COURT OF APPEALS
DECISION
DATED AND FILED

October 13, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2485 **Cir. Ct. No. 2008CV215**

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

THOMAS R. JORNS AND SANDRA EVANS JORNS,

PLAINTIFFS-APPELLANTS,

V.

WESLEY W. FISCHER, HAZEL G. FISCHER, LESLIE L. FISCHER, BARBARA L. HEILMAN, ELAINE A. RESLER, JOHN O'CONNOR, HELEN ALEXANDER, KATHRYN A. TESSIN, JOHN C. O'CONNOR, JAMES K. O'CONNOR, THOMAS O'CONNOR, POLLY O. HOHN, THOMAS SAVAGE AND GAIL SAVAGE,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Door County: PETER C. DILTZ, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Thomas and Sandra Jorns appeal a summary judgment dismissing their claim for an easement by necessity over neighboring

property. The trial court determined as a matter of law that the Jornses could not meet the requirements for a court-awarded easement by necessity. We agree and affirm.

BACKGROUND

¶2 On September 14, 2001, Thomas and Sandra Jorns purchased a tract of land in the Town of Jacksonport, Door County. The parcel to the north and west of the Jornses' land is owned by Leslie Fischer, Barbara Heilman, and Elaine Resler, with a life estate retained by Wesley and Hazel Fischer (collectively, the Fischers). Thomas and Gail Savage own a smaller parcel that also borders the western edge of the Jornses' property. Lost Lake and a parcel owned by John O'Connor, Helen Alexander, Kathryn Tessin, John C. O'Connor, James O'Connor, Thomas O'Connor, and Polly Hohn (collectively, the O'Connors) lie to the south of the Jornses' property. Dennis and Susan Dietrich own the land to the east of the Jornses' property.

¶3 It is undisputed that the Jornses' property is presently landlocked.[1] The Jornses' property is surrounded by the Fischer and Savage properties to the north and west, the O'Connor property and Lost Lake to the south, and the Dietrich property to the east. The closest access roads are County Road T, which runs along the eastern edge of the Dietrich property, and Lost Lake Road, which runs along the western edge of the Fischer property. Neither of these roads provides direct access to the Jornses' land.

[1] Property is landlocked when it is surrounded by land belonging to other persons so that it cannot be reached by a public roadway. *See* ***Richards v. Land Star Grp., Inc.***, 224 Wis. 2d 829, 845-46, 593 N.W.2d 103 (Ct. App. 1999).

¶4 All of the parcels in this case were granted to the State of Wisconsin by the federal government pursuant to the Swamp Land Act of 1850. Sometime between 1850 and 1899, the Jorns parcel became landlocked.[2] At various times during the 1880s and 1890s, individual members of the Fischer family owned the Fischer, Jorns and O'Connor parcels.[3] William Fischer, Sr., owned the O'Connor parcel from 1880 until 1902. His son, Herman Fischer, acquired the Fischer parcel in 1897. Herman's brother, William Fischer, Jr., owned the Jorns parcel from March 15 to September 12, 1899. Thus, for a six-month period in 1899, members of the Fischer family concurrently owned the Fischer, Jorns and O'Connor parcels.

¶5 Additionally, between 1917 and 1927, both the Jorns and Dietrich parcels were owned by Reinhardt and Emma Lautenbach. This common ownership was severed in 1927, when the Lautenbachs conveyed the Dietrich parcel to Minna Leimbach. At all times since that severance, the Jorns parcel has been landlocked.

¶6 When Thomas Jorns purchased the property in 2001, he knew it was landlocked. He assumed he would be able to gain access by purchasing an easement from a neighboring property owner or by petitioning the Town of Jacksonport to build an access road. However, Jorns was unable to obtain an easement, and the town refused to construct a road to his property.

[2] The Jornses contend the State of Wisconsin caused their parcel to become landlocked by deeding away the Fischer and O'Connor parcels in 1872 and 1876, respectively. The Fischers and Savages assert the Jorns parcel first became landlocked in 1891 by a transfer between private individuals. The precise date the Jorns parcel first became landlocked is not material to this appeal. The parties agree that the Jorns parcel became landlocked sometime before 1899.

[3] During the 1880s and 1890s, the Fischer parcel included the Savage parcel.

¶7 As a result, the Jornses filed a complaint asking the circuit court to declare an easement by necessity in their favor over the Fischer, Savage or O'Connor parcels. The Fischers, Savages, and O'Connors moved for summary judgment, arguing the Jornses could not meet the requirements for an easement by necessity. In a June 8, 2009 decision, the circuit court concluded the common ownership of the Jorns and Dietrich parcels from 1917 to 1927 terminated any easement of necessity that may have previously existed over the Fischer, Savage and O'Connor parcels. In a supplemental decision, the court concluded concurrent ownership of the Fischer, Jorns, and O'Connor parcels by members of the Fischer family did not meet the common ownership requirement for an easement by necessity. The court also determined the Jornses' claims were barred by the statute of limitations found in WIS. STAT. § 893.33.[4] The court entered a judgment dismissing the Jornses' complaint, and the Jornses now appeal.

DISCUSSION

¶8 We review a grant of summary judgment independently, applying the same standard as the trial court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2); ***Green Spring Farms***, 136 Wis. 2d at 315. The "mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." ***Baxter v. DNR***,

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

165 Wis. 2d 298, 312, 477 N.W.2d 648 (Ct. App. 1991) (quoting ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 247-48 (1986)).

¶9 To establish an easement by necessity, the party seeking the easement has the burden to prove two elements: "(1) common ownership of the proposed servient and dominant estates at the time of the severance that created the landlocked condition; and (2) the landlocked parcel had no access to a public roadway after it was severed and such lack of access continues." ***McCormick v. Schubring***, 2003 WI 149, ¶11, 267 Wis. 2d 141, 672 N.W.2d 63. If these two elements are met, the court then determines whether equity favors granting the easement. ***Id.***, ¶15. An easement by necessity continues only as long as the need for it continues to exist. *See* ***Niedfeldt v. Evans***, 272 Wis. 362, 364-65, 75 N.W.2d 307 (1956). For instance, if the owner of landlocked property acquires another way to access the property, any previously granted easement by necessity will terminate. *See* ***id.***

¶10 The Jornses first argue the circuit court erred by determining that the common ownership of the Jorns and Dietrich parcels from 1917 to 1927 extinguished any previously existing easement by necessity. However, the undisputed facts demonstrate that during those years the two parcels were both owned by Reinhardt and Emma Lautenbach, and the Dietrich parcel had access to County Road T. During this period, the Lautenbachs could access County Road T from the Jorns parcel by crossing the Dietrich parcel. As a result, the Jorns parcel was not landlocked from 1917 to 1927, because it was not surrounded by land belonging to others and it had access to a public road. *See* ***Richards v. Land Star Grp., Inc.***, 224 Wis. 2d 829, 845-46, 593 N.W.2d 103 (Ct. App. 1999). Because an easement by necessity terminates when the necessity no longer exists, the

common ownership of the Jorns and Dietrich parcels extinguished any previously existing easement by necessity across the Fischer, Savage, or O'Connor parcels.

¶11 The Jornses nevertheless contend their property remained landlocked from 1917 to 1927 because the swampy condition of the land made it extremely difficult to access their parcel by traveling across the Dietrich parcel. They argue the condition of the land demonstrates there has never been any "real access" to their property from County Road T. However, the existence of swampy conditions on the Jorns and Dietrich parcels is irrelevant to the issue of whether the Jorns parcel was landlocked between 1917 and 1927. Property is landlocked when it is "surrounded by land belonging to other persons so that it cannot be reached by a public roadway." *See* ***id.*** The Jorns parcel did not meet this definition from 1917 to 1927, so during that time it was not landlocked.

¶12 Moreover, Wisconsin courts have consistently held that geographic barriers alone are insufficient to warrant an easement by necessity. *See, e.g.*, ***Schwab v. Timmons***, 224 Wis. 2d 27, 39, 589 N.W.2d 1 (1999). "A grantor is not landlocked when he or she has difficulty getting from his or her land to a public road as long as he or she can get from his or her land to a public road." ***Id.*** at 40 (citing ***Ludke v. Egan***, 87 Wis. 2d 221, 230, 274 N.W.2d 641 (1979)). An easement by necessity is not an easement of convenience. ***Backhausen v. Mayer***, 204 Wis. 286, 288, 234 N.W. 904 (1931). Even though accessing the Jorns parcel from the Dietrich parcel may be difficult due to the swampy condition of the land, it is not impossible.[5] The circuit court therefore correctly held that the common

[5] The Jornses concede that despite the wet condition of their own parcel and the Dietrich parcel, Thomas Jorns has accessed his land at least once by crossing the Dietrich parcel on foot.

ownership of the Jorns and Dietrich properties extinguished any previously existing easement by necessity.

¶13 Consequently, the severance that most recently landlocked the Jorns parcel occurred in 1927, when the Lautenbachs conveyed the Dietrich parcel but retained the Jorns parcel. A party seeking an easement by necessity must first prove that the proposed servient and dominant estates were commonly owned at the time of the severance that created the landlocked condition. *See* ***McCormick***, 267 Wis. 2d 141, ¶11. Here, the Jornses seek an easement by necessity over the Fischer, Savage, or O'Connor parcels. However, the undisputed evidence demonstrates that the Jorns parcel was not under common ownership with any of those parcels in 1927. We therefore agree with the circuit court that, as a matter of law, the Jornses cannot meet the first requirement for an easement by necessity.

¶14 The Jornses also contend the trial court erred by concluding that "Fischer Family" ownership of the Fischer, Jorns, and O'Connor properties during the 1890s did not satisfy the common ownership requirement for an easement by necessity. The Jornses argue their property was not landlocked from March 15 to September 12, 1899, because during that time members of the Fischer family owned the Fischer, Jorns, and O'Connor parcels. They argue the Jorns property became landlocked again in 1899 when the O'Connor property was transferred outside the family.[6] They therefore contend the Fischer, Jorns, and O'Connor parcels were under common ownership at the time of the severance that landlocked the Jorns parcel. *See* ***id.***, ¶11.

[6] In reality, it was the Jorns parcel that was conveyed in 1899, not the O'Connor parcel. The distinction is not material for purposes of this appeal.

¶15 The Jornses' argument is without merit. Real estate records show that during the period in question, the Jorns, Fischer and O'Connor parcels were owned by different individuals. The fact that these individuals were members of the same family is irrelevant. The circuit court concluded, and we agree, that "title records must prevail over family relationship interests in land." Ownership by individual members of a family does not constitute the common ownership required to obtain an easement by necessity.

¶16 Even so, the Jornses argue that "[t]he fact of 'Fischer Family' ownership together with other equitable considerations should have been allowed into evidence to be considered by the court in order to make an educated and informed decision in this case." This argument misses the mark for two reasons. First, the Jornses did present evidence of "Fischer Family" ownership to the circuit court in the affidavits supporting their brief in opposition to summary judgment. The court simply determined this evidence did not constitute proof of common ownership. Second, a court is not allowed to consider equitable factors unless it determines that the two preliminary requirements for an easement by necessity have been met. ***Id.***, ¶¶11, 15. Here, the court determined the preliminary requirements were not satisfied and therefore properly refused to balance the equities.

¶17 Finally, the Jornses contend the trial court erred by concluding the statute of limitations found in WIS. STAT. § 893.33 bars their claims. Because we affirm on alternate grounds, we need not reach this issue. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (appellate courts should decide cases on narrowest possible grounds).

By the Court.—Judgment affirmed.

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