Id.*** at 239, 477 N.W.2d at 335. The conveyance described the tract of lake frontage subject to the easement and stated that the tract was "to be used solely for park, beach and docking purposes by purchasers of lots in the Jerome Ingalls estate, their successors and assigns." ***Id.*** at 240, 477 N.W.2d at 335. As a consequence of this transaction, Emma owned Lot 4, the Snells owned Lot 5 and Fassbinder owned Lot 6A (the Krepels' present lot), plus the remainder of the original parcel, including the riparian property now known as Lot 6. Also, following this transaction, the inherited parcel was burdened with an easement. ***Id.*** at 240, 477 N.W.2d at 336.

In 1950, Fassbinder conveyed Lot 6A to the Bankses by warranty deed. ***Id.*** That deed was silent as to any easement, but in 1952, Fassbinder executed a corrective deed which granted a "personal easement" to the Bankses to use her lakefront property. ***Id.*** The easement was given to "use in common with other lot owners in the former Jerome Ingalls estate" and carried the same legal description as that described in the 1929 conveyance. In 1964, Fassbinder executed a corrective deed to Helen Burke, the heir of the original owner of Lot 5, Walter Snell. ***Id.*** In that deed, Fassbinder again granted to the "other lot owners in the former Jerome Ingalls estate" exactly the same easement in exactly the same words which she had previously created and granted to the other lot owners in the former Jerome Ingalls estate in the 1929 conveyance. ***Id.*** at 240-41, 477 N.W.2d at 336. The Krepels ultimately purchased Lot 6A. ***Id.*** at 241, 477 N.W.2d at 336. At the time of her death, Fassbinder owned the last remaining Ingalls parcel, Lot 6, the riparian property adjoining Geneva Lake. ***Id.*** Esther Darnell inherited this parcel from Fassbinder's estate. It is this parcel which is the object of the Krepels' claimed easement. ***Id.***

In ***Krepel I,*** the trial court dismissed the Krepels' action for a declaration of their claimed easement rights in Darnell's property on the

grounds that the Krepels based their easement claim upon conveyances outside the chain of title to their property. ***Id.*** at 237, 477 N.W.2d at 334-35. We held that the Krepels' easement claim appears in their chain of title by virtue of the 1952 corrective deed from Fassbinder to the Bankses who were predecessors in title to the Krepels. ***Id.*** at 242, 477 N.W.2d at 337. In the alternative, we concluded that the Krepels' easement claim need not have appeared in their chain of title in order to be valid. ***Id.*** at 243, 477 N.W.2d at 337. We concluded that there was vertical privity such that the easement granted in the 1929 conveyance would, under proper factual circumstances, result in an easement in favor of the Krepels over Darnell's riparian Lot 6. ***Id.*** at 246-48, 477 N.W.2d at 338-39.[1] Therefore, we reversed and remanded to permit the trial court and the parties to litigate the efficacy of the 1952 corrective deed and any questions relating to the efficacy of easement grants outside of the Krepels' chain of title. ***Id.*** at 249, 477 N.W.2d at 339.[2]

In January 1995, Darnell moved for summary judgment on the grounds that the Krepels did not have an easement over her property. The court granted summary judgment to Darnell because the motion had not been countered and construction of the 1929 conveyance did not permit a conclusion that it created an easement in favor of Lot 6A. The court also concluded that the 1952 corrective deed granted a personal easement to the Bankses, the Krepels' predecessors in title on Lot 6A, and negated any intention on the grantor's part to create a permanent easement in favor of Lot 6A in Lot 6.

The Krepels appeal from a grant of summary judgment. Preliminarily, we must comment on the Krepels' view that the decision to grant summary judgment was discretionary with the trial court. This is no longer the law in Wisconsin. *See* ***Wright v. Hasley***, 86 Wis.2d 572, 577-79, 273 N.W.2d 319, 322-23 (1979); *see also* ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 316-17, 401 N.W.2d 816, 820-21 (1987). If the standards set forth in § 802.08(2), STATS., are

[1] These factual circumstances included whether the Krepels' predecessors in title to Lot 6A qualify as lot owners in the Jerome Ingalls estate and whether any of the conveyances were sufficient to create an easement. We did not decide these questions in ***Krepel I***. ***Krepel v. Darnell,*** 165 Wis.2d 235, 246, 477 N.W.2d 333, 339 (Ct. App. 1991).

[2] A second appeal was decided on May 12, 1993. ***Krepel v. Darnell,*** No. 92-0570 (Wis. Ct. App. May 12, 1993). The outcome of that appeal does not appear to be relevant to the issues presented in the current appeal.

met, summary judgment must be granted. ***Wright***, 86 Wis.2d at 579, 273 N.W.2d at 323.

On appeal, we apply the same methodology used by the trial court and decide de novo whether summary judgment is appropriate. ***Coopman v. State Farm Fire & Casualty Co.***, 179 Wis.2d 548, 555, 508 N.W.2d 610, 612 (Ct. App. 1993). We review the parties' submissions on summary judgment to determine whether any material issues of fact exist. *See* ***Loveridge v. Chartier***, 161 Wis.2d 150, 167, 468 N.W.2d 146, 150 (1991). Summary judgment is inappropriate if material facts are in dispute or if competing inferences might be drawn from the facts. ***Rach v. Kleiber***, 123 Wis.2d 473, 478, 367 N.W.2d 824, 827 (Ct. App. 1985).

We independently examine the record to determine whether any genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law. ***Streff v. Town of Delafield***, 190 Wis.2d 348, 353, 526 N.W.2d 822, 824 (Ct. App. 1994). The moving party bears the burden of demonstrating the absence of a genuine issue as to any material fact with such clarity as to leave no room for controversy. *See* ***Grams v. Boss***, 97 Wis.2d 332, 338, 294 N.W.2d 473, 477 (1980). The inferences to be drawn from the moving party's proofs should be viewed in the light most favorable to the party opposing the motion, and doubts as to the existence of a genuine issue of material fact should be resolved against the party moving for summary judgment. ***Id.*** at 338-39, 294 N.W.2d at 477.

At the summary judgment motion hearing, counsel for the Krepels indicated that she had misread Darnell's motion and did not believe that it sought dismissal of the Krepels' claims. Darnell argued that there were no factual questions relating to the issues for which this court remanded in ***Krepel I.*** Darnell also argued that neither the Krepels nor other interested parties had filed affidavits opposing Darnell's summary judgment motion. On the merit of the motion, Darnell argued that the 1929 conveyance created an appurtenant easement which benefitted only the 1929 grantee and direct successors and assigns. The parcel which was the subject of the 1929 conveyance is not owned by the Krepels.

The court noted Darnell's arguments and granted summary judgment based on those arguments and because Darnell's summary judgment motion was not countered.

In ***Krepel I***, we held that the Krepels' easement claim need not be found in their chain of title in order to be effective. We remanded to permit the trial court to rule upon the significance of the 1952 corrective deed and any questions relating to the efficacy of easement grants outside of the Krepels' chain of title, including any claim that their easement arises from the 1929 conveyance.

We restate some basic principles of easement law. "An easement is a permanent interest in another's land, with a right to enjoy it fully and without obstruction. In an easement, there are two distinct property interests—the dominant, which enjoys the privileges granted by an easement and the servient, which permits the exercise of those privileges. ... An easement passes by a subsequent conveyance of the dominant estate without express mention in the conveyance. Generally, ownership of an appurtenant easement follows ownership of the dominant estate. A covenant entered into between such parties that pertains to the easement may be enforced by or against their successors in interest." ***Krepel,*** 165 Wis.2d at 244-45, 477 N.W.2d at 337-38 (citations omitted).

Based upon our independent review of the record, we conclude that the trial court erred in granting summary judgment to Darnell because Darnell did not demonstrate that she was entitled to judgment as a matter of law, notwithstanding the Krepels' failure to submit counteraffidavits. *See* ***Jones v. Sears Roebuck & Co.,*** 80 Wis.2d 321, 326, 259 N.W.2d 70, 72 (1977) (even in the absence of counteraffidavits, movant must still be entitled to judgment as a matter of law).

Darnell's summary judgment motion refers to the 1929 conveyance and states that the Krepels' chain of title contains the 1952 corrective deed referencing a personal easement. Our independent review leads us to conclude that the Krepels' easement rights were created in the 1929 conveyance. At the time of that conveyance, Fassbinder owned the lot now owned by the Krepels, Lot 6A, and she received by deed from her mother, Emma, all of the

Ingalls property with the exception of Lot 5, which was previously conveyed to the Snells, and Lot 4, which was conveyed to Emma. The property Emma deeded to Fassbinder included the riparian property now owned by Darnell (Lot 6). The deed from Emma to Fassbinder contained the language conveying an appurtenant easement permitting "an unrestricted use in common with other lot owners in the former Jerome Ingalls estate." The deed further stated that the tract of lake frontage subject to the easement was "to be used solely for park, beach and docking purposes by purchasers of lots in the Jerome Ingalls estate, their successors and assigns." We conclude that this language created an easement over the riparian property now known as Lot 6 in favor of "other lot owners in the former Jerome Ingalls estate."[3]

Because the easement rights over Lot 6 were created in 1929, the 1952 corrective deed executed by Fassbinder to the Bankses which granted a "personal easement" to use Lot 6 did not change the legal nature and function of the 1929 appurtenant easement. The 1952 easement is superfluous to the Krepels' rights which flow from the 1929 appurtenant easement. The fact that language indicating that the easement over Lot 6 travels to "other lot owners in the former Jerome Ingalls estate" appears in numerous conveyances of former Ingalls property confirms that the appurtenant easement benefits the owners of properties formerly included in the Ingalls' estate, including the current owners of Lot 6A, the Krepels.

Based on the summary judgment record, the trial court erred in granting summary judgment to Darnell. Based upon our construction of the 1929 conveyance and the state of the record, it appears that on remand, disposition short of a full trial would be appropriate.

By the Court.—Order reversed and cause remanded.

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

[3] "[The] first step in construction of a deed is to examine what is written within the four corners of the deed, for this is the primary source of the intent of the parties. ... If the language of the deed is unambiguous, then its construction, as the construction of other unambiguous instruments, is purely a question of law for the court ...." ***Rikkers v. Ryan,*** 76 Wis.2d 185, 188, 251 N.W.2d 25, 27 (1977) (citations omitted).