STATE OF MICHIGAN

COURT OF APPEALS

MATTHEW E. GRONDA AND MARK E. GRONDA,

Plaintiffs-Appellants,

v

GEORGE HAWKINS, EUGENE ROSS, FRED J. RITZ, EUGENE G. ROSS II, STEPHEN F. ROSS, JOHN J. JACQUES and DENISE M. JACQUES as Co-Trustees of the JOHN H. JACQUES FAMILY TRUST, THOMAS E. JACQUES, PAMELA J. JACQUES, JEROLD J. JACQUES, PATRICIA S. JACQUES, JOHN A LECLAIR as Trustee of the JOHN A. LECLAIR REVOCABLE LIVING TRUST, THOMAS H. LECLAIR and JOYCE E. LECLAIR as Co-Trustees of the THOMAS H. LECLAIR FAMILY TRUST,

Defendants-Appellees.

UNPUBLISHED
October 15, 2020

No. 350255
Iosco Circuit Court
LC No. 18-001077-CH

Before: LETICA, P.J., and K. F. KELLY and REDFORD, JJ.

PER CURIAM.

Plaintiffs, Matthew E. Gronda and Mark E. Gronda, appeal as of right the final judgment that awarded plaintiffs an easement by necessity over the property of defendants, neighboring landowners. Although they were successful in obtaining the easement by necessity that they requested, plaintiffs challenge the trial court's designated locations for their easement by necessity

awarded over the property of defendant George Hawkins (Hawkins).[1] Finding no error warranting reversal, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

In the 1930s, the McDonnells owned a large parcel of property. However, between 1939 and the mid-1950s, they began to divide and sell the property. The end result was the creation of various hunting and recreational land parcels in sizes that varied between 160 to 320 acres. In order to provide access to the southern properties, a private road was created and identified as Knute Road. Knute Road connects to a public road now known as Old US 23.[2]

The north half of Section 26 of the McDonnells property was divided into two parcels. Both parcels one and two are primarily used as hunting and recreational properties. Parcel two is comprised of wetlands. Parcel one is located in the northwest corner of section 26. It is currently owned by plaintiffs and consists of landlocked property. Plaintiffs and its predecessors in interest were aware that the property was landlocked at the time of purchase. For over 50 years, plaintiffs and its predecessors in interest accessed parcel one by traversing federal lands. However, the federal permit expired, and the United States Forestry Service (USFS) closed the trail used to access plaintiffs' property for safety concerns. Instead, the USFS recommended that plaintiffs pursue access through a route over the property to the east, known as parcel two. Plaintiffs did so by filing this declaratory action seeking an easement by necessity.

Parcel two is located in the northeast corner of section 26 and is owned by Hawkins.[3] The Hawkins property is not landlocked because it has access to Knute Road. Additionally, there is a route that runs approximately through the center of the Hawkins property that is also known as "the forest trail" or the driveway. This route connects from Knute Road and extends to the middle of the Hawkins' property, leading to a cabin.[4] Hawkins has established various deer blinds along this forest trail.

Thus, plaintiffs filed this litigation to access their landlocked property through a route to the east over parcel two, the Hawkins property. Additionally, plaintiffs also needed access to travel

---

[1] The named defendants all hold an interest in the neighboring properties over which plaintiffs sought an easement by necessity. The trial court awarded plaintiffs an easement by necessity over Knute Road. However, the sole appellate issue raised by plaintiffs is the location of the easement by necessity awarded over the property held by defendant Hawkins.

[2] The owners of the Jacques, LeClair, Ross, and Hawkins parcels all access their lands by using Knute Road.

[3] In the trial court, it was alleged that Fred J. Ritz also had an interest in parcel two. However, to be consistent with plaintiffs' brief on appeal and for ease of reference, this land is solely identified as the Hawkins property.

[4] The forest trail or driveway is not a direct and straight line through the center of the property, but curves southwest toward the Hawkins' cabin. However, in the lower court, it was essentially characterized as the route through the center of the property.

north on Knute Road, the private road that crosses over parcels three through six and leads to Old U.S. 23. Aside from Hawkins and Fred J. Ritz, the remaining defendants have ownership interests in parcels three through six. However, these defendants do not protest the easement by necessity granted along Knute Road.

In this declaratory action and on appeal, plaintiffs requested the most convenient route of access to Knute Road. Specifically, they sought to use the forest trail along the Hawkins property that ended near his cabin. Plaintiffs wanted to continue the route from the forest trail to its property line because it was allegedly the most convenient and economical access.

Hawkins opposed an easement by necessity along the forest trail, citing privacy concerns as well as a disruption of the use of the property for hunting, skiing, and other recreational activities with friends and family. Hawkins proposed granting plaintiffs an easement by necessity along the northern border of his property. However, plaintiffs questioned the feasibility of constructing a route at that location because of regulated wetlands. Over the course of the litigation, Hawkins' counsel proposed a second route at the southern border of his property where there was an existing 1214-foot trail.

During various hearings, the trial court apparently advised the parties of its legal research that access should be granted to a landlocked parcel and expressed its frustration that the parties could not reach an amicable solution. The trial court was further disappointed when plaintiffs filed a motion for summary disposition to resolve the case, but did not prepare and present proposed legal descriptions of the benefited property, the burdened property, and the easement itself.

After multiple motions and hearings, the trial court granted plaintiffs' motion for summary disposition. Ultimately, the trial court concluded that an easement by necessity was required because plaintiffs' property was landlocked. However, it ordered that plaintiffs could place the easement over the proposed northern or southern borders of the Hawkins property and did not grant the easement by necessity over the existing forest trail or driveway through the center of the Hawkins property. It also granted plaintiffs an easement by necessity over Knute Road. As noted, the only issue raised on appeal is the location of the easement by necessity as designated by the northern and southern borders over the Hawkins property instead of through the center.

II. STANDARD OF REVIEW

Summary disposition is appropriate pursuant to MCR 2.116(C)(10) where there is "no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). When reviewing a motion for summary disposition challenged under MCR 2.116(C)(10), the court considers the affidavits, pleadings, depositions, admissions, and other admissible documentary evidence then filed in the action or submitted by the parties. MCR 2.116(G)(4), (G)(5); *Puetz v Spectrum Health Hosps*, 324 Mich App 51, 68; 919 NW2d 439 (2018). To succeed on a motion for summary disposition, the moving party must make and support the motion with admissible documentary evidence. *McCoig Materials LLC v Galui Constr Inc*, 295 Mich App 684, 694; 818 NW2d 410 (2012). After the moving party makes and supports the motion, the burden shifts to the nonmoving to demonstrate a genuine issue of material fact. *Id*.

Equitable actions to resolve title disputes to property and questions of law are reviewed de novo. *Jonkers v Summit Twp*, 278 Mich App 263, 265; 747 NW2d 901 (2008).

III. EASEMENT BY NECESSITY – THE LOCATION

Plaintiffs contend that that the trial court erred by designating the easement by necessity over Hawkins property at the northern or southern border. Specifically, they contend permission by the Michigan Department of Environmental Quality (MDEQ)[5] to construct a route through the northern or southern borders will not be approved because of the wetlands. Alternatively, plaintiffs allege that, even if permission is granted for construction of a route through the wetlands, the cost of the easement by necessity at those locations is cost prohibitive, inconvenient, and incorrectly imposes a substantial burden on plaintiffs, contrary to equity and the court's holding. We disagree.

A. EASEMENT LAW

The following provides a basic overview of the law governing easements, the retention of possession, the burdened land, and the easement's limitations:

> An easement is the right to use the land of another for a specified purpose. *Bowen v Buck & Fur Hunting Club*, 217 Mich App 191, 192; 550 NW2d 850 (1996). An easement does not displace the general possession of the land by its owner, but merely grants the holder of the easement qualified possession only to the extent necessary for enjoyment of the rights conferred by the easement. *Morrill v Mackman*, 24 Mich 279, 284 (1872).
>
> An appurtenant easement . . . attaches to the land and is incapable of existence separate and apart from the particular land to which it is annexed. See *McClintic-Marshall Co v Ford Motor Co*, 254 Mich 305, 318-319; 236 NW 792 (1931). The land served or benefited by an appurtenant easement is called the dominant tenement. The land burdened by an appurtenant easement is called the servient tenement. *Rusk v Grande*, 332 Mich 665, 669; 52 NW2d 548 (1952). . . .
>
> Once granted, an easement cannot be modified by either party unilaterally. *Douglas v Jordan*, 232 Mich 283, 287; 205 NW 52 (1925); *Tittiger v Johnson*, 103 Mich App 437, 443; 303 NW2d 26 (1981). The owner of an easement cannot materially increase the burden of it upon the servient estate or impose thereon a new and additional burden. *Delaney v Pond*, 350 Mich 685, 687; 86 NW2d 816 (1957). [*Schadewald v Brule*, 225 Mich App 26, 35-36; 570 NW2d 788 (1997).]

---

[5] The MDEQ was reorganized into the Michigan Department of Environment, Great Lakes and Energy or EGLE effective April 22, 2019. See <https://www.michigan.gov/egle/0,9429,7-135-3308_3323-495401--,00.html#:~:text=The%20Michigan%20Department%20of%20Environmental,Monday%2C%20April%2022%2C%202019.>

In this case, plaintiffs contends that an easement by necessity is required because their property is landlocked, and there is no reasonable route of access. "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." *Charles A Murray Trust v Futrell*, 303 Mich App 28, 41; 840 NW2d 775 (2013) (quotation marks and citation omitted).

> A way of necessity arises when one grants [a] parcel of land surrounded by his other land, or when the grantee has no access to it except over other land of the grantor, or as an alternative by passing upon the land of a stranger. In such case, the grantor impliedly grants a right of way over his land as an incident to the purchaser's occupation and enjoyment of the grant. [*Goodman v Brenner*, 219 Mich 55, 59; 188 NW 377 (1922).]

When an easement is implied by way of necessity, "[t]he use exercised by the holders of the easement must be reasonably necessary and convenient to the proper enjoyment of the easement, with as little burden as possible to the fee owner of the land." *Frey v Scott*, 224 Mich App 304, 310; 568 NW2d 162 (1997). "Where there are several ways to a land-locked tenement, the owner of the servient tenement can select the way which the land-locked owner shall use, provided the way selected be reasonably convenient." *Wanbun Beach Ass'n v Wilson*, 274 Mich 598, 612; 265 NW 474 (1936).

In *Schmidt v Eger*, 94 Mich App 728, 732-734; 289 NW2d 851(1980), this Court explained that public policy favored implied easements to foster the productive and beneficial use of land, but also advised that strict necessity was a requirement when an easement by necessity was involved:

> An implied easement may arise in essentially two ways. First, it can be implied from necessity. In this situation, an estate has been severed, leaving the dominant estate without a means of access. Before an easement will be implied in this situation, the party who would assert the easement must establish that it is strictly necessary for the enjoyment of the property. Mere convenience, or even reasonable necessity, will not be sufficient if there are alternative routes, even if these alternatives prove more difficult or more expensive. All implied easements are based on the presumed intent of the parties, but this sort is additionally supported by the public policy favoring the productive and beneficial enjoyment of property. Easements implied from necessity have been recognized in Michigan as requiring a showing of strict necessity. *Wanbun Beach Ass'n v Wilson, supra, Goodman v Brenner*, 219 Mich 55; 188 NW 377 (1922), *Moore v White*, 159 Mich 460; 124 NW 62 (1909), *Birch Forest Club v Rose*, 23 Mich App 492; 179 NW2d 39 (1970). This sort of implied easement is not dependent on the existence of any established route or quasi-easement prior to the severance of the estate by the common grantor; it is first established after the severance.
>
> The easement with which we are involved in the instant case is of a different type, what Dean Cribbet refers to as easements implied from quasi-easements. It requires that at the severance of an estate an obvious and apparently permanent servitude already exists over one part of the estate and in favor of the other. It also

requires a showing of necessity, but whether that necessity needs to be "strict", or only "reasonable", traditionally has depended on whether the easement claimed was an implied *grant*, or an implied *reservation*. Aigler, Comment: *Real Property -- Easements by Implication -- Creation of Easements by Implied Reservations in Michigan,* 59 Mich L Rev 432 (1961).

It appears to be the position of a majority of jurisdictions that an implied grant of an easement requires only a showing of reasonable necessity, while an implied reservation of an easement in the grantor requires a showing of strict necessity. The difference seems based on the idea that a grantor will not be allowed to derogate from the grant by alleging to retain interests which the deed purports to convey. Because the grantor is not allowed to assert the reservation of an implied easement based on the existence of a pre-existing servitude or quasi-easement, the claim of an implied reservation must, under this view, proceed as if no servitude or quasi-easement existed, and requires a showing of strict necessity as in the case of an easement implied from necessity.

B. DOCUMENTARY EVIDENCE ADDRESSING LOCATIONS, COST, AND CONVENIENCE

In the present case, plaintiffs moved for summary disposition and presented deeds, title searches, and death certificates. However, defendants did not dispute that the properties at issue arose from a common grantor, the McDonnells, and that Knute Road was created by the neighboring property owners to access public road now known as Old U.S. 23.

Plaintiffs also submitted a letter from Anthon C. Martoglio, Forest Service District Ranger, that addressed plaintiffs' prior use of a federal forest road to access their property. This letter purportedly demonstrated that plaintiffs were required to obtain alternate access. It provided, in relevant part:

> You requested that I provide a response to three (3) items confirming that: "(1) FS 4543 is permanently closed for safety reasons (or whatever reason(s) it is closed); (2) that my permit to use FS 4543 is expired; and (3) that I will not be able to obtain a new permit to use FS 4543 due to its closure." A response to these items follows:
>
> 1) Forest Road 4543 is closed under an emergency closure order because of excessive resource damage and illegal dumping by the public.
>
> 2) A Forest Road special use permit (TAW410) was issued to you previously by this office, for year round access by foot and seasonal access by ATV or snowmobile, along approximately 0.17 miles of trail extending from Forest Road 4543 to your property. This permit expired on April 30, 2017.
>
> 3) The closure of Forest Road 4543 and associated concerns for wetland resource and other impacts would be a factor in the Forest Service's analysis of any new proposal for use of the road. Another factor would be the apparent availability of

> alternate access routes across non-Federal lands. As you are aware, in the Forest Service's response dated February 22, 2018, to your letter dated December 22, 2017, we identified that the most desirable option for long term access to your property is across adjacent non-Federal lands to the east. Under Forest Service regulation, when potential access routes exist across adjacent non-Federal lands or the best route is across non-Federal lands, prior to issuing any access authorization, the authorized officer is required to ensure that a landowner has demonstrated that all legal recourse to obtain reasonable access across adjacent non-Federal lands has been exhausted or has little chance of success (36 CFR 251.114(f)(4)).

In contrast to this evidence, the affidavit of defendant Hawkins, the neighboring property owner to the east of parcel one, was presented, and he objected to plaintiffs' request for an easement by necessity across the center of his property:

> I, George Hawkins, being first duly sworn, deposes and states that I am a Defendant in the above entitled action and an owner of that property described as parcel 2 in Plaintiffs' Motion for Summary Disposition. Plaintiffs' Motion seeks a way of necessity through the approximate center of my property which is primarily hunting and recreational land. Were such an intrusive route granted, the same would invade my privacy and would interfere with the private enjoyment of my property with family, friends and relatives. The route proposed by Plaintiffs would include travel to my cabin, through the center of hunting areas, near ponds and dear [sic] blinds, open feeding areas, campfire sites, camper sites, and areas of activities including four wheeling, snowmobiling, volleyball, partying, badminton, barbecues, golf outings, hunting, fishing, trap shooting, horseshoes, cross-country skiing, hiking, and croquet activities that have occurred and are routinely engaged in with family, friends and relatives throughout different times of the year.
>
> I further state that if a way of necessity across my property is ordered by the court, I herewith request and designate the north 20 feet of my property for such purpose. I further state that if called as a witness to testify in the above entitled litigation, I could competently testify to the matters contained herein to be true to the best of my knowledge, information, and belief.

In addition to the Hawkins' affidavit, defendants presented the report of wetlands expert Rollin C. Reineck, Jr. of Affiliated Researchers LLC. His lengthy report indicated that plaintiffs sought 2.77 miles of easement through privately held lands with 2.02 miles of Knute Road, .52 miles of private road through the center of Hawkins' hunting camp, and .23 miles of jurisdictional wetland environments through parcels one and two. In light of his experience as a wetland scientist, Reineck opined that the MDEQ would conclude that "vehicular access to Parcel 1 can be established via the existing road through US Forest Service managed properties, which has historically and recently been utilized as such" in lieu of disrupting the wetlands. He further found that it would cost $191,500 to prepare the Hawkins property as the easement by necessity with an additional probable cost of $57,500. Thus, Reineck concluded that the route proposed as the most convenient and economical by plaintiffs could nonetheless cost nearly $250,000. However, it would cost only $29,000 to continue to use the forestry service route. He determined that it would cost $247,000 with possible additional costs of $68,000 or nearly $320,000 to establish the

easement by necessity at the north property line of parcels one and two. In a summary of his findings, Reineck opined that the MDEQ would deny a permit to disrupt wetlands and instead prefer the continued use of access over federal lands.

Lastly, plaintiffs cited to an affidavit filed by Kenny Schaaf, a licensed contractor retained by defendants, that provided road construction for an 18-foot road with side ditches for a length of 12,850.54 feet would cost over $514,000.

C. APPLICATION

In light of the above, we conclude that the trial court did not err in denying plaintiffs' request to order the location of the easement by necessity through the center of the Hawkins property by using the existing forest trail and allow plaintiffs to extend that route to their property.

When an easement is implied by way of necessity, "[t]he use exercised by the holders of the easement must be reasonably necessary and convenient to the proper enjoyment of the easement, with as little burden as possible to the fee owner of the land." *Frey*, 224 Mich App at 310. In the present case, the trial court concluded that plaintiffs' landlocked parcel was entitled to an easement by necessity. However, the trial court concluded that the smallest intrusion to the Hawkins property would involve an easement by necessity located at the northern or southern border, and allowing plaintiffs access through the center of the property by using and extending the existing forest trail would disrupt Hawkins' use.

1. CONVENIENCE

On appeal, plaintiffs contend that the Reineck opinion supports their position to an easement by necessity down the center of the Hawkins property. The routes ordered by the trial court at the northern or southern border of Hawkins property were allegedly not *convenient* routes, but unusable because of wetland regulations.

However, to succeed on a motion for summary disposition, the moving party must make and support the motion with admissible documentary evidence. *McCoig Materials LLC*, 295 Mich App at 694. Plaintiffs failed to present any documentary evidence to demonstrate that the convenience and cost of the easement by necessity was best served by extending the existing forest trail on Hawkins property. Moreover, the Reineck report did not support plaintiffs' request to establish the location of the easement by necessity through the center of Hawkins property. Rather, Reineck concluded that the MDEQ would prefer not to disrupt the wetland environment, and therefore, the agency would recommend that plaintiffs obtain a permit to continue to access their parcel through federal lands.[6] Reineck also opined that the federal land option was the most cost-effective proposal. He submitted that it would cost $29,000 to make the necessary improvements

[6] This view was consistent with the only record evidence submitted pertaining to federal lands. Indeed, while district ranger Martoglio opined that plaintiffs' permit to access federal lands had expired, his opinion did not foreclose any future permit. Rather, he opined that plaintiffs had to pursue and *exhaust* other remedies, including a route of the Hawkins property to the east; it did not eliminate future permits.

to the federal land. Yet, he would minimally cost over $200,000 to make the necessary improvements to the northern border of Hawkins' property or to the existing forest trail, regardless of the option selected.

Although representations were made regarding what the MDEQ, now EGLE, would allow, administrative hearings involving EGLE were occurring, yet plaintiffs did not present documentary evidence to contest the Reineck opinion. Consequently, plaintiffs failed to demonstrate that the routes selected by the trial court were inconvenient when compared to plaintiffs request to use the existing forest trial on Hawkins property.[7]

2. EXPENSIVE AND DIFFICULT

Plaintiffs next allege that even if new road construction was approved for the easement by necessity, it was without dispute that the construction would be expensive and difficult. Again, plaintiffs failed to present documentary evidence to support its contention that the use of the existing forest trail would not be expensive. In light of the Reineck opinion that plaintiffs expansion of the existing forest trail would result in substantial cost, plaintiffs failed to demonstrate that the trial court's placement of the easement by necessity at the northern or southern border of Hawkins property was erroneous.

3. LEGAL ERROR

Finally, plaintiffs contend that the trial court erred in its selection of the route for the easement by necessity because it (1) merely granted access and not practical access, (2) misapplied equity, and (3) improperly considered the servient estate's interest to the exclusion of the dominant estate's right of access.

As noted, an easement by necessity must balance the easement holder's reasonably necessary and convenient enjoyment of their property while imposing as little burden on the servient estate as possible. *Frey*, 224 Mich App at 310. We disagree with plaintiffs' contention that the trial court did not grant practical access and misapplied equity. Plaintiffs conveniently ignore the nature of the property at issue. Defendant Hawkins used his property for hunting and other recreational activities, including skiing. He created a forest trail that led to his cabin on the property. Additionally, he had deer blinds off this trail. Thus, Hawkins and his guests would be traversing the trail to engage in these outdoor activities. If plaintiffs were given access to this trail for their easement by necessity, skiers would have to be aware of the potential for plaintiffs'

[7] Plaintiffs' reliance on the decision in *Edinger-Flower v Kezelian*, unpublished per curiam decision of the Court of Appeals, issued October 23, 2018 (Docket No. 339164) is misplaced. Unpublished decisions of the Court of Appeals are not binding precedent. MCR 7.215(J)(1). Furthermore, plaintiffs did not rely on the holding in the case, but upon judicial commentary regarding an alternative theory that may be pertinent on remand in the trial court. Accordingly, plaintiffs were citing to non-binding dictum. See *Carr v City of Lansing*, 259 Mich App 376, 383-384; 674 NW2d 168 (2003).

vehicles travelling the property. Similarly, defendants' hunting guests would have to be aware of the potential for vehicular and pedestrian ingress and egress to avoid mistaking deer or other wildlife for plaintiffs or their guests. There would be far less likelihood of a skiing or hunting accident with the placement of an easement by necessity at the northern or southern border as opposed to the middle of Hawkins property.

Finally, the trial court did not award defendant Hawkins' rights to the detriment of plaintiffs' access. Rather, the easement by necessity required balancing plaintiffs' reasonably necessary and convenient enjoyment of their property while imposing as little burden on Hawkins property as possible. *Frey*, 224 Mich App at 310. The trial court's determination that the easement by necessity must occur along the northern or southern border as opposed to the center of Hawkins' property mirrors the legal instruction.

Affirmed.

/s/ Anica Letica
/s/ Kirsten Frank Kelly
/s/ James Robert Redford