

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2007-308

APRIL TERM, 2008

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| Robert Kest | } | APPEALED FROM: |
| | } | |
| v. | } | Washington Superior Court |
| | } | |
| Willis C. Manges, Jr. and Darcy Manges | } | DOCKET NO. 380-7-04 Wncv |

Trial Judges: Matthew I. Katz
Mary Miles Teachout

In the above-entitled cause, the Clerk will enter:

Robert Kest appeals from several superior court orders in this property dispute. He argues that the court erred in: (1) determining the location of a deeded right-of-way across his property; and (2) declaring the boundaries of the Manges' property. We affirm.

Kest and Willis Manges own property on "Martin Road," an abandoned town road extending off Muzzy Road in the Town of Berlin. They obtained their property from a common grantor, Robert McGovern. McGovern obtained the property as follows. In 1983, McGovern purchased a ninety-acre parcel with a single-family residence located near the traveled end of Martin Road ("Lear parcel"). In 1986, McGovern purchased a ten-acre parcel with a single family residence located farther down Martin Road ("Vanderbush parcel"). Neither the Lear parcel nor the Vanderbush parcel had frontage on a public road. Access was provided via Martin Road, the lower portion of which was steep and difficult to negotiate at certain times of the year. In 1990, McGovern purchased a third parcel, a 3.7-acre lot with frontage on Muzzy Road ("Wall parcel"). In the early 1990s, McGovern built a route connecting Muzzy Road and Martin Road across the Wall parcel, thereby bypassing the difficult lower portion of Martin Road. Between the early 1990s and July 1998, McGovern and his tenants, including the Manges, used this road as their primary access route. There was also an iron gate at the top of the lower portion of Martin Road which was frequently closed, discouraging use of the lower portion of Martin Road.

In July 1998, McGovern conveyed the Vanderbush parcel to Willis Manges, including the following right-of-way:

There is also conveyed herewith, to the Grantee, his heirs and assigns, an ingress and egress right-of-way, for single family residential purposes only, extending from Muzzy Road, so-called, over, along and of equal width to the existing roadway which now serves the herein-conveyed land and premises and retained land

and premises of this Grantor, Richard McGovern, which right-of-way is sometimes called Martin Road and is the former Town Highway 37, to, and not beyond, the general northeasterly boundary of the parcels herein conveyed. This right-of-way runs between the herein conveyed Parcel 1 and Parcel 2. . . .

In February 1999, McGovern conveyed the Lear and Wall parcels to Kest subject to the right-of-way described above. Between 1999 and 2004, the parties continued to use the bypass road as their primary access route. During this period, the lower portion of Martin Road was not plowed. Kest also maintained a wooden pole across the bottom entrance of the old road, in addition to the existing iron gate at the top of the lower portion of the road.

In July 2004, Kest filed a declaratory judgment action, asking the court to determine the location of the deeded right-of-way. Kest argued that the Manges had the right to use only “Martin Road,” not the bypass road. The Manges filed a counterclaim, seeking to define the boundaries of their property. Both parties moved for summary judgment on the location of the right-of-way, and the court granted judgment in favor of the Manges. The court first found that the 1998 deed appeared to contain an ambiguity. The deed described the right-of-way as “sometimes called Martin Road and is the former Town Highway 37,” which suggested that it followed the original Martin Road and not the bypass road. Yet it also described the right-of-way as being “over, along and of equal width to the existing roadway which now serves the herein-conveyed land and premises,” which suggested that the deed was describing a right-of-way over the bypass.

Given this potential ambiguity, the court examined the undisputed circumstances surrounding the 1998 deed, and concluded that they demonstrated the parties’ intent to include the bypass road as part of the right-of-way. It found the parties’ prior use of the road particularly probative of their intent. As it explained, the residents of the Vanderbush parcel had used the bypass road to access their home for more than five years before the conveyance of this parcel to Manges, and the Manges continued to use this route, without interruption, for another seven years. The court considered the presence of the iron gate additional evidence of the parties’ practice and intent to have the bypass serve as the Manges’ right-of-way. It noted as well that Kest used the lower portion of Martin Road for storage, which indicated that this portion of the road was not the primary route of passage. Based on these and other reasons, the court found it undisputed that the parties’ conduct after the 1998 deed evinced an understanding that the new bypass road was the route to the interior. Given this, the court reasoned, even if the deed language was ambiguous, the probative evidence that would be admitted to resolve that ambiguity all pointed in one direction. Thus, the court concluded, the construction of the deed remained a question of law.

Turning to the language of the deed, the court found that although it was arguably ambiguous, it nevertheless provided the strongest indication of the parties’ intent at the time of their transaction. The deed specifically provided for a right-of-way “along . . . the existing roadway which now serves the herein-conveyed land” As noted above, the bypass road was the existing roadway that served these parcels for six to eight years before the deed was executed. Thus, the court concluded, the interpretation of the deed came down to weighing a plain description of the roadway against the reference to a name, and it concluded that the plain

description was entitled to greater weight. The court reasoned, moreover, that the name was not fully inconsistent with the description. The roadway was, and still is, the “old Martin Road,” the court explained, its route simply had been slightly altered. The court also found the deed language fully supported by subsequent activities of the parties. Finally, the court noted that Kest provided no evidence that would undermine this interpretation. Kest provided only an old plan that did not reflect the bypass road, but Kest admitted visiting the property prior to purchasing it, and thus, he had seen the newer route. Moreover, the court found, even if the materials provided by Kest amounted to more than a mere scintilla of contradictory evidence, which the court believed they did not, they were irrelevant. The issue was not what Kest thought he was getting into in February 1999, but rather, what McGovern had conveyed to Manges the year before. As reflected above, the court concluded that McGovern had conveyed to Manges the right to use the new road. The court therefore granted the Manges’ motion for summary judgment.

Kest appeals from this decision, arguing that the court erred in interpreting the Manges’ deed. According to Kest, the deed unambiguously limits the right-of-way to the old Martin Road, but even assuming that the deed is ambiguous, the extrinsic evidence supported his interpretation of the deed.

We apply well-established principles to this dispute. Our master rule in construing a deed is that “the intent of the parties governs.” Main St. Landing, LLC v. Lake St. Ass’n, Inc., 2006 VT 13, ¶ 7 (mem.) (citation omitted). We look first to the language of the written instrument “because it is assumed to declare the intent of the parties.” Kipp v. Estate of Chips, 169 Vt. 102, 105 (1999). If a writing is unambiguous, “the plain meaning of the language controls without resort to rules of construction or extrinsic evidence.” Main St. Landing, LLC, 2006 VT 13, ¶ 7 (citation omitted). If ambiguity exists, however, the “interpretation of the parties’ intent becomes a question of fact to be determined based on all of the evidence—not only the language of the written instrument, but also evidence concerning its subject matter, its purpose at the time it was executed, and the situations of the parties.” Id. (citations omitted). The court may consider “limited extrinsic evidence of ‘circumstances surrounding the making of the agreement’ in determining whether the writing is ambiguous.” Id. (quotation omitted). This Court reviews the trial court’s finding of ambiguity, as well as its interpretation of an unambiguous contract, de novo. Id.

We agree with the trial court that the deed appeared ambiguous, and thus resort to extrinsic evidence was appropriate. Kipp, 169 Vt. at 107; see also 14 R. Powell et al., Powell on Real Property, § 81A.05[3][e], at 81A-102 (M. Wolf ed. 2000) (explaining that extrinsic evidence may be introduced to explain or clarify an ambiguous written description but may not be used to contradict the written description). As noted above, the deed describes the right-of-way as “extending from Muzzy Road, so-called, over, along and of equal width to the existing roadway which now serves the herein-conveyed land . . . , which right-of-way is sometimes called Martin Road and is the former Town Highway 37, to, and not beyond, the general northeasterly boundary of the parcels herein conveyed.” The reference to “Martin Road” and “former Town Highway 37” could be construed as inconsistent with the phrase “the existing roadway which now serves the herein-conveyed land.” See Trs. of Net Realty Holding Trust v. AVCO Fin. Servs. of Barre, Inc., 144 Vt. 243, 248 (1984) (“A provision in a contract is

ambiguous only to the extent that reasonable people could differ as to its interpretation.” (citation omitted)).

Yet, as the trial court found, the extrinsic evidence offered by the parties unequivocally shows that “the existing roadway” serving the parcels included the bypass route constructed by McGovern in the 1990s. Thus, to implement the parties’ intent, the reference to “Martin Road” and “Town Highway 37,” which follows the deed’s description of “the existing roadway,” must be construed to include the bypass route. See Main St. Landing, LLC, 2006 VT 13, ¶ 7 (In determining intent, we “must consider the deed as a whole and give effect to every part contained therein to arrive at a consistent, harmonious meaning, if possible.”). The lower portion of Martin Road had not been used as a primary access route since the 1990s, and there is no evidence to suggest that the parties intended to resurrect this defunct route through the conveyance in the 1998 deed. Indeed, all of the evidence suggests otherwise. Moreover, as the trial court found, the reference to Martin Road and Town Highway 37 are not wholly inconsistent with the description of the “existing roadway” because the majority of the right-of-way does travel along Martin Road.

Kest’s arguments do not undermine this conclusion. The fact that the lower portion of Martin Road remained traversable does not mean that the parties intended to include this route in the 1998 conveyance, nor does it establish that the bypass road was not considered as part of the “existing roadway” in 1998. We reject Kest’s assertion that the bypass route should be considered a “driveway” and not a “roadway.” The evidence plainly shows that the bypass route was a “roadway.” Finally, the record shows that the superior court considered the deed language in its proper context, and it did not err by referring first to the provision concerning “Martin Road” instead of the provision regarding the “existing roadway.”

We are equally unpersuaded by Kest’s assertion that the extrinsic evidence supports his interpretation of the deed. Kest argues that the use of the bypass route both before and after the 1998 conveyance was immaterial, and that the presence of the iron gate and the wooden pole were similarly of no consequence. We disagree. As the trial court found, the import of this evidence was to show that in referring to the “existing roadway” in the 1998 deed, the parties intended to include the bypass route in the conveyance. Whether McGovern gave prior tenants permission to use this route is immaterial. The critical fact is that the road was used as the primary access route and thus, it was intended to be conveyed by McGovern to the Manges. This holds true for the court’s reference to the old road being used for storage. Kest’s assertions regarding maintenance of the lower portion of the road, and his assertions that there was never a permanent barrier on this road, are immaterial for the same reason. Given the undisputed evidence, a specific reference to the bypass route was unnecessary, and the deed’s “silence” on this point is immaterial. By referring to the “existing roadway,” the parties expressed their intent to include the bypass route as part of the right-of-way. We reject Kest’s assertion that McGovern’s affidavit, proffered by the Manges, was “effectively withdrawn,” and like the trial court, we find Kest’s reference to materials that he was provided prior to purchasing his property irrelevant to the construction of the 1998 deed. The court did not err in concluding that the Manges’ right-of-way included the bypass road.

We turn next to the superior court’s decision, made on the record after a bench trial, which declared the boundaries of the Manges’ property. The court found as follows. The

Manges owned an approximately ten-acre parcel of land on the westerly side of Martin Road. The property was surrounded on the north, east, and south sides by Kest's property. At issue was the boundary of the northeast corner of the Manges' parcel and, specifically, an area referred to as the "disputed triangle" in the northeast corner. The Manges' driveway crossed the disputed triangle.

The court explained that the Manges' lot was created in September 1973 by Kest's predecessor-in-title, Lear, who carved the lot from a 100-acre parcel that Lear owned. The Manges' house was built shortly after the subdivision, and, while there had been intervening owners since 1973, there was no indication that the driveway's location had ever changed. The court also found that the driveway was in a topographically logical location.

Kest purchased his property in 1999, and prior to the purchase, he met with Lear and a realtor, who pointed out the boundaries. Kest understood that the northeast boundary of the Manges' property was not on the road but rather at a marked tree, which indicated to Kest that he owned the disputed triangle. Kest subsequently had a conversation with Lear that confirmed this belief, although it was not exactly clear where he or Lear thought that the eastern boundary hit the road and whether it was clear to them that the Manges' driveway would be cut off by such boundary. No surveys had been prepared prior to Kest's purchase.

All parties agreed that the determination of the boundary turned on the construction of a 1973 deed from Lear to Kyle. That deed describes the parcel in relevant part as follows:

Commencing at a point which is approximately 400 feet northeasterly along the Grantors southwestern boundary with lands now or formerly of one Robert J. Satink from an iron pin set in the ground at the westernmost corner of the Grantors' property, as shown on a "Stadia Survey" of said property by Robert R. Millette, dated October 1966 . . . ; thence continuing N 35° E a distance of 550 feet along said Satink boundary to a point; thence turning an approximate right angle to the right and proceeding southeasterly a distance of 800 feet to a point near the westerly edge of so-called Town Highway #37; thence turning another approximate right angle to the right and proceeding southwesterly in a line roughly parallel to, and equidistant from, the first mentioned line, a distance of 550 feet along the westerly edge contour of said Town Highway; thence turning a final approximate right angle to the right and running northwesterly therefrom in a line parallel to, and equidistant from, the second mentioned line, along the northeastern edge contour of a portion of said Town Highway and beyond, a distance of 800 feet back to the point of beginning, meaning hereby to convey a rectangularly shaped parcel of land estimated to contain at least 10.1 acres of land.

Both Kest and the Manges had surveys conducted, and both surveyors, Mr. Townsend on behalf of Kest, and Mr. Thetford on behalf of the Manges, agreed that the description above was ambiguous. As the court explained, the deed stated that the northerly boundary ran east 800 feet

to a point near the road, which was an impossibility because if one traveled 800 feet from the previous point (which was undisputed), one did not get close to the road. Rather, one would be 211 feet away from the road. Thus, the 800-foot measurement could not be reconciled and it created an ambiguity. The deed was also ambiguous in its description of the easterly boundary. The deed stated that this boundary started near the road, yet the entire description of it was that it ran along the road for a distance of 550 feet along the westerly edge contour of the road. The court found that another ambiguity existed in that the description stated that it intended to convey a rectangular-shaped parcel of land “estimated to contain at least 10.1 acres of land.

Working from this deed, the surveyors reached different conclusions as to what the parties intended to convey. Townsend determined that Kest owned the disputed triangle, and Thetford determined that it was owned by the Manges. The court found that Thetford’s interpretation most accurately represented the parties’ intent as expressed by the language used in the deed. First, the court explained, the easterly boundary was defined by a monument—the westerly edge contour of the road. This controlled over the 800-foot measurement in the deed. The court found this particularly important because the easterly boundary represented the only frontage at the time of the conveyance, and the description of the easterly boundary as being entirely along the road showed the intent that the entire easterly boundary would have road frontage. The court found the word “near” to be a flexible term, and one that would ordinarily not be construed to mean 211 feet away in the surveying context. But, the court reasoned, in construing the parties’ intent, the easterly boundary of the road as defined by a monument was significant. If the intent had been that only part of the easterly boundary was along the roadway, the parties could have made this clear, as they did with the description of the southerly boundary. The court also found Thetford depicted a parcel of “at least 10.1 acres,” as intended by the parties. The court noted that this minimum acreage was consistent with state permitting regulations in effect at the time of the conveyance, and consistent with the reference to the Millette stadia survey.

Unlike the Thetford survey, the court found that Townsend had elevated the importance of the 800-foot distance over the road monument on the easterly side. The court found it clear, however, that the 800-foot distance was not based on a survey but rather, on a distance scaled off from the Millette stadia survey, which in itself was not precise. Therefore, the 800 foot measurement did not purport to be a specific distance, and in fact, it did not reflect what either surveyor did on the parallel distances on the east and south lines. The court also noted that the deed included language such as “roughly” and “approximately” at various important locations indicating that the description was not a specific description as to distances or angles, but rather an unsurveyed subdivison based on the Millette stadia survey. Therefore, the monuments contained in the deed assumed even greater importance, specifically, the road on the easterly side. The court also found that Townsend’s survey depicted a lot of less than ten acres, which was inconsistent with the minimum acreage stated in the deed and which would have required state permitting. The court found that one could assume that the parties intended to comply with state law at the time of the conveyance. Finally, it noted that the Townsend survey resulted in a gap of 211 feet between the northeast corner and the road which was inconsistent with the description in the deed. Thus, for these reasons, the court found that the boundary line between the Manges and Kest properties was that set forth in the Thetford survey. Kest appealed from this decision.

Kest asserts that the court erred in adopting the Thetford survey rather than the Townsend survey. He maintains that the deed's reference to a lot of at least 10.1 acres was of little import, and that Thetford's reliance on state permitting regulations in effect at the time was unjustified. He also argues that Thetford and the court ignored the ambiguous monument description and improperly found that the Manges' northerly boundary extended all the way to the road, despite the source deed's statement that the boundary line terminated "near" the road. In a similar vein, Kest offers various reasons why the Townsend survey was more persuasive. He points to testimony from the original grantor, and asserts that he would have introduced evidence from the original grantee as well, had the court not denied his motion to reopen trial and judgment.

We find no error. As Kest acknowledges, our review of the superior court's decision is highly deferential. The court's determination of a boundary line is a question of fact to be determined on the evidence. Monet v. Merritt, 136 Vt. 261, 265 (1978). Thus, Kest must show that the court's finding is clearly erroneous. See id. (Supreme Court will not disturb the trial court's findings of fact unless they are clearly erroneous, despite inconsistencies or substantial evidence to the contrary). He fails to meet that burden here.

Where a deed is ambiguous, the court applies well-established rules of construction to establish the intent of the parties to the deed. Id. at 264. An inconsistent metes and bounds description yields to a description by monument. Id. at 265; Marshall v. Bruce, 149 Vt. 351, 352 (1988) (monuments referred to in the grant description control over courses and distances because it is more likely that there would be a mistake or misunderstanding about the course or distance than about the boundary or monument). "Accordingly, distances must be lengthened or shortened and courses varied so as to conform to the monument description." Monet, 136 Vt. at 265. In this case, the deed referred to a monument and that reference was not ambiguous, as Kest suggests. The deed plainly states that the boundary line runs "a distance of approximately 500 feet along the westerly edge contour" of the town highway. Thus, the monument controlled over the 800 foot measurement. When one follows the contour of the road, as called for in the deed, the easterly and westerly property lines can be construed as "roughly parallel." Moreover, the court did not err in considering the deed's reference to a lot of "at least 10.1 acres," nor was it unreasonable to consider state permitting requirements in effect at the time of the conveyance. Finally, the court was not obligated to credit Kest's testimony regarding statements allegedly made by the original grantor, and in any event, such statements would not serve to show that the court's findings were clearly erroneous. See Bull v. Pinkham Eng'g Assocs., 170 Vt. 450, 454 (2000) (party alleging error must show that there is no credible evidence to support court's findings).

Kest essentially asks this Court to reweigh the evidence and reach a conclusion opposite to that of the trial court. This we will not do. The trial court was faced with two competing surveys, and it found the survey offered by the Manges most persuasive. It provided a thorough explanation for its decision, and its findings are supported by credible evidence in the record. It is not for this Court to reassess the persuasiveness of the evidence or the credibility of witnesses on appeal. See Mullin v. Phelps, 162 Vt. 250, 261 (1994) (role of Supreme Court in reviewing findings of fact is not to reweigh evidence or to make findings of credibility de novo). The court did not commit clear error in determining the boundaries of the Manges' property.

Finally, the trial court acted well within its discretion in denying Kest's motion to reopen the judgment and the evidence. As the court explained in its entry order, Kest offered no reason why the evidence he sought to introduce could not have been proffered at trial. See Stalb v. Stalb, 168 Vt. 235, 248 (1998) (trial court did not abuse discretion in denying motion to reopen evidence or amend judgment where no showing made as to why proffered evidence could not have been presented during trial).

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Denise R. Johnson, Associate Justice

Brian L. Burgess, Associate Justice