COURT OF APPEALS
DECISION
DATED AND FILED

December 19, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2979 **Cir. Ct. No. 2003CV551**

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

GEORGE J. ROBERTS, DEBORAH A. ROBERTS AND GEORGE AND DEBORAH ROBERTS FAMILY, LLC,

PLAINTIFFS-RESPONDENTS,

V.

NICHOLAS THOLL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Ozaukee County: PAUL V. MALLOY, Judge. *Affirmed*.

Before Brown, C.J., Anderson, P.J., and Nettesheim, J.

¶1 ANDERSON, P.J. Nicholas Tholl appeals a circuit court judgment granting a motion for directed verdict to George J. Roberts, Deborah A. Roberts and George and Deborah Roberts Family, LLC (hereinafter "Roberts") and

dismissing Tholl's counterclaim. This case arises out of Tholl's claim that Roberts has an easement obligation to maintain a driveway and to construct and maintain a bridge for ingress and egress to Tholl's property. Tholl's appeal rests on the contention that constructive notice exists when, though not part of the chain of title, a recorded affidavit exists averring easement obligations. We roundly rejected the idea that such an affidavit has this effect in the recently published decision ***Smiljanic v. Niedermeyer***, 2007 WI App 182, ___ Wis. 2d ___, 737 N.W.2d 436. We note that, due to the timing of ***Smiljanic***'s release, neither the parties nor the circuit court were privy to its analysis. Given our holding in ***Smiljanic*** and our interpretation of the relevant statutes, we affirm the circuit court.

¶2 The facts are not in dispute. On September 22, 1999, Roberts purchased a large tract of land from Peter F. Becker. The Becker parcel fronted on the west on County Trunk Highway LL (formally State Highway 141), and on the east, in part, on a parcel owned by Tholl. Prior to purchasing the Becker parcel, Roberts walked the land several times with realtors. There was no bridge present at any time that Roberts looked at the property. Roberts obtained a title commitment in connection with the purchase of the Becker parcel. This title commitment identified the Fenner deed that contained the easement allowing the use of the driveway as then used. The deed was silent as to a requirement to maintain a bridge over Sucker Brook. The title searcher reviewed the records in the county for judgments and liens.

¶3 The Tholl parcel had at one time been part of the Becker family farm. Becker's grandfather conveyed the Tholl parcel to Albert Fenner and his wife by warranty deed, dated May 27, 1927. As already noted, the Fenner deed granted the Fenners the right to use the easement for ingress and egress to what is

now the Tholl parcel. The easement specifically provided that the Fenners had "the right to the use of the private driveway as now used, which said driveway extends from the premises to U.S. highway 141." Again as already noted, there is no mention in the deed of a bridge over Sucker Brook, nor does the deed contain any obligation of Becker to maintain a bridge over the private driveway. Following that conveyance, the property was used as a summer residence for the Fenners and their successors in interest. However, at some point, a year-round home was constructed on the land by one of the Fenners' successors in interest.

¶4 In 1986, Tholl began renting what eventually became his land from Tom Krier under a rent-to-own agreement. Access to the Tholl parcel is by an easement road running roughly east to west over the Becker parcel. To reach Tholl's land via the easement, one must also cross Sucker Brook, which flows in a southeasterly direction across the Becker parcel. In 1996, Tholl received title to the parcel by warranty deed. That deed set forth a legal description and granted the purchaser the right to use the private driveway as now used, which driveway extends from the premises to U.S. Highway 141 (now County Highway LL). At the time Tholl began renting the property through the time that he actually purchased the parcel, the only bridge over Sucker Brook was one owned by a local snowmobile club.

¶5 Sometime in the late 1980s, Tholl's brother, Edward, learned from Michael Schowalter, a local realtor, that he had located an affidavit recorded by Albert Fenner in the Register of Deeds Office for Ozaukee county which appeared to relate to the Tholl parcel and was dated July 30, 1956. In this affidavit, Fenner states that prior to his purchase of the Tholl parcel, he and the seller agreed that the seller would be responsible for keeping the driveway and bridge in reasonable repair. Attached to the affidavit is a handwritten note dated June 27, 1926, which

states "Bridge to be passable and driveway to be kept in reasonable repair and right of way to road leading to property." The note was signed by the Beckers and the Fenners.

¶6 On December 22, 2003, Roberts filed a complaint alleging causes of action for trespass and nuisance against Tholl claiming that Tholl repeatedly allowed his dogs to run wild on the Becker parcel. Tholl counter-claimed, alleging that easement existed by virtue of the "deed" recorded by Fenner in 1956. He further alleged that the document required Roberts to maintain an easement roadway and bridge over Sucker Brook for Tholl's benefit.

¶7 Prior to trial, Tholl stipulated that his dogs trespassed on the Becker parcel and that their presence on that parcel constituted a nuisance. As a result, the only issue before the trial court was Tholl's claim that Roberts was obligated to maintain the easement and a bridge. At the conclusion of testimony, Roberts moved the trial court for a directed verdict on the ground that the evidence in support of Tholl's claims was insufficient as a matter of law. Roberts' motion was taken under consideration, and the matter was submitted to the jury in a four-question special verdict. The first two questions asked the jury to determine if Roberts had actual knowledge of an obligation to maintain the easement and the bridge, respectively. The jury determined that Roberts did not have actual knowledge of that obligation. The third and fourth questions asked whether Roberts had constructive knowledge of the obligation to maintain the easement and bridge, respectively. The jury determined that he did.

¶8 In motions after verdict, Roberts renewed his motion for a directed verdict. After examining the weight and relevancy of the evidence presented, the trial court determined that Roberts met the burden required for a successful

challenge to the sufficiency of the evidence finding no credible evidence to sustain a finding in favor Tholl. Tholl appeals.

¶9 When circuit courts consider challenges of the sufficiency of the evidence, WIS. STAT. § 805.14(1) (2005-06)[1] provides the following test:

> No motion challenging the sufficiency of the evidence as a matter of law to support a verdict, or an answer in a verdict, shall be granted unless the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party.

¶10 Appellate courts "will not overturn a circuit court's decision to dismiss for insufficient evidence unless the record reveals that it was clearly wrong." ***Haase v. Badger Mining Corp.***, 2004 WI 97, ¶17, 274 Wis. 2d 143, 682 N.W.2d 389; *see also* ***Miller v. Wal-Mart Stores, Inc.***, 219 Wis. 2d 250, 273, 580 N.W.2d 233 (1998). In assessing the sufficiency of the evidence, circuit courts are accorded substantial deference because they are in a better position to decide the weight and relevancy of the evidence presented. ***Haase***, 274 Wis. 2d 143, ¶17; ***Miller***, 219 Wis. 2d at 273. A motion challenging the sufficiency of the evidence, as a matter of law, should not be granted unless the circuit court is satisfied that considering all the credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party. ***Schwigel v. Kohlmann***, 2002 WI App 121, ¶23, 254 Wis. 2d 830, 844, 647 N.W.2d 362.

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶11 An easement is an interest in land and is therefore governed by WIS. STAT. ch. 706. *See* ***Negus v. Madison Gas & Elec. Co.***, 112 Wis. 2d 52, 58, 331 N.W.2d 658 (Ct. App. 1983). WISCONSIN STAT. § 706.09 provides in relevant part:

> **(1)** WHEN CONVEYANCE IS FREE OF PRIOR ADVERSE CLAIM. A purchaser for a valuable consideration, without notice as defined in sub. (2), and the purchaser's successors in interest, shall take and hold the estate or interest purported to be conveyed to such purchaser free of any claim adverse to or inconsistent with such estate or interest, if such adverse claim is dependent for its validity or priority upon:
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> ....
>
> (b) *Conveyance outside chain of title not identified by definite reference*. Any conveyance, transaction or event not appearing of record in the chain of title to the real estate affected, unless such conveyance, transaction or event is identified by definite reference in an instrument of record in such chain....
>
> ….
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> **(2)** NOTICE OF PRIOR CLAIM. A purchaser has notice of a prior outstanding claim or interest, within the meaning of this section wherever, at the time such purchaser's interest arises in law or equity:
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> (a) *Affirmative notice*. Such purchaser has affirmative notice apart from the record of the existence of such prior outstanding claim, including notice, actual or constructive, arising from use or occupancy of the real estate by any person at the time such purchaser's interest therein arises, whether or not such use or occupancy is exclusive; but no constructive notice shall be deemed to arise from use or occupancy unless due and diligent inquiry of persons using or occupying such real estate would, under the circumstances, reasonably have disclosed such prior outstanding interest; nor unless such use or occupancy is actual, visible, open and notorious ….

¶12 Pursuant to WIS. STAT. § 706.09(2)(a), Roberts had constructive notice of a duty to maintain an easement and bridge on Tholl's parcel if credible

evidence and reasonable inferences drawn from that evidence support a finding that (1) Tholl's occupancy of the easement was actual, visible, open and notorious; *and* (2) due and diligent inquiry, under the circumstances, reasonably would have disclosed an obligation to maintain the easement and bridge in favor of Tholl's parcel. *See* ***Hoey Outdoor Adver., Inc. v. Ricci***, 2002 WI App 231, ¶15, 256 Wis. 2d 347, 653 N.W.2d 763. The trial court findings with respect to these issues will be affirmed unless they are clearly wrong. *See* ***Haase***, 274 Wis. 2d 143, ¶17.

¶13 A purchaser of land has three sources of information that the purchaser should consult to learn of rights to the land: (1) the records in the office of the register of deeds where the basic rights involved are recorded; (2) other public records to discover rights that usually are not recorded in the office of the register of deeds, i.e., judgments and liens; and (3) the land itself, to discover by observation the rights that arise outside the recording system by virtue of possession or use. ***Hoey***, 256 Wis. 2d 347, ¶19; ***Bump v. Dahl***, 26 Wis. 2d 607, 614-15, 133 N.W.2d 295 (1965). The purchaser is chargeable with knowledge of the location of the land's boundaries as against third persons. ***Hoey***, 256 Wis. 2d 347, ¶19; ***Bump***, 26 Wis. 2d at 615.

¶14 WISCONSIN STAT. § 847.07 provides the procedure for seeking correction of the description of property in conveyance:

> **(1)** The circuit court of any county in which a conveyance of real estate has been recorded may make an order correcting the description in the conveyance on proof being made to the satisfaction of the court that any of the following applies:
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> (a) The conveyance contains an erroneous description, not intended by the parties to the conveyance.
>
> (b) The description is ambiguous and does not clearly or fully describe the premises intended to be conveyed.

> (c) The grantor of the conveyance is dead, a nonresident of the state, a corporation that has ceased to exist, or a personal representative, guardian, trustee, or other person authorized to convey who has been discharged from his or her trust and the grantee or his or her heirs, legal representatives, or assigns have been in the quiet, undisturbed, and peaceable possession of the premises intended to be conveyed from the date of the conveyance.
>
> **(2)** This section does not prevent an action for the reformation of any conveyance, and if in any doubt the court shall direct the action to be brought.

¶15 On appeal, Tholl argues that the trial court erred in granting a directed verdict in favor of Roberts because there was ample evidence to support the jury's finding that Roberts had constructive notice of a duty to maintain the easement driveway and bridge. Tholl contends first, that Roberts failed to exercise the due and diligent inquiry required under WIS. STAT. § 706.09(2)(a) that would have disclosed an obligation to maintain the easement driveway and bridge, and second, that the 1956 Fenner affidavit "shows further that [Roberts] should have been aware of the problems posed by Sucker Brook and [his] duties to maintain a bridge over it." We disagree.

¶16 Rather, we agree with the trial court that there is no credible evidence to sustain the jury's finding that Roberts had affirmative or constructive notice of a duty to maintain the easement and bridge. Thus, the trial court did not err in its determination that Roberts met the burden required for a successful challenge to the sufficiency of the evidence.

¶17 With regard to Tholl's lack of due diligence contention, the trial court found that Roberts' efforts undertaken as part of his purchase of the Becker farm constituted due diligence as required by WIS. STAT. § 706.09(2)(a). The trial court's finding in this regard is not clearly wrong. Applying the law of ***Hoey***, 256 Wis. 2d 347, ¶19, and ***Bump***, 26 Wis. 2d at 614-15, the trial court determined that

Roberts properly consulted the three sources of information that the purchaser should consult to learn of rights to the land: (1) Roberts obtained a title commitment in connection with the purchase of the Becker parcel. This title commitment identified the Fenner deed that contained the easement allowing the use of the driveway as then used. The deed was silent as to a requirement to maintain a bridge over Sucker Brook; (2) the title commitment also showed that the title searcher reviewed the records in the county for judgments and liens; and (3) Roberts walked the land several times with realtors in connection with his purchase. There was no bridge present at any time that Roberts looked at the property. There was no bridge when Tholl took possession of the land in 1986—as a result, though Tholl's use of the roadway easement was arguably "actual, visible, open and notorious," the same cannot be said regarding Tholl's use of a bridge over Sucker Brook. *See* ***Hoey***, 256 Wis. 2d 347, ¶19. Finally, even assuming that the roadway easement was actual, visible, open and notorious, in order to prove constructive knowledge of Roberts' duty to maintain an easement under WIS. STAT. § 706.09(2)(a), Tholl must also show that due and diligent inquiry reasonably would have disclosed an obligation to maintain the easement in favor of Tholl's parcel. *See* ***id.***; *see also* ***Hoey***, 256 Wis. 2d 347, ¶19.

¶18 With regard to Tholl's contention that the Fenner affidavit "shows further that [Roberts] should have been aware of the problems posed by Sucker Brook and [his] duties to maintain a bridge over it," the circuit court noted:

> The only evidence pertaining to the obligation to maintain a bridge appears to be in the June 27, 1926, document located by Michael Schowalter while doing a hand search of the records at the Ozaukee County Register of Deeds Office. That document, however, does not appear in the chain of title to the Becker parcel as set forth in the title commitment, and the title searcher did not locate it. [WISCONSIN STAT. § 706.09(2)(b)] does not require purchasers for value to hand search the records at the

> Register of Deeds to see if there is some way, in the absence of proper recording, that adverse interest could possibly be discovered. [***Associates Fin. Servs. Co. of Wis. v. Brown***, 2002 WI App 300, ¶14, 258 Wis. 2d 915, 656 N.W.2d 56.] In this case that search would be the only way the 1956 document would be located.

¶19 The sound logic of the circuit court's decision is validated by this court's recent analysis in ***Smiljanic***—as already noted, an opinion not yet released at the time the instant case came up on appeal. *See* ***Smiljanic***, 737 N.W.2d 436.

¶20 Similar to the instant case, ***Smiljanic*** concerned a dispute over the effect of a recorded affidavit that averred the sellers had intended to convey an easement not reflected in the recorded deed. ***Id.***, ¶1. Based on this affidavit, Smiljanic claimed he had the right to an easement not reflected in the recorded deed. ***Id.*** The circuit court concluded that the affidavit was not a valid means of conveying the easement or correcting the deed. ***Id.*** The circuit court therefore granted summary judgment against Smiljanic. ***Id.*** Smiljanic appealed, contending that the recorded affidavit was a valid method of correcting the deed and that it was not necessary to utilize the court procedure established in WIS. STAT. § 847.07 and its predecessor.[2] ***Smiljanic***, 737 N.W.2d 436, ¶1.

[2] Smiljanic also contended that WIS. STAT. § 706.09(1)(i) bars an attack on the facts asserted in the affidavit because it was recorded more than five years ago. ***Smiljanic v. Niedermeyer***, 2007 WI App 182, ¶1, ___ Wis. 2d ___, 737 N.W.2d 436. Unlike Smiljanic, Tholl does not rely on § 706.09(1)(i) for an alternative argument to support his claim. *See* ***Smiljanic***, 737 N.W.2d 436, ¶19. Therefore, we do not discuss it beyond this footnote. Section 706.09(1)(i) provides:

(continued)

¶21 We upheld the circuit court and concluded there was and is no statutory authority for accomplishing a correction of the description of the property conveyed by the deed by simply recording an affidavit. ***Id.***, ¶2. We held that WIS. STAT. § 847.07 and its predecessor establish the proper procedure for seeking a correction. ***Smiljanic***, 737 N.W.2d 436, ¶2.

¶22 In holding that simply recording an affidavit does not establish as fact the assertions in it, s*ee* ***id.***, ¶14, we relied on the explicit language of WIS. STAT. § 847.07—"The circuit court of any county in which a conveyance of real

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> (i) *Facts not asserted of record*. Any fact not appearing of record, but the opposite or contradiction of which appears affirmatively and expressly in a conveyance, affidavit or other instrument of record in the chain of title of the real estate affected for 5 years. Such facts may, without limitation by noninclusion, relate to age, sex, birth, death, capacity, relationship, family history, descent, heirship, names, identity of persons, marriage, marital status, homestead, possession or adverse possession, residence, service in the armed forces, conflicts and ambiguities in descriptions of land in recorded instruments, identification of any recorded plats or subdivisions, corporate authorization to convey, and the happening of any condition or event which terminates an estate or interest.

If Tholl had attempted to rely on this section, we would have rejected it as we did in ***Smiljanic***. *See* ***Smiljanic***, 737 N.W.2d 436, ¶¶20-21. In ***Smiljanic***, we explained that § 706.09(1)(i) is a means of eliminating adverse claims based on facts not of the record when the facts are contradicted by *recorded instruments in the chain of title.* ***Smiljanic***, 737 N.W.2d 436, ¶20. We further explained:

> It is not reasonable to construe the inclusion of the term "affidavit" in the phrase "conveyance, affidavit or other instrument of record …" in § 706.09(1)(i) to create an exception to the requirements for a conveyance contained in § 706.02. Rather, "affidavit" refers to those affidavits that are or were authorized by statute, such as … WIS. STAT. § 236.295.

Smiljanic, 737 N.W.2d 436, ¶20. Smiljanic argued further that we should construe § 706.09(1)(i) liberally to effectuate the intent of the parties to the original transaction. Again, we rejected this argument because it asks us to presume that the affidavit, rather than the deed, is the correct expression of the parties' intent. We refused to make this presumption.

estate has been recorded may make an order correcting the description ….”—which reveals a differing legislative intent than that which was asserted by Smiljanic. ***Smiljanic***, 737 N.W.2d 436, ¶¶11, 12. It reveals that whether it is appropriate to enter an order correcting the description in a recorded conveyance of real estate, and what proof is satisfactory, are questions that the legislature determined should be committed to the circuit court's discretion. ***Id.***, ¶2. In addition, we reasoned that additional language in § 847.07—"This section does not prevent an action for the reformation of any conveyance ….”—illustrates that the legislature, if it *had* meant for other means of correcting a description in a recorded conveyance *not* to be prevented by the statute, would have included these means expressly—as it did with an action for reformation (i.e., § 847.07). ***Smiljanic***, 737 N.W.2d 436, ¶13.

¶23 Smiljanic argued that WIS. STAT. § 236.295 provided another source of evidence that the legislature did not intend WIS. STAT. § 847.07 or its predecessor to be the exclusive means of correcting a description (other than an action for reformation). ***Smiljanic***, 737 N.W.2d 436, ¶15. Section 236.295 states:

> **(1)** Correction instruments shall be recorded in the office of the register of deeds in the county in which the plat or certified survey map is recorded and may include any of the following:
>
> (a) Affidavits to correct distances, angles, directions, bearings, chords, block or lot numbers, street names, or other details shown on a recorded plat or certified survey map. A correction instrument may not be used to reconfigure lots or outlots.
>
> (b) Ratifications of a recorded plat or certified survey map signed and acknowledged in accordance with s. 706.07.
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> (c) Certificates of owners and mortgagees of record at time of recording.

> **(2)** (a) Each affidavit in sub. (1)(a) correcting a plat or certified survey map that changes areas dedicated to the public or restrictions for the public benefit must be approved prior to recording by the governing body of the municipality or town in which the subdivision is located. The register of deeds shall note on the plat or certified survey map a reference to the page and volume in which the affidavit or instrument is recorded. The record of the affidavit or instrument, or a certified copy of the record, is prima facie evidence of the facts stated in the affidavit or instrument.
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> (b) Notwithstanding par. (a), in a county that maintains a tract index pursuant to s. 59.43 (12m), a correction may be made by reference in the tract index to the plat or certified survey map.

¶24 In rejecting this part of Smiljanic's argument, we contrarily concluded that the express language of WIS. STAT. § 236.295, in fact, "shows that when the legislature intends to give legal significance to the recording of an affidavit, without a court proceeding, it is very specific about what is permitted and what the effect is."[3] ***Smiljanic***, 737 N.W.2d 436, ¶15.

¶25 We conclude that a recorded affidavit that is not part of the chain of title does not equal constructive notice of easement obligations. The 1927 warranty deed from Becker to Fenner includes an easement "with the right to the use of the private driveway as now used, which said driveway extends from the premises to U.S. highway 141." What the warranty deed does not contain is an obligation for Becker to maintain the driveway and a bridge over the driveway. The trial court properly found that Roberts exercised the necessary due diligence before purchasing the land. The 1999 title insurance commitment did not include

[3] We determined WIS. STAT. § 236.295 to be instructive, even though it was inapplicable to Smiljanic's case and is inapplicable to the instant case in that neither deals with a recorded plat nor a certified survey map. *See* ***Smiljanic***, 737 N.W.2d 436, ¶15.

Fenner's 1956 affidavit in which he avers a side agreement for maintenance of the easement and a bridge. In short, there is nothing in the chain of title that creates an obligation for Roberts to maintain the driveway and build and maintain a bridge. We therefore affirm the circuit court.

By the Court.—Judgment affirmed.

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