

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 5, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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Appeal No. 2008AP1621

Cir. Ct. No. 2007CV166

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

BRYAN K. PAULSEN AND LINDA S. CURRAN-PAULSEN,

PLAINTIFFS-RESPONDENTS,

v.

MICHAEL L. WOLFF,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Grant County:
GEORGE S. CURRY, Judge. *Reversed and cause remanded with directions.*

Before Lundsten, Higginbotham and Bridge, JJ.

¶1 HIGGINBOTHAM, J. This case concerns a dispute over an easement conveyed to Bryan K. Paulsen and Linda S. Curran-Paulsen by the prior owners of land now owned by Michael L. Wolff. The easement granted the Paulsens a nonexclusive right of way over Wolff's property "for access to a boat

dock” on the Platte River. After allowing the Paulsens to access the river through his property for many years, Wolff padlocked the entrance to his property, denying the Paulsens access to the river. The Paulsens brought this action seeking a declaration of their rights under the easement agreement, and Wolff filed a counterclaim for trespass. Following a trial to the court, judgment was entered in the Paulsens’ favor declaring their access rights to the river under the easement agreement, granting injunctive relief, damages, and attorneys’ fees, and dismissing Wolff’s counterclaim. Wolff appeals the judgment and an order denying his motion for reconsideration.

¶2 Wolff argues that the trial court misinterpreted the easement agreement as granting the Paulsens unconditional access to the Platte River via Wolff’s property. Contrary to the court’s construction of the agreement, he contends that the plain language of the deed conveying the easement imposes a condition precedent that the Paulsens must meet to enjoy the use of the easement—the construction of a boat dock—and that this condition has not been fulfilled. Wolff also contends that the easement is void as contrary to WIS. STAT. § 30.131(1) (2007-08),¹ which prohibits nonriparian owners like the Paulsens from placing and maintaining a pier in navigable waters, except in limited circumstances not applicable here. Further, Wolff asserts that the trial court erred in dismissing his counterclaim for trespass. We agree with Wolff, and therefore reverse the court’s judgment in favor of the Paulsens and remand for the circuit court to enter judgment in Wolff’s favor on his counterclaim and to determine the amount of damages.

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

BACKGROUND

¶3 The following facts are undisputed. Michael Wolff owns a residential property abutting the Platte River in Grant County. The Paulsens own the residential property across the street. The properties are units within the Platte River Shores Condominium development.

¶4 At one time, both properties were owned by Bruce Meyer and Mary Meyer. In 1992, the Paulsens purchased their property from the Meyers. The Meyers and the Paulsens recorded an easement agreement with the deed granting the Paulsens a right-of-way easement over the Meyers' property for access to a boat dock. The easement agreement provides the Paulsens "a nonexclusive and perpetual right of way easement over and across [the Meyers'] real estate, for access to a boat dock which [the Paulsens] may construct and maintain on river frontage on [the Meyers'] real estate in a location and manner mutually agreeable to the parties" The Paulsens have not built a boat dock on the river frontage. Instead, they used an existing concrete structure that extended into the water as a makeshift dock.² The Paulsens regularly entered the adjacent property to clear brush from approximately thirty feet of riverfront shoreline, which included the area around the concrete structure.

¶5 In 1998, the Meyers sold their remaining lot to Michael Wolff. Wolff erected a fence around the property in 2002, but left an opening through which the Paulsens could pass to access the shoreline. In 2006, Wolff closed off

² It appears that, while the Paulsens regularly used the concrete structure as a dock in the early 1990s, they rarely used the structure as a dock in recent years. At trial, Bryan Paulsen did not refute Wolff's testimony that he had used the area to launch his boat only once since Wolff had moved into the neighborhood in 1998.

this opening with a padlocked gate. Wolff had dogs and allowed them to run off-leash on his fenced-in property. Through their attorney, the Paulsens demanded that Wolff leash his dogs and remove the padlock so that they could exercise their right to access the shoreline under the easement. Wolff refused the Paulsens' request.

¶6 The Paulsens sued Wolff seeking an order declaring their rights under the easement, directing Wolff to remove the padlock and to leash his dogs, and for compensatory and punitive damages and attorney fees. Wolff answered that the easement was invalid, and filed a counterclaim against the Paulsens for trespass. Following a bench trial, the court found in favor of the Paulsens, enjoining Wolff from restricting the Paulsens' access to the shoreline, awarding the Paulsens punitive damages, costs and attorney fees, and dismissing Wolff's counterclaim. Wolff filed a motion for reconsideration, which was denied by the circuit court. Wolff appeals.

DISCUSSION

¶7 Wolff makes two arguments we determine to be dispositive of this appeal.³ First, he contends that the court misconstrued the easement by failing to give effect to a condition precedent requiring the construction of a boat dock before the easement could be perfected. Second, he contends that the court erred

³ Wolff's other arguments that we do not address are as follows: (1) The circuit court erred in determining that the Paulsens had a right-of-way easement that cut a diagonal path across his property when the language of the easement provides that the right-of-way follows the property's boundaries; (2) the court erred in determining that WIS. STAT. § 30.12, which provides that no person may construct a pier without a permit, would not prevent the Paulsens from perfecting their easement; and (3) the court misapplied the law in concluding that Wolff lacked standing to challenge the validity of the easement under WIS. STAT. § 703.06, which prohibits condominium unit owners from "impair[ing] any easement or hereditament."

in concluding that the easement was not contrary to WIS. STAT. § 30.133(1) and WIS. STAT. § 30.131, which prohibit the conveyance of riparian rights separate from riparian land. We conclude that the circuit court misconstrued the easement agreement, which plainly requires the Paulsens to construct a boat dock to perfect the easement. Further, we conclude that the Paulsens cannot now perfect the easement by constructing a boat dock because placement of a boat dock in water abutting Wolff's property would be contrary to WIS. STAT. § 30.131, which prohibits the placement of a pier or wharf in navigable water by a nonriparian owner.

The Easement Agreement

¶8 The easement agreement at issue conveyed to the Paulsens and their assigns

a nonexclusive and perpetual right of way easement over and across Grantors' real estate, for access to a boat dock which [the Paulsens] may construct and maintain on river frontage on Grantors' real estate in a location and manner mutually agreeable to the parties, subject to the terms and limitations set forth herein.

The right of way easement shall be for the sole purpose of providing Grantees access to a boat dock located on the above described property of Grantor from the [Paulsens'] real estate.

The easement agreement also required the Paulsens to “keep the dock area clear and litter free,” and declared that it contained “the entire and complete agreement and understanding of the parties.”

¶9 The circuit court concluded that the agreement was ambiguous as to whether the Paulsens were required to build a boat dock before they could exercise their rights under the easement agreement. Resorting to extrinsic evidence to

resolve the ambiguity, the court observed that the Paulsens regularly accessed the property and used the concrete structure as a boat dock. Based on this and other evidence, the court concluded that the actions of the parties “clearly show[ed] they mutually agreed to use the existing pier area as a place where the Paulsens could dock their boat, even though they never came to an agreement as to whether to ‘construct and maintain’ another dock.”

¶10 When interpreting an easement agreement, we start with the language of the written instrument. See *Hunter v. Keys*, 229 Wis. 2d 710, 714, 600 N.W.2d 269 (Ct. App. 1999). “If the language within the four corners of the deed is unambiguous, the court need not look further for the parties’ intent.” *Eckendorf v. Austin*, 2000 WI App 219, ¶7, 239 Wis. 2d 69, 619 N.W.2d 129. Whether a deed’s language is ambiguous is a question of law that we review de novo. *Wisconsin Pub. Serv. Corp. v. Andrews*, 2009 WI App 30, ¶10, 316 Wis. 2d 734, 766 N.W.2d 232. The interpretation of an unambiguous deed is a legal question subject to our independent review. *Id.*

¶11 The Paulsens argue that the easement agreement’s use of “may” rather than “shall” in providing that they “may construct and maintain” a boat dock indicates that they were not required to build and maintain a boat dock to exercise their rights under the easement. They further argue that the existing concrete structure is, in fact, a boat dock, citing THE NEW LEXICON WEBSTER’S DICTIONARY OF THE ENGLISH LANGUAGE, ENCYCLOPEDIA EDITION 276 (1989) (defining “dock” as “an enclosure or artificial basin in which ships may be loaded, unloaded, repaired, etc.”). They add that language in the second paragraph referring to “a boat dock located on the above described property” indicates that the dock contemplated by the agreement was in existence at the time of the

agreement. We conclude that the plain language of the easement agreement does not support the Paulsens' arguments.

¶12 First, to the extent that the Paulsens suggest that the easement provides them with a general right to access the shoreline, we disagree. The easement plainly provides a limited right to pass “over and across [Wolff’s] real estate, for access to a boat dock” It goes on to provide that “[t]he right of way easement shall be for the *sole purpose* of providing Grantees access to a boat dock location on the above described property” (Emphasis added.)

¶13 Second, while the Paulsens are technically correct that the agreement does not require the Paulsens to build a dock—they “may” construct one if they so choose—it does require them to build and maintain a dock if they wish to exercise the rights provided under the agreement. Further, regardless whether the concrete structure is a “dock” within the dictionary meaning of the term, the agreement specifically requires that the Paulsens must construct and maintain a new boat dock to exercise their rights under the agreement. The agreement provides the Paulsens with the right to access and use a boat dock “which [the Paulsens] may construct and maintain,” not an existing structure.

¶14 We conclude that the only reasonable interpretation of the easement agreement is that the construction and maintenance of a boat dock is a condition precedent that must be fulfilled before the Paulsens may lawfully exercise the rights conveyed to them by the agreement. The Paulsens may not pass over Wolff’s property for the purpose of accessing a boat dock until they have “construct[ed]” a boat dock “on river frontage on [Wolff’s] real estate in a location and manner mutually agreeable to the parties.”

¶15 The Paulsens note that evidence was presented at trial that the Meyers and Wolff permitted the Paulsens to use the concrete structure as a boat dock, which they contend demonstrates that the rights conveyed in the easement were not conditioned on the construction of a boat dock. We may not consider extrinsic evidence of the parties' intent, however, because the pertinent language of the easement agreement is not ambiguous in conditioning the Paulsens' right to exercise their rights under the agreement on the building and maintenance of a boat dock. *See Stone v. Acuity*, 2008 WI 30, ¶67, 308 Wis. 2d 558, 747 N.W.2d 149 (extrinsic evidence may not be considered when interpreting a written agreement that is not ambiguous).

¶16 In sum, we conclude that the circuit court misconstrued the easement agreement, which plainly requires the Paulsens to construct and maintain a boat dock before exercising their rights under the easement. The circuit court's judgment declaring the Paulsens' rights under the agreement and awarding punitive damages, costs and attorney fees must therefore be vacated.

Effect of WIS. STAT. § 30.131(1) on the Easement Agreement

¶17 Having concluded that the easement agreement plainly requires the Paulsens to construct a boat dock before they may exercise their rights under the agreement, we must address whether the Paulsens may yet claim their rights under the easement agreement by “construct[ing] and maintain[ing]” such a dock. We conclude that they cannot because the construction and maintenance of a dock by the Paulsens would be contrary to WIS. STAT. § 30.131(1).

¶18 WISCONSIN STAT. § 30.131(1) provides in pertinent part that, “[n]otwithstanding s. 30.133,” which prohibits conveyance of riparian rights apart from riparian lands,⁴

a wharf or pier ... 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.⁵

⁴ As pertinent, WIS. STAT. § 30.133(1)(a) provides:

Beginning on April 9, 1994, and except as provided in s. 30.1355 ..., no owner of riparian land that abuts a navigable water may grant by an easement or by a similar conveyance any riparian right in the land to another person, except for the right to cross the land in order to have access to the navigable water.

⁵ WISCONSIN STAT. § 30.131(1) provides in full:

(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.

(continued)

¶19 Wolff argues that the easement agreement is contrary to the restriction on the conveyance of riparian rights apart from riparian land contained in WIS. STAT. § 30.133(1). However, the easement agreement in this case was recorded by deed in 1992 before this statute’s effective date of April 9, 1994. Thus, § 30.133(1) has no direct effect on the validity of the easement agreement.

¶20 However, we conclude that the easement agreement is nonetheless invalid under WIS. STAT. § 30.131(1). This statute indicates that a structure placed in navigable water by a nonriparian owner is unlawful unless it is authorized by an easement agreement recorded before December 31, 1986. Section 30.131(1) provides that a “wharf or pier” placed in navigable water by a nonriparian owner “may not be considered to be an unlawful structure on the grounds that it is not placed and maintained by the owner if” he or she meets all of a series of requirements, including that the riparian land owner entered into an easement agreement with the nonriparian owner that was recorded before December 31, 1986. Because the agreement in this case was recorded after this date, any boat dock placed by the Paulsens in the navigable water abutting the Wolff’s land

(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.

would be prohibited by § 30.131(1).⁶ Accordingly, we conclude that the Paulsens cannot fulfill the condition precedent in the easement agreement because construction and maintenance of a boat dock on riparian land not owned by them would be contrary to § 30.131(1).

Wolff's Counterclaim for Trespass

¶21 Wolff argues that the circuit court erred in dismissing his counterclaim for trespass, and requests that we award damages on this claim. Wolff maintains that the Paulsens never had a legitimate right to enter his property because they failed to fulfill the condition precedent of building a boat dock to legitimately assert their rights under the easement agreement. We agree with Wolff.

¶22 It is undisputed that the Paulsens regularly accessed Wolff's property to clear brush from approximately thirty feet of riverfront shoreline. It is also undisputed that the Paulsens accessed Wolff's property on at least one occasion to use the concrete structure to launch a boat. Because the Paulsens failed to construct a boat dock as required by the easement agreement in the six years prior to Wolff's purchase of the property, they did not have the legal right to access Wolff's property. Accordingly, we conclude that the undisputed facts

⁶ The Paulsens suggest that the dictionary definitions of "pier" and "dock" are relevant to our analysis of this case. We fail to see the relevance of these definitions to the dispositive issues. As explained in the prior section, the easement agreement requires the Paulsens to build something to which they would attach a boat before exercising their rights under the agreement. In the present discussion of WIS. STAT. § 30.131(1), if there is a difference between a "boat dock" and a "pier" or "wharf," such a difference would not be helpful to the Paulsens. Section 30.131(1) provides an exception for certain "piers" and "wharfs" to the general rule that a structure placed in navigable water by a nonriparian is an unlawful structure. No such exception exists for "boat docks."

establish Wolff's counterclaim for trespass, and we remand for the circuit court to determine the amount of damages. *See Jacobs v. Major*, 139 Wis. 2d 492, 530, 407 N.W.2d 832 (1987) (nominal damages are appropriate in a claim of trespass to vindicate the rights of the property owner when the trespass did not reduce the value of the property).⁷

CONCLUSION

¶23 In sum, we conclude under the terms of the easement agreement that the specific, limited right granted to the Paulsens—to access a boat dock—does not take effect until the dock has been constructed. We further conclude that placement of the dock in waters abutting Wolff's land would contravene WIS. STAT. § 30.131(1). Moreover, we conclude that the undisputed facts support Wolff's counterclaim. Accordingly, we vacate the circuit court's judgment declaring the Paulsens' rights under the agreement and awarding punitive damages, costs and attorney fees, and remand for the circuit court to enter judgment in favor of Wolff on his counterclaim for trespass and to make a finding of damages.

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

Not recommended for publication in the official reports.

⁷ Wolff does not seek punitive damages on his counterclaim. Regardless, punitive damages are available only in cases of intentional trespass, *Jacque v. Steenberg Homes, Inc.*, 209 Wis. 2d 605, 617-621, 563 N.W.2d 154 (1997), and Wolff does not suggest that the Paulsens did not have a good faith belief that they had a right to access his property under the easement agreement.

