COURT OF APPEALS
DECISION
DATED AND FILED

June 16, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1959 **Cir. Ct. No. 2007CV3169**

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

MARGO R. HANSON AND THOMAS J. SCHWARTZBURG,

PLAINTIFFS-APPELLANTS,

V.

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County: RALPH M. RAMIREZ, Judge. *Affirmed*.

Before Brown, C.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Margo R. Hanson and Thomas J. Schwartzburg (Schwartzburg) have appealed from an order granting summary judgment to the Wisconsin Department of Natural Resources (DNR) on the first claim of Schwartzburg's amended complaint. We affirm the order.

¶2 Schwartzburg commenced this action pursuant to WIS. STAT. § 806.04(2) (2007-08),[1] seeking a declaratory judgment limiting the DNR's use of an access easement across a corner of the Schwartzburg property. The easement over the Schwartzburg property was conveyed to the DNR in 2005 via a deed providing: "Easement for the benefit of Parcel C for right of way purpo[s]es described as follows." The easement, whose precise location is described in the deed, provides access to an adjacent lakefront property (Parcel C) owned by the DNR, upon which the DNR intends to build a boat launch and parking lot for public use.

¶3 In his complaint, Schwartzburg alleged that the DNR's use of its land for a public boat launch would increase traffic on the access easement beyond the scope of the original easement, creating an unreasonable burden on Schwartzburg's property. Schwartzburg sought a declaration limiting the use of the access easement to a use consistent with the original grant.

¶4 The DNR moved for summary judgment on the ground that no material issue of fact existed for trial. It requested an order providing: "That the portion of the plaintiff's property that is subject to the recorded access easement is subject to use for the purpose of right of way by the WDNR and by any members of the public who choose to use it to access the WDNR property for recreational purposes."

¶5 The trial court agreed that no material issue of fact existed for trial and granted the DNR's motion. It held that the access easement provided a right

[1] All references to the Wisconsin Statutes are to the 2007-08 version.

of way to the DNR property over the Schwartzburg property that could be utilized with no restrictions as to the number or types of vehicles using it, the number of times it may be used, or what time of day it may be used. It concluded that, as a matter of law, the easement afforded the people of the state the right to come and go from the DNR's lakefront property without restriction.

¶6 We review a trial court's grant or denial of summary judgment de novo. *See* ***Waters v. United States Fid. & Guar. Co.***, 124 Wis. 2d 275, 278, 369 N.W.2d 755 (Ct. App. 1985). Upon review, we apply the same standards as those used by the trial court, as set forth in WIS. STAT. § 802.08. ***Krier v. Vilione***, 2009 WI 45, ¶14, 317 Wis. 2d 288, 766 N.W.2d 517. "[S]ummary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." ***M&I First Nat'l Bank v. Episcopal Homes Mgmt., Inc.***, 195 Wis. 2d 485, 497, 536 N.W.2d 175 (Ct. App. 1995). We will reverse a decision granting summary judgment if the trial court incorrectly decided legal issues or material facts are in dispute. ***Coopman v. State Farm Fire & Cas. Co.***, 179 Wis. 2d 548, 555, 508 N.W.2d 610 (Ct. App. 1993).

¶7 A right of way is an easement providing a right of passage over another person's property. ***Kleih v. Van Schoyck***, 250 Wis. 413, 418, 27 N.W.2d 490 (1947). "An easement creates two distinct property interests: the dominant estate, which enjoys the privileges granted by an easement; and the servient estate, which permits the exercise of those privileges." ***Atkinson v. Mentzel***, 211 Wis. 2d 628, 637, 566 N.W.2d 158 (Ct. App. 1997). When, as here, the easement in question is created by deed, the court must look to that instrument in construing the relative rights of the parties. ***Hunter v. McDonald***, 78 Wis. 2d 338, 342-43, 254 N.W.2d 282 (1977). "The use of the easement must be in accordance with and confined to the terms and purposes of the grant." ***Id.*** When the language of

the deed is not ambiguous or indefinite, parole evidence is inadmissible to explain the terms of the deed, and the acts of the parties are not admissible to show a practical construction. ***Kleih***, 250 Wis. at 419. Construction of the deed to determine the grant's terms and purpose is a question of law unless an ambiguity requires a resort to extrinsic evidence. ***Atkinson***, 211 Wis. 2d at 638. Whether an ambiguity exists is a question of law which this court reviews de novo. ***Id.***

¶8 No ambiguity exists in the terms of the deed granting the DNR an easement over the Schwartzburg property, and no basis therefore exists for admitting extrinsic evidence concerning the purpose of the easement or the history of its use. By its express terms, the easement is a right of way allowing ingress and egress to and from the waterfront property owned by the DNR. The deed set no conditions, restrictions, or qualifications on the DNR's use of the right of way. It contained no limitations on the number or types of vehicles the DNR could permit to traverse the right of way to get to and from the lakefront property.

¶9 Because the easement granted by the deed is clear and unambiguous, the trial court properly determined that no material issue of fact existed for trial and that the DNR was entitled to judgment as a matter of law. Based upon the express language of the easement, the trial court properly determined that the DNR was entitled to summary judgment declaring its right, and the right of members of the public as permitted by the DNR, to have ingress and egress over the Schwartzburg property to the DNR's lakefront property without restriction.

¶10 In reaching this conclusion, we reject Schwartzburg's contention that the trial court implicitly determined that his claim regarding the scope of the easement was not ripe for declaratory judgment and therefore failed to declare the rights of the parties. At the summary judgment hearing, the trial court

acknowledged Schwartzburg's concern about the eventual effect of the use of the easement on the surrounding landowners, and stated "that may be something that we may look at in the future in a different lawsuit." Schwartzburg relies upon this statement to contend that the trial court implicitly found that his declaratory judgment action was not ripe for resolution.

¶11 Schwartzburg's argument reflects a misunderstanding of the trial court's decision. The trial court concluded that no material issues of fact prevented judgment in favor of the DNR, not that issues were not ripe for resolution. It determined and declared that the DNR has the right to allow public access over the land described in the easement for purposes of ingress and egress to and from its lakefront property, without restriction. Acknowledging that facts might arise in the future that would give rise to another lawsuit did not mean that the DNR had not shown a right to summary judgment declaring its right to ingress and egress based upon the plain language of the deed.[2] No basis therefore exists to disturb the trial court's order.

By the Court.— Order affirmed.

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

[2] Relying on ***S. S. Kresge Co. of Michigan v. Winkelman Realty Co.***, 260 Wis. 372, 50 N.W.2d 920 (1952), Schwartzburg contends that a material issue of fact existed as to whether the DNR and public use of the easement puts an unreasonable burden on his servient estate. However, in ***Kresge***, the defendant had expanded and changed the use by the dominant estate beyond the use permitted under the easement. *See* ***id.*** at 376-77. No such issue exists here, where the DNR is acting in accordance with the right of access unambiguously granted by the deed creating the easement. Moreover, Schwartzburg's contention that there might be some kind of undue burden on his property in the future was purely speculative, and provided no basis for defeating the DNR's motion for summary judgment.