COURT OF APPEALS
DECISION
DATED AND FILED

July 20, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP1668 **Cir. Ct. No. 2001CV867**

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

LANE B. ALTMANN AND JOAN M. ALTMANN,

PLAINTIFFS-RESPONDENTS,

V.

ROGER L. KELBER AND PAMELA J. KELBER,

DEFENDANTS-THIRD-PARTY PLAINTIFFS-APPELLANTS,

LAWRENCE F. KRAUSE AND JO ANN R. KRAUSE,

THIRD-PARTY DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed.*

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

¶1 PER CURIAM. Roger Kelber and Pamela Kelber appeal from a declaratory judgment that determined that Lane Altmann and Joan Altmann have an express easement over the Kelbers' property. The Kelbers argue that the circuit court erred because it relied on inadmissible evidence when finding the easement, that the easement must fail under the statute of frauds, that there is an issue of fact that precludes summary judgment, that the circuit court also erred when it found that the Altmanns had, alternatively, a prescriptive easement, and that the circuit court improperly dismissed their counterclaims and third-party claims. We conclude that the circuit court properly found that the Altmanns had an express easement over the Kelbers' property, and therefore we affirm the judgment of the circuit court.

¶2 The Kelbers, the Altmanns, and the third-party defendants Lawrence Krause and Jo Ann Krause own neighboring properties in the Town of East Troy. The Kelbers' property is located within section 22 of the Town of East Troy. The Altmanns' property is located northeast of the Kelbers' property. The Krauses' property is located east of the Kelbers' property, and south of the Altmanns' property. Both the Krauses' and the Altmanns' property are located within section 23.

¶3 The evidence establishes that in 1857, the person who owned the Altmanns' property acquired an easement over the Krauses' property. This easement is referred to as the "Dickinson easement." More recently, Frank Janowak originally owned both the Altmann and the Krause property, and consequently also owned the easement across the Krauses' property. Janowak sold the Altmanns' property by two separate deeds. Both deeds contained the same language creating the easement at issue here: "A further 66-foot easement in common for ingress and egress over additional lands of the Seller along the

West line of the Southwest ¼ of Section 23 ….” The “West line of the Southwest ¼ of Section 23” identifies the property line between the Kelbers’ property on the west and the Krauses’ property on the east. Janowak also owned the property now owned by the Kelbers. After the sale to the Altmanns, Janowak sold the property to the Kelbers. This deed does not mention the easement. The issue here is whether the easement occupies the Kelbers’ property as well as the Krauses’ property.

¶4 At the time the Kelbers purchased their property, there was a gravel driveway that ran along the east boundary. The Altmanns used this driveway for ingress and egress to access Highway 20. Both the Altmanns and the Kelbers maintained the driveway. At some point, Roger Kelber noticed Lane Altmann cutting trees along the drive. This led to a dispute between them and the Kelbers eventually blocked the drive. The Altmanns then brought the declaratory judgment action. The circuit court ruled that the Altmanns had a valid easement of record or, in the alternative, they were entitled to a prescriptive easement. The court granted judgment to the Altmanns and dismissed the Kelbers’ counterclaims and third-party complaint.

¶5 The Kelbers argue that the circuit court improperly determined that there was a valid easement of record by considering extrinsic evidence. They assert that the Altmanns’ deeds are not clear about whether the easement described is the Dickinson easement across the Krauses’ property or an easement across their property. Since the deeds are ambiguous and the ambiguity cannot be resolved, they argue, the easement is void. We disagree.

¶6 The easement language in the Janowak deeds to the Altmanns recite the location of the easement as “over additional lands of the Seller along the West

line ….” This could not possibly refer to the easement already held by Janowak over the Krauses’ property because Janowak did not own the Krauses’ property. This language has to refer to the Kelbers’ property, which was then retained by Janowak. Janowak had not yet sold the property to the Kelbers.

¶7 We agree with the Kelbers that the Altmann deeds do not precisely describe the easement across their property. However, a court may use extrinsic evidence “to make reasonably certain an indefinite description of property,” as long as there is some “indicia or token establishing a link” between the extrinsic evidence and the document. ***Struesser v. Ebel***, 19 Wis. 2d 591, 594-95, 120 N.W.2d 679 (1963). The deeds at issue here provide such indicia. The deeds state that the easement occupies land owned by Janowak along the West property line. This language allows us to easily locate the easement along Janowak’s west property line.

¶8 The Kelbers respond that the language of the deed limits the easement to section 23, and since their property is in section 22, it cannot be referring to their property. This argument is too narrow. Given that the language of the deed says property owned by Janowak, the easement could not lie to the east of the line because that property was owned by the Krauses. Logic dictates that the easement had to refer to the property to the west, and in section 22, since that is the property owned by Janowak.

¶9 The Kelbers also argue that the Altmann deeds are not in the Kelbers’ chain of title. Chain of title is defined by statute as including “instruments, actions and proceedings discoverable by reasonable search of the public records and indexes affecting real estate in the offices of the register of deeds and in probate and of clerks of courts of the counties in which the real estate

is located." WIS. STAT. § 706.09(4) (2003-04).[1] The undisputed facts here establish that the deeds were of record and both the Altmanns' and the Kelbers' property originated with Janowak as the common owner. Further, a search of the public records for the property deed by Janowak to the Kelbers would have revealed the Altmann deeds. The Altmann deeds were of record and revealed the easement. Consequently, there was no disputed issue of material fact about the chain of title.

¶10 Further, the circuit court also found that the Kelbers had affirmative notice of the easement under WIS. STAT. § 706.09(2)(a). The evidence established that the Kelbers knew that the gravel roadway was being used by the Altmanns for ingress and egress from Highway 20 to their property, and the roadway easement was described in the Kelbers' offer to purchase. The Kelbers' deed from Janowak excepted existing easements. We conclude that the circuit court properly found that the Altmanns had a valid easement of record over the Kelbers' property.

¶11 The Kelbers raise a number of other arguments. We need not address those issues pertaining to the circuit court's alternate conclusions because we affirm the finding of an easement of record. The Kelbers argue that the circuit court improperly relied on the affidavit of Attorney Lowell E. Sweet, when it decided the summary judgment motion. The Kelbers assert that Attorney Sweet's affidavit contained legal conclusions, and therefore was not admissible. The Altmanns respond that, while the affidavit did contain Attorney Sweet's opinion, the circuit court relied only on statements of fact in the affidavit. We agree. The

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

circuit court used the facts stated in this affidavit that a reasonable search of the public records and indices would have disclosed the existence of the Altmann deeds. The court then went on to draw the legal conclusions based on the description of the easement as we discussed previously. We conclude that the circuit court did not err when it considered the factual statements in Attorney Sweet's affidavit. For the reasons stated, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

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