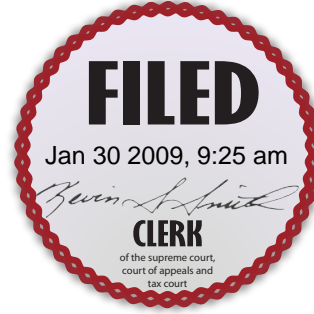


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

ARMAND MURAT,)
)
Appellant-Plaintiff,)
)
vs.)
)
SOUTH BEND LODGE NO. 235 OF THE)
BENEVOLENT AND PROTECTIVE ORDER OF)
ELKS OF THE UNITED STATES OF)
AMERICA and BURKHART)
ADVERTISING, INC.,)
)
Appellees-Defendants.)

No. 71A04-0712-CV-729

APPEAL FROM THE ST. JOSEPH CIRCUIT COURT
The Honorable Michael G. Gotsch, Judge
Cause No. 71C01-0705-PL-119

January 30, 2009

MEMORANDUM ON REHEARING – NOT FOR PUBLICATION

MAY, Judge

Armand Murat has petitioned for rehearing of our decision in *Murat v. South Bend Lodge No. 235 of the Benevolent and Protective Order of Elks of the United States of America*, 893 N.E.2d 753 (Ind. Ct. App. 2008). We grant his petition solely to explain why we reject his arguments on rehearing and we reaffirm our original decision in all aspects.

FACTS AND PROCEDURAL HISTORY

On March 27, 1964, Clarence and Martha Dockery conveyed to the Elks a strip of land twenty-three feet wide. The Dockerys retained an easement, but the deed did not specify its width. On the same day, the Dockerys conveyed the easement and the adjoining land to their daughter and son-in-law, Dorothy and Armand Murat. The Dockery-Murat deed specified the easement was twenty-three feet wide. Murat paved a nineteen-foot strip within the easement; the remaining four feet is a grassy area containing bushes.

The Elks contracted with Burkhart Advertising to place a billboard within the twenty-three-foot strip. They planned to place it in the middle of the paved portion. Murat initially obtained a temporary restraining order, but the trial court later dissolved it and declined to award a permanent injunction. During the course of the proceedings, the Elks and Burkhart decided to place the billboard within the grassy area. Murat filed a motion to correct error, apparently to address this change of events.¹ On October 19, 2007, the trial court held a hearing on the motion, and Murat testified concerning his use

¹ The record does not contain Murat's motion to correct error or the related memoranda.

of the grassy strip over the years. The trial court denied the motion to correct error, and Murat appealed.

On appeal, Murat argued the two deeds should have been construed together pursuant to the contemporaneous document doctrine to fix the width of the easement at twenty-three feet. We discussed at length *Estate of Spry v. Greg & Ken, Inc.*, 749 N.E.2d 1269 (Ind. Ct. App. 2001), *reh'g denied*, a decision that declined to apply the contemporaneous document doctrine where the parties to the documents were not the same. We concluded:

Application of the contemporaneous document doctrine is determined on a case-by-case basis, [*GEICO Ins. v. Rowell*, 705 N.E.2d 476, 482 (Ind. Ct. App. 1999)], and Murat has not explained why the Elks should be bound by the Dockery-Murat deed. We believe the doctrine should be applied cautiously when the documents involve different parties. *See Estate of Spry*, 749 N.E.2d at 1274. The Dockery-Elks deed does not reserve an easement of a specific width; yet, when the Dockerys conveyed their easement to the Murats, they purported to set out a specific width. The Dockery-Elks deed does not reference the Dockery-Murat deed, and Murat points to no evidence that the Elks understood the transaction to involve an easement of a specific width. *See* 17A C.J.S. Contracts § 315 (1999) (“[S]eparate written agreements between different parties which serve different purposes and which do not refer to each other, are not intended to be interdependent and do not combine to form a unitary contract.”).

Furthermore, Murat does not explain why the deeds should be considered a single transaction. The Elks wanted access to Hickory Road and agreed to provide a sewage connection in exchange; it was of no concern to the Elks that the Dockerys chose to immediately convey their interest in the easement to the Murats. Murat has not shown why the contemporaneous document doctrine should apply, and the trial court did not err by declining to find controlling the width set out in the Dockery-Murat deed.

Murat, 893 N.E.2d at 757-58.

DISCUSSION

In his petition for rehearing, Murat attempts to explain his failure to explain why the deeds were part of the same transaction:

Burkhart's argument on appeal with respect to the contemporaneous document doctrine was not based on the proposition that the two deeds were not part of the same transaction. Burkhart instead argued that in the cases involving the contemporaneous document doctrine in Indiana, the separate documents involved only identical parties Because the evidence was undisputed that the two documents were part of the same transaction and were executed at the same time and related to the same 23-foot strip of land conveyed to the Elks Lodge over which the Dockerys retained an easement which was then conveyed to Murat, Murat focused the reply brief only on the issue raised by Burkhart, i.e., whether the contemporaneous document doctrine applied when the parties were not identical.

(Pet. for Reh'g at 5.)

We disagree. On appeal, it was Murat who framed the issue as whether the deeds were part of the same transaction:

The trial court erroneously considered the two warranty deeds . . . as separate transactions. The uncontroverted evidence establishes that the warranty deeds were part of a *single transaction* occurring on the same date, notarized by the same person, and involving the same strip of land. Under the contemporaneous document doctrine, the two warranty deeds should have been considered a *single transaction*. When properly considered as a *single transaction*, the two deeds establish the width of the easement as 23 feet thereby giving Murat the benefit of using the entire 23 foot easement for ingress and egress.

(Appellant's Br. at 6-7) (emphases added). Burkhart disagreed: "The two deeds do not relate to the same transaction These are two distinct transactions that involve different parties and different subject matter." (Appellee's Br. at 9.)

In support of his argument on appeal, Murat cited his testimony from a June 4, 2007, hearing on the defendants' motion to dissolve the temporary restraining order:

Q. . . . There is another document that we stipulated into evidence, and . . . that is a deed from the Dockerys to the Elks Lodge. . . . Is that part of the same transaction?

A. Yes.

Q. Can you tell the Court what that transaction involved?

A. Well, what that involved was when we were building those buildings the City of South Bend had no sewer on Hickory Road. So we needed a sewer access to build the buildings. So we gave or sold that property where the road is to the Elks for one dollar so they let us hook onto their sewer in the front which goes out to McKinley. So that's how this all come about to start with.

(Tr. at 45-46.) This testimony explains how, from Murat's point of view, the deeds were part of one transaction; however, nothing in this testimony revealed the Elks were aware of the Dockery-Murat deed or intended for the easement to be twenty-three feet wide, as stated in that deed.

In his petition for rehearing, Murat directs us to his testimony at the hearing on his motion to correct error to support his argument that the documents were part of the same transaction:

Q. Was there more than just one deed in that transaction? Let me put it to you another way. We had two exhibits in this case earlier, one is the deed from Clarence and Martha, was it?

A. Yes.

Q. Dockery to the Elks Lodge.

A. Yes.

Q. And the deed from the Dockerys to you and your late wife.

A. Yes.

Q. Were those deeds both signed at the same time?

A. Yes.

Q. Was there one closing, if you will, for that transaction?

A. Yes.

Q. Did you participate at that closing?

- A. Yes.
- Q. Were you present there?
- A. Yes.
- Q. Were there representatives of the Elks Lodge there?
- A. I think there was.
- Q. Were the Dockerys there?
- A. Yes.
- Q. Without telling me anything that was said, was there discussion concerning the easement itself?
- A. I can't really recall on way back at that time.
- * * * * *
- Q. Were there any discussions leading up to that?
- A. No.
- Q. About the easement.
- A. Well, yes, there was.
- Q. And did you participate in those discussions?
- A. Some.
- Q. Who was your counsel at that time?
- A. Robert Zimmerman.
- Q. And did you communicate with him about this matter?
- A. Yes. He was also the Dockerys' attorney.
- Q. All right. From all of this did you come to an understanding as to what the nature of the easement was?
- A. Yes.
- * * * * *
- Q. And is it from that you then conclude that the intention was that your easement was to be 23 feet wide for the full length of the parcel of land?
- A. Yes.

(*Id.* at 209-11.) Murat did not cite this testimony on appeal. *See* Ind. Appellate Rule 46(A)(8)(a) (“Each contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on”); *Shepherd v. Truex*, 819 N.E.2d 457, 463 (Ind. Ct. App. 2004) (purpose of rule is to relieve appellate court of the burden of searching the record).

Even if we were to now consider this testimony, we would not change our opinion. This testimony was elicited at the hearing on the motion to correct error and was not

before the trial court when it ruled on the merits. Although changed circumstances may have warranted hearing additional evidence concerning Murat's use of the grassy strip, testimony concerning whether the 1964 deeds were part of one transaction could have been elicited at the earlier hearings. The trial court was not required to consider such evidence. *See LTL Truck Serv., LLC v. Safeguard, Inc.*, 817 N.E.2d 664, 670 (Ind. Ct. App. 2004) (trial court did not err by denying motion to correct error where appellant sought to introduce additional evidence that was not newly discovered).

Finally, we note Murat's testimony was equivocal. He testified the deeds were part of one transaction, but he was not certain whether anyone from the Elks was involved. He initially testified he could not remember whether there were conversations or negotiations about the easement, but then stated his conclusion that the intent was for a fixed width of twenty-three feet.

For the foregoing reasons, we reaffirm our previous decision.

MATHIAS, J., and VAIDIK, J., concur.