COURT OF APPEALS
DECISION
DATED AND FILED

July 26, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1483 **Cir. Ct. No. 2003CV491**

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

MATTHEW G. ALWES AND PATTY L. ALWES,

PLAINTIFFS-APPELLANTS,

V.

TOWN OF NORRIE,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Marathon County: GREGORY B. HUBER, Judge. *Affirmed.*

Before Vergeront, Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Matthew and Patty Alwes appeal a judgment resolving a boundary line and property dispute in favor of the Town of Norrie. The Alweses challenge the circuit court's interpretation of the subject deed and contend that "latent ambiguity" in the deed requires the consideration of extrinsic

evidence. The Alweses also claim the circuit court erred when it determined the Alweses were not entitled to that part of a discontinued road adjoining the Town's property. Finally, the Alweses argue that the circuit court erred by dismissing their nuisance claim. We reject the Alweses' arguments and affirm the judgment.

BACKGROUND

¶2 The circuit court found the following facts. Leonard and Alvina Szews owned property lying between County Highway D and Mayflower Lake in the Town of Norrie. In 1963, the Szewses deeded the southern portion of their property to the Town, and that property has since been used as a public boat landing. The Szewses retained the northern portion of their original property as their homestead and, in 1987, sold that property to the Alweses' predecessors-in-interest, Arthur and Joyce Alwes.

¶3 In the 1980s, Marathon County shifted part of Highway D further to the east of the lake. Keith and Patricia Frederick sold a part of their property on the east side of old Highway D to the county, where the new section of Highway D was then built. The right of way for the old highway was abandoned when the new highway was completed in 1991. In 1995, Joyce Alwes, as a surviving spouse, deeded her property to her son and daughter-in-law, the Alweses.

¶4 The Alweses, believing the Town was encroaching on their property, filed this action seeking a declaration of the correct boundary line; reformation and modification of the deed; ejection of improvements made by the Town; possession and restoration of their claimed property; and attorneys' fees. The Alweses also alleged a variety of claims, including trespass; nuisance and disturbance of quiet enjoyment; illegal removal of timber; inverse condemnation; unconstitutional taking; and intentional interference with real property. Based on an allegation in

the complaint, a dispute also arose over who owned that part of old County Highway D adjoining the Town's property.

¶5 After attempts at settlement ultimately failed, the matter proceeded to a court trial. The court resolved the boundary dispute in favor of the Town and determined that the Alweses had no claim to the part of the old highway adjoining the Town's property. The court dismissed the Alweses' remaining claims, concluding they were dependent upon who prevailed in the boundary line dispute. This appeal follows.

DISCUSSION

¶6 The Alweses challenge the circuit court's interpretation of the Szewses' deed to the Town, and contend that "latent ambiguity" in the deed required the consideration of extrinsic evidence. Deeds are construed in the same manner as other written instruments. If the language of a deed is unambiguous, its construction is a question of law, which we review independently. ***Edlin v. Soderstrom***, 83 Wis. 2d 58, 69, 264 N.W.2d 275 (1978). When there is ambiguity in the deed, extrinsic evidence may be considered to resolve the ambiguity, and resolution of the ambiguity is then a question of fact. ***Id.*** We do not overturn the circuit court's findings of fact unless they are clearly erroneous. ***Id.*** at 69-70; WIS. STAT. § 805.17(2). Although a court may look to extrinsic evidence to resolve an ambiguity, extrinsic evidence may not be considered when the language of the deed is unambiguous. *See* ***Rikkers v. Ryan***, 76 Wis. 2d 185, 188, 251 N.W.2d 25 (1977).

¶7 Here, the Szewses' 1963 deed to the Town conveyed, in relevant part: "[a]ll that land … which lies between Mayflower Lake and County Trunk Highway 'D' running in a southwesterly manner 455 feet more or less from a line

265 feet South of and parallel to a fence on the north boundary of the Szews property…." At trial, the court heard the testimony of three surveyors: (1) Stuart Foltz, who was hired by the Alweses; (2) Daniel Higginbotham, Jr., who was hired by the Town; and (3) Steven Favorite, who was appointed by the court.

¶8 Foltz opined that the fence referenced in the deed is a wooden fence that intersects the western corner of the northern boundary and runs at approximately a forty-five degree angle in a southeasterly direction from the northern boundary. Based on Higginbotham's and Favorite's testimony, however, the court found that the deed referred to what remains of an old barbed wire fence that runs along and, thus, parallel with the north boundary. The Alweses challenge the court's substitution of the word "along" for the word "on," claiming it "dynamically alters the interpretation of the deed." We are not persuaded.

¶9 The surveyors, including Foltz, located the barbed wire fence along the northern boundary. Favorite testified that it was at least fifty years old and, therefore, would have been there when the Szewses deeded the property in 1963. The court accepted the testimony of Higginbotham and Favorite, who opined that a 455-foot line could not be drawn in a southwesterly direction without first establishing the line that is 265 feet south *and parallel* to the north boundary of what was the Szewses' property. The court found that it was the parallel barbed wire fence, rather than the intersecting wooden fence, mentioned in the deed. The Alweses have failed to show that the court's finding is clearly erroneous; and, to the extent there was conflicting trial testimony, the circuit court is the ultimate arbiter of witness credibility. ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979).

¶10 The Alweses nevertheless claim there is "latent ambiguity" in the deed that requires consideration of extrinsic evidence. It is unclear what extrinsic evidence the Alweses are referring to. In any event, the deed is not rendered ambiguous merely because there is an issue of fact regarding which of the two fences it referenced. As noted above, the court resolved the factual issue based on the surveyors' testimony and the Alweses have failed to show that the court's finding was clearly erroneous.

¶11 Next, the Alweses argue the circuit court erred when it determined the Alweses were not entitled to that part of a discontinued road adjoining the Town's property. WISCONSIN STAT. § 66.1005(1) governs the reversion of title of discontinued highways and states:

> When any highway or public ground acquired or held for highway purposes is discontinued, the land where the highway or public ground is located shall belong to the owner or owners of the adjoining lands. If the highway or public ground is located between the lands of different owners, it shall be annexed to the lots to which it originally belonged if that can be ascertained. If the lots to which the land originally belonged cannot be ascertained, the land shall be equally divided between the owners of the lands on each side of the highway or public ground.

¶12 The Alweses argued that they own that part of the old highway adjoining the Town's property by virtue of a quit claim deed from the Fredericks in 2002. According to the Alweses, once the highway was abandoned in 1991, title to the property reverted to the Fredericks pursuant to the second clause of the reversion statute. The second clause, however, is inapplicable.

¶13 As the court noted, the relevant portion of the old highway did not lie between the lands of two different owners. Rather, its path adjoined the property of both the Town and the Alweses. Because the Fredericks had no legal

interest in the subject property, they could not have conveyed it via the 2002 quit claim deed. The court, therefore, properly concluded that the Alweses have no claim to that part of the old highway adjoining the Town's property.

¶14 Finally, the Alweses argue that the circuit court erred by dismissing their nuisance claim as derivative of the boundary dispute. The Alweses contend that, because their nuisance claim was not dependent upon the location of the parties' common border, the court erred by summarily dismissing it along with the Alweses' other claims. The Alweses, however, did not make this argument to the circuit court on reconsideration. Therefore, the court was not afforded an opportunity to cure this alleged error. Failure to bring a motion to correct manifest errors constitutes a waiver of the right to have such an issue considered on appeal. ***Schinner v. Schinner***, 143 Wis. 2d 81, 93, 420 N.W.2d 381 (Ct. App. 1988).

By the Court.—Judgment affirmed.

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