COURT OF APPEALS
DECISION
DATED AND FILED

May 28, 2009

David R. Schanker
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. 2008AP1145 **Cir. Ct. No. 2007CV6**

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

BENEDICT A. SOLIS AND LAURA M. SOLIS,

PLAINTIFFS-RESPONDENTS,

V.

THOMAS L. WAARVIK REVOCABLE TRUST,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Jackson County: GERALD W. LAABS, Judge. *Reversed and cause remanded with directions.*

Before Dykman, Bridge and Gaylord,[1] JJ.

[1] Circuit Judge Shelley J. Gaylord is sitting by special assignment pursuant to the Judicial Exchange Program.

¶1 GAYLORD, J. The Thomas L. Waarvik Revocable Trust appeals from an order granting summary judgment to Benedict and Laura Solis in the Solises' action to reform a deed executed by previous owners of the properties now owned by the parties. Waarvick argues that the trial court erred by reforming the deed to include an additional 116 feet, thereby giving the Solises access to a town road by crossing through Waarvik's land. The Solises argue that either reformation based on mutual mistake or a prescriptive easement entitles them to the additional length of their easement. We conclude that the deed cannot be reformed based on mutual mistake on the facts of this case, and that the record does not support the Solises' claim for a prescriptive easement. Accordingly, we reverse and remand with directions to dismiss the Solises' complaint.

Background

¶2 Sackett owned land and split it into two parcels, selling one parcel to Johnson in 1967.[2] In the Sackett-Johnson deed, Sackett granted Johnson two easements described as follows:

> Also a right of way easement commencing at a point which is the Northwest corner of the Northwest Quarter of the Southeast Quarter of Section 4, … as a point of beginning; thence South along said forty line to a point on the South forty line of said forty following the present traveled route. This easement intended … for right to travel and maintenance purposes only. Also an easement commencing at a point on the South right-of-way line of the town road running East and West through the Northwest Quarter of the Southwest Quarter … approximately forty rods East of the West forty line of said forty as a point of beginning, along the present traveled

[2] We have omitted the first names of the previous owners of the properties to simplify our analysis. Also, for ease of understanding, we have attached a map as an appendix which shows the land conveyed, its present owners, the easement and the land in dispute.

> route to a point which is the Southeast corner of said forty. Said right to travel easement to be one rod on either side of said line.[3]

¶3 Later, Johnson sold his parcel to the Solises. Sackett sold the second parcel to Grenawalt, and Grenawalt then sold his parcel to Waarvik.

¶4 In January 2007, the Solises brought this declaratory action to establish their right to an easement over Waarvick's property. The Solises sought to reform the 1967 deed so that the first easement in the deed would reach the town road. Alternatively, the Solises argued they were entitled to a prescriptive easement reaching the road. The parties brought cross-motions for summary judgment. The court granted summary judgment to the Solises on the basis of mutual mistake, and Waarvick appeals.

Standard of Review

¶5 This case requires that we review an order granting summary judgment. The supreme court has explained:

> When reviewing a grant of summary judgment, we apply the standards set forth in [WIS. STAT. § 802.08 (2007-

[3] In addition, the complaint alleged that Solis owns a third easement as follows, lying in the same Northwest quarter of the Southwest quarter:

> Commencing at a point on the South right-of-way line of the town road running North and South through the above-described forty approximately one rod East of the West forty line of said forty as the point of beginning; thence along the present traveled route to a point which is the Southwest corner of said forty. Said right to travel easement shall be one rod on either side of the above-described line.

There are no facts of record showing when this last easement was created or by whom. Neither party claims that this purported easement has relevance here.

> 08)],[4] just as the trial court applies those standards. Under [§] 802.08, summary judgment must be entered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Swatek v. County of Dane, 192 Wis. 2d 47, 61, 531 N.W.2d 45 (1995) (citations omitted).

Discussion

¶6 Waarvick argues that the trial court erred in reforming the 1967 deed based on mutual mistake because that remedy is not available when it is sought against an innocent subsequent purchaser, which Waarvick claims to be. It also argues that there are no facts in the record to support the Solises' claim of a prescriptive easement. The Solises respond that the court properly reformed the original deed based on the clear intent of the original parties. Alternatively, they contend that there is a disputed issue of material fact as to whether they have established a prescriptive easement, requiring trial. We agree with Waarvick.

¶7 While "Wisconsin courts have long recognized that a court in equity can reform written instruments that, by mutual mistake, do not express the true intentions of the parties," reformation is unavailable "if the rights of innocent third parties, such as innocent bona fide purchasers … are affected." ***Chandelle Enterprises, LLC v. XLNT Dairy Farm, Inc.***, 2005 WI App 110, ¶18, 282 Wis. 2d 806, 699 N.W.2d 241. Here, the Solises claim a mutual mistake between Sackett and Johnson in the 1967 deed creating the easement. Subsequent to

[4] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

execution of the deed, Johnson sold to Grenawalt and Grenawalt then sold to Waarvick. The Solises now seek to reform the 1967 deed to encumber Waarvick's land. Under ***Chandelle***, they may not do so.

¶8 The Solises attempt to avoid the ***Chandelle*** bar to use of mutual mistake against innocent subsequent purchasers by arguing that Waarvick had notice, via the 1967 deed, that the property was subject to an easement reaching the town road.[5] We disagree.

¶9 The 1967 deed unambiguously describes the easement's specific starting and ending points within the Northwest Quarter of the Southeast Quarter. There is nothing in the deed's description of the easement referencing the Southwest Quarter of the Northeast Quarter, which is where the easement would need to extend to reach the town road through Waarvik's land. Thus, the deed did not notify Waarvick that it was purchasing land subject to an easement reaching the town road. Because Waarvick is an innocent subsequent purchaser, the deed may not be reformed against it.

¶10 Next, the Solises argue that there is a disputed issue of material fact as to whether they have established a prescriptive easement. They contend that Benedict Solis's affidavit and deposition testimony create an issue of material fact as to whether they have met the elements for a prescriptive easement claim. We disagree.

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[5] The Solises also argue that ***Chandelle Enterprises, LLC v. XLNT Dairy Farm, Inc.***, 2005 WI App 110, ¶18, 282 Wis. 2d 806, 699 N.W.2d 24, was wrongly decided. However, ***Chandelle*** is binding precedent and we are not free to overrule it. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997). Alternatively, the Solises argue that Waarvick had notice of an easement encumbering its land because Grenawalt allowed the Solises to use the easement prior to selling the land to Waarvick. One does not follow from the other.

¶11 A prescriptive easement arises when there is: "(1) adverse use hostile and inconsistent with the exercise of the titleholders' rights; (2) which is visible, open and notorious; (3) under an open claim of right; (4) and the use is continuous and uninterrupted for twenty years."[6] ***Ludke v. Egan***, 87 Wis. 2d 221, 230, 274 N.W.2d 641 (1979). Here, viewing all facts in the pleadings, affidavits and depositions in a light most favorable to the Solises, the record does not establish twenty years of continuous use of the asserted easement in a visible, open, notorious and hostile manner. Solis's affidavit contains no specific allegations about the easement, but only general conclusions that the easement was travelled in a manner that was adverse, open, hostile, visible and inconsistent with general rights for twenty years.

¶12 Solis's deposition describes his sporadic use four or five times a year for picking berries, gathering firewood, hauling lumber, hunting, or travelling for the purpose of hunting. Solis stated that he left no visible marks, other than occasionally driving over grass or alfalfa, but not over crops such as corn or soybeans. He indicates that there was a road "many years ago," but for most years the easement consisted of crops or grass. Solis had consent to cross the land from Waarvik's predecessors, Sackett and Grenawalt. He stayed out of Grenawalt's crops. Solis stated that Grenawalt had asked him not to run through the middle of the field and Solis honored that request.

[6] The time of Grenawalt's ownership prior to Waarvik's must be included for the Solises to claim a continuous twenty year period. Therefore, we examine the facts during Grenawalt's and Waarvik's ownership periods.

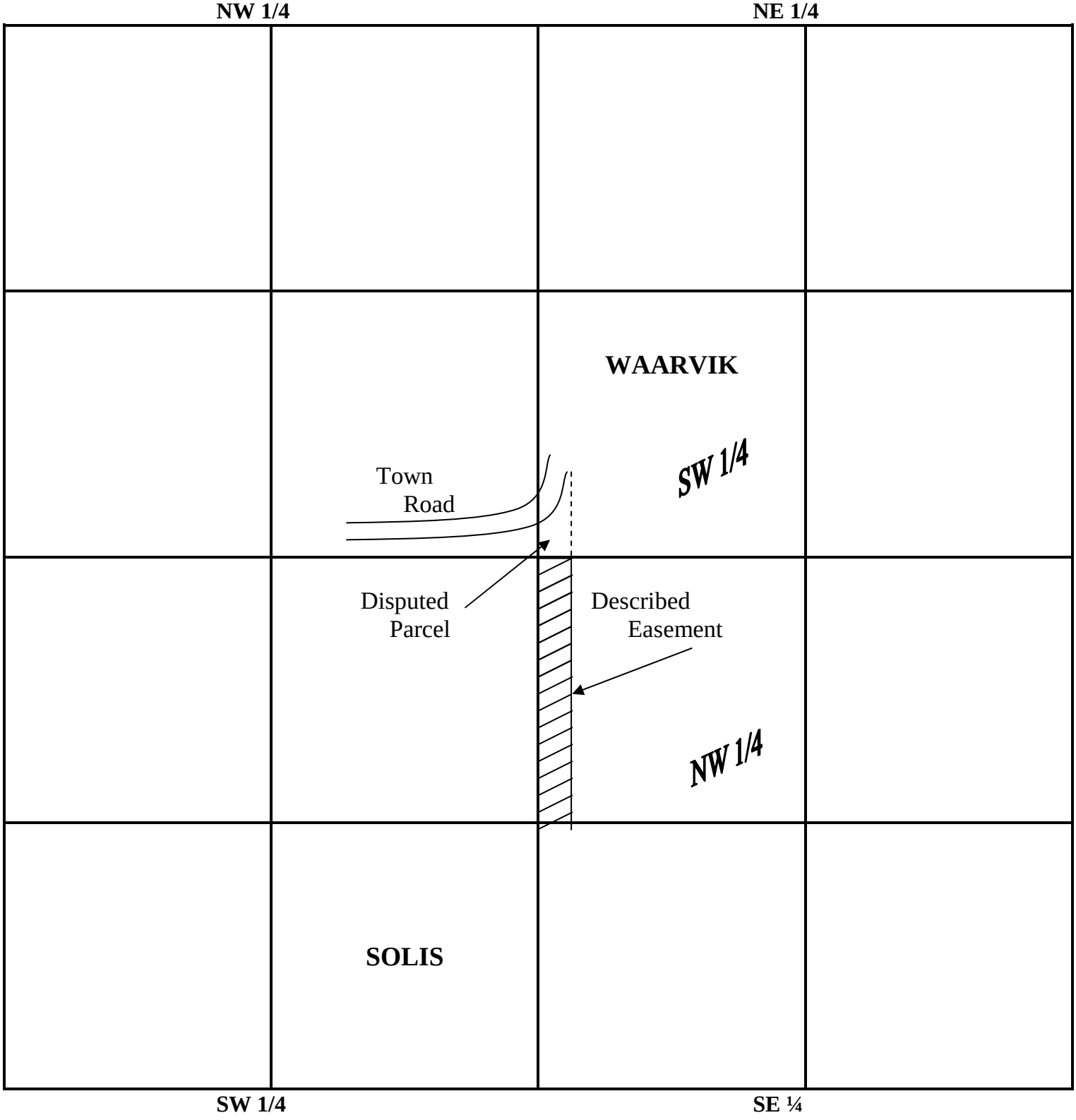
¶13 None of these facts support a claim that Solis used the easement in an adverse, open or notorious manner.[7] Because there are no material facts in dispute by which the Solises could show a prescriptive easement, Waarvik is entitled to summary judgment denying the Solises' claim for a prescriptive easement. Because Waarvik has prevailed, there is no need to address his claim that Solis's affidavit is a sham under ***Yahnke v. Carson***, 2000 WI 74, ¶¶20-21, 236 Wis. 2d 257, 613 N.W.2d 102. We reverse and remand with directions to grant summary judgment to Waarvik on both of the Solises' claims.

By the Court.—Judgment reversed and cause remanded with directions.

Not recommended for publication in the official reports.

[7] Grenawalt asserted in his affidavit that he was the owner of Waarvik's property from 1972 through 2003 and that he is familiar with the area where the Solises claim an easement. He stated that while he owned the real estate, neither Benedict Solis nor his friends or family used the area where the Solises claim an easement for access, and that the area was maintained as a field. While there are some inconsistencies between Grenawalt's and Solis's descriptions of Solis's use of the easement, none of the assertions in Solis's affidavit or deposition create an issue of material fact as to whether the elements of a prescriptive easement were met.

Sec. 4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