

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 19, 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. 2008AP1546

Cir. Ct. No. 2007CV35

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

ROBERT D. KONNEKER AND ANN M. KONNEKER,

PLAINTIFFS-RESPONDENTS,

V.

ROBERT S. ROMANO AND FRANCIS A. ROMANO,

DEFENDANTS-APPELLANTS,

NORMAN E. NELSON AND LAWRENCE A. NELSON,

DEFENDANTS.

APPEAL from an order of the circuit court for Green Lake County:
WILLIAM M. McMONIGAL, Judge. *Reversed and cause remanded with
directions.*

Before Higginbotham, P.J., Vergeront and Bridge, JJ.

¶1 PER CURIAM. Robert and Francis Romano appeal from an order granting summary judgment to Robert and Ann Konneker on the Konnekers' claim that they have the right to build a pier on the Romanos'¹ lakefront property pursuant to a recorded easement. We reverse and remand with directions that summary judgment be entered in the Romanos' favor.

BACKGROUND

¶2 In 2004, the Konnekers obtained a deed which conveyed to them certain property on Orchard Avenue in Green Lake "TOGETHER WITH an easement 20 feet in width along the Westerly side of Lot Three (3) ... extending from Orchard Avenue to Beyer's Cove." The language in the deed followed that of prior conveyances, and did not specify the purpose of the easement or state whether it was to include riparian rights.

¶3 The Konnekers' easement was first created in 1983 by the Ciszeks, predecessors in interest to the current owners of Lot 3, the Romanos and Nelsons. Apparently at or around the same time, the Ciszeks also granted easements over Lot 3 to the owners of seven other nearby parcels for the subsequently recorded purpose of granting "access to Beyer's Cove."

¶4 There was no pier, boat lift or boat located upon the easement at the time of its creation or for twenty-three years thereafter. Over the following years, at least two easement holders obtained non-transferable leases for the use of the Romanos' and Nelsons' pier, which was located adjacent to the easement.

¹ The property is co-owned by Norman and Lawrence Nelson, who were parties below but have not filed their own notice of appeal.

¶5 In 2006, the Konnekers installed their own pier along the shore of the easement. The Romanos and Nelsons removed the pier, and this declaratory judgment action followed. The parties filed cross-motions for summary judgment. The circuit court noted that there was no direct evidence in the summary judgment materials as to the intent of the original parties with regard to the scope of the easement. However, the court reasoned that “in the context of what lake access easements are given for, and in the absence of any indications to the contrary that full access rights were in some way restricted or prohibited,” the easement implicitly included riparian rights, which would include the right to erect and maintain a pier. In reaching its decision, the court apparently took judicial notice of the purported fact that the primary use of Beyer’s Cove would be for boat access to Green Lake.

STANDARD OF REVIEW

¶6 This court reviews summary judgment decisions *de novo*, applying the same methodology and legal standard employed by the circuit court. *Brownelli v. McCaughtry*, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994). The summary judgment methodology is well established and need not be repeated here. *See, e.g., Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25, ¶¶20-23, 241 Wis. 2d 804, 623 N.W.2d 751. The legal standard is whether there are any material facts in dispute that entitle the opposing party to a trial. *Id.*, ¶24.

DISCUSSION

¶7 A riparian landowner generally enjoys an exclusive right to access to navigable waters from his or her shore, including the right to construct a pier sufficient to effectuate such access. *Colson v. Salzman*, 272 Wis. 397, 400, 75 N.W.2d 421 (1956). In some instances, such riparian rights may be conveyed to a

third party by easement. See *Stoesser v. Shore Drive P'ship*, 172 Wis. 2d 660, 663, 494 N.W.2d 204 (1993), *superseded by statute*, WIS. STAT. § 30.133 (2007-08).²

¶8 We look first 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 269 (Ct. App. 1999). An easement's use must comport with and is confined to the grant's terms and purposes, *id.*, although 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). When the language of an easement is ambiguous, the acts of the parties may, in some cases, be an expression of their intent. 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). This practical construction of an agreement by the act of the parties is accorded great weight. *Id.*

¶9 The easement in this case was silent as to its purpose and scope, and is therefore ambiguous. Accordingly, we look to extrinsic evidence, including the actions of the parties to the easement, to determine the parties' rights. It was

² After April 9, 1994, easements could not be used to convey riparian rights, except for purposes of conveying a right to cross land in order to have access to the navigable water. WIS. STAT. § 30.133. Section 30.133 provides that "[t]his right to cross the land may not include the right to place any structure or material, including a boat docking facility ... in the navigable water." The easement in this case was originally conveyed in 1983. Section 30.133, therefore, does not limit the nature of the easement in this case.

All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

undisputed that there was no pier in place when the easement was created, and the original parties to the easement never erected one. While the Konnekers stated in an affidavit made part of their summary judgment submission, that the water in Beyer's Cover is currently heavily vegetated, has no beach area, is not conducive to swimming, and serves only as an access point to enter Green Lake by boat, their summary judgment materials made no reference to the condition of the cove at the time the easement was conveyed. The fact that the original easement holders made use of the easement without erecting a pier is strong evidence that the easement had some purpose other than providing boat access to Green Lake.

¶10 The Konnekers' attorney argued before the circuit court that the historical use of the cove was for launching boats. However, counsel's argument did not constitute evidence. Nor was the cove's use as a means of boat access to Green Lake a proper subject for judicial notice. Courts may take judicial notice at any stage of a proceeding of any fact "not subject to reasonable dispute" because it is "generally known within the territorial jurisdiction of the trial court" or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." WIS. STAT. § 902.01(2). Here, other than the personal knowledge of the court and counsel, there does not appear to be any verifiable evidence that the historical use of the cove was primarily for access to Green Lake by boat. Indeed, the proposition that the cove was primarily used for boating was contested by opposing counsel's personal knowledge that there had been a swimming raft located just off shore from the easement for years; that the easement was suitable for viewing the lake; that it provided an excellent fishing spot; and that it could be used to launch canoes or kayaks in the summer, or snowmobiles in the winter.

¶11 In addition, we note that the Ciszeks' contemporaneous grant of multiple easements to the same twenty foot stretch of property makes it inherently improbable that they contemplated giving all of the easement holders the right to erect and maintain piers. Again, the claim that a primary use for the easement must have been to allow boat access to Green Lake via Beyer's Cove is inconsistent with the uncontested fact that over a twenty-three year time span, none of the easement holders prior to the Konnekers erected a pier. In sum, there was no evidence in the summary judgment materials to support the contention that the parties' intent when creating the easement included a conveyance of riparian rights allowing the easement holders to erect their own pier.

By the Court.—Order reversed and cause remanded with directions.

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

