

STATE OF MICHIGAN
COURT OF APPEALS

SALLY A. GORDON, Trustee of the SALLY A.
GORDON Living Trust, JOHN LEIGHTON, and
KATHLEEN LEIGHTON,

UNPUBLISHED
September 25, 2001

Plaintiffs/Counter Defendants-
Appellants,

v

WOODLAND DEVELOPMENT COMPANY,

Defendant/Counter Plaintiff-
Appellee.

No. 224288
Cheboygan Circuit Court
LC No. 98-006468-CH

Before: Cavanagh, P.J., and Markey and Cooper, JJ.

PER CURIAM.

Following a bench trial in this easement matter, the trial court entered judgment in favor of defendant. Plaintiffs appeal as of right. We affirm in part, vacate in part, and remand for further proceedings. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On appeal, plaintiffs first argue that the trial court erred in determining that defendant's division of the 120-acre parcel into 14 separate parcels would not create an unreasonable burden on the servient estate. The scope or extent of a party's right under an easement is a question of fact, which is reviewed on appeal for clear error. *Bang v Forman*, 244 Mich 571, 576; 222 NW 96 (1928); *Dobie v Morrison*, 227 Mich App 536, 541; 575 NW2d 817 (1998). The decision whether to grant injunctive relief is within the trial court's sound discretion, although the decision must be based on the particular facts of the case and must not be arbitrary. *Roy v Chevrolet Motor Car Co*, 262 Mich 663, 668; 247 NW 774 (1933); *Schadewald v Brule*, 225 Mich App 26, 39-40; 570 NW2d 788 (1997).

An appurtenant easement attaches to the land and is incapable of existence separate and apart from the particular land to which it is annexed. *Schadewald, supra* at 35-36. In general, when a dominant estate is divided, an appurtenant easement is not destroyed and any owner may claim the easement so far as it is applicable to his parcel provided that such division can be accomplished without materially increasing the burden on the servient estate or imposing a new and additional burden. *Delaney v Pond*, 350 Mich 685, 687; 86 NW2d 816 (1957); *Bang, supra*. See, also, *Walker v Bennett*, 111 Mich App 40, 44; 315 NW2d 142 (1981). No definite rule can

be stated as to what may be considered a reasonable use as distinguished from an unreasonable use. The question is usually one of fact, to be determined in light of the situation of the property and surrounding circumstances. See *Schadewald, supra*.

Here, we find no clear error in the trial court's factual determination that defendant's division of the parcel was a reasonable burden on the easement. As the trial court noted, plaintiffs' desire to restrict the 120-acre parcel to one or two owners was "not realistic," especially where there were no such deed restrictions regarding the easement. Further, to allay some of plaintiffs' concerns, the trial court did impose certain restrictions limiting the future division, use, and occupancy of the parcels. Given the circumstances, we conclude that the trial court did not clearly err in its fact findings regarding the scope and use of the easement. Thus, the trial court did not abuse its discretion in denying permanent injunctive relief as requested by plaintiffs.

Next, plaintiff Leightons argue that the trial court's decision to require that they be made a party to defendant's Road Maintenance Agreement was inequitable. The Leightons request a remand to the trial court "to develop a maintenance agreement that apportions the costs of repairs and maintenance . . . in proportions that closely approximate the usage for the entire easement." In its brief on appeal, defendant states that it welcomes a remand on this issue. In light of defendant's agreement with the Leightons' request for a remand to redraft a fair and equitable maintenance agreement, we vacate that portion of the trial court's judgment regarding the Road Maintenance Agreement and remand this matter for further proceedings on the issue.

Affirmed in part, vacated in part, and remanded for further proceedings regarding the easement maintenance agreement. We do not retain jurisdiction.

/s/ Mark J. Cavanagh

/s/ Jane E. Markey

/s/ Jessica R. Cooper