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DISTRICT II

August 28, 2024

To:

Hon. David M. Reddy
Circuit Court Judge
Electronic Notice

Michele Jacobs
Clerk of Circuit Court
Walworth County Courthouse
Electronic Notice

Brett A. Ekes
Electronic Notice

Steven A. Koch
Electronic Notice

You are hereby notified that the Court has entered the following opinion and order:

2022AP1486 Highfield Glen Homeowners Association, Inc. v. Glenn Ahrens (L.C. #2020CV303)

Before Gundrum, P.J., Neubauer and Grogan, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Highfield Glen Homeowners Association, Inc. (the "Association") appeals an order determining that the provisions of a restrictive covenant are insufficient to establish an easement for a walking trail over real property owned by Glenn and Lynette Ahrens. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).[1] We reverse and remand for further proceedings.

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

The relevant facts to this appeal appear undisputed. In 2001, Terry Woods began developing a fifteen-lot subdivision now known as Highfield Glen, using property that was under the ownership of his company. He designed the back of each lot as a conservancy area. In 2002 or 2003, he cut an approximately five-foot-wide walking trail through the lots.

In April 2003, Woods recorded a plat of the subdivision. It did not show an easement for the trail. However, in October 2003, Woods caused to be recorded a document titled, "Highfield Glen Restrictive Covenants." It designated the Highfield Glen subdivision as "a nature and wildlife conservancy." In addition to creating a homeowners' association and imposing various restrictions on subdivision owners, the document purports to create an easement for a walking trail over the lots in the Highfield Glen subdivision:

> **11. Easement for Woodland Walking Trail (WT)**
>
> Each home site owner acknowledges that an easement for the exclusive use of the Highfield Glen homeowners is provided over the present location of the WT.
>
> No mechanical vehicles of any kind are to be used in the conservancy area or on the woodland trail. Horses are not allowed on the trail.

The restrictions and covenants contained in the document were made applicable to all Highfield Glen lots. The restrictive covenants document was the only recorded document explicitly naming the Woodland Walking Trail easement.

Glenn Ahrens purchased by warranty deed Lot 13 of the Highfield Glens subdivision in 2012. He acknowledged during his deposition that there was an easement for the walking trail and that he was aware of the easement at the time of his purchase. The Association contends that Ahrens at some point posted "No Trespassing" signs where the woodland trail bisects their property, thereby excluding the other Association homeowners from traversing Ahrens' property.

The Association commenced this lawsuit in 2020, seeking a declaration that the restrictive covenants applied to the Ahrens' property and that a walking trail easement existed for the benefit of the Highfield Glen homeowners. At the scheduled date for a court trial in March 2022, the circuit court began by questioning whether the easement language in the restrictive covenants was effective to create a valid easement. The Ahrens had argued that the language was insufficient because the location of the walking trail was not precisely defined, and therefore there had to be another document specifically identifying where the easement ran.

After a recess, the circuit court returned with a copy of ***Berg v. Ziel***, 2015 WI App 72, 365 Wis. 2d 131, 870 N.W.2d 666. The court highlighted the language in paragraph fourteen of that opinion stating that express easements are "easements created by written grant in a deed." ***Id.***, ¶14. Observing that the easement was not shown on the plat and not specifically referenced in Glenn Ahrens's deed, the court set the matter for further briefing and adjourned the trial.

The court held another hearing following briefing. It began by quoting language from ***Stoesser v. Shore Drive Partnership***, 172 Wis. 2d 660, 494 N.W.2d 204 (1993), which stated that "[a]n easement can be created by a reservation or any language in a contract, deed or will expressing an intent to create an easement."[2] ***Id.*** at 666 n.3. The court believed that the case did not involve a deed or will, and the remainder of the hearing focused on whether the elements of contract formation existed for the document containing the easement language. The court expressed skepticism that a restrictive covenant could contain an enforceable easement, focusing on the "lack of an offer" and the "lack of consideration." At the conclusion of the hearing, the

[2] The central holding of ***Stoesser v. Shore Drive Partnership*** was superseded by statute as recognized in ***Konneker v. Romano***, 2010 WI 65, ¶36, 326 Wis. 2d 268, 785 N.W.2d 432.

court stated it was sua sponte dismissing the case as a result of its conclusion that no easement had been created. The Association now appeals.

The parties generally agree that the circuit court disposed of the matter on summary judgment. We review a grant of summary judgment de novo using a well-established methodology. ***Tews v. NHI, LLC***, 2010 WI 137, ¶¶40-41, 330 Wis. 2d 389, 793 N.W.2d 860. "Summary judgment is appropriate where there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law." ***Id.***, ¶42; *see also* WIS. STAT. § 802.08(2).

A written instrument that creates an easement can take the form of an express grant or reservation. Melanie S. Lee et al., *Wisconsin Law of Easements and Restrictive Covenants* (6th ed. 2022). We do not view the title of the document as controlling. "Declarations of servitudes affecting a development are known by various names," including declarations, conditions, covenants and restrictions. RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 2.1 cmt. c. (2000).

An easement requires that there be "two distinct tenements, the dominant to which the right belongs, and the servient, upon which the obligation rests." ***New Dells Lumber Co. v. Chicago, St. P., M. & O. Ry. Co.***, 226 Wis. 614, 619, 276 N.W. 632 (1937). The circuit court's focus appears to reflect uncertainty regarding the existence of two estates when the property affected is under common ownership at the time of the servitude's creation.

Fortunately, the Restatement considers precisely this factual scenario:

> So long as all the property covered by the declaration is in a single ownership, no servitude can arise. Only when the developer

> conveys a parcel subject to the declaration do the servitudes become effective. Ordinarily the intent to convey a lot or unit subject to the declaration is expressed in the deed, but the intent may also be inferred from the circumstances. If the declaration has been recorded, a conveyance of a lot or unit to a consumer purchaser sufficiently manifests the intent to effectuate the development plan and subject all property in the development to the terms of the declaration.

RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 2.1 cmt. c. (2000). The conveyance of the first lot in the Highland Glen development therefore triggered the servitude contained in the restrictive covenants.

Moreover, the Ahrens took title to their property subject to the easement language contained in the restrictive covenant. The deed reflects the title was subject to all "recorded building and use restrictions and covenants." This included the recorded "Highfield Glen Restrictive Covenants."

The parties' briefing covers only whether express easement language can be given effect when placed within a document setting forth restrictive covenants. That question of law is the only matter addressed by this opinion. Because the circuit court's grant of summary judgment was in error, we reverse and remand for further proceedings.

Based on the foregoing,

IT IS ORDERED that the order is summarily reversed and the cause remanded to the circuit court for further proceedings. *See* WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals