COURT OF APPEALS
DECISION
DATED AND FILED

June 28, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2255 **Cir. Ct. No. 2009CV577**

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

GEORGE DILLENBURG,

PLAINTIFF-RESPONDENT,

V.

WAYNE B. AHLERS,

DEFENDANT-APPELLANT,

RACHEL L. AHLERS, STEVE DANEY AND PREMIER COMMUNITY BANK,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Shawano County: JAMES R. HABECK, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Wayne Ahlers, pro se, appeals a summary judgment in favor of George Dillenburg. Ahlers argues that summary judgment

was inappropriate and that the circuit court judge should have recused himself. We reject Ahlers' arguments and affirm.

BACKGROUND

¶2 Ahlers and Dillenburg own adjacent parcels of land in Shawano County. In 2008, Ahlers acquired the larger parcel, Shawano County Tax Parcel 024-29220-0000, at a sheriff's sale. In 2009, Dillenburg acquired the other parcel, Shawano County Tax Parcel 024-29220-0010, via a guardian's deed. Dillenburg's property lies north of the eastern portion of Ahlers' property, such that the southern edge of Dillenburg's property also forms part of the northern boundary of Ahlers' property.

¶3 Before 2008, both parcels were owned by Ruben E. Schwartz. In December 1996, Schwartz formed tax parcel 024-29220-0010 by combining two contiguous parcels of land in order to erect a pole building. In 1997, Schwartz erected the pole building on his property.

¶4 Dillenburg contends that, when he purchased tax parcel 024-29220-0010 from Schwartz's guardian, he intended to purchase, and the guardian intended to convey, "the entire pole barn, and approximately ten additional feet of separation from the exterior walls of the pole barn and any adjoining land." However, after Dillenburg purchased the property, he and Ahlers discovered that, based on the legal descriptions in their deeds, their properties' common boundary actually bisected the pole building. Thus, while Dillenburg believed he had purchased the entire pole building, Ahlers contended he owned the southern portion of the building and proceeded to occupy the premises.

¶5 In response, Dillenburg sued Ahlers, seeking a declaration of their respective interests in real estate, reformation of their deeds, and an injunction prohibiting Ahlers from trespassing on Dillenburg's property. Dillenburg alleged that the legal descriptions in the deeds were erroneous, and that he had actually purchased the entire pole building.

¶6 After Ahlers answered the complaint, Dillenburg moved for summary judgment. In support of his motion, Dillenburg offered certified copies of 1942 and 1951 deeds to Schwartz's property, as well as the expert opinion of registered land surveyor Wayne Reuter, who had previously testified at a preliminary injunction hearing, and two plat maps that Reuter prepared depicting the disputed boundary area. Reuter opined that the 1942 and 1951 deeds did not share a common point of beginning and therefore created a "deed overlap." He further testified that, because of the deed overlap created by the 1942 and 1951 deeds, the present-day boundary of the Dillenburg and Ahlers properties erroneously bisected the pole building. To correct the problem, the boundary should be "relocated to be contiguous with the earlier and superior 1942 deed," which would cause the boundary to surround the pole building, rather than bisect it. Relocating the boundary in this way would result in Dillenburg owning the entire pole building.

¶7 Ahlers filed a written response to Dillenburg's summary judgment motion. However, he did not challenge the authenticity or content of any of the certified deeds filed in support of Dillenburg's motion, nor did he offer any expert opinion contradicting Reuter's testimony. Following a hearing, the circuit court granted summary judgment in favor of Dillenburg. The court reformed Dillenburg's and Ahlers' deeds to reflect the fact that Dillenburg owned the entire pole building. The court also declared that Ahlers did not have any ownership

interest in tax parcel 024-29220-0010 and that Dillenburg was the sole owner of the pole building. Finally, the court issued a permanent injunction, requiring Ahlers to remove his personal property from the pole building, to repair damage to the pole building, and to cease occupying or using the pole building.

DISCUSSION

I. Summary judgment

¶8 We independently review a grant of summary judgment, using the same methodology as the circuit court. ***Hardy v. Hoefferle***, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. Summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. WIS. STAT. § 802.08(2).[1]

¶9 Where a summary judgment opponent fails to offer any admissible evidence in opposition to a properly supported motion for summary judgment, "summary judgment, if appropriate, shall be entered against such party." WIS. STAT. § 802.08(3); *see also* ***Leszczynski v. Surges***, 30 Wis. 2d 534, 539, 141 N.W.2d 261 (1966) ("To defeat the motion, the statute requires the opposing party by affidavit or other proof to show facts which the court shall deem sufficient to entitle him to a trial."). Here, Dillenburg's summary judgment motion rested on certified copies of public records—the 1942 and 1951 warranty deeds—whose authenticity Ahlers has not challenged. The content of these unchallenged, certified records "control[s] on [a] motion for summary judgment[.]" ***Breitenbach***

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

v. Gerlach, 27 Wis. 2d 358, 363, 134 N.W.2d 400 (1965). Furthermore, Reuter, a registered land surveyor who had researched the title history of Schwartz's property, testified that an accidental deed overlap occurred because the 1942 and 1951 deeds did not share a common point of beginning. He opined that, to correct the problem, the present-day boundaries of the Dillenburg and Ahlers properties should be relocated to be contiguous with the boundary from the superior 1942 deed. Ahlers has not offered any expert testimony or other admissible evidence to contradict Reuter's opinion. On the whole, Ahlers has failed to present admissible evidence to oppose Dillenburg's properly supported summary judgment motion.

¶10 An appellant challenging summary judgment must demonstrate either the existence of a genuine issue of material fact or that the circuit court erred in applying controlling law. *See* WIS. STAT. § 802.08(2). On appeal, Ahlers has failed to identify any disputed factual issue. Furthermore, he does not present a developed argument regarding any legal error by the circuit court. Although Ahlers is a pro se litigant, he is "bound by the same rules that apply to attorneys on appeal." *See* ***Waushara Cnty. v. Graf***, 166 Wis. 2d 442, 452, 480 N.W.2d 16 (1992). "While some leniency may be allowed, neither a trial court nor a reviewing court has a duty to walk *pro se* litigants through the procedural requirements or to point them to the proper substantive law." ***Id.*** An appellate court "cannot serve as both advocate and judge" by developing arguments for the parties. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992).

¶11 To the extent we can discern Ahlers' appellate argument, he seems to contend that the legal description in his sheriff's deed fully determines the interest he acquired when he purchased tax parcel 024-29220-0000. However,

Ahlers' argument is flawed because it begs the ultimate question: what is the scope of the interest Ahlers acquired under the sheriff's deed?

¶12 Ahlers seems to argue that WIS. STAT. §§ 842.20 and 846.17 mandate that the words of the legal description in a sheriff's deed conclusively determine the interest conveyed, regardless of accidental and unknown errors in predecessor instruments of record. These statutes affirm that the purchaser of land at a sheriff's sale, and the purchaser's assigns and personal representatives, acquire free and clear of other liens or encumbrances the entire estate, right, title and interest of the mortgagor in the land sold. *See* WIS. STAT. §§ 842.20, 846.17. However, neither statute states that the terms of the legal description in a sheriff's deed conclusively define the boundaries or position of the land conveyed, regardless of accidental and unknown errors in earlier deeds. *See* WIS. STAT. §§ 842.20, 846.17. Moreover, these statutes must be read in conjunction with other statutes governing real property. Specifically, WIS. STAT. §§ 840.03 and 841.01 expressly authorize a court to quiet title to real estate by declaring the parties' relative "interest[s]" in land. That is precisely what the circuit court did here, and Ahlers has not presented a developed argument that the circuit court erred.

II. Recusal

¶13 Ahlers also argues the circuit court judge should have recused himself because of "an earlier conflict with [Ahlers'] parents[.]" Ahlers does not identify any instance in which he moved for recusal at the circuit court level, and we generally do not consider arguments raised for the first time on appeal. *See* ***Terpstra v. Soiltest Inc.***, 63 Wis. 2d 585, 593, 218 N.W.2d 129 (1974). However, judging from Dillenburg's response brief, we discern that Ahlers orally moved for

recusal on November 23, 2010, two months after entry of the court's final judgment, at a hearing on Ahlers' motion to stay the permanent injunction pending appeal. Dillenburg represents that the circuit court orally denied Ahlers' motion. The record does not contain a written order denying Ahlers' motion or a transcript of the November 23 hearing.

¶14 Ahlers' argument that the circuit court judge should have recused himself fails for three reasons. First, because no written order has been entered, we lack appellate subject matter jurisdiction to review the court's denial of Ahlers' recusal motion. *See* ***State ex rel. Hildebrand v. Kegu***, 59 Wis. 2d 215, 216-17, 207 N.W.2d 658 (1973) (Appellate court has no jurisdiction over a determination by the circuit court unless there is a written order from which an appeal may be taken.); ***Ramsthal Adver. Agency v. Energy Miser, Inc.***, 90 Wis. 2d 74, 75-76, 279 N.W.2d 491 (Ct. App. 1979) (An oral ruling must be reduced to writing for there to be appellate jurisdiction.).

¶15 Second, even assuming we had jurisdiction, our review would be limited to the record before us, *see* ***Austin v. Ford Motor Co.***, 86 Wis. 2d 628, 641, 273 N.W.2d 233 (1979), which does not contain a transcript of the November 23 hearing. As the person raising the issue, it is Ahlers' responsibility to ensure the record contains all relevant transcripts. *See* WIS. STAT. RULE 809.11(4); ***State Bank of Hartland v. Arndt***, 129 Wis. 2d 411, 423, 385 N.W.2d 219 (Ct. App. 1986). "[I]n the absence of a transcript we presume that every fact essential to sustain the circuit court's decision is supported by the record." ***Butcher v. Ameritech Corp.***, 2007 WI App 5, ¶35, 298 Wis. 2d 468, 727 N.W.2d 546.

¶16 Third, Ahlers' appellate brief does not identify, must less establish, any factor specified in WIS. STAT. § 757.19(2) that would mandate judicial disqualification. Ahlers states that the circuit court judge had previously represented a party adverse to Ahlers' parents "in a road dispute." Ahlers does not explain how this purported "conflict" meets any of the six objective standards for disqualification listed in WIS. STAT. § 757.19(2)(a)-(f). *See* ***State v. American TV & Appliance of Madison, Inc.***, 151 Wis. 2d 175, 182, 443 N.W.2d 662 (1989) (explaining that the first six paragraphs of § 757.19(2) are objective standards for disqualification). Nor does Ahlers argue that the seventh, subjective standard for disqualification has been met. *See* WIS. STAT. § 757.19(2)(g) (Disqualification is required "[w]hen a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner."). Ahlers simply has not established that the judge's prior representation of a party adverse to Ahlers' parents required recusal.

¶17 As a final matter, Dillenburg moves for double costs based on Ahlers' failure to comply with various rules of appellate procedure. *See* WIS. STAT. RULE 809.83(2). We conclude double costs are not warranted and deny Dillenburg's request.

By the Court.—Judgment affirmed.

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