

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 11, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2008AP1052

Cir. Ct. No. 2007CV801

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**TAMARA PARTRIDGE AS TRUSTEE OF THE TAMARA L. PARTRIDGE
REVOCABLE TRUST DATED JANUARY 12, 2000 AND DEBRA L.
PARTRIDGE AS TRUSTEE OF THE DEBRA L. PARTRIDGE DECLARATION
OF TRUST DATED FEBRUARY 22, 1999,**

PLAINTIFFS-RESPONDENTS,

v.

CHRIS GEORGES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County:
BARBARA A. KLUKA, Judge. *Affirmed.*

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

¶1 PER CURIAM. This appeal involves the scope of a lake-access easement. Tamara Partridge as trustee of the Tamara L. Partridge Revocable Trust and Debra L. Partridge as trustee of the Debra L. Partridge Declaration of Trust (the Partridges) have an easement over the riparian servient estate Chris Georges owns. Georges appeals the judgment concluding that the Partridges' easement entitles the Partridges to place and maintain a pier. We affirm.

BACKGROUND

¶2 The three parcels of land relevant to this dispute lie near or adjacent to Powers Lake in Kenosha county. In addition to his servient estate, Georges also owns a nonriparian dominant estate. The Georges and Partridge dominant estates each have access to the lake by way of a nineteen-foot-wide easement over Georges' servient estate.

¶3 All three properties originally were owned by Casimir and Anna Fec. The Partridge chain of title began in 1949 when the Fecs sold by warranty deed a parcel of nonriparian property to a party named Doerner. The warranty deed included an easement that granted a "right of access to ... the waters of Powers Lake, for the purpose of fishing and bathing ... more particularly described in Warranty Deeds to the grantors" The Doerners seasonally placed and maintained a pier and moored a boat on the easement until about 1959 when the new owners of the servient estate moved the easement to the opposite side of the property. In 1974, the Doerners sold the property to the Beamesderfers, who sold it to the Partridges in 2006.

¶4 The Georges dominant estate chain of title also began in 1949 when the Fecs sold a parcel of nonriparian property to a party named Jaszkowski. This warranty deed contained an easement granting "the right of ingress and egress ...

for the purpose of boating and bathing.” With the 1960 easement site relocation, Jaszkowski and another easement holder not in either the Partridge or Georges chain of title began installing and maintaining the pier. The Doerners, however, were not excluded from using the pier. In 2003 Jaszkowski conveyed his property to another party who sold it to Georges in 2005. It is not disputed that the original easements passed with each conveyance.

¶5 The third parcel of land is the riparian estate servient to the Partridge and Georges easements. The Fecs sold the servient estate to a party named Ochocki in 1959. A year later, the Ochockis relocated the easement and set its width at nineteen feet. A pier was placed in the new location every year through 2002 or 2003, and stored in the easement in the off-season. The pier always was fifty-six to sixty-four feet long.

¶6 Gregory Pytko acquired the servient estate in 1979 and in 1985 created Lakeshore Condominiums. The recorded Declaration of Condominium advised condominium owners that their ownership rights were subject to existing easements created in the Fec-to-Doerner and Fec-to-Jaszkowski deeds, and that the easements granted easement holders the right of “ingress and egress to and from the waters of Powers Lake for the purpose of boating, fishing and bathing.” Pytko testified that his attorney drafted the language based on a title search and an examination of the deeds. He also testified that Jaszkowski and the Beamesderfers placed a pier every year, kept their boats there, stored the pier in the easement in the off-season, and that he knew of and did not object to the easement.

¶7 Georges testified that when he acquired Unit 2 of the condominiums in 1988, he knew of the easements but believed the Partridges’ was limited to ingress to and egress from the lake for fishing or bathing only. He destroyed the

pier the Beamesderfers had installed for decades, told the Partridges their easement included no boating or pier rights, and then placed a pier about half as long as the prior one, with the crank of the shore station, or boat lift, on the wrong side. Michael Partridge, on behalf of the trust, testified that the short pier ended in shallow water and, being essentially backwards, was “totally unusable.”

¶8 The Partridges commenced this action to temporarily restrain Georges from maintaining a pier that obstructed their use, and to enjoin Georges from obstructing their installation and use of a pier. The circuit court granted the temporary restraining order and preliminary injunction, and denied Georges’ subsequent motion for summary judgment. The court concluded after a bench trial that the Partridges’ easement entitled them to place and maintain a fifty-six- to sixty-four-foot pier on the easement for boating, bathing and fishing and to moor boats on it overnight and seasonally.

¶9 Georges appeals on grounds that the Partridges’ proposed pier is not authorized either by the language of the easement or by WIS. STAT. § 30.131 (2007-08).¹ We disagree in both respects.

¶10 An easement is an interest in land another possesses. *Atkinson v. Mentzel*, 211 Wis. 2d 628, 637, 566 N.W.2d 158 (Ct. App. 1997). “Every easement carries with it by implication the right of doing whatever is reasonably necessary for the full enjoyment of the easement itself.” *Id.* at 640 (citation omitted). We look to the instrument that created the easement to construe the landowners’ relative rights. *Hunter v. Keys*, 229 Wis. 2d 710, 714, 600 N.W.2d

¹ All references to the Wisconsin Statutes are to the 2007-08 edition.

269 (Ct. App. 1999). While the easement's use must comport with and is confined to the grant's terms and purposes, *id.*, resort to extrinsic evidence is proper when an ambiguity exists. *Gilbert v. Geiger*, 2008 WI App 29, ¶10, 307 Wis. 2d 463, 747 N.W.2d 188, *review denied*, 2008 WI 115, 310 Wis. 2d 707, 754 N.W.2d 850 (No. 2007AP95).

¶11 Georges submits that the Partridges' easement is unambiguous and we therefore are limited to the four corners of the deed, the primary source for determining the parties' intent. *See id.* He argues that the easement plainly provides access for ingress and egress only for fishing and bathing, not for boating, in contrast to the Jaszkowski easement specifically mentioning boating and bathing, but not fishing. He further argues that the trial court erroneously allowed the Declaration of Condominium language to expand the Partridges' easement rights to include boating rights the Partridges' "existing easement[]" did not include. In support, he points to Pytko's testimony that the Declaration conferred no new easement rights.

¶12 The Partridges' interpretation is that the original language granting "access" to the lake, coupled with the parties' subsequent conduct, demonstrates the grantors' intent to permit easement holders to place and maintain a pier so as to fully enjoy the easement. The Partridges emphasize that at the time of the 1985 Declaration, a pier had been placed and maintained annually for thirty-five years without objection.

¶13 We conclude the language is ambiguous, and so may look to extrinsic evidence. Acts giving a practical construction to the grant are deemed to express the intention of the parties. *See Scheeler v. Dewerd*, 256 Wis. 428, 432, 41 N.W.2d 635 (1950). "There is no surer way to find out what parties meant,

than to see what they have done.” *Jorgenson v. Northern States Power Co.*, 60 Wis. 2d 29, 35, 208 N.W.2d 323 (1973) (citations omitted). We accord the parties’ practical construction of an agreement great weight. *Id.*

¶14 The trial court found that, beginning in 1950, the parties’ predecessors in interest seasonally placed a pier upon the easement, repaired and painted it, and stored it off-season in the easement. The court also found that the easement itself was relocated at some point but that, since the easement’s inception, a pier was placed on the easement every year, that it customarily was fifty-six- to sixty-four feet long, that it was sufficient to accommodate two moored boats overnight and seasonally, and that the Beamesderfers, the Partridges’ predecessors in title from 1974 through 2006, used the pier for boating, bathing and fishing. The court also found that Georges acquired the servient estate in 1988 and that the Declaration of Condominium declared that the easements the Fecs created to run with the property and provide easement owners with the right of ingress and egress to the waters of Powers Lake for boating, fishing and bathing. These findings are not clearly erroneous. We see no reason, under the circumstances here, not to give the language the same interpretation that the various property owners and easement holders adopted throughout in the course of their dealings. *See id.*

¶15 Finally, Georges argues that if we determine that the Partridges have a right under their easement to place a pier, the pier still would be unlawful for failure to satisfy all of the criteria set forth in WIS. STAT. § 30.131.²

² WISCONSIN. STAT. § 30.131 provides in relevant part:

(continued)

WISCONSIN STAT. ch. 30 regulates Wisconsin's navigable waters pursuant to the public trust doctrine. *ABKA Ltd. P'ship v. DNR*, 2002 WI 106, ¶11, 255 Wis. 2d 486, 648 N.W.2d 854. Statutory regulations concerning piers are designed to assure, among other things, that public rights in navigable waters are protected and obstructions of navigable waters are not created. *Waukesha County v. Seitz*, 140 Wis. 2d 111, 119, 409 N.W.2d 403 (Ct. App. 1987). The Partridges contend that a

(1) Notwithstanding s. 30.133, a wharf or pier of the type which does not require a permit under ss. 30.12 (1) and 30.13 that abuts riparian land and that is placed in a navigable water by a person other than the owner of the riparian land may not be considered to be an unlawful structure on the grounds that it is not placed and maintained by the owner if all of the following requirements are met:

(a) The owner of the riparian land or the owner's predecessor in interest entered into a written easement that was recorded before December 31, 1986, and that authorizes access to the shore to a person who is not an owner of the riparian land.

(b) The person to whom the easement was granted or that person's successor in interest is the person who places and maintains the wharf or pier.

(c) The placement and maintenance of the wharf or pier is not prohibited by and is not inconsistent with the terms of the written easement.

(d) The wharf or pier has been placed seasonally in the same location at least once every 4 years since the written easement described in par. (a) was recorded.

(e) The wharf or pier is substantially the same size and configuration as it was on April 28, 1990, or during its last placement before April 28, 1990, whichever is later.

(f) The placement of the wharf or pier complies with the provisions of this chapter, with any rules promulgated under this chapter and with any applicable municipal regulations or ordinances.

pier's lawfulness under this statute thus contemplates its lawfulness in the eyes of the DNR, the agency charged with regulatory authority over the state's navigable waters. See *Wendt v. Blazek*, 2001 WI App 91, ¶14, 242 Wis. 2d 722, 626 N.W.2d 78; see also *ABKA Ltd. P'ship*, 255 Wis. 2d 486, ¶12. Thus, they submit, the statute does not apply here. Whether it does or not, we conclude that Georges' argument does not prevail.

¶16 Under WIS. STAT. § 30.131, a pier maintained off an easement by a person other than a riparian owner is "not ... unlawful" if the pier meets all conditions set forth in subsecs. (a) through (f). Georges contends the Partridges' proposed pier is unlawful because it does not satisfy subsecs. (b) and (d). We conclude he misreads the statutory requirements.

¶17 The construction of a statute when the facts are not disputed presents an issue of law we review de novo. *Ellingsworth v. Swiggum*, 195 Wis. 2d 142, 147, 536 N.W.2d 112 (Ct. App. 1995). We aim to discern the intent of the legislature, beginning with the language of the statute. *Voss v. City of Middleton*, 162 Wis. 2d 737, 749, 470 N.W.2d 625 (1991). Only if the statutory language is not clear on its face will we resort to judicial construction to ascertain and effect the legislative intent. See *id.*

¶18 Georges first contends the Partridges' proposed pier does not satisfy WIS. STAT. § 30.131(1)(b), requiring that the person who places and maintains the wharf or pier also is the person to whom the easement was granted or that person's successor in interest. As applied here, the Partridges—the ones who seek to place and maintain a pier—are the successors in interest to the Doerners, the original grantees. Georges argues that the Partridges are not the successor in interest to Jaskowski, who at times in the past placed and maintained the pier.

¶19 Whether Jaszkowski typically physically erected the pier at the present site has no bearing on the Partridges' underlying rights. The record shows that the pier installation and maintenance over the years was a cooperative effort of physical labor and financial support between the various easement holders. Moreover, even if Georges' predecessor had placed the pier unaided, it does not extinguish the same right in the Partridges' predecessors—if for no other reason than that, on a purely practical level, there is not room for more than one usable pier on an easement only nineteen feet wide.

¶20 Georges also contends the Partridges' proposed pier does not satisfy WIS. STAT. § 30.131(1)(d), requiring the pier to have been placed seasonally in the same location at least once every four years since the easement first was recorded. The Doerners placed the first pier in 1950 at the site of the original easement. The Ochockis, the Fecs' successors, changed the location of the easement to the other side of the servient estate, as was their right to do under the express terms of the easement. The pier has been placed seasonally in the easement at least once every four years since 1949. This argument likewise fails.

By the Court.—Judgment affirmed.

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

