COURT OF APPEALS
DECISION
DATED AND FILED

March 6, 2012

Diane M. Fremgen
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. 2011AP1688 **Cir. Ct. No. 2009CV264**

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

ARTHUR W. SUNDSTROM AND KATHRYN J. SUNDSTROM, A/K/A KATHRYN J. SALAS,

PLAINTIFFS-RESPONDENTS,

V.

EUGENE PEIL, ROBERT LINDBOM AND CATHLEEN LINDBOM,

DEFENDANTS-APPELLANTS,

OAKLAND SHORES MEMBERSHIP ASSOCIATION, CURTIS P. BRAUN, DELLA S. BRAUN, DALE VENTEICHER, KAREN VENTEICHER, THE ESTATE OF JAN KURKOWSKI, BRIAN DAHLKE, SHARON DAHLKE, GARY ARNDT, DEBORAH ARNDT, CHARLES A. DECKER, JOY I. DECKER, TWYLA VANDERWEERDT, 2000 AD PROPERTIES, LLC, BENJAMIN SPADER, CLINTON G. HALLMARK, MARIA VASILIOU, OM P. MOOSAI, TEELOTAMA D. MOOSAI, GREGORY NORMAN, JILL NORMAN, GREGORY A. HUPPERT, MARY JO HUPPERT, JEFFREY P. HEIDE, CARL C. HEIDE, CENTRAL BANK AND DARYL C. RADEN, RACHEL RADEN, ALLEN J. THOMPSON, JAMES L. THOMPSON,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Burnett County: KENNETH L. KUTZ, Judge. *Affirmed*.

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

¶1 PER CURIAM. Eugene Peil, Robert Lindbom and Cathleen Lindbom appeal a judgment permitting Arthur and Kathryn Sundstrom to use an access road on property used by members of the Oakland Shores Membership Association. The Sundstroms hold a permanent access easement over as much of that property as is "reasonably necessary" for ingress to and egress from their adjacent parcel. The circuit court concluded the easement was ambiguous and exercised its equitable authority to define the scope of the easement. We affirm.

BACKGROUND

¶2 In 1994, Arthur Sundstrom purchased lakefront property known as Lot 14 from the American Investment Company. Sundstrom's property was bordered on one side by Lot 13, and on the other by Outlot 1, a parcel established "for private lake access and private park purposes" for certain members of the Oakland Shores Membership Association.

¶3 A road on Outlot 1 provides the only access to Lot 14 from the nearest public road. The first 200 feet of the access road is blacktopped, and is adjacent to the furthest portion of Lot 14 from the lake frontage. The rest of the access road is graveled and runs the length of Sundstrom's property, on Outlot 1, to the lake. Sundstrom traveled the entire access road before purchasing the

property and has used it in the seventeen years before this litigation was commenced.

¶4 The deed conveying Lot 14 also conveyed an easement over Outlot 1. Specifically, the deed conveyed "a permanent access easement over so much of Outlot One (1) of aforesaid plat as is reasonably necessary for ingress and egress from Lot 14 to the road, as provided for in the Covenants and Restrictions recorded in Volume 360 Pages 55-58 Document Number 222829." The document referenced in the deed provides, "The entrance to Outlot One (1) also serves as access to Lots 13 and 14, Block 1, Oakland Shores." The document also contains language that mirrors that used in the deed: "Developers further declare that Outlot One (1) contains a permanent access easement for Lots 13 and 14, Block 1, Oakland Shores, over so much of Outlot One (1) as is reasonably necessary for ingress and egress from said lots to the road."

¶5 Lot 14 was vacant when Sundstrom purchased it.[1] He built a foundation and garage near the lake frontage between 1994 and 1997. In 2001, Sundstrom evened the road and placed a fence along it. He and his wife made Lot 14 their permanent residence in 2002.

¶6 Peil purchased an association lot in 2008, giving him an interest in Outlot 1. At some point Peil became president of the association, and he notified the Sundstroms in July 2009 of his belief that their easement terminated at the blacktopped portion of the access road. The Sundstroms then initiated this lawsuit

[1] Kathryn Sundstrom became part-owner of Lot 14 in 2000.

seeking a judgment that permitted them continued use of the access road.[2] The trial court ruled that the easement was ambiguous and held a trial. At its conclusion, the court found that the Sundstroms "are entitled to the use of the access road as their easement, at least up to the point necessary to get into their property [using] their existing driveway … by the garage."

DISCUSSION

¶7 An easement is an interest in property that is in another's possession. ***Atkinson v. Mentzel***, 211 Wis. 2d 628, 637, 566 N.W.2d 158 (Ct. App. 1997). This interest is distinct from ownership and constitute merely a "liberty, privilege, or advantage in lands, without profit." ***Richards v. Land Star Group, Inc.***, 224 Wis. 2d 829, 836, 593 N.W.2d 103 (Ct. App. 1999). "An easement creates two distinct property interests: the dominant estate and the servient estate." ***Id.*** The dominant estate enjoys the privileges of an easement, while the servient estate—the property burdened by the easement—permits the dominant estate to exercise those privileges. ***Id.***

¶8 The easement in this case is an express easement, or an easement created by a written grant. *See* ***Mnuk v. Harmony Homes, Inc.***, 2010 WI App 102, ¶24, 329 Wis. 2d 182, 790 N.W.2d 514. The relative rights of the landowners are defined by the written instrument. ***Eckendorf v. Austin***, 2000 WI App 219, ¶7, 239 Wis. 2d 69, 619 N.W.2d 129. We first look to the language of the deed; if that is unambiguous, we apply the language as written. ***Mnuk***, 329 Wis. 2d 182, ¶24. If there is ambiguity, the court may consider extrinsic evidence to resolve it.

[2] At trial, Sundstrom clarified that he was claiming access only to his building site, not to the lake.

Id. The proper interpretation of the deed and whether it is ambiguous are questions of law. ***Atkinson***, 211 Wis. 2d at 638.

¶9 The easement in this case is patently ambiguous. It is missing an essential term: the location of the easement. The deed does not indicate what portion of Outlot 1 is "reasonably necessary for ingress and egress" between Lot 14 and the road. Peil asserts that the easement is unambiguous because the document referenced in the deed provides that the "entrance" to Outlot 1 also serves as access to Lots 13 and 14. However, this provision is insufficient to render the deed unambiguous. "Entrance" could, as Peil contends, refer solely to the blacktopped portion of the access road, but it could also refer to the entire access road, which is used by members of the association to travel to the lake.

¶10 When the location of an access easement is not defined by the grant, we presume that the parties intended a "reasonably convenient and suitable way." *See* ***Werkowski v. Waterford Homes, Inc.***, 30 Wis. 2d 410, 417, 141 N.W.2d 306 (1966). If the parties cannot agree on a location, a court has the authority, as an equitable matter, to determine the location of the servitude. ***Id.*** "The reasonable convenience of both parties is of prime importance and the court cannot act arbitrarily, but must proceed with due regard for the rights of both parties." ***Id.*** (citations omitted).

¶11 The circuit court appropriately weighed the equities here in determining the easement's location. It noted the Sundstroms have used the access road since acquiring Lot 14 in 1994. The plat includes the access road as a dedicated road for access to the lake. The Sundstroms have improved the road and developed their property in reliance on the road's availability. It would cost the Sundstroms a great deal to place a new driveway, which would run virtually the

entire length of their property. Few equities weighed in Peil's favor, as the circuit court found that the road was and would continue to be used "by all members of the association for access to the lake." Further, the court found that the Sundstroms' use would not interfere with the association members'.

¶12 Peil objects that the circuit court measured the equities as they currently exist, rather than as they existed in 1994. The court conceded that the case "may have had a different outcome if this lawsuit had been brought … back in 1994 when the Sundstroms initially acquired their property rights here." At that time, the land was undeveloped, and the court found that "putting in an easement road across … their property[,] as opposed to using the access roadway to the lake, would have made considerably more sense."

¶13 We acknowledge that the purpose of easement construction is to determine the parties' intent at the time of the grant. ***Mnuk***, 329 Wis. 2d 182, ¶24. However, ***Mnuk*** also noted ***Werkowski***'s holding that a court has equitable power to determine the location of an undefined easement. ***Id.***, ¶32. When sitting in equity, a court has broad authority to do justice in individual cases. ***State v. Excel Mgmt. Servs., Inc.***, 111 Wis. 2d 479, 491, 331 N.W.2d 312 (1983). "The court of equity has always had a traditional power to adapt its remedies to the exigencies and the needs of the case …." ***American Med. Servs., Inc. v. Mutual Fed. Savs. & Loan Ass'n***, 52 Wis. 2d 198, 205, 188 N.W.2d 529 (1971); ***Town of Fond du Lac v. City of Fond du Lac***, 22 Wis. 2d 525, 531-32, 126 N.W.2d 206 (1964) (failure to consider facts of the case would render equity "as sterile and arbitrary in its relief as the old common law courts"). ***Werkowski*** itself noted that a court must take into consideration "all relevant factors" in determining the location of a sufficient and reasonably convenient way. ***Werkowski***, 30 Wis. 2d at 417.

¶14 In any event, the court properly refused to limit itself to considering the equities at the time of the grant because the conduct of the parties afterwards is relevant to determining intent. When a contract includes terms "'so vague and indefinite as to be incapable of interpretation with a reasonable degree of certainty,' the parties' subsequent conduct and practical interpretation can cure this defect by evincing the parties' intent in entering the contract." ***Metropolitan Ventures, LLC v. GEA Assocs.***, 2006 WI 71, ¶25, 291 Wis. 2d 393, 717 N.W.2d 58, *opinion clarified on denial of reconsideration*, 2007 WI 23, 299 Wis. 2d 174, 727 N.W.2d 502 (quoting ***Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.***, 206 Wis. 2d 158, 179-80, 557 N.W.2d 67 (1996)). The circuit court's consideration of the parties' conduct subsequent to the grant was not reversible error.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).