STATE OF MICHIGAN

COURT OF APPEALS

TERRANCE R. FOWLE and DEBRA FOWLE,

Plaintiffs-Appellees,

v

MARK DUSHANE,

Defendant-Appellant.

UNPUBLISHED
December 10, 2020

No. 351706
Lenawee Circuit Court
LC No. 13-004812-CH

Before: LETICA, P.J., and RIORDAN and CAMERON, JJ.

PER CURIAM.

In this action concerning a driveway easement, defendant Mark Dushane appeals the trial court's order denying his motion to enforce a prior judgment and to direct plaintiffs Terrance R. Fowle and Debra Fowle (collectively "the Fowles") to pay for a land survey to properly mark the boundaries of the Fowles' easement on Dushane's property. We affirm.

I. BACKGROUND

The instant dispute arises out of an express easement that was created by a 1989 consent judgment, which settled litigation between the parties' predecessors in interest. The consent judgment provided for "[a] non-exclusive easement Thirty-three (33) feet in width for ingress and egress," commencing on the south right-of-way line of Highway M-50. The 1989 consent judgment also contained a metes-and-bounds legal description. The dominant estate now belongs to the Fowles, and the adjacent, servient estate now belongs to Dushane. The parties use the easement to access Highway M-50 from their respective properties, which are used for commercial purposes.

The easement has been the subject of litigation for many years. As noted by this Court in a previous appeal involving the same parties, *Fowle v Dushane (Fowle I)*, unpublished per curiam opinion of the Court of Appeals, issued October 16, 2018 (Docket No. 339913), p 1,

> for decades, the location and course of the easement as actually used by the parties differed slightly from the easement's legal description (as described in the 1989 judgment). In other words, as used by the parties, the driveway easement covered

> a triangular "wedge" of [Dushane's] property that fell outside the bounds of the easement's metes-and-bounds legal description. This case arose after the Michigan Department of Transportation (MDOT) repaired an underlying culvert in 2013, after which it restored [Dushane's] driveway to the stated dimensions of the express easement.

After the parties' mistake concerning the boundaries of the easement was discovered, Dushane began blocking the easement with railroad ties and hazard cones. The Fowles initiated a quiet title action against Dushane, alleging that the Fowles had, by way of prescriptive use for more than 15 years, obtained an easement to use Dushane's driveway as it was situated before MDOT's 2013 repairs. Following a five-day bench trial, the trial court held that "[t]he proofs presented at trial establish the Fowles have met all of the requirements to establish a prescriptive easement over the disputed wedge of the property." The trial court ordered Dushane to "immediately remove all impediments" to the Fowles' use of the driveway and prohibited Dushane "from interfering with [the Fowles'] use, maintenance or restoration of the driveway[.]" Dushane appealed. In *Fowle I*, this Court affirmed the trial court's conclusion that the boundaries of the easement, as described in the 1989 consent judgment, were modified by the parties' conduct. *Fowle I*, unpub op at 5-6.

Thereafter, Dushane filed a motion in the trial court, alleging that the Fowles had unilaterally removed markers that represented the boundaries of the easement that were put in place after the original survey of the property was conducted. Dushane requested that the trial court order the Fowles to pay for a new land survey to properly mark the boundaries of the Fowles' easement on Dushane's property. Dushane also sought attorney fees and costs. The Fowles opposed the motion, arguing that Dushane was seeking to relitigate issues that had already been decided. In a November 8, 2019 order, the trial court declined to order the Fowles to pay for a new land survey. In doing so, the trial court stated as follows:

> [I]n its 2018 Opinion, the Court of Appeals held that the legal description of the easement from 1989 is no longer valid as the parties acquiesced to a slightly different location of the easement than that contained in the legal description. As a result, the survey based on the 1989 legal description is not a valid survey, and any survey stakes which were in the easement—as acquiesced to—should have been removed to avoid obstructing the easement. [Dushane] has failed to establish that any stakes not in the easement were removed, or that any related damage occurred. The request to order a new survey of the now obsolete 1989 legal description is denied.

The trial court also denied Dushane's request for attorney fees and costs. This appeal followed.

II. ANALYSIS

On appeal, Dushane only seeks to challenge the trial court's decision to deny his motion to require the Fowles to pay for a land survey to properly mark the boundaries of the easement. However, this issue is not properly before this Court because it is outside the scope of appeal from the November 8, 2019 order. The November 8, 2019 order from which Dushane appeals is "a post

judgment order." In part, the November 8, 2019 order denied Dushane's motion for attorney fees and costs. Under MCR 7.203(A), the scope of the appeal from that order is "limited to the portion of the order with respect to which there is an appeal of right," i.e., whether the trial court properly denied the motion for attorney fees and costs. Nonetheless, for purposes of judicial economy, we will consider Dushane's arguments. See *Wardell v Hincka*, 297 Mich App 127, 133 n 1; 822 NW2d 278 (2012). See also MCR 7.216(A)(7).

On appeal, Dushane argues that a new land survey was necessary because the original legal description of the easement was invalidated, and the parties are unable to ascertain the actual physical boundaries of the easement. We conclude that Dushane's argument is abandoned because Dushane altogether fails to support his argument on appeal with any legal authority. It is insufficient for a party "simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Innovation Ventures v Liquid Mfg*, 499 Mich 491, 518; 885 NW2d 861 (2016) (quotation marks and citations omitted). Because "[a]n appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue," Dushane is not entitled to relief on appeal. See *Bank of America, NA v Fidelity Nat'l Title Ins Co*, 316 Mich App 480, 517; 892 NW2d 467 (2016) (quotation marks and citation omitted).

Furthermore, we fail to see how a new land survey was necessary. During the bench trial, detailed drawings of the dimensions of the easement were introduced into evidence; the drawings depicted the parties' use of the easement following the entry of the 1989 consent judgment. After the bench trial, the trial court held that "[t]he proofs presented at trial establish the Fowles have met all of the requirements to establish a prescriptive easement over the disputed wedge of the property." Although this Court determined in *Fowle I* that the trial court improperly concluded that an easement by prescription was created, this Court affirmed the trial court's ultimate conclusion that the boundaries of the easement, as described in the 1989 consent judgment, were modified by the parties' conduct. *Fowle I*, unpub op at 5-6. Specifically, this Court held as follows:

> It is undisputed that in all of the years after the 1989 judgment was entered—up until 2013—the owners of both the dominant estate and the servient estate treated the actual physical location of [Dushane's] driveway as if it was properly situated within the bounds of the easement to which the property owners had agreed in the 1989 judgment. Such acquiescence exceeded 15 years, and even if it had not, it would suffice because the owners of the estates agreed to it in 1989 following a consent judgment that settled litigation between them concerning this very easement. Therefore, under the doctrine of acquiescence, [Dushane] is barred from now contending that the boundaries of the easement are different than those to which both he and his predecessors in interest acquiesced for more than two decades. [*Id*. at 6.]

Consequently, we fail to see how a new survey to mark the boundaries of the easement was required. Indeed, "[i]t has been repeatedly held by this Court that a boundary line long treated and acquiesced in as the true line, ought not to be disturbed on new surveys." *Sackett v Atyeo*, 217 Mich App 676, 682; 552 NW2d 536 (1996) (quotation marks and citations omitted). If certain

boundary lines "have been acquiesced in for a sufficient length of time, they fix the 'true line' as matter of fact and as matter of law." *Hanlon v Ten Hove*, 235 Mich 227, 233; 209 NW 169 (1926). Based upon the foregoing, we conclude that the trial court did not err when it declined to order the Fowles to obtain a new land survey to mark the boundaries of the easement.[1]

Affirmed. The Fowles, as the prevailing parties, may tax costs. MCR 7.219(A).

/s/ Anica Letica
/s/ Michael J. Riordan
/s/ Thomas C. Cameron

[1] "A trial court's . . . conclusions of law are reviewed de novo." *Schumacher v Dep't of Natural Resources*, 275 Mich App 121, 127; 737 NW2d 782 (2007).