

FILED: June 11, 2014

IN THE COURT OF APPEALS OF THE STATE OF OREGON

JEFFREY KRAFT and ANGELA SCHMIEDE,
Plaintiffs-Appellants,

v.

ESTATE OF JOHN RONALD COOPER, SR.; et al,
Defendants,

and

CHICAGO TITLE INSURANCE COMPANY OF OREGON,
Defendant-Respondent.

JEFFREY KRAFT and ANGELA SCHMIEDE,
Plaintiffs-Appellants,

v.

ESTATE OF JOHN RONALD COOPER, SR.; et al,
Defendants,

and

ANTHONY W. FURNISS, in his capacity as Personal Representative of the Estate of
John Ronald Cooper, Deceased,
Defendant-Respondent.

Multnomah County Circuit Court
100304347

A147776 (Control)
A148616

Thomas M. Christ, Judge pro tempore. (Limited Judgment entered January 13, 2011)

Charles E. Corrigan, Judge pro tempore. (Limited Judgments entered April 18, 2011, and
September 2, 2011)

Argued and submitted on December 18, 2012.

Margaret H. Leek Leiberan argued the cause for appellants. With her on the briefs was
Jensen & Leiberan.

Matthew Cleverley argued the cause for respondent Chicago Title Insurance Company of
Oregon. With him on the brief was Fidelity National Law Group.

Glen S. Shearer argued the cause for respondent Anthony W. Furniss. With him on the brief was Furniss, Shearer & Leineweber.

Before Armstrong, Presiding Judge, and Duncan, Judge, and Brewer, Judge pro tempore.

ARMSTRONG, P. J.

Affirmed.

1 ARMSTRONG, P. J.

2 Plaintiffs challenge on appeal separate grants of summary judgment for
3 defendant Chicago Title Insurance Company of Oregon (Chicago Title) and defendant
4 Anthony Furniss, in his capacity as personal representative of the Estate of John Ronald
5 Cooper (Cooper). At its heart, the issue in this case is whether the legal description in a
6 warranty deed from Cooper to plaintiffs was an accurate description of the property
7 conveyed. We agree with the trial court that it was and affirm.

8 On review of grants of summary judgment, we review the record in the
9 light most favorable to the nonmoving party and draw all reasonable factual inferences in
10 that party's favor. *Jones v. General Motors Corp.*, 325 Or 404, 408, 939 P2d 608 (1997).
11 The background facts are undisputed and set out below. When necessary to our
12 disposition, we discuss elsewhere in this opinion in more detail the evidence produced on
13 summary judgment with respect to each summary-judgment motion because those
14 motions were decided at different times and on different records.

15 Plaintiffs purchased a historic home on a large lot in Portland from Cooper,
16 who at the time of the transaction was still living. Cooper was represented in the
17 transaction by his son John, a real estate agent with Realty Trust. The handout for the
18 historic home stated, as one of the home's "[f]eatures," that "[the p]roperty sits on 6
19 Lots," and the RMLS listing included as part of the "private" information that "[t]he
20 property offers 6 city lots." Plaintiffs and Cooper entered into a purchase agreement for
21 the property that provided,

1 "Neither Seller nor any Licensee(s) warrant the square footage of any
2 structure or the size of any land being purchased. If square footage or land
3 size is a material consideration, all structures and land should be measured
4 by Buyer prior to signing or should be made an express contingency in this
5 Agreement."

6 The agreement also provided that "Seller and Buyer agree that[,] if it is not provided
7 herein, a complete legal description as provided by the title insurance company * * *
8 shall, where necessary, be used for purposes of legal identification and conveyance of
9 title." A complete legal description was not included with the sales contract.

10 Plaintiffs purchased title insurance for the property from Chicago Title.
11 Chicago Title issued a title report that failed to pick up a 1924 deed from a prior owner of
12 the property to the City of Portland that conveyed a 10-foot strip bordering NE U.S.
13 Grant Place. As a result, the deed was not a stated exception in the final title policy. As
14 relevant here, the title policy issued by Chicago Title, subject to the stated exclusions,
15 exceptions, and conditions and stipulations, insured against loss or damage incurred "by
16 reason of * * * [t]itle to the estate or interest described in Schedule A being vested other
17 than as stated therein; [or] * * * [a]ny defect in or lien or encumbrance on the title[.]"
18 The title that the policy insured was title to the property described in the legal description
19 prepared by Chicago Title. In Schedule B, the title policy expressly excepted from
20 coverage any loss or damage "which arise by reason of * * * [d]iscrepancies, conflicts in
21 boundary lines, shortage in area, encroachments or other facts which a correct survey
22 would disclose."

23 Cooper transferred the property to plaintiffs by warranty deed, using the

1 legal description provided by Chicago Title. That legal description provides in full, with
2 the portion that is at the heart of this dispute emphasized:

3 "Beginning at a point on the East line of NE 28th Avenue, 225 feet South of
4 the South line of NE Thompson Street; **thence South along the East line**
5 **of NE 28th Avenue, 151.88 feet, more or less, to the North line of NE**
6 **U.S. Grant Place, as now laid out and established;** thence Easterly along
7 the North line of NE U.S. Grant Place, 195.04 feet, more or less, to the East
8 line of Tract 4, BOWERING TRACT, as shown on the plat of a portion of
9 the William C. Bowering Donation Land Claim recorded in Book 1, Page
10 19, Plat Records; thence North along the East line of said Tract 4, a
11 distance of 151.67 feet, more or less, to a point 225 feet South of the South
12 line of NE Thompson Street, said point being on the Southerly line of a
13 tract of land conveyed to Mary F. Kennard by Deed recorded August 29,
14 1922 in Book 890, Page 302, Deed Records; thence Westerly along the
15 Southerly line of said Kennard Tract, 195.22 feet, more or less, to the place
16 of beginning, the same being a portion of Tract 4, BOWERING TRACT."

17 (Boldface added.) It is undisputed that 151.88 feet from the starting point south along the
18 east line of NE 28th Avenue ends at a point approximately 10 feet into the right-of-way
19 of NE U.S. Grant Place, which logically corresponds to the 10-foot strip conveyed to the
20 City of Portland in 1924. After completing the purchase, plaintiffs learned the property's
21 true dimensions, using the streets and tract line as boundaries, when they had the property
22 surveyed to determine how many lots they could subdivide from the property. They also
23 learned that the city would not allow six subdivided lots; they could subdivide the
24 property into only four, possibly five, lots.

25 Plaintiffs brought this action against Chicago Title, Cooper, and Realty
26 Trust¹ for various claims, all of which were decided on summary judgment against

¹ Realty Trust is not a party to this appeal.

1 plaintiffs. On Chicago Title's motion for summary judgment, the trial court concluded
2 that the legal description provided by Chicago Title accurately described the property
3 conveyed to plaintiffs, that is, the description did not include the 10-foot strip previously
4 conveyed to the City of Portland:

5 "In my opinion, the description does not include that [10-foot] strip,
6 because it says that the property line runs south 'to the north line of NE U.S.
7 Grant Place, as now laid out and established,' and 'thence, Easterly, along
8 the north line of NE U.S. Grant Place.' Clearly, the property, thus
9 described, lies to the north of U.S. Grant Place, as 'now laid out and
10 established,' meaning at the time of the conveyance from Cooper to
11 plaintiffs."

12 The trial court further explained that the dimension given of "151.88 feet, more or less,"
13 was approximate and not inconsistent with NE U.S. Grant Place providing the southern
14 border of the property, and, even if it were inconsistent, ORS 93.310 (set out below, ___
15 Or App at ___ (slip op at 6 n 2)) required the court to resolve that inconsistency in favor
16 of using the established street as the property boundary. Because the parties agreed that
17 the accuracy of the legal description was the only issue presented as to Chicago Title, the
18 trial court granted summary judgment to Chicago Title on plaintiffs' claims for breach of
19 the title policy and negligence.

20 Later, on Cooper's motion for summary judgment, the trial court adhered to
21 the earlier ruling and concluded that, because Chicago Title's legal description did not
22 include the 10-foot strip conveyed to the City of Portland--the same description used in
23 the warranty deed--Cooper was entitled to summary judgment on plaintiffs' claims for
24 breach of contract and breach of the covenants in the warranty deed. On appeal,

1 plaintiffs contend that the trial court erred in granting summary judgment to Chicago
2 Title and Cooper on those claims.

3 We begin with the trial court's construction of the legal description, because
4 it informs in large part our disposition of this appeal. The dispute on appeal, as it was
5 below, is whether the legal description inaccurately described the property conveyed to
6 plaintiffs by including the 10-foot strip that had been previously conveyed to the City of
7 Portland. Plaintiffs' only argument in this respect is that the call of 151.88 feet cannot be
8 ignored, that is, it is too specific to be rendered merely "approximate" by the words
9 "more or less," particularly when the dimension is a full 10 feet off. We conclude,
10 however, as did the trial court, that the legal description unambiguously conveyed only to
11 the north line of NE U.S. Grant Place.

12 The disputed portion of the deed provides, "thence South along the East
13 line of NE 28th Avenue, 151.88 feet, more or less, to the North line of NE U.S. Grant
14 Place, as now laid out and established." The north line of NE U.S. Grant Place "as now
15 laid out and established" clearly means the line of the street as "laid out and established"
16 at the time of the transfer from Cooper to plaintiffs. Plaintiffs do not contend otherwise.
17 The measurement of 151.88 feet, more or less, in the call does not create an ambiguity in
18 an otherwise very clear property line. The use of the term "more or less" indicates that
19 the measurement may be approximate or inaccurate. *See Weniger v. Ripley*, 134 Or 265,
20 277, 293 P 425 (1930) (observing that "the qualifying words 'more or less,' * * * mean
21 'approximately,' as distinguished from definite, precise, amounts").

1 While we appreciate plaintiffs' argument that a person would not assume
2 that a measurement to the hundredths of a foot would be off by 10 feet, we cannot agree
3 with plaintiffs that that necessarily causes the legal description here to become
4 ambiguous or inaccurate. What plaintiffs' argument fails to recognize is that, in
5 construing any written instrument, our *duty* is to effectuate the intention of the parties to
6 the transaction. *See, e.g., O'Gorman v. Baker et ux*, 219 Or 170, 189, 347 P2d 85 (1959)
7 ("In construing a deed, it is the duty of the court to give effect to the intention of the
8 parties."). Here, the intent of the parties is clear from the written instrument itself--
9 Cooper intended to convey and plaintiffs intended to purchase (and to insure title to) a
10 piece of property that ended at the north line of NE U.S. Grant Place. Moreover, even if
11 the legal description were ambiguous, plaintiffs nowhere assert that they intended to
12 purchase (or insure title to) part of the road, nor could they plausibly do so. That
13 plaintiffs believed that the property's dimensions contained within the intended and
14 described boundaries were greater than they actually were--based on the "more or less"
15 calls--does not change the fact that the property's boundaries were accurately set out in
16 the legal description.² The purpose of the legal description here was to describe the

² Because we conclude that the legal description is not ambiguous, we do not need to resort to extrinsic evidence or rules of construction to resolve any ambiguities. However, we note that ORS 93.310, which provides rules of construction for property legal descriptions, also supports our reading of the property description. That statute provides, in part:

"(1) Where there are certain definite and ascertained particulars in the description, the addition of others, which are indefinite, unknown or false, does not frustrate the conveyance, but it is to be construed by such

1 property's *boundaries*, which it did, not to recite a quantity of property. *See Weniger*, 134
2 Or at 277 ("When a deed indicates an intention that quantity shall prevail over courses
3 and measurements that intention will be given effect; but generally the recital of quantity
4 is subordinated to boundaries, measurements, courses, etc.").

5 Thus, we agree with the trial court's construction of the legal description in
6 the title policy and the deed. However, that is not the end of our inquiry. We next
7 address whether that construction necessarily forecloses plaintiffs' claims against Chicago
8 Title and Cooper, as a matter of law.

9 Briefly, with respect to plaintiffs' claims against Cooper for breach of
10 contract and breach of the covenants in the warranty deed, plaintiffs offer no argument
11 that would permit those claims to survive if the legal description does not contain the 10-
12 foot strip conveyed to the city. First, the parties' purchase and sale agreement contained
13 no terms that the property was of any particular dimensions or size (such as six city lots),
14 and, second, based on our construction of the legal description, the warranty deed
15 purported to convey title to exactly what plaintiffs obtained. The trial court did not err in
16 granting summary judgment to Cooper.

17 With respect to their claims for breach of contract and negligence brought

particulars, if they constitute a sufficient description to ascertain its
application.

"(2) When permanent and visible or ascertained boundaries or
monuments are inconsistent with the measurement, either of lines, angles or
surfaces, the boundaries or monuments are paramount."

1 against Chicago Title, however, plaintiffs argue that the legal description is not the whole
2 story. Essentially, plaintiffs argue that, even if the words "more or less" somehow negate
3 the distance calls in the legal description, Chicago Title breached the title policy, and was
4 negligent, when it failed to discover and disclose the 1924 deed to the City of Portland,
5 which was in the public record and would have been discovered with a reasonable title
6 search. In connection with that argument, plaintiffs assert that, based on the title policy
7 issued by Chicago Title, they reasonably believed that the dimensions of the property
8 they purchased were 10 feet larger and that they were damaged by that false information.

9 With respect to their claim for breach of the title policy, plaintiffs' argument
10 fails based on the plain terms of the title policy. The policy insured title only to the
11 property described in the legal description (it insured against loss or damage incurred "by
12 reason of * * * [t]itle to the estate or interest described in Schedule A being vested other
13 than as stated therein"), and also expressly excepted from coverage any loss or damage
14 "which arise by reason of * * * [d]iscrepancies, conflicts in boundary lines, shortage in
15 area, encroachments or other facts which a correct survey would disclose." Because we
16 conclude, as did the trial court, that the legal description did not include the 10-foot strip
17 previously conveyed to the City of Portland, Chicago Title did not breach the title policy,
18 and it was entitled to summary judgment on that claim.

19 With respect to their negligence claim, plaintiffs' argument on appeal may
20 have some merit. However, they failed to make that argument below, and there is no
21 evidence in the summary judgment record to support it. In opposition to Chicago Title's

1 motion for summary judgment, plaintiffs solely argued that the legal description
2 unambiguously included the 10-foot strip previously conveyed, and, alternatively, that
3 the description is ambiguous and requires extrinsic evidence to resolve (although
4 plaintiffs did not offer any such extrinsic evidence).³ Plaintiffs offered no evidence or
5 argument regarding Chicago Title's standard of care, what plaintiffs' reasonable beliefs
6 were regarding the property dimensions, or how they were damaged. It was plaintiffs'
7 burden to meet Chicago Title's motion with evidence to create a genuine issue of material
8 fact on their negligence claim. ORCP 47 C ("The adverse party has the burden of
9 producing evidence on any issue raised in the motion as to which the adverse party would
10 have the burden of persuasion at trial."). Plaintiffs did not do that. Accordingly, the trial
11 court did not err in granting summary judgment to Chicago Title.

12 Affirmed.

³ The record on summary judgment included the following evidence: the 1924 City of Portland ordinance accepting the 10-foot strip, the 1924 deed, the warranty deed from Cooper to plaintiffs, the title insurance policy, the preliminary title report, and the plat of plaintiffs' later partition of the property. Plaintiff Kraft also offered an affidavit that attested only that Chicago Title had failed to bring to his attention the existence of any conveyance not listed in the title report, did not alert him to the existence of the city ordinance, and that a physical inspection of the property did not reveal the 1924 conveyance.