

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 27, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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Appeal No. 2012AP69

Cir. Ct. No. 2007CV35

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

ROBERT D. KONNEKER AND ANN M. KONNEKER,

PLAINTIFFS-RESPONDENTS,

V.

ROBERT S. ROMANO,

DEFENDANT-APPELLANT,

FRANCIS A. ROMANO, DECEASED, NORMAN E. NELSON AND

LAWRENCE A. NELSON,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Green Lake County: RICHARD O. WRIGHT, Judge. *Reversed.*

Before Lundsten, Higginbotham and Kloppenburg, JJ.

¶1 HIGGINBOTHAM, J. This dispute centers on a deed conveying an interest in a twenty-foot easement abutting Green Lake in Green Lake County. This case was before us in a first appeal, where we reversed the circuit court’s grant of summary judgment to Robert D. and Ann M. Konneker and denial of summary judgment to Robert and Francis Romano.¹ On a petition for review, the Wisconsin Supreme Court found the deed creating the easement to be ambiguous as to the use and purpose of the easement, and, after considering the summary judgment materials, concluded that there was a genuine issue of material fact concerning whether the parties to the deed intended to grant “riparian rights including the right to construct and maintain a pier.”² *Konneker v. Romano*, 2010 WI 65, ¶¶3, 30, 326 Wis. 2d 268, 785 N.W.2d 432. The supreme court reversed and remanded this case to the circuit court to consider extrinsic evidence to ascertain the original parties’ intent. A trial was held to the court and the court found that the parties to the deed intended to “grant boat access including the use of a pier,” and entered judgment in favor of the Konnekers.

¶2 The dispositive issue we address on appeal is whether the record supports the trial court’s finding that the parties to the deed intended the easement holders to have the right to construct and maintain a pier. We conclude that the facts on which the court relied and the only reasonable inferences that can be

¹ Francis Romano is now deceased.

² Although the Wisconsin Supreme Court framed the issue as whether the original parties intended to grant “riparian rights, including the right to construct and maintain a pier,” the parties do not dispute that the easement at issue grants some riparian rights. *Konneker v. Romano*, 2010 WI 65, ¶2, 326 Wis. 2d 268, 785 N.W.2d 432. The parties focus on whether the easement granted the riparian right to construct and maintain a pier. *See id.*, ¶5 n.5 (explaining that riparian rights include the “right to use the shoreline and have access to the waters” and “the right to construct a pier or similar structure in aid of navigation”) (quoting another source). Accordingly, in this opinion, we refer only to the riparian right to construct and maintain a pier.

drawn from those facts do not support the court's finding that the original parties to the deed intended to grant the right to construct and maintain a pier. In short, no reasonable view of the evidence supports the court's finding that the grantor, the Ciszeks, intended to convey the right to construct and maintain a pier, to the original grantees, the Blizeks. Accordingly, we reverse.

FACTUAL BACKGROUND

¶3 In 2004, the Konnekers purchased off-shore property, located across the street from a cove that feeds into Green Lake. The deed to the Konnekers property also conveyed to them a twenty-foot easement, which is the subject of this case. The Konnekers' easement was first created in 1983. The 1983 deed conveying the easement contained the following language:

Lot Number Two (2) of Certified Survey Map No. 770, being a resurvey of Lot Number Four (4) of Certified Survey Map No. 289, TOGETHER WITH AN EASEMENT TWENTY (20) FEET IN WIDTH along the westerly side of Lot 3 of Certified Survey Map No. 289, extending from Orchard Avenue to Beyer[']s Cove.

(Emphasis added.)

¶4 The Konnekers' easement was created by the original owners of Lot 2 CSM No. 770, Barbara Cizek, Edward Cizek, Peter Cizek, and Angeline Cizek (the Ciszeks). In December 1983, the Ciszeks conveyed Lot 2 of CSM No. 770, together with rights in the subject easement on Lot 3, to Robert and Marguerite Blizek. In 1989, the Blizeks conveyed Lot 2 along with the easement on Lot 3 to Grant G. and Patricia A. Gardner, who, in 1994, conveyed Lot 2 and the easement to the Rose D. Carlsson Trust. In October 2004, the Carlsson Trust conveyed Lot 1 of CSM No. 2643, "being a division of" Lot 2 of CSM No. 770,

together with the easement, to the Konnekers. The language in the original deed granting the twenty-foot easement has not materially changed since 1983.

¶5 The Ciszeks are also the predecessors in interest of Lot 3, which is now co-owned by the Romanos and Norman and Lawrence Nelson.³ In total, the Ciszeks granted seven easements over Lot 3. In an affidavit executed by Barbara and Edward Cizek in August 1984, the Ciszeks averred that Lot 3 “is intended as an access to Beyer[']s Cove” and listed seven parcels of property “presently entitled to use said access,” including the lot that the Ciszeks conveyed to the Blizeks.

¶6 From the time the easement was created in 1983 and throughout the subsequent twenty-three years, no pier was constructed on the easement. Beginning in 1990, the Romanos and the Nelsons leased their pier, which was located adjacent to the easement, to two of the Konnekers’ predecessors in interest, Grant Gardner and subsequently to Arne Carlsson, for the purpose of placing a boat lift to moor their boats. In 2006, the Konnekers constructed a pier along the shore of the easement, which was subsequently removed by the Romanos and the Nelsons. After the circuit court granted summary judgment to the Konnekers, the Konnekers again erected their pier on the easement. However, after we reversed the circuit court and granted summary judgment in favor of the Romanos, the Konnekers removed their pier.

³ Lawrence Nelson is now deceased.

PROCEDURAL BACKGROUND

¶7 In *Konneker*, the Wisconsin Supreme Court detailed the procedural background of this case leading up to the Romanos’ petition for review. *See Konneker*, 326 Wis. 2d 268, ¶¶13-21. We supplement that background with the following.

¶8 In *Konneker*, the supreme court reversed this court on the ground that the parties’ summary judgment materials raised a genuine issue of material fact concerning whether the original parties to the deed intended to grant the right to construct and maintain a pier. The supreme court remanded this case to the trial court to take extrinsic evidence to ascertain the intent of the original parties to the deed.⁴ *Id.*, ¶¶30, 41.

¶9 A trial was held to the court.⁵ A few months later, the court issued an order finding that the original parties to the deed granted “lake access with the right to install and maintain a pier.” Romano appeals.

⁴ On remand, Romano moved for leave to file an amended counterclaim for public nuisance, based on the claim that, even if the intent of the parties was to grant the right to construct and maintain a pier, any pier constructed by the Konnekers would violate the statutory conditions for placing a pier on navigable water by a non-riparian landowner. *See* WIS. STAT. § 30.131. Applying the law of the case doctrine, the trial court denied the motion on the ground that the Wisconsin Supreme Court concluded in the first appeal that § 30.131 was inapplicable to this case. *See Konneker*, 326 Wis. 2d 268, ¶¶40, 42. On appeal, Romano contends that the trial court erred in denying his motion for leave to file an amended counterclaim under the law of the case doctrine. Romano contends that the trial court incorrectly determined that the supreme court ruled that § 30.131 does not apply to this case. We agree with the trial court that the supreme court ruled that § 30.131 does not apply to this case and therefore the trial court did not err in denying Romano’s motion for leave to amend. *See id.*

⁵ The parties dispute whether the Konnekers had the burden to prove their case by the preponderance of the evidence, the ordinary burden of proof in a civil case, or by clear and satisfactory evidence, the burden of proof set forth in WIS. STAT. § 706.04, regarding the equitable reformation of an agreement. We conclude that § 706.04 has no application to this

(continued)

DISCUSSION

¶10 In this case, we are asked to determine whether the trial record supports the trial court’s finding that the original parties to the deed intended to convey the right to construct and maintain a pier to the easement holders of the 1983 easement. This poses a question of fact. *Id.*, ¶23 (“[I]f the language of the deed is ambiguous, then the intent behind the language presents a question of fact.”). We uphold a trial court’s finding of fact unless clearly erroneous. WIS. STAT. § 805.17(2); *see also State v. Ayala*, 2011 WI App 6, ¶10, 331 Wis. 2d 171, 793 N.W.2d 511.

¶11 On appeal, review of a trial court’s factual finding requires us to search the record for evidence that supports the court’s findings. *Noble v. Noble*, 2005 WI App 227, ¶15, 287 Wis. 2d 699, 706 N.W.2d 166. However, where only one reasonable inference can be drawn from the evidence, the drawing of that inference is a question of law, which we decide independent of the trial court. *See Ritt v. Dental Care Assocs., S.C.*, 199 Wis. 2d 48, 81, 543 N.W.2d 852 (Ct. App. 1995).

¶12 We begin with a review of the law on easements. Our supreme court stated in *Konneker*:

An easement is a permanent interest in another’s land, with a right to enjoy it fully and without obstruction. The “dominant estate” enjoys the privileges granted by the easement, and the “servient estate” permits the exercise of

case. The Konnekers sought a judicial determination as to whether the original parties intended the holders of the 1983 easement to have the right to construct and maintain a pier, and were not seeking, pursuant to § 706.04, the “enforcement in equity of an agreement which is invalid under the statute of frauds.” *Spensley Feeds, Inc. v. Livingston Feed & Lumber, Inc.*, 128 Wis. 2d 279, 287, 381 N.W.2d 601 (Ct. App. 1985).

those privileges. While the servient estate may not unreasonably interfere with the dominant estate's right to use the easement, the use of the easement must be in accordance with and confined to the terms and purposes of the grant.

Konneker, 326 Wis. 2d 268, ¶25 (quoted and cited sources omitted).

¶13 When an easement is created by deed, the court looks to the language of the deed to construe the relative rights of the landowners. *Id.*, ¶26. The purpose of construing a deed is to ascertain the intent of the parties. *Id.* If the language of the deed is ambiguous, the intent of the parties may be determined by extrinsic evidence. *Id.* The acts of the parties may be helpful in determining the parties' intent. "There is no surer way to find out what parties meant, than to see what they have done." *Jorgenson v. Northern States Power Co.*, 60 Wis. 2d 29, 35, 208 N.W.2d 323 (1973) (quoting other sources). The practical construction of an agreement as reflected by the acts of the parties is accorded great weight. *Id.*

¶14 As we have indicated, the trial court held a bench trial to take extrinsic evidence to ascertain the intent of the parties. The court found that the Ciszeks and Blizeks intended for the easement to grant the easement holders the right to construct and maintain a pier. Based on the undisputed facts of record,⁶ we conclude that the trial court's finding was erroneous as a matter of law.

⁶ The Konnekers presented testimony that the easement's best use is for docking a boat on Beyer's Cove for access to Green Lake. There is also evidence, however, that the easement on the Cove has been used for other purposes, such as fishing, ice fishing, canoeing, snowmobiling, and cross-country skiing. The trial court found that the cove was used primarily as a boat access to Green Lake. To the extent that evidence presented by the parties regarding the use of the easement may appear to be in dispute, that dispute ultimately is not material to this case, for the reasons that will become evident later in this opinion.

¶15 Below we provide a summary of the material facts and state the reasoning the court relied on in reaching its finding that the original parties intended for the easement to grant the right to construct and maintain a pier. We then explain why the court's reasoning does not support its finding. Finally, we explain why the only reasonable inference to be drawn from the undisputed evidence is that the original parties to the deed did not intend for the easement to grant the right to construct and maintain a pier.

¶16 **PIER.** It is undisputed that no pier existed on the twenty-foot easement in 1983, when the easement was created, or any time up until 2006, when the Konnekers erected their pier. However, a pier was constructed on Lot 3 on property jointly owned by the Romanos and the Nelsons and adjacent to the easement. Prior holders of the 1983 easement entered into lease agreements with the Romanos and the Nelsons for the purpose of using the pier to moor and launch boats into the lake. The Romanos and the Nelsons never entered into a similar lease agreement with the Konnekers.

¶17 **USE OF EASEMENT.** The easement sits on property abutting Beyer's Cove, which is an access point to Green Lake for boats. Although the parties dispute whether the best use of the easement is for boating from a pier, they agree that the easement may be used for canoeing, fishing, ice fishing, snowmobiling, and cross-country skiing. There is a public boat landing on Beyer's Cove, approximately a quarter mile from the easement.

¶18 **OTHER EASEMENTS.** In December 1983, the Ciszeks conveyed the twenty-foot easement and an empty lot to the Blizeks. The easement sits on Lot 3 CSM 289, which runs seventy-five feet along the shoreline of Beyer's Cove, of which fifty-five feet is not on the easement. As we have discussed, the 1983

deed creating the easement was silent as to its purpose and scope. In August 1984, the Ciszeks conveyed by warranty deed Lot 1 of CSM. 714, along with an easement across all of Lot 3 of CSM 289, “for lake access purposes, including all riparian rights,” to the Romanos’ predecessors in interest. By the end of 1984, the Ciszeks granted access to all or part of Lot 3 to seven parcels of property. The 1984 deeds contain language that the easement holders were specifically granted “an easement across Lot 3” for “access” to the lake, “including all riparian rights.” An affidavit signed by two of the Ciszeks in August 1984 states that “Lot 3 of CSM #289 is intended as an access to Beyer[']s Cove, being a part of Green Lake.” The affidavit is silent as to whether “access” was granted to all the easement holders for all riparian rights. The Romanos and the Nelsons did not grant the holders of the 1983 easement the right to construct and maintain a pier. The Blizeks’ 1983 easement and the other easements conveyed in 1984 were drafted by the same attorney.

¶19 Based on the record and the only reasonable inferences that can be drawn from the record, we conclude that the trial court erred in finding that the original parties intended for the easement holders to have the right to construct and maintain a pier. There is no reasonable view of the evidence that supports the court’s finding in light of the following undisputed facts: (1) no pier was ever constructed on the 1983 easement until the Konnekers built a pier in 2006; (2) prior holders of the 1983 easement used a pier that was built on a portion of the servient estate that was not part of the 1983 easement; and (3) the Ciszeks granted easements over all of Lot 3 in 1984 that expressly included all riparian rights, and the same attorney that drafted the deed creating the 1983 easement also drafted the 1984 deeds. The only reasonable inference that a fact finder could draw from

these facts is that the original parties did not intend to grant easement holders of the 1983 easement the right to construct and maintain a pier.

¶20 The trial court gave considerable weight to the testimony of the Konnekers' two witnesses, Sherwood Zink, a lawyer, and Donald Ahonen, a real estate broker, who claimed to be familiar with the Green Lake area for many years.⁷ Both witnesses testified about the general nature and the common uses of Green Lake in general, and of Beyer's Cove in particular, at the time the easement was created. The witnesses testified that Beyer's Cove was and still is used primarily to access Green Lake by boat and that piers can be found throughout Beyer's Cove and Green Lake in general. The court noted that Zink's and Ahonen's testimony was helpful to understanding the common use of Green Lake and of lake access easements in this area. In the court's own words, this evidence was helpful to provide "some idea of what people are expecting with a lake access easement ... when such a parcel is included in a transaction." Based in part on this evidence, the court found that the primary use of Green Lake, including Beyer's Cove, was for boating and that piers were constructed to moor the boats.

¶21 Assuming that the trial court's factual finding that the primary use of Green Lake for many years was for constructing piers and mooring boats is

⁷ Romano argues that the trial court erred in admitting the testimony of Zink and Ahonen because they lacked personal knowledge of the easement at issue and the intentions of the original parties to the easement. We assume for our purposes here that Romano's argument goes to the weight the trial court should have given the testimony, and not the admissibility of the testimony. However, as we explain in this opinion, we conclude that there is no reasonable view of the testimony provided by Zink and Ahonen from which the court could find that the easement at issue granted the right to construct and maintain a pier. In a separate argument, Romano argues that the trial court erred in admitting a private survey obtained by the Konnekers in 2006. Because we reverse in favor of Romano, we need not address this argument. See *Gross v. Hoffman*, 227 Wis. 296, 299-300, 227 N.W. 663 (1938) (only dispositive issue need be addressed).

supported by the record, this evidence does not support a finding that the original parties to the deed intended to grant the right to construct and maintain a pier to holders of the 1983 easement. The inference the court apparently drew from this testimony is that, because other lake shore property owners and easement holders had constructed piers and used the cove to access Green Lake for boating, it follows that the original parties to the 1983 deed intended for easement holders to have the right to construct and maintain a pier for boating. The court's inference that the Ciszeks and Blizeks must have intended for the easement to be used to construct and maintain a pier for boating because the cove was primarily used for boating in the past is nothing more than speculation. There is no evidence concerning the circumstances surrounding the creation of this easement that would support such an inference. For example, there is no evidence of the discussions that took place between the Ciszeks and Blizeks regarding any particular use. In short, the connection that the trial court draws between how this cove had been used in the past and the intentions of the original parties to the deed is too attenuated to shed any light on what the parties intended by creating the easement.

¶22 The only reasonable inference to be drawn from the undisputed evidence is that the parties did not intend for the 1983 easement to include the right to construct and maintain a pier. As we have indicated, it is undisputed that no pier was constructed on the easement for twenty-three years after the easement was created. In the absence of evidence to the contrary, it is reasonable to assume that prior easement holders would have constructed a pier and used the pier for boating purposes if the original parties intended for the easement to be used in this way. Building a pier on the easement would be consistent with a construction of the deed granting broad riparian rights, including the right to construct and maintain a pier. The opposite is true as well, however; the fact that none of the

prior easement holders constructed a pier is strong evidence that the original parties did not intend to grant the right to construct and maintain a pier.

¶23 The trial court did not address in any detail evidence that a pier had never been constructed on the twenty-foot easement before the Konnekers did so in 2006. The court stated that this evidence related to “the legal right, but that’s not what we’re determining here.” It is not clear what the court meant by this statement. Regardless, in the absence of any evidence to the contrary, the only reasonable view of this evidence is that this evidence supports Romano’s construction of the deed.

¶24 Our conclusion that the trial court erred in reaching its finding is also supported by undisputed evidence that prior easement holders used a pier on a portion of the servient estate that was not part of the 1983 easement. As we have explained, the Romanos and the Nelsons leased their pier on the servient estate, adjacent to the easement, to two of the Konnekers’ predecessors in interest for the purpose of mooring their boats. Although the use of a pier on the servient estate shows that piers were constructed on lake shore lots on this part of Green Lake, it also shows, importantly here, that the easement at issue was not used to construct a pier prior to 2006. The only reasonable inference to be drawn from this evidence is that the original parties did not intend for the easement to be used to construct a pier.

¶25 Finally, evidence regarding the sequence and timing of the easement conveyances by the Ciszeks does not support the trial court’s finding. In 1984, the same attorney who drafted the 1983 deed drafted deeds that conveyed easements specifically granting “all riparian rights.” The trial court suggested that the attorney simply made a mistake in drafting the 1983 deed and that the failure to

grant all riparian rights was a mere oversight. However, even the trial court acknowledged that there is “no direct proof of this.” If, as the trial court seemed to infer, the Ciszeks made a mistake in drafting the Blizeks’ deed, it is reasonable to assume that the attorney could have amended the Blizeks’ deed to include all riparian rights in the easement. However, the Konnekers presented no evidence from which it could be reasonably inferred that the attorney simply made a mistake in failing to grant “all riparian rights.”

CONCLUSION

¶26 In sum, we conclude there was no evidence in the record to support the trial court’s finding that the original parties to the 1983 deed intended to provide the easement holder with “lake access with the right to install and maintain a pier.” We therefore reverse.

By the Court.—Judgment reversed.

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