

STATE OF MICHIGAN
COURT OF APPEALS

JOE B. HUMPHRIES,
Plaintiff-Appellant,

UNPUBLISHED
September 25, 2003

v

No. 240935
241393
St. Clair Circuit Court
LC No. 00-003568-CZ

DONNA MCCULLUM, CEIL MCCULLUM and
JOSEPH and WANDA JOCK

Defendant-Appellee.

Before: Owens, P.J. and Griffin and Schuette, JJ.

PER CURIAM.

In this real property case, plaintiff purchased a landlocked piece of property and filed suit in the St. Clair Circuit Court in an attempt to have the court declare an easement by necessity so that he could access the property via the property of three of his neighbors (defendants). The trial court granted defendants' motion for summary disposition on March 5, 2002. Plaintiff now appeals this order by leave granted (docket number 241393). This appeal has been consolidated with plaintiff's appeal as of right from the trial court's order for costs and attorneys fees on April 23, 2002 (docket number 240935). We affirm.

I. FACTS

In October 2000, plaintiff purchased 58 acres of property on a land contract in Wales Township. The piece of property in dispute is currently landlocked as the result of a bridge washout over thirty years ago and road construction over fifteen years ago, both of which occurred before plaintiff purchased the property.

Defendants and plaintiff agree that the property in question was historically accessed via Castor Road (from the south) and Kitchen Road (from the north). Approximately 34 years ago, the bridge on Castor Road (crossing over the south branch of Pine River) that allowed for southerly access to the property washed out. In response, St. Clair county road commission barricaded Castor Road just south of the Pine River where the washout had occurred so that there was no longer vehicular access to Castor Road north of the river. This left the property accessible only from Kitchen Road to the north.

In 1985, the construction of Interstate-69 (I-69) eliminated access to the property from the north. In addition, in 1985, an additional portion of Castor Road was closed at the expressway right-of-way lines. On August 6, 1985, the board of county commissioners of St. Clair county passed resolution no. 85-29, formally abandoning the portion of Castor Road between the I-69 right-of-way and the south bank of the south branch of the Pine River (where the bridge had washed away). The board noted that the property owners had been compensated for their loss of access. This parcel of land has now been landlocked since 1985.

In October 2000, plaintiff purchased this property for \$26,500. Before becoming landlocked, the property sold for \$92,600. Plaintiff now wishes to build a house on the property and is willing to build and maintain a bridge where the former bridge washed out in the 1960s across the Pine River. In December 2000, plaintiff filed a civil suit against three of his neighbors (defendants). Plaintiff asserts that access is required for approximately 300 feet along the vacated portion of Castor Road through defendants' property. Plaintiff claims that defendants must allow him to build a road over their property where Castor Road was formerly located and that he has an "easement by necessity." Plaintiff asserts that the portion of Castor Road south of the barricade (at the south edge of the river) was never abandoned and remains a public road right of way and Castor Road was only abandoned north between I-69 and the barricade.

Plaintiff presented a two-count complaint. First he asserted that an easement by necessity was created along the former Castor Road after vacation of the public right of way. Next, he sought a declaration that a parcel on a vacated road has an easement over the portion of the road that is vacated in order to gain access to the property.

Litigation was stayed in order for plaintiff to pursue a claim under the private roads act, MCL 229.1 *et seq.*,¹ before a township jury. On July 12, 2001, the jury denied plaintiff's petition, finding that the road plaintiff demanded was unnecessary. Circuit court litigation resumed and on March 5, 2002, the court granted defendants' motion for summary disposition. The court noted that an easement by necessity can only be created by express reservation where one parcel is split such that one of the resulting parcels becomes landlocked. The court concluded that there was no factual basis for an easement by necessity.

Further, the court determined that plaintiff desired to construct his road over property owned by defendants and that plaintiff's rights must be balanced against the rights of defendants. The trial court, citing *Tolksdorf v Griffith*, 464 Mich 1; 626 NW2d 163 (2001), concluded that there was no basis in equity to allow plaintiff an easement across the private property of defendants. The trial court then awarded sanctions against plaintiff for pursuing a frivolous action against defendants pursuant to MCR 2.2625(A) and MCL 600.2591. The trial court found that there was no privity of estate and thus no easement by necessity. It also found that "you can't just take somebody's private land and give it to somebody else." It further found that plaintiff's attempt to apply the subdivision control act (MCL 560.101, *et. seq.*) was devoid of legal merit.

¹ Our Supreme Court has since declared the private roads act unconstitutional in *Tolksdorf v Griffith*, 464 Mich 1; 626 NW2d 163 (2001), this will be discussed within this opinion.

II. ANALYSIS

A. Motion for Summary Disposition

Plaintiff first argues that the trial court erred in granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(8)² and (C)(10). We disagree.

On appeal, a trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). This Court must review the record in the same manner as must the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998). Review is limited to the evidence, which had been presented to the trial court at the time the motion was decided. *Peña v Ingham County Road Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003).

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The purpose of summary disposition is to avoid extensive discovery and an evidentiary hearing when a case can be quickly resolved on an issue of law. *American Community Mutual Ins Co v Comm'r of Ins*, 195 Mich App 351, 362; 491 NW2d 597 (1992).

Plaintiff contends that the trial court erred in applying *Tolksdorf, supra*, to the facts of this case because this case sought an equitable remedy and was not brought under the private roads act, MCL 229.1 *et seq*. Plaintiff asserts that the trial court erred in reaching the conclusion that plaintiff was not entitled to an easement by necessity.

An easement by necessity may be implied by law where an owner of land splits his property so that one of the resulting parcels is landlocked except for access across the other parcel. *Schmidt v Eger*, 94 Mich App 728, 732, 289 NW2d 851 (1980). An easement by necessity may arise either by grant, where the grantor created a landlocked parcel in his grantee, or it may arise by reservation, where the grantor splits his property and leaves himself landlocked. *Goodman v Brenner*, 219 Mich 55, 59, 188 NW 377 (1922).

The analytical basis for enforcing a common-law easement by necessity is the assumption that the parties who have originally created the landlocked parcel intended that the owner of the landlocked parcel have access to the land over the other's parcel. Accordingly, with a common-law easement by necessity, the court is essentially enforcing the original intent of the parties. *Schmidt, supra* at 733. In this case, plaintiff was not the one who split the land and rendered it landlocked. In fact, the owners at the time the land was rendered inaccessible were compensated for their loss, and the property dramatically decreased in value because of its landlocked status. Property law does not support the creation of an easement by necessity in this situation.

² Although the March 5, 2002, motion states that it was granted on the basis of MCR 2.116(C)(7) and (C)(10), it appears that the trial court actually relied on MCR 2.116 (C)(8) an (C)(10).

In addition, plaintiff's land was formerly accessed by two routes, a north route and a south route. The south route has not been able to be used for over thirty years due to the bridge washout. The south route is the route by which plaintiff now seeks to access his property, by using the property of three of his neighbors. However, the north route was the route most recently extinguished by the construction of I-69 in 1985. "A way by necessity is limited by the necessity creating it, and ceases when the grantee obtains lands over which he may pass to the dominant estate." *Morgan v Meuth*, 60 Mich 238; 27 NW 509 (1886). Thus, the southerly route was not historically a "way by necessity."

In *Tolksdorf*, owners of landlocked property sued adjoining landowners and a township supervisor, seeking to establish prescriptive easement and to compel the supervisor to commence proceedings to open a private road under the private roads act, MCL 229.1 *et seq.* The circuit court entered judgment for defendants and plaintiffs appealed. This Court affirmed as to easement, but reversed and remanded as to claim under the private roads act. Leave to appeal was granted. Our Supreme Court held that the private roads act authorized an unconstitutional taking of private property for a predominantly private purpose, overruling *Bieker v Suttons Bay Twp. Supervisor*, 197 Mich App 628, 496 NW2d 398 (1992), and *McKeighan v Grass Lake Twp. Supervisor*, 234 Mich App 194, 593 NW2d 605 (1999).

While it is true that the present case was not brought under the private roads act, and instead sought an equitable remedy, our Supreme Court's decision in *Tolksdorf* does provide a relevant framework for analysis of the current situation. In *Poletown Neighborhood Council, Inc. v Detroit*, 410 Mich 616, 304 NW2d 455 (1981), our Supreme Court set forth the analysis used when a taking benefits both private entities and the public:

The power of eminent domain is restricted to furthering public uses and purposes and is not to be exercised without substantial proof that the public is primarily to be benefited. Where, as here, the condemnation power is exercised in a way that benefits specific and identifiable private interests, a court inspects with heightened scrutiny the claim that the public interest is the predominant interest being advanced. Such public benefit cannot be speculative or marginal but must be clear and significant if it is to be within the legitimate purpose as stated by the Legislature. [*Id.* at 634-635, 304 NW2d 455.]

The private roads act allowed the owner of a landlocked piece of property to petition for the creation of a private road over the land of his neighbors. Similarly, plaintiff seeks to have land that has now been privately owned since 1985³ declared a road for his use over the land of his neighbors. On this subject, the *Tolksdorf* Court stated:

We are unconvinced that the public is the predominant interest served by the private roads act. The very language of the act reveals that it is concerned with private roads having, presumably, a private not a public benefit. The private

³ MCL 224.18(3) provides that "after proceedings to absolutely abandon and discontinue, the road or part of the road shall cease to exist as a public highway."

roads act uses the state's power of eminent domain to convey an interest in land from one private person to another . . .

We agree with the Court of Appeals panel in *McKeigan I*, [229 Mich App 801] at 808, 587 NW2d 505 [1998]. "[T]he primary benefit under the private roads act inures to the landlocked private landowner seeking to open a private road on the property of another.... [A]ny benefit to the public at large is purely incidental and far too attenuated to support a constitutional taking of private property." We find that the private roads act is unconstitutional, because it authorizes a taking of private property for a predominantly private purpose. *Id.* at 9-10.

We agree with the trial court that the remedy plaintiff seeks in this case is nearly identical to the remedy sought by plaintiff in *Tolksdorf*, although in *Tolksdorf* the remedy sought was pursuant to statute, and here it is pursuant to equity, the same principles of property law govern. Here the trial court was correct in granting summary disposition where the court cannot authorize the taking of private property for a predominantly private purpose.

B. Award of Fees and Costs

Plaintiff next asserts that the trial court erred when it granted costs in the amount of \$40.00 and fees in the amount of \$7,087.00 pursuant to MCR 2.2625(A) and MCL 600.2591 after finding plaintiff's complaint devoid of arguable legal merit. We disagree.

This Court reviews the findings of fact underlying an award of attorney fees for clear error, *Solution Source, Inc v LPR Associates Ltd Partnership*, 252 Mich App 368, 381; 652 NW2d 474 (2002), while the decision whether to award attorney fees and the determination of the reasonableness of the fees are within the trial court's discretion and will be reviewed on appeal for an abuse of discretion, *Phinney v Perlmutter*, 222 Mich App 513, 560; 564 NW2d 532 (1997). This Court reviews an award of costs for an abuse of discretion. *Kernen v Homestead Dev Co*, 252 Mich App 689, 691; 653 NW2d 634 (2002). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with a definite and firm conviction that a mistake was made. *Solution Source, Inc, supra*, at 381-382. An abuse of discretion occurs when the decision was so violative of fact and logic that it evidenced a perversity of will, a defiance of judgment, or an exercise of passion or bias, *Bean v Directions Unlimited, Inc*, 462 Mich 24, 34-35; 609 NW2d 567 (2000), or the trial court misapplied or misunderstood the law, *Bynum v ESAB Group, Inc*, 467 Mich 280, 283; 651 NW2d 383 (2002).

MCL 600.2591 provides in relevant part:

(1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney . . .

(a) "Frivolous" means that at least 1 of the following conditions is met:

(i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.

(ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.

(iii) The party's legal position was devoid of arguable legal merit.

The trial court awarded costs in this case based on MCL 600.2591(3)(a)(iii), because it found plaintiff's legal position was devoid of any legal merit. Plaintiff's claim for an easement by necessity was unsupported by property law. All relevant property law states that in order for an easement by necessity to be created there must have been a transaction between the owner of the dominant estate and the owner of the servient estate. *Schmidt, supra* at 733. Similarly, plaintiff's claim that he should be allowed to continue to use a legally vacated roadway was completely unsupported by case law and statute and his reliance on an Attorney General opinion interpreting the subdivision control act, MCL 560.229, *et. seq.* is irrelevant. Plaintiff purchased a landlocked piece of property at a cost reflecting its status. Plaintiff's predecessors in interest were compensated in 1985 when their property became landlocked. Plaintiff is now attempting to use the courts to invade the property rights of his neighbors without legal basis. Thus, the trial court correctly assessed plaintiff fees and costs associated with this lawsuit.

Affirmed.

/s/ Donald S. Owens
/s/ Richard Allen Griffin
/s/ Bill Schuette