

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 28, 2004

Cornelia G. Clark
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. 04-1234-FT

Cir. Ct. No. 01CV000339

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**RALPH W. HUTCHENS, SR., RALPH W. HUTCHENS, JR.,
AND MICHAEL P. HUTCHENS,**

PLAINTIFFS-APPELLANTS,

V.

DANIEL R. SIMONSON AND IDAGENE M. SIMONSON,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Chippewa County:
FREDERICK A. HENDERSON, Judge. *Reversed.*

Before Cane, C.J., Hoover, P.J., and Dykman, J.

¶1 CANE, C.J. Ralph Hutchens, Sr., Ralph Hutchens, Jr., and Michael Hutchens appeal from a judgment that Daniel and Idagene Simonson own the

eastern half of an island in Chain Lake and that the Hutchenses own the western half.¹ The Hutchenses claim they own the entire island and argue the circuit court erred by (1) placing the burden of proof of ownership of the island on the Hutchenses, and (2) by concluding that they failed to prove ownership of the entire island. We conclude that the court properly allocated the burden of proof. However, because the trial court erroneously concluded that the island property was conveyed in a 1946 deed, we reverse the judgment.

BACKGROUND

¶2 This case involves an island located in Chain Lake. The original land survey regarding this island was done in 1852 when the island was a peninsula. A dam built in 1875 raised the lake level and the peninsula became an island. On July 7, 1927, Ralph Hutchens² received sole ownership of land that included the island. When he died in 1946, the land passed to his wife, Harriet. On December 31, 1946, Harriet conveyed a portion of the land to Norman and Ida Auer. The Simonsons' claim derives from this conveyance.

¶3 The dispute in this case also derives from this conveyance because the parties argue whether the island was included in the 1946 deed. Specifically, the relevant portion of the description in the deed states, “thence north 20 [degrees] west to the south meander line of Chain Lake; thence westerly along said meander line to a point thirty-five (35) links west and ten (10) rods north of the point of commencement.” Depending on the location of the “meander line,”

¹ This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

² Ralph Hutchens is the father of Ralph Hutchens, Sr.

the island may or may not have been part of the conveyance.³ The island lies in a bog that separates the land from the lake. If the meander line is where the land meets the bog, the island would not be included in the deed. However, if the meander line is where the bog meets the lake, the island would be included in the deed.

¶4 Harriet died in 1971. Her son, Ralph Hutchens, Sr., and her grandsons, Ralph Hutchens, Jr. and Michael Hutchens, are the plaintiffs in this case. They received the interest in Harriet's real estate at the time of her death. The Auers' property went to their heirs, who divided it. In 1992, the Simonsons received the eastern portion of what was the Auers' property.

¶5 The Hutchenses filed a complaint against the Simonsons for physical injury to and interference with their property, namely the island, pursuant to WIS. STAT. § 844.01. They sought a declaration that they owned the island, plus an injunction and damages against the Simonsons. In response, the Simonsons alleged they were the owners of the eastern half of the island.⁴

¶6 At trial, a surveyor, Evelyn Ferneding-Farr, testified on behalf of the Hutchenses. She stated, based on her interpretation regarding the intent of the 1946 deed, the meander line was represented by three posts on the shoreline. She

³ A meander line is "[a] survey line (not a boundary line) on a portion of land, [usually] following the course of a river or stream." BLACK'S LAW DICTIONARY 995 (7th ed. 1999). See also *State Commissioners v. Thiel*, 82 Wis. 2d 276, 283, 262 N.W.2d 522 (1978) ("The general rule is that meander lines are not run as boundaries, but to define the sinuosities of the banks of the stream or other body of water, and as a means of ascertaining the quantity of land embraced in the survey, the stream, or other body of water, and not the meander line as actually run on the ground, being the boundary." (Citations omitted)).

⁴ The Simonsons argued in the alternative that they owned the eastern half of the island through adverse possession. The circuit court rejected this argument. It is not an issue on appeal.

concluded that, following the description of the land in the deed and following the line represented by the posts where the deed mentions the meander line, the deed did not include the island. Thus, Ferneding-Farr stated the island still belonged to the Hutchenses.

¶7 John Mickesh, also a surveyor, testified for the Simonsons. He testified that the term “meander line” was ambiguous and that ownership of the island could not be based on the deed to the Auers. He further stated that the term “meander line” could have meant something different in 1946 than it does now. Mickesh did not have an opinion as to who owns the island because he was not asked to determine that issue when he surveyed the land in 1992.

¶8 The circuit court first determined that the Hutchenses had the burden to prove by the greater weight of credible evidence that the meander line was where the land meets the bog, and therefore that the 1946 conveyance did not include the island. The court concluded that the Hutchenses failed to satisfy this burden. Thus, it found that the Simonsons are the lawful owners of the eastern half of the island. The Hutchenses remained owners of the western half of the island. The Hutchenses appeal the judgment.

DISCUSSION

Whether the Hutchenses have the Burden of Proof

¶9 The Hutchenses argue the court erroneously allocated to them the burden to prove that they owned the island. The allocation of the burden of proof is a question of law, which we review de novo. *Long v. Ardestani*, 2001 WI App 46, ¶36, 241 Wis. 2d 498, 624 N.W.2d 405. The Hutchenses maintain that the

Simonsons had the burden to prove that they owned the island because they asserted ownership as an affirmative defense. We disagree.

¶10 The Hutchenses alleged physical injury to and interference with their property, that is, the island. Under WIS. STAT. § 844.01, “Any person owning or claiming an interest in real property may bring an action claiming physical injury to, or interference with, the property or the person’s interest therein.” Thus, one element the Hutchenses must prove to succeed in their claim is that they owned the island. That the Simonsons alleged an affirmative defense does not shift the Hutchenses’ burden of proving their prima facie case. *See Alesch v. Haave*, 178 Wis. 19, 22, 189 N.W. 115 (1922). Thus, the circuit court correctly placed the burden on the Hutchenses to prove they owned the island.

Whether the Hutchenses Satisfied the Burden of Proof

¶11 Whether a party has satisfied the burden of proof is a question of law, which we may independently review, but in doing so we must accept the circuit court’s credibility determinations unless they are wrong as a matter of law. *Seraphine v. Hardiman*, 44 Wis. 2d 60, 65, 170 N.W.2d 739 (1969). The credibility of a witness is for the trial court to determine, and we will not upset such a finding unless clearly erroneous. WIS. STAT. § 805.17(2).

¶12 The Hutchenses contend that the evidence did not support the circuit court’s determination that they had failed to prove the meander line was where the land meets the bog. The Hutchenses note that their expert, Ferneding-Farr, and the Simonsons’ expert, Mickesh, both had the opinion that the 1946 deed did not convey the island. Thus, the Hutchenses maintain the court’s conclusion that the Simonsons own the eastern half of the island was erroneous. We agree. The evidence in the record supports only one conclusion—that the island could not

have been included in the 1946 deed. We therefore conclude that the court's determination that the Simonsons own the eastern half of the island was clearly erroneous.

¶13 We first look at the expert witness testimony. The Hutchenses' expert, Ferneding-Farr, testified that she had located posts in the area where the land meets the bog. She stated that it was her opinion, based on her training and experience, that those represent the meander line noted in the 1946 deed. She therefore concluded the island was not conveyed in 1946 and in fact remained titled to the Hutchenses.

¶14 The Simonsons' expert, Mickesh, did not disagree. He stated he had no opinion regarding who owned the island. However, he agreed with Ferneding-Farr that it was reasonable to conclude that the posts represented the meander line. He further stated that he was uncomfortable with the concept of the island being part of the 1946 deed, and that ownership of the island could not be based on the deed. Although he commented that the meander line could have been in a different place in 1946 than it is now, he did not state where it might have been in 1946. In fact, there is no evidence whatsoever indicating that the meander line in 1946 was where the bog meets the lake rather than where the land meets the bog.

¶15 Our conclusion is further supported by following the land description in the 1946 deed. Deeds are construed the same as other written instruments. If the language of the deed is unambiguous, its construction is purely a question of law, which we review de novo. *Edlin v. Soderstrom*, 83 Wis. 2d 58, 69, 264 N.W.2d 275 (1978). Further, if the deed is unambiguous we need not look further than the four corners of the deed to determine the parties' intent. *See Gojmerac v. Mahn*, 2002 WI App 22, ¶24, 250 Wis. 2d 1, 640 N.W.2d 178.

Whether a deed is ambiguous is also a question of law. *Id.* We conclude the deed is unambiguous.

¶16 After going a distance east from the commencement, the description states to go north and west to the meander line, and then follow the meander line west until arriving at a point thirty-five links west and ten rods north of the point of commencement. If we assume that the meander line is where the bog meets the lake and follow that line west, it never meets up with a point thirty-five links west and ten rods north of the point of commencement. The meander line ends at a point at least twice that distance from the point of commencement. In order to link the meander line with that point, the line would have to cross open water. However, as Mickesh testified, meander lines cannot cross a body of water.

¶17 On the other hand, if we assume that the meander line is where the land meets the bog, we can follow the meander line west and meet the point thirty-five links west and ten rods north of the point of commencement. Thus, the only reasonable interpretation of the description of the land conveyed in the 1946 deed puts the meander line where the land meets the bog. The deed, therefore, did not include the island.

By the Court.—Judgment reversed.

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