COURT OF APPEALS
DECISION
DATED AND FILED

March 29, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2006AP1262 **Cir. Ct. No. 2001CV89**

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

ROBERT D. JACKMAN AND DONNA L. JACKMAN,

PLAINTIFFS-APPELLANTS,

V.

DALE C. JAHN AND LESLIE JAHN,

DEFENDANTS-THIRD-PARTY PLAINTIFFS-RESPONDENTS,

V.

BANK OF AMERICA, RICHARD JAHN, GLEN JAHN, HALE JAHN, POST OFFICE CREDIT UNION AND MERCHANTS BANK OF WINONA,

THIRD-PARTY DEFENDANTS.

APPEAL from a judgment of the circuit court for Marquette County: RICHARD O. WRIGHT, Judge. *Affirmed*.

Before Dykman, Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Robert and Donna Jackman appeal a judgment reforming a deed and transferring property from the Jackmans to Dale and Leslie Jahn (the Jahns). The Jackmans challenge the trial court's findings of fact, and contend the trial court should have dismissed the Jahns' claim applying the laches doctrine. We affirm.

¶2 Wilma Jahn owned two adjacent lots, living on the south lot (Lot 2) and renting the north lot (Lot 1) to the Jackmans. After she died in 1996 her estate deeded Lot 2 to her son Dale and Lot 1 to another son, Richard Jahn. Attorney Tom Kubasta was retained to assist with the estate. He met with Richard and Dale regarding their understanding of the property line dividing their lots and memorialized that understanding through a stipulation agreement. At some point after the meeting, Kubasta received a call from the title company indicating there was a problem with the property line. Kubasta consequently sent a letter to the estate's representative, Glen Jahn, addressing the problem. The letter indicated Kubasta's awareness that Richard was in the process of selling part of his property to the Jackmans. In the letter, Kubasta informed Glen that a building used by Dale encroached onto Richard's property, and suggested that Richard would sign a quit claim deed on the .18 acre at issue if Dale paid him $4000. The .18 acre at issue includes a garage (the building referenced in the letter) and a well, both of which were originally surveyed as falling within the boundaries of Lot 2. However, as Kubasta discovered, the property line dividing Lot 1 from Lot 2 actually went through the middle of the garage, while the well was on Lot 1, not Lot 2. No quit claim deed was ever signed, and the .18 acre is what is at issue on appeal.

¶3 In 1997, Richard sold Lot 1 to the Jackmans. The deed for the sale describes Lot 1 as the property described by the Marquette County certified survey map No. 2025. That original survey map, in turn, describes Lot 1 in the terms originally understood by the Jahn brothers, with the .18 acre containing the garage and well located south of Lot 1's boundary.

¶4 Dale continued to use and maintain the .18 acre until 2000. In 2000, a second deed of sale was executed between Richard and the Jackmans, conveying a strip of land matching the description of the .18 acre disputed property to the Jackmans. In 2001, the Jackmans commenced this action seeking a judgment requiring the Jahns to move their garage and disconnect from the well. The Jahns counterclaimed to reform the deed Dale received from his mother's estate, and to establish a property line placing the well and the entire garage on Lot 2.

¶5 The claims were tried to the court in 2005. Dale testified that all parties involved in settling his mother's estate, including Dale, Richard and Glen, mistakenly believed that the line dividing Lots 1 and 2 placed the garage and well on Lot 2. Dale also testified that the stipulated settlement of the estate by which Dale and Richard received their lots was premised on that mistake. The stipulated estate settlement stated that "the well is located on Dale Jahn's property." Testimony from Glen Jahn and Kubasta confirmed Dale's version of events in their testimony, as did the letter from Kubasta. Dale further testified that he believed the problem had been resolved at the time of the Jackmans' first purchase, and treated the disputed property as his own until Richard deeded it to the Jackmans three years later.

¶6 Dale and a neighbor also testified to occasions when Robert Jackman heard Dale assert that the garage and well were on Lot 2. The Jackmans testified that they did not have notice of Dale's claim.

¶7 The trial court found that all parties to the stipulated estate settlement believed that the property line lay north of the well and the north end of the garage and that the deeds to Lot 1 and Lot 2 were premised on that mistake. The court further found that the Jackmans were not purchasers of the disputed parcel in good faith because they knew of Dale's claim to the parcel. The Jackmans appeal that decision.

¶8 A court in equity may reform written instruments that, by mutual mistake, do not express the true intentions of the parties. ***Chandelle Enters., LLC v. XLNT Dairy Farm, Inc.***, 2005 WI App 110, ¶18, 282 Wis. 2d 806, 699 N.W.2d 241. The party seeking reformation must offer clear and convincing proof that both parties intended to make a different instrument and had agreed on facts that were different than those set forth on the instrument. ***Id.*** However, courts will not reform a deed if the rights of innocent third parties, such as bona fide purchasers, are affected. ***Id.***; WIS. STAT. § 706.08(1) (2005-06).[1] A bona fide purchaser is one without notice of a prior claim. *See* ***Associates Fin. Servs. Co. v. Brown***, 2002 WI App 300, ¶8, 258 Wis. 2d 915, 656 N.W.2d 56. We review the decision to grant equitable relief under the erroneous exercise of discretion standard. ***Pietrowski v. Dufrane***, 2001 WI App 175, ¶5, 247 Wis. 2d 232, 634 N.W.2d 109.

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶9 We conclude the Jahns introduced evidence from which the court could determine that clear and convincing evidence showed that the estate's conveyances to Dale and Richard were based on a shared mistake of fact. Such evidence included the testimony described and the stipulation declaring the well to be on Dale's property. Every witness to the transaction who testified agreed that the parties did not know the true property line. The court consequently found that the deeds to Wilma Jahn's sons did not conform to the actual property boundaries due to mutual mistake agreed to by the Jahn brothers. This finding was not clearly erroneous.

¶10 The court properly exercised its discretion by reforming the deed. We affirm a discretionary decision if the court relies on facts of record, applies the correct law, and reaches a reasoned and reasonable result. *See* ***Button v. Button***, 131 Wis. 2d 84, 99, 388 N.W.2d 546 (1986). The facts demonstrated the clear intent of the parties to the conveyances and the mistake that frustrated that intent, and the court reached a reasonable decision based on those facts, and fully and clearly explained it.

¶11 The Jackmans also cite case law for the principle that a court may not use equity to reform a will. However, the Jahns did not ask the court to reform a will. Wilma Jahn died intestate. The deeds were granted to settle claims to her estate and the recipients waived those claims in consideration for the deeds.

¶12 The evidence supports the trial court's finding that the Jackmans had notice of Dale's claim and were not, therefore, bona fide purchasers entitled to protection from that claim. Dale testified that prior to the Jackmans' purchase of Lot 1 he told Robert Jackman that the garage and well lay across the line on Lot 2. A neighbor testified to hearing Dale say this in Robert Jackman's presence. As

the trial court noted, the Jackmans could not have reasonably denied knowledge of the claim in light of the survey and title accompanying their 1997 purchase which drew a boundary line north of the garage. When they purchased the parcel with the well and garage in 2000, their title insurance excluded coverage for claims to the use of the well and garage, and for the garage encroachment onto the property. The Jackmans characterize as disputed much of the testimony about their notice of the claim. However, the court resolved those disputes in the Jahns' favor, stating in the process that "to put it bluntly, in the Court's opinion, Mr. Jackman's testimony and the evidence on this issue simply is not credible." The fact finder is the ultimate arbiter of the weight and credibility of the evidence, and we therefore defer to its resolution of conflicts in the evidence. *See* ***Global Steel Prods. Corp. v. Ecklund Carriers, Inc.***, 2002 WI App 91, ¶10, 253 Wis. 2d 588, 644 N.W.2d 269.

¶13 The circumstances of this case do not mandate application of the laches doctrine to dismiss Dale's reformation claim. The Jackmans contend that Dale should have known that the property line was in question, and done something about the problem far earlier than 2001. However, Dale testified that he believed the problem was resolved at the time of the 1997 transactions, and did not learn there was a controversy until after the Jackmans' 2000 purchase. Additionally, it is undisputed that nobody interfered with Dale's use of the well and garage until 2000. Under these circumstances, the trial court did not erroneously exercise its discretion by permitting Dale to litigate his claim.

By the Court.—Judgment affirmed.

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