COURT OF APPEALS
DECISION
DATED AND FILED

July 19, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2990 **Cir. Ct. No. 2007CV138**

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

LONE PINE OWNERS ASSOCIATION, INC., C/O JIM KNOLL, PRESIDENT OF THE LPOA,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

JOHN R. PELLETT AND JOAN B. PELLETT,

DEFENDANTS-APPELLANTS-CROSS-RESPONDENTS.

APPEAL and CROSS-APPEAL from an order of the circuit court for Vilas County: NEAL A. NIELSEN, III, Judge. *Affirmed*.

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

¶1 PER CURIAM. John and Joan Pellett appeal an order requiring them to sell a small portion of their property to the Lone Pine Owners Association, Inc. The Pelletts' primary contention is that the circuit court lacked equitable

authority to order a forced sale, but they also submit arguments regarding the court's exercise of discretion, the sufficiency of the evidence, and the clean hands doctrine. We reject the Pelletts' arguments and affirm.

¶2 Lone Pine cross-appeals, arguing the circuit court erroneously exercised its discretion when it imposed conditions on the grant of title. Specifically, Lone Pine contends the circuit court could not enjoin further improvement of the disputed parcel. We conclude the circuit court properly exercised its equitable authority and affirm.

BACKGROUND

¶3 Lone Pine Lake occupies the southwest corner of section ten of the Town of Presque Isle, Wisconsin. In 1967, Erm Foltz, who owned substantial lakefront property, created a subdivision with lots extending inland from the shoreline. The original plan called for a road at the rear of the lots, away from the lake. However, the road was built in front of the lots and near the shoreline, diminishing the value of the lakefront properties.

¶4 In 1991, as a condition of the sale of subdivision lots 27, 28 and 29, the road was relocated to the rear of the lots. Foltz demarcated what he believed to be the boundaries of his property using trees marked in blue, and instructed the contractor not to let any part of the new road cross the marked boundary. In fact, the marked boundary was several feet removed from the true boundary line, as revealed by later surveys.

¶5 The relocated road roughly mirrored the lake's contour, and curved at the rear of lot 28, which Bruce and Shirley Meriwether would later purchase. The curve became known as the Meriwether curve. At its apex, the Meriwether

curve encroached slightly on adjacent land to the northeast (the "Edith Lake tract"), owned by Steven Kram's predecessors in interest.

¶6 In 2001, Lone Pine determined that the road was dangerous. Drivers traveling from the west to the east encountered a large hill and could not see what was coming around the curve. The Pelletts, who had owned land in Lone Pine for decades, nearly struck a child driving a go-kart. A logging truck also had a serious accident on the curve, and there had been either another accident or close call. At a July 2001 meeting, the Lone Pine road committee reported that it had placed fifteen-mile-per-hour signs and created a shoulder around the curve using fill from a nearby hill.

¶7 The Pelletts offered to purchase the 223-acre Edith Lake tract from Kram in early 2002. Although the Pelletts believed the Meriwether curve encroached on the Edith Lake tract, their offer included no contingencies and was not subject to completion of a survey. Joan Pellett testified she did not consider the encroachment to be particularly consequential. In subsequent months, Lone Pine members again discussed the safety and widening of the Meriwether curve. Despite their outstanding offer, the Pelletts did not object to recent or future activity at the curve. Instead, the Pelletts added to complaints about the road's safety. Less than one week before closing, Kram sent a letter to Lone Pine's president objecting to the fill placed at the Meriwether curve.

¶8 In 2003, the Pelletts, believing proposed changes to the association bylaws benefitted smaller lake lots at the expense of larger back lots like theirs, negotiated their exit from Lone Pine. The Pelletts retained the right to use Lone Pine roads, and agreed to continue paying their share of the road maintenance costs.

¶9 The Pelletts' attorney sent a letter to Lone Pine in 2004 after a survey confirmed their suspicions about the encroachment. No further action was taken in 2005 or 2006, but in April 2007 the Pelletts applied for a permit to remove the encroaching portion of the Meriwether curve. The deputy zoning administrator requested that the Pelletts "rethink" the project and raised safety and access concerns. On April 30, John Pellett issued Lone Pine a written ultimatum, stating that further legal action would ensue if the encroachment was not removed by May 10.

¶10 Lone Pine filed the present action on May 10, seeking a prescriptive easement, an order enjoining the Pelletts from interfering with the road, and "such other and further relief as the Court deems just and equitable." The circuit court issued a temporary injunction prohibiting the Pelletts from altering the road. The Pelletts counterclaimed for ejectment and removal.

¶11 The Pelletts filed several motions to dismiss, all of which were denied, arguing variously that Lone Pine had no interest in the road, and that Lone Pine had failed to state claims for its desired relief. Lone Pine then filed a trial brief proposing the equitable remedy of a forced sale.

¶12 The circuit court issued its findings after reviewing evidence that included a site view, a video of the encroachment in 2004, photographs, surveys and testimony. The portion of the Edith Lake tract extending from the road to the lake is a steep hill that contains wetlands and does "not represent a buildable lot." The surface of the road encroaches a maximum of 6.7 feet but, because of the fill necessary to stabilize the road, the encroachment extends an additional 15 feet. The total encroachment encompasses approximately one-tenth of an acre, and does not diminish the value of the Edith Lake tract.

¶13 The circuit court determined that Lone Pine had no legal justification for maintaining the road on the Pelletts' land, and that the Pelletts had "an absolute right to require [Lone Pine] to move the road." However, the court deemed that remedy unsatisfactory, finding that relocation would prove difficult and expensive:

> If the roadway is moved, there is no question that it would require cutting into the bank of the hillside on the Meriwether side of the road. It would require a significant slope back from whatever cut is made, in order to make that stable. And that slope would likely get to, if not partially include, what might very well be the Meriwethers[']garage. It would make … their driveway, which is already steep, even steeper.
>
> Can it be done? The answer to that is, yes. You can do just about anything. With appropriate engineering, perhaps with some type of abutments, or heavy improvements, to hold back any portion of the road toward the Pellett boundary. The road would be capable of being moved. Retaining walls, and other types of improvements, could be constructed on the Meriwether parcel ….
>
> It would be a great expense. It would be at significant inconvenience to the Meriwethers. And would result in some diminution of value to them, undoubtedly. Although we don't have testimony.

The court concluded it could "not bring [it]self to order the relocation of that road under these facts."

¶14 Citing ***Knuth v. Vogels***, 265 Wis. 341, 61 N.W.2d 301 (1953), the circuit court characterized the case as an action under WIS. STAT. ch. 844[1] and determined that Lone Pine was entitled to the equitable remedies of a forced sale and permanent injunction prohibiting the Pelletts from interfering with the road. It ordered Lone Pine to pay as damages $1,625, the fair market value of the disputed

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

property. In addition, Lone Pine was enjoined from further widening the road on the property subject to the forced sale, and from subsequent encroachment on the Edith Lake tract.

¶15 Lone Pine objected to the injunction prohibiting additional widening of the road, noting that the court was enjoining activity on land that Lone Pine would own. The court stated that it had "wrestled with this concept of ownership," but wanted to "maintain the status quo. And I am doing that by placing an injunction the other way on further widening of the traveled surface of the roadway."

DISCUSSION

¶16 The Pelletts appeal the circuit court's order requiring a forced sale. They contend the circuit court lacked authority to order the forced sale. They also argue the circuit court erroneously exercised its discretion when ordering the forced sale, and the order was unsupported by the evidence. Finally, they contend the clean hands doctrine bars Lone Pine's claim for equitable relief.

¶17 Lone Pine cross-appeals and challenges the circuit court's authority to impose conditions on the grant of title. Specifically, Lone Pine contends the court erred by enjoining further expansion of the road.

I. The Pelletts' Appeal

A. Scope of the circuit court's equitable authority

¶18 The Pelletts first challenge the circuit court's equitable authority to award title to an encroacher who has no lawful claim to the land. "The issue of whether judicial authority exists is a question of law and therefore one which this

court reviews de novo." ***GMAC Mortg. Corp. v. Gisvold***, 215 Wis. 2d 459, 480, 572 N.W.2d 466 (1998).

¶19 The circuit court relied on three authorities to establish the scope of its equitable authority: WIS. STAT. ch. 844; ***Knuth***; and ***Perpignani v. Vonasek***, 139 Wis. 2d 695, 408 N.W.2d 1 (1987). In addition, ***Soma v. Zurawski***, 2009 WI App 124, 321 Wis. 2d 91, 772 N.W.2d 724, confirms that the circuit court has equitable authority to order a forced sale.

¶20 Demands for forced sales are generally governed by WIS. STAT. § 843.10, but that is not the sole authority under which a circuit court may order such a remedy. *See* ***Soma***, 321 Wis. 2d 91, ¶10. WISCONSIN STAT. ch. 844 governs actions to address physical injury to, or interference with, real property. The action may be to redress past injury, to restrain further injury, to abate the source of injury, "or for other appropriate relief." WIS. STAT. § 844.01(1). Nothing in ch. 844 limits a circuit court's authority to reach an equitable resolution to the dispute. Indeed, a judgment rendered in a ch. 844 proceeding "shall award the relief, legal or equitable, to which the plaintiff is entitled …." WIS. STAT. § 844.20(1).

¶21 ***Knuth*** confirms that a circuit court has broad equitable authority to resolve encroachment disputes. There, an adjacent landowner inadvertently placed a driveway and a garage that slightly encroached on the plaintiff's property. ***Knuth***, 265 Wis. at 342. Our supreme court determined the trial court erred in dismissing the plaintiff's action for a mandatory injunction. ***Id.*** at 346. It remanded the case, stating, "We believe this is a proper case for the court to invoke its equity powers to work out an equitable solution that will end this unfortunate boundary-line controversy between two neighbors." ***Id.*** at 346-47.

¶22 The Pelletts attempt to distinguish ***Knuth*** in several ways. First, they argue that the supreme court's instructions on remand were very specific, and would not have permitted the type of forced sale ordered by the circuit court here. The supreme court's instructions permitted the plaintiff to chose between selling the disputed property to the defendant at fair market value and collecting damages for its use. *See* ***id.*** at 347-48. However, nothing in ***Knuth*** suggests the supreme court intended that procedure to constrain the future exercise of a court's equitable powers. The court presumably recognized that equitable determinations must be made on a case-by-case basis. *See* ***Wisconsin Dept. of Revenue v. Moebius Printing Co.***, 89 Wis. 2d 610, 641, 279 N.W.2d 213 (1979); ***Hokin v. Hokin***, 231 Wis. 2d 184, 208, 605 N.W.2d 219 (Ct. App. 1999).

¶23 The Pelletts next attempt to distinguish ***Knuth*** by arguing that the "problem in the case at bar is not a building encroachment resulting from innocent mistake." They continue, "The resulting encroachment can hardly be characterized as an innocent mistake, particularly given Lone Pine's common law obligation to ascertain and honor boundary lines." However, we do not read ***Knuth*** to establish "innocent mistake" as a threshold finding necessary to trigger the circuit court's equitable authority. The encroaching landowner in ***Knuth*** presumably had a similar obligation to ascertain the correct property boundaries, and yet that proved no bar to the supreme court's application of equitable principles to resolve the dispute.

¶24 ***Perpignani*** reaffirms a circuit court's equitable authority to resolve disputes such as the present one. In ***Perpignani***, 139 Wis. 2d at 703-04, a survey of relicted land caused a change in the property division line between the plaintiff's and defendant's parcels. As a result, some of the defendant's buildings encroached on the plaintiff's property. ***Id.*** at 706. The supreme court approved of

the circuit court's decision to award the plaintiff the fair market value of the land instead of requiring the defendant to remove the buildings, stating that a forced sale was "the most equitable solution." ***Id.*** at 736. It further stated, "Courts may apply equitable remedies as necessary to meet the needs of a particular case. … [T]he general rule is that a court may grant such relief as it feels a party is entitled to, even if such relief has not been demanded." ***Id.*** at 737 (citations and internal quotation marks omitted).

¶25 Finally, in ***Soma***, 321 Wis. 2d 91, ¶9, this court noted that the question of whether circuit courts have equitable authority, apart from WIS. STAT. § 893.10, to order a forced sale was implicitly resolved by ***Perpignani***. Although the legislature may have intended to prohibit forced sales that did not comply with § 893.10, we concluded we were bound by ***Perpignani***'s holding and any arguable inconsistency between that holding and § 893.10 was to be addressed by the supreme court or the legislature. ***Soma***, 321 Wis. 2d 91, ¶11. A court's general powers of equity, as well as its authority under WIS. STAT. ch. 844, permit it to order a forced sale when equity demands. ***Id.***, ¶10.

B. Circuit court's exercise of discretion

¶26 Next, the Pelletts challenge the circuit court's decision to order a forced sale. First, they argue that their land should not be forcibly sold to Lone Pine because it was neither an encroaching party nor an adjoining landowner. Second, they contend that the circuit court erred in granting equitable relief because Lone Pine did not have an interest in the disputed land. We reject both arguments.

¶27 Our review of a circuit court's decision in a matter of equity is limited to whether the court erroneously exercised its discretion. *See* ***Shanak v.***

City of Waupaca, 185 Wis. 2d 568, 588, 518 N.W.2d 310 (Ct. App. 1994). A discretionary act will be affirmed if the circuit court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982).

¶28 As to their first argument, the Pelletts cite no authority for the proposition that only an encroaching party or adjoining landowner may receive equitable relief in the form of a forced sale.[2] The Pelletts correctly note that ***Knuth***, ***Perpignani***, and ***Soma*** involved encroachment disputes between adjoining landowners, but "[t]he jurisdiction of courts of equity is defined by principles, not by precedents …." *See* ***Harrigan v. Gilchrist***, 121 Wis. 127, 133, 99 N.W. 909 (1904). As we have stated, equitable determinations must be made on a case-by-case basis: "A court of equity has inherent power to fashion a remedy to the particular facts." ***Town of Fond du Lac v. City of Fond du Lac***, 22 Wis. 2d 525, 531, 126 N.W.2d 206 (1964).

¶29 The Pelletts' second argument must also fail. The Pelletts contend Lone Pine "does not have any interest whatsoever in those lands adjacent to [the Pelletts] …." That contention is incorrect and inconsistent with the circuit court's findings. There is no dispute that Lone Pine has maintained the road for many years, as required by Lone Pine's agreement with its landowner members. The circuit court found that "by subdivision covenants, and other documents which have been created and followed over time, it is understood that [Lone Pine] is the

[2] Indeed, as Lone Pine notes, WIS. STAT. § 844.01(1) allows *any* person owning or claiming an interest in real property to bring an action. Adjacency is not a prerequisite to commencing an action.

owner of the common roadways, and is responsible for the maintenance of the roadways." WISCONSIN STAT. § 840.01 broadly defines an "interest in real property." ***Village of Hobart v. Oneida Tribe of Indians***, 2007 WI App 180, ¶14, 303 Wis. 2d 761, 736 N.W.2d 896. That definition includes present and future rights to, title to, and interests in real property "without limitation." WIS. STAT. § 840.01(1). We conclude that Lone Pine's de facto ownership, coupled with its obligation to keep the road safe and in good repair for its landowner members, satisfies the interest requirement under § 840.01(1).[3]

¶30 The Pelletts also assert the circuit court erred by characterizing Lone Pine's action as one under WIS. STAT. ch. 844. They contend Lone Pine's complaint was insufficient under WIS. STAT. § 844.16.[4] However, ***Perpignani***, 139 Wis. 2d at 736-37, establishes that a plaintiff need not invoke ch. 844 to be eligible for the remedies specified in that chapter. It logically follows that a plaintiff may, in the court's discretion, receive relief under that chapter without complying with its formalities. Accordingly, we hold that Lone Pine's failure to comply with § 844.16 does not affect its claim for equitable relief.

[3] The parties do not address whether WIS. STAT. § 840.01(2) has any bearing on the present case. That subsection states that an "interest in real property" does not include licenses. We generally decline to address issues not raised in the briefs. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998). In any event, Lone Pine's agreement with its members and historical practices suggest a permanent relationship, and we note that anything more than a revocable license creates an interest in the land. *See* ***Van Camp v. Menominee Enters., Inc.***, 68 Wis. 2d 332, 344, 228 N.W.2d 664 (1975).

[4] WISCONSIN STAT. § 844.16 requires that the complaint "indicate each plaintiff's interest, the interests of all persons entitled to possession, the nature of the alleged injury and, if damages are asked, … the percentages and amounts claimed by each person claiming an interest."

C. Sufficiency of the evidence

¶31 The Pelletts also assert the circuit court lacked sufficient evidence to make the finding that moving the road would be costly and inconvenient. The Pelletts raise this argument for the first time in their reply brief, and we will not consider it. *See* ***Schaeffer v. State Pers. Comm'n***, 150 Wis. 2d 132, 144, 441 N.W.2d 292 (Ct. App. 1989). In any event, the court possessed photos, surveys and a video illustrating the encroachment, and also conducted a site view. General observations regarding the difficulty and expense of moving the road are permissible inferences from this evidence.[5]

D. Unclean hands

¶32 Finally, the Pelletts contend Lone Pine is not eligible for equitable relief because it has unclean hands. A plaintiff who seeks affirmative equitable relief must have "clean hands" before the court will entertain the plea. ***S & M Rotogravure Serv., Inc. v. Baer***, 77 Wis. 2d 454, 466, 252 N.W.2d 913 (1977). The Pelletts assert Lone Pine has unclean hands because it created the encroachment and failed to respond to informal requests to remove it.

¶33 "Before a court may deny a plaintiff relief in equity upon the 'clean hands' doctrine, it must clearly appear that the things from which the plaintiff seeks relief are the fruit of its own wrongful or unlawful course of conduct." ***Id.***

[5] The circuit court explicitly acknowledged it had no testimony regarding the cost of moving the road, but it did not attempt to determine the specific cost. Instead, it made general observations about the type of work that would be necessary, estimating that relocation could be done "with appropriate engineering, perhaps with some type of abutments, or heavy improvements …. Retaining walls, and other types of improvements, could be constructed on the Meriwether parcel to allow that construction to take place."

at 467. However, the conduct must be something more than legally wrong. It must be "substantial misconduct constituting fraud, injustice or unfairness." *See* ***id.*** at 466. Indeed,

> [e]quity does not demand that its suitors shall have led blameless and pure lives. If it did, the chancellor's court would be little frequented. The general principle simply is that he who has been guilty of substantial misconduct in regard to, or at all events connected with, the matter in litigation, so that it has in some measure affected the equitable relations subsisting between the two parties and arising out of the transaction, shall not be afforded relief when he comes into court as an actor seeking to set the judicial machinery in motion.

Huntzicker v. Crocker, 135 Wis. 38, 41, 115 N.W. 340 (1908) (internal quotation marks omitted).

¶34 Although Lone Pine was undoubtedly wrong to create the encroachment, we are not persuaded it is guilty of substantial misconduct that would bar its equitable claim. In 1991, the road was thought to have been placed entirely on Foltz's property. The encroachment was unintentionally aggravated by Lone Pine in 2001 because the road in its earlier form presented a dangerous and unsatisfactory condition. There had been a serious accident involving a logging truck, and several near misses. Indeed, the Pelletts themselves had complained about the unsafe condition of the road.

¶35 ***David Adler & Sons Co. v. Maglio***, 200 Wis. 153, 228 N.W. 123 (1929), provides a useful example of substantial misconduct that bars equitable relief. There, an employer began a series of "deliberate and systematic breaches" of its employees' union contract to create unrest, and then used an unauthorized meeting of the employees as justification for terminating the union contract. ***Id.*** at 155. That conduct "precipitated a labor war. When the tide of battle seemed to be

setting against it, [the employer] sought to withdraw from the field to which it had deliberately gone and appealed to a court of equity for protection …." ***Id.*** at 158. "But the portals of equity are closed to those who come seeking relief from the consequences which naturally flow from *deliberate* wrongs committed by the applicant for relief." ***Id.*** at 159 (emphasis added). The supreme court emphasized that there can be no relief to a "complainant who has been guilty of bad faith, fraud, or any unconscionable act in the transaction which forms the basis of his suit." ***Id.*** at 158.

¶36 We perceive a distinction between deliberate placement of the road and deliberate encroachment. Lone Pine intentionally placed the road at the rear of the lots, but nothing in the record suggests it intended to encroach on the Pelletts' land in doing so. When the road was widened, and the encroachment aggravated, it was not because Lone Pine sought to further interfere with the Pelletts' property rights. That was done out of concern for the safety of Lone Pine's members. The clean hands doctrine does not apply.

II. Lone Pine's Cross-Appeal

¶37 Lone Pine cross-appeals, asserting the circuit court had no authority to impose conditions on the grant of title. Lone Pine specifically challenges the circuit court's injunction against further widening of the road. Lone Pine contends it has a "common law … right to make use of [its] land as [it] sees fit …." *See* ***Bennett v. Larsen Co.***, 118 Wis. 2d 681, 690, 348 N.W.2d 540 (1984). It asserts that, in the absence of evidence suggesting that Lone Pine would likely further encroach on the Edith Lake tract, the circuit court could not enjoin Lone Pine from utilizing the disputed property to the fullest extent allowed.

¶38 Lone Pine fails to appreciate that it has received title to the disputed parcel not because of its legal entitlement to that property, but because the circuit court's weighing of the equities dictated that remedy. The privilege to make use of one's land is "qualified by due regard for the interests of others who may be affected by the landowner's activities on the property." ***Id.*** The circuit court's equitable remedy was intended to finally settle this long-running property dispute in a way that left no ambiguity regarding the rights and obligations of all parties.

¶39 The circuit court's decision reflects a delicate compromise that allows Lone Pine to maintain the road in its present form despite having no legal justification for the encroachment:

> By the same token, [Lone Pine] does not have any right to extend its improvements on the roadway, or to improve the traveled width any further towards the land of the Pelletts, or to place any additional fill to the north or east of the roadway. And they are permanently enjoined from doing that. They can gravel the surface, and if they need to improve the width, it's going to have to go towards [the] Meriwethers.
>
> We have relatively few owners who use that. Most people should be aware, by now, of the limitations on the roadway. The Association can place signs regarding the safety of that curve, and everyone's just going to have to exercise caution and hope for the best. But we are not going to [improve] it at the further expense of the Pelletts. You don't have the right to do that, and really, never did.

The court elaborated further when pressed by Lone Pine's attorney:[6]

> Because, I have real difficulty with the concept that we're going to resolve this problem in a way that people will walk away from it so long as the Association has the belief that it can further encroach the traveled surface of the

[6] Lone Pine's attorney indicated that he spoke with his client about "com[ing] up with a type of structure" that would allow the road to be widened without further encroachment.

> roadway, and further widen that curve as a result of my ruling.
>
> I am specifically not granting the relief you request to go out to those blue markers, because the whole point here is that, whatever encroachments existed in 2002, I am finding has not increased. There hasn't been any testimony to it being increased. And it's not going to be increased. It shouldn't have been there now. But they certainly aren't going to increase it.
>
> ….
>
> And I am very concerned about if they were to try to add two or three feet to the traveled width of that roadway, that in doing so, we're going to have problems with the run of that slope exceeding this figure. We're going [to] create another encroachment. And you're permanently enjoined from doing that.

The court used a demonstrated rational process to reach a reasonable conclusion. The condition on the grant of title was therefore a proper exercise of discretion.

By the Court.—Order affirmed.

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