OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

March 26, 2025

To:

Hon. Michael J. Aprahamian
Circuit Court Judge
Electronic Notice

Monica Paz
Clerk of Circuit Court
Waukesha County Courthouse
Electronic Notice

Joe Hentz
Electronic Notice

Elizabeth K. Miles
Electronic Notice

You are hereby notified that the Court has entered the following opinion and order:

2024AP3 Susan Otis v. Michael Coughlin (L.C. #2019CV2247)

Before Neubauer, Grogan and Lazar, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Michael and Barbara Coughlin and the Michael R. Coughlin & Barbara Coughlin Living Trust (collectively, "the Coughlins") appeal from a judgment of the trial court regarding the boundary between their property and the neighboring property belonging to Susan and William Otis. Based upon our review of the briefs and Record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2023-24).[1] Because there is no factual basis in the Record supporting the court's decision to shift the boundary 31 inches from the line determined by the Coughlins' expert, who the court characterized as "the most

[1] All references to the Wisconsin Statutes are to the 2023-24 version.

credible" and whose survey was based on what the court determined to be the best evidence, we summarily reverse and remand with instructions to enter a judgment consistent with that survey.

The single issue in this case is the boundary between the parties' properties; both the Coughlins and the Otises believe that a wedge-shaped piece of land measuring approximately 4.5 feet at the widest point (adjacent to Lake Nagawicka) belongs to them.[2] The disputed boundary is the western boundary of the Coughlins' property (described as "Lot 7" in the original plat map of the neighborhood) and the eastern boundary of the Otises' property (consisting of "Lot 6" and the eastern half of "Lot 5").

After the Otises filed suit in late 2019, various witnesses testified in a three-day trial to the court in 2023. Among these witnesses was Mark Powers, a professional surveyor who had been hired to prepare surveys of the Coughlin property on four occasions.[3] Though the final survey (created in 2019) reflected additional detail not shown on earlier surveys (including a new house constructed in 2015), Powers testified that all of his surveys were consistent with respect to the boundary at issue; he did not perform new calculations to determine where the line should be. Powers explained his process in painstaking detail. He stated that original monuments (pipes set when an area was originally platted, in this case in 1924) are to be given the greatest

[2] The full survey of the parties' properties—i.e., the other boundaries of each property—are not at issue; parties necessary to resolve any disputes about those boundaries (the owners of the properties on the other side of those borders) are not part of this case.

[3] The first survey, from March 2014, shows the original house that the Coughlins bought. This survey was requested by the contractor the Coughlins hired to tear down that house and build a new house on the property. The second survey, dated later in 2014, reflects the proposed new house. The third survey, dated January 2015, shows the foundation of the new house as built. The Coughlins hired Powers to create a final survey, dated June 2019, after it was apparent that they had some disagreement with the Otises about the lot line.

weight in surveying. In this case, it was "virtually impossible to know" if any of the monuments found were original. Thus, Powers conducted a "retracement survey," comparing everything found on-site with the original plat and using the totality of the circumstances to determine the correct lines.

Powers acknowledged one error in his first survey. He marked the platted distance for the lake frontage of "Lot 8" (immediately to the east of the Coughlins' property and two properties to the east of the Otises' property) as 50 feet. In reality, the platted distance was 48 feet. Powers fixed this error between his first and final surveys but testified that it did not affect where he drew the Otis/Coughlin boundary.

The trial court also heard testimony from John Stigler, a professional surveyor hired by the Otises in 2017 in connection with planned improvements to their property. His first survey showed a lake frontage of 70.5 feet for the Otis property. Powers testified to his belief that Stigler basically "got it right"—"it" being "[t]he lot line between the Otises and Coughlins"—on this first survey. However, Susan Otis wrote to Stigler's firm that the Otises "were told it was 75 feet of frontage when [they] purchased" the property and questioned why the survey showed a shorter dimension. Stigler's response was to have his colleague (who had prepared the original survey) go "back to the drawing board" and get the survey to match the platted 75 feet of frontage. He issued a revised survey four days later reflecting 75 feet of lake frontage for the Otises, with the additional 4.5 feet coming from what had originally been designated the Coughlins' property.

The trial court convened at the Otises' house to deliver its judgment orally after inspecting the properties. The court noted that, pursuant to ***Northrop v. Opperman***, 2011 WI 5,

331 Wis. 2d 287, 795 N.W.2d 719, its task was to determine the best evidence available to determine the boundary at issue. The court stated that it found Powers to be "very credible" and "the way that he went about determining the various plats and the lines … was most persuasive." By contrast, the court "did not find [Stigler] as credible" and found that "his survey was driven by the need to have 75 feet of frontage for the Otises." Further, "[o]n the stand he just wasn't as credible as Mr. Powers."

Despite these statements and others detailing why it "put the most stock" in Powers's line and deemed his methodology correct (including comments explaining its rejection or disregard for testimony from witnesses other than Powers and Stigler), the trial court did not adopt Powers' boundary in full. Instead, it mentioned

> the mistake relative to [the property neighboring the Coughlins' to the east in Powers' first survey showing a platted lake frontage of] 50 feet instead of 48 which would suggest that maybe the line on the Coughlins' property to the [east] … should be over more based upon that mistake and if that's over more [on the Coughlins' east boundary] it would suggest to me that there would be room for it to come over to the east on the Otis side of the property as well.

The court then announced its intent to mark the line "essentially where Mr. Powers['s] line is but … over approximately one to two feet to compensate for the fact that … Mr. Powers shifted it …." When the court went outside to mark the line, it chose a point 31 inches east of Powers's

line (giving 31 inches more to the Otises at the lake than Powers's survey did), stating that "it looked to [the court] to be the fairest most appropriate spot to draw the line."[4]

The Coughlins appeal, arguing that the trial court's finding of fact that Powers shifted the Coughlin/Otis boundary as a result of the error in his first survey (regarding the platted frontage of the property on their opposite border) is unsupported by the record and therefore clearly erroneous. Pursuant to ***Northrop***, which both parties agree is controlling, a trial court determines a boundary line based on "the best evidence the nature of the situation is susceptible of" when original monuments have disappeared. 331 Wis. 2d 287, ¶44 (citing ***Brew v. Nugent***, 136 Wis. 336, 338, 117 N.W. 813 (1908)). The trial court's "determination of the best evidence locating the boundary line … is essentially a finding of fact" that an appellate court does not set aside unless it is clearly erroneous. ***Northrop***, 331 Wis. 2d 287, ¶42. Indeed, this court does not set aside any finding of fact unless it is clearly erroneous, meaning "unsupported by the record." WIS. STAT. § 805.17(2); ***Schreiber v. Physicians Ins. Co. of Wis.***, 223 Wis. 2d 417, 426, 588 N.W.2d 26 (1999).

Here, the trial court articulated the facts in the record supporting its finding that the best evidence of the boundary at issue was reflected in Powers's survey including, for example, Powers's credibility, his methodology for determining the right-of-way for the road by using monumentation "further apart" and matching it up with the original plat as a starting point, and his consideration of occupation. However, the court found, as a matter of fact, that Powers had

[4] The trial court also awarded equitable relief to the Otises to compensate them for removing a black walnut tree at their expense from a point that it intended to declare was on the Coughlin property. When the court actually drew its boundary, the replacement maple tree (which both Susan Otis and Michael Coughlin testified was now in the place that the black walnut tree had been) was on the Otis side of the line. The Coughlins do not appeal this aspect of the trial court's judgment.

mistakenly shifted both the east and west boundaries of the Coughlins' lot in his original survey. The Record makes clear that this factual finding was clearly erroneous.

First and most importantly, there is no evidence to support the trial court's finding that Powers mistakenly shifted the Coughlin/Otis border in any survey. To the contrary, Powers testified that that boundary was the same in each of his surveys and was not determined based on the platted distance from the Coughlins' eastern border. Indeed, William Otis admitted that the bearing of that boundary was the same in both Powers's first and final survey. Powers also provided uncontroverted testimony that the error (which, again, was notation of the originally platted lake frontage for the property on the Coughlins' eastern side) was fixed between his first and final survey. Second, there are no facts whatsoever supporting the court's 31-inch shift of Powers's line; even if the mistake on Powers's first survey had a practical effect on the boundary at issue (the evidence shows it did not) the mistake was writing 50 feet of frontage instead of the actually platted 48 feet—a difference of 24 inches, not 31.

The Otises attempt to argue that the trial court permissibly considered other factors, including "the location of the rip rap between the parties' properties, the location of the Coughlin's air conditioner, and the location of the maple tree the Otises planted" as part of a "holistic" approach prescribed by ***Northrop*** to determine the proper boundary. Although the court did mention these considerations, stating that its boundary "accommodated" these things, its oral ruling makes clear that its sole reason for shifting Powers's line—after finding Powers's survey to have been based on the best evidence of the boundary—was its erroneous factual finding relating to the mistaken notation of the platted lake frontage of the Coughlins' eastern

neighbor as 50 feet instead of 48 feet in Powers's first survey. Setting aside whether the court could have properly considered these other factors under ***Northrop***,[5] we conclude that it shifted the Coughlin/Otis boundary by 31 inches exclusively to compensate for this perceived error—which, as discussed above, was clearly erroneous. We therefore reverse the order of the trial court with respect to the boundary, and direct the court to enter a judgment reflecting a boundary based on the best evidence, i.e., in accord with the Powers survey.

Therefore,

IT IS ORDERED that the judgment of the circuit court is summarily reversed and remanded with directions. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals

[5] The Coughlins argue that these "recent improvements," based only on the surveys of Powers or Stigler, are not proper considerations under ***Northrop*** because the factfinder is to weigh only the best evidence established by "practical location and undisturbed possession for a great many years." ***Northrop v. Opperman***, 2011 WI 5, ¶55, 331 Wis. 2d 287, 795 N.W.2d 719 (citation omitted).