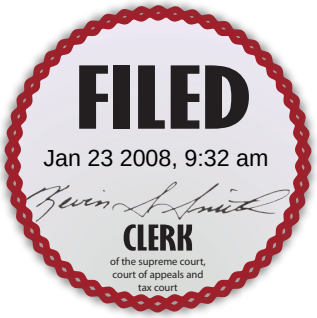

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IN THE
COURT OF APPEALS OF INDIANA

PIKE LUMBER CO., INC.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 55A01-0704-CV-176
	)	
FRANCES E. BURNETT, BRUCE L. BURNETT, TRUSTEE HARRY IVAN BURNETT CREDIT TRUST,	)	
	)	
Appellees-Plaintiffs.	)	

APPEAL FROM THE MORGAN SUPERIOR COURT
The Honorable G. Thomas Gray, Judge
Cause No. 55D01-0409-PL-557

January 23, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Pike Lumber Co., Inc., ("Pike Lumber") appeals the trial court's judgment in favor of Frances E. Burnett and Bruce L. Burnett, Trustee of the Harry Ivan Burnett Credit Trust (collectively, the "Burnetts"). Pike Lumber raises three issues, which we consolidate and restate as:

I. Whether the trial court's conclusion that the Burnetts have an easement over Pike Lumber's property is clearly erroneous; and

II. Whether the trial court's conclusion that part of the road leading to the Burnetts' property is a public roadway is clearly erroneous.

We affirm.

The relevant facts follow. The Burnetts own several parcels of property located in Morgan County, Indiana. The Burnett family has owned much of the property since 1913. The Burnetts' property is accessed by a road that extends in a northerly direction from Pocket Hollow Road across property owned by Deborah Mullendore, Donald Mullendore, Barry Ferguson, Tessa Ferguson, and Derek Tanber (collectively, the "Mullendores") and Pike Lumber. This road is divided into two sections. The first section extends from Pocket Hollow Road north approximately two-tenths of a mile ("Public Road"). The second section extends north from the Public Road to the Burnetts' property ("Dedicated Roadway").

Frances Burnett and her husband used the Public Road and the Dedicated Roadway approximately four times a year beginning in the 1930's to access their property. Pike Lumber acquired its property in 1988 from William and Frances Mullendore. Pike Lumber installed a gate at the entrance to its property in 2002 at least in part to prevent the Burnetts from using the Dedicated Roadway.

After Pike Lumber installed its gate, the Burnetts filed a complaint against Pike Lumber and the Mullendores seeking to quiet title to the Dedicated Roadway and the Public Road, to obtain an injunction against the defendants to prevent them from blocking the Dedicated Roadway and the Public Road, and to obtain damages.[1] At a bench trial, the Burnetts presented evidence that the Mullendores had gated the Public Road in the past but did not object to the Burnetts opening the gates and using the Public Road or Dedicated Roadway or restrict the Burnetts' access in any manner. The Burnetts also entered into evidence two abstracts of title regarding their property, which included affidavits executed in 1934. The affidavits indicated that access was obtained to the Burnetts' properties by way of the Public Road and the Dedicated Roadway since at least 1884. Pike Lumber and the other defendants did not object to the admission of these exhibits.

Following the bench trial, the trial court entered sua sponte findings of fact and conclusions thereon. The trial court found that the Burnetts "have shown by a preponderance of the evidence that there exists a public road . . . leading from Pocket Hollow Road in a generally northern direction and connecting with the Dedicated Roadway." Appellant's Appendix at 60. Further, the trial court found that "[t]he Dedicated Roadway is an easement for the benefit of the Burnetts[‘] parcels, which includes all of that real estate formally a part of the 36.00 acre and 72.91 acre parcels.

[1] The Mullendores do not appeal the trial court's judgment.

The easement is a burden on the real estate owned by Pike, or any other party, over which the easement extends." Id. at 58.

Pike Lumber appeals the trial court's sua sponte findings of fact and conclusions thereon. Sua sponte findings control only as to the issues they cover, and a general judgment will control as to the issues upon which there are no findings. Yanoff v. Muncy, 688 N.E.2d 1259, 1262 (Ind. 1997). We will affirm a general judgment entered with findings if it can be sustained on any legal theory supported by the evidence. Id. When a court has made special findings of fact, we review sufficiency of the evidence using a two-step process. Id. First, we must determine whether the evidence supports the trial court's findings of fact. Id. Second, we must determine whether those findings of fact support the trial court's conclusions of law. Id.

Findings will only be set aside if they are clearly erroneous. Id. "Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference." Id. A judgment is clearly erroneous if it applies the wrong legal standard to properly found facts. Id. In order to determine that a finding or conclusion is clearly erroneous, an appellate court's review of the evidence must leave it with the firm conviction that a mistake has been made. Id.

I.

The first issue is whether the trial court's conclusion that the Burnetts have an easement over Pike Lumber's property is clearly erroneous. The trial court concluded that "[t]he Dedicated Roadway is an easement for the benefit of the Burnetts[‘] parcels, which includes all of that real estate formally a part of the 36.00 acre and 72.91 acre

parcels. The easement is a burden on the real estate owned by Pike, or any other party, over which the easement extends." Appellant's Appendix at 58. This finding was based upon language found in the legal description of one of the Burnetts' parcels as follows:

> . . . containing 72.91 acres, except so much of the above described land as may be included in the following reserved for a roadway:
>
> > Beginning at a point 12.67 chains West of the Southeast corner of the Northeast quarter of the Northwest quarter of Section 36, Township 11 North, Range 2 West, thence North 13 degrees West 11.02½ chains, thence North 3 degrees East 3.82 chains, thence North 38 degrees East 4.11 chains, thence North 57¼ degrees West 2.62 chains, thence North 6 degrees East 3.52 chains, thence North 7 degrees West 2.55 chains, thence North 21 degrees East 1.22 chains, thence North 54½ degrees East 3.24 chains, thence North 23½ degrees West 1.37 chains, thence North 25½ degrees West 8.00 chains, thence North 44½ degrees East .37 of a chain, thence South 47 degrees East 4.44 chains, thence South 44 degrees East 6.00 chains, said road to be 20 feet wide.

Exhibit 8 at 30-31. The abstract of title for the 72.91 acre parcel also contained two affidavits that indicated the Dedicated Roadway and Public Road were used as a public road from at least 1884 until 1934. The trial court entered the following conclusions regarding the Dedicated Roadway:

> 49. The grants of the Dedicated Roadway contained in the Burnetts' chains of title and deeds for the 72.91 acre parcel and 36.00 acre parcel are ambiguous. The language of the grants could either intend the conveyances to exclude the described roadway from the grant, or intend to grant the roadway as an easement. Where the language in a deed is ambiguous, the Court must determine the parties' intent by reference to the instrument, the circumstances attending and leading up to its execution and the situation of the parties at that time. Kuhn v. Kruger, 226 N.E.2d 902, 902 (Ind. App. 1967).

> 50. As set forth above, Dedicated Roadway is not contained wholly within the 72.91 acres or the 36.00 acres and extends well south of both parcels into real estate now owned by Pike. The evidence clearly establishes that the Dedicated Roadway links with the Public Road to provide access from the Burnett real estate to Pocket Hollow Road.
>
> 51. The Dedicated Roadway was intended to be an easement for the benefit of the 72.91 acre parcel and the 36.00 acre parcel. The language of the grant in this instance is very similar to the language of the grant in Kuhn, which was held to be an easement. The Kuhn court stated, "in general, an exception which retains or excludes from the grant, a previously granted right-of-way over described property retains or excludes merely an easement and not the fee to the realty used for the right-of-way." Kuhn[, 226 N.E.2d] at 904.
>
> 52. The Dedicated Roadway is an easement for the benefit of the Burnetts['] parcels, which includes all of that real estate formally a part of the 36.00 acre and 72.91 acre parcels. The easement is a burden on the real estate owned by Pike, or any other party, over which the easement extends.

Appellant's Appendix at 57-58.

On appeal, Pike Lumber argues that the reservation "does not recite for whom or whose benefit this roadway was created" and the "reservation out of a grant would be presumed to be for the benefit of or at least still be held by the grantor, since it was not conveyed."[2] Appellant's Brief at 19. "The object of deed interpretation is to identify and implement the intent of the parties to the transaction as expressed in the plain language of the deed." Kopetsky v. Crews, 838 N.E.2d 1118, 1124 (Ind. Ct. App. 2005). Whenever possible, we apply the terms of the deed according to their clear and ordinary meaning.

[2] Pike Lumber also seems to argue that the Dedicated Roadway was not a public road. However, the trial court determined that the Burnetts had an easement to the Dedicated Roadway, not that the Dedicated Roadway was a public road. Consequently, we do not address this argument.

Id. "We presume that the parties intended for every part of a deed to have some meaning, and we favor a construction that reconciles and harmonizes the entire deed." Id. Courts may resort to extrinsic evidence to ascertain the intent of the parties only where the language of the deed is ambiguous. Id. A deed is ambiguous if it is susceptible to more than one interpretation and reasonably intelligent persons would honestly differ as to its meaning. Id.

We first address Pike Lumber's argument that a "reservation out of a grant would be presumed to be for the benefit of or at least still be held by the grantor, since it was not conveyed." Appellant's Brief at 19. The language in the legal description seems to create a reservation for a roadway. In general, a "reservation" is "[a] clause in a deed or other instrument of conveyance by which the grantor creates, and reserves to himself, some right, interest, or profit in the estate granted, which had no previous existence as such, but is first called into being by the instrument reserving it; such as rent, or an easement." Nelson v. Parker, 687 N.E.2d 187, 188 (Ind. 1997) (quoting BLACK'S LAW DICTIONARY 1307 (6th ed. 1990)). "A reservation carves out a new interest in the property for the grantor, for example a life estate or an easement." Id. at 188 n.1. Here, the language in the deed could not have been a reservation for a roadway because the Dedicated Roadway was not part of the grantor's 72.91-acre parcel. A grantor cannot reserve an interest in property that does not belong to him or her. Consequently, the trial court correctly determined that the language in the legal description was ambiguous. The

trial court determined that the intent of the legal description was to transfer an easement for the Dedicated Roadway rather than create a reservation for the grantor. Given the language in the legal description, the location of the roadway described in the legal description, and the extrinsic evidence, we cannot say that the trial court's conclusion is clearly erroneous.[3] See, e.g., Nelson, 687 N.E.2d at 189 ("Inadvertent use of the word 'reservation,' or other clumsy effort to grant an interest in land should not frustrate an otherwise clear intent based on mindless adherence to a formal and outdated rule.").

We next address Pike Lumber's argument that the language cannot create an easement because the language "does not recite for whom or whose benefit this roadway was created." Appellant's Brief at 19. "Although Indiana law prefers that an instrument creating an express easement describe the dominant and servient tenements with reasonable certainty, an easement may be valid even though it does not use the particular terms 'dominant' and 'servient' in referring to the relevant estates." Kopetsky, 838 N.E.2d at 1125 (citing Larry Mayes Sales v. HSI, LLC, 744 N.E.2d 970, 973 (Ind. Ct. App. 2001)). The purpose of such a description in a deed "is not to identify the land but to furnish the means of identification." Id. (quoting Tazian v. Cline, 686 N.E.2d 95, 100 (Ind. 1997)). "It stands to reason, then, that if we can identify the dominant tenement with reasonable certainty based upon the language of the deed, we are not required to find

[3] Pike Lumber seems to challenge the trial court's reliance upon the affidavits found in the abstracts of title concerning the use of the Dedicated Roadway and Public Road to access the Burnetts' parcels since at least 1884. However, Pike Lumber did not object at trial to the admission of these abstracts of title or the affidavits. It is the general rule that a party must object to evidence at the time it is offered into the record. Everage v. Northern Indiana Public Service Co., 825 N.E.2d 941, 948 (Ind. Ct.

a direct description of that tenement in the conveyance." Id. at 1126. Here, based upon the legal description of the Dedicated Roadway, which corresponds to the physical location of the Dedicated Roadway, it is possible to identify the dominant and servient tenements. Consequently, the trial court's conclusion that the Burnetts have an easement over the Dedicated Roadway is not clearly erroneous. See, e.g., id. at 1126-1127 (concluding that the description contained in the deed, though not artfully drafted, provided a means of identifying the dominant tenement benefited by the easement created).

II.

The next issue is whether the trial court's conclusion that part of the road leading to the Burnetts' property is a public roadway is clearly erroneous. The trial court concluded that the Burnetts "have shown by a preponderance of the evidence that there exists a public road . . . leading from Pocket Hollow Road in a generally northern direction and connecting with the Dedicated Roadway." Appellant's Appendix at 60. On appeal, Pike Lumber argues that, even if the road was public, it was abandoned because the public did not use the Public Road after 1934. Pike Lumber also argues that the Burnetts used the road only with the Mullendores' permission.

Before a 1988 amendment, Ind. Code § 8-20-1-15 provided, in pertinent part, that "[a]ll county highways heretofore laid out according to law, or used as such for twenty (20) years or more, shall continue as originally located and as of their original width,

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App. 2005). A party that fails to make a timely objection or fails to file a timely motion to strike waives

respectively, until changed according to law." Chaja v. Smith, 755 N.E.2d 611, 614 (Ind. Ct. App. 2001). "Despite the fact that the statute was amended in 1988 to remove the language in the previous sentence, we may still hold that the public accepted a street by usage if the street was used as a public street for twenty years prior to 1988." Id. "If the street became a public street before 1988, then the public has a vested right in that street, and the vested right was not eliminated by the amendment of the statute." Id. Therefore, we must decide whether the public used the Public Road for twenty years prior to 1988. The Burnetts presented evidence that the Public Road and Dedicated Road had been used to gain access to their properties from Pocket Hollow Road since at least 1884. The trial court's finding that a public road was established connecting Pocket Hollow Road and the Dedicated Road is not clearly erroneous. See, e.g., id. at 614-615 (holding that twenty-seven years of public use prior to 1988 was sufficient to show that the public acquired a vested right in the street).

Pike Lumber also asserts that the Public Road was not used continuously or by the public after 1934. "The public's right to use a public highway established by public use may be lost by abandonment." AmRhein v. Eden, 779 N.E.2d 1197, 1207 (Ind. Ct. App. 2002) (citing Fenley Farms, Inc. v. Clark, 404 N.E.2d 1164, 1167 (Ind. Ct. App. 1980)). Public use is the sole test in determining whether a highway has been abandoned. Id.

> The public use necessary to prevent abandonment is merely use by those who have occasion to use the highway. The fact that a highway is rarely if ever used by persons other than landowners makes it nonetheless a public road. If the road is open only on one end, as here, and if it goes only to one

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the right on appeal to assert the admission of evidence as erroneous. Id.

> property, it is still a public road. A road may be a public highway although it is of no great length and terminates on private property.

Id. (quoting Fenley Farms, 404 N.E.2d at 1167).

Here, the Burnetts presented evidence that Frances Burnett and her husband used the Public Road and the Dedicated Roadway approximately four times a year beginning in 1938 to access their property. They continued to use the Public Road and Dedicated Roadway until Pike Lumber gated the Dedicated Roadway in approximately 2002. This evidence was sufficient to demonstrate that the Public Road had not been abandoned.

Finally, Pike Lumber argues that the Burnetts used the Public Road only with the Mullendores' permission.[4] We addressed this same issue in Fenley Farms and noted:

> Under the statute but one question is presented, and that is, Has the road been used as a highway for twenty years? . . . If it has, the statute fixes its status as a highway, and it is wholly immaterial whether the use has been with the consent, or over the objection of the landowner . . . It is not a question of a common-law dedication, or a way strictly by prescription, though analogous to the latter. . . . It is a statutory highway, by twenty years' user, irrespective of all other methods of creating highways. It is a highway created by statute.

404 N.E.2d at 1168-1169 (quoting Pitser v. McCreery, 172 Ind. 663, 669-672, 88 N.E. 303, 306 (1909), reh'g denied). Thus, once a public road is created, such permission is irrelevant.[5]

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[4] Pike Lumber also seems to argue that the roadway was not accepted or maintained by Morgan County as a public road. We held in Fenley Farms that "[t]he fact that public authorities have not worked or improved the highway does not change its status." 404 N.E.2d at 1170. Moreover, the fact that Morgan County had not recognized the Public Road does not change its status under the former Ind. Code § 8-20-1-15.

[5] Pike Lumber also argues that the Burnetts failed to prove the location of the Public Road. We addressed this same argument in Fenley Farms. There, we noted that Ind. Code § 8-20-1-15 provided that

For the foregoing reasons, we affirm the trial court's judgment in favor of the Burnetts and against Pike Lumber.

Affirmed.

BARNES, J. and VAIDIK, J. concur

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the highways "shall continue as originally located and as of their original width." 404 N.E.2d at 1170. In Fenley Farms, "there was testimony as to direct visual evidence of the original location, there was testimony that the original road was wide enough for wagons and tractors, and the trial court judge, after hearing the testimony and considering the stipulations and exhibits, viewed the premises." Id. at 1171. That evidence was sufficient to demonstrate the road's original location and width. Id. Likewise, here, there was direct visual evidence of the original location and width of the Public Road, several witnesses testified regarding the location of the Public Road, and maps and aerial photographs were admitted. The Burnetts presented sufficient evidence of the Public Road's original location and width.