STATE OF MICHIGAN

COURT OF APPEALS

JAMES STORM and FAE STORM,

Plaintiffs/Counterdefendants-Appellees,

v

ROBERT E. TRAPP, JUDY L. TRAPP, and ARLAN KOHTZ,

Defendants-Appellants,

and

LEE ROSS and CAROL ROSS,

Intervening defendants,
Counterplaintiffs-Appellants.

UNPUBLISHED
April 25, 1997

No. 179351
Mason Circuit Court
LC No. 93-009698-CZ

Before: Griffin, P.J., and Doctoroff and Markman, JJ.

PER CURIAM.

Defendants Robert Trapp, Judy Trapp, and Arlan Kohtz appeal as of right from the judgment for plaintiffs James Storm and Fae Storm and the injunction requiring them to remove barriers they had erected on an easement claimed by plaintiffs across their land. Intervening defendants and counterplaintiffs Lee Ross and Carol Ross also appeal as of right from the dismissal of their countersuit in the same action. We affirm.

The parties own adjoining parcels of land on Indian Pete Bayou in Mason County. Plaintiffs brought suit seeking to enjoin defendants from blockading an easement across defendants' properties that was provided for in the parties' deeds from a common grantor. Defendants claimed that the easement referred to in the deeds was over a different, higher road and that, even if the easement was where plaintiffs claimed it was, the easement had been abandoned. Defendants also argued that plaintiffs' clearing and improvement of the lower road impermissibly increased the burden on the

servient estates. In the countersuit, the Rosses claimed to have a deeded easement in the upper road, an easement by prescription in the upper road and parking areas, and an implied easement by necessity in the upper road and in portions of the concrete driveway they shared in common with plaintiffs.

Following a bench trial, the court found that the lower road was the original access road referred to in the deeds and determined as a matter of law that non-use of an express easement cannot support a finding of abandonment. The court further found that the proximity of the road to the cottages did not increase the burden on those estates because at the time the cottages were built, it was not unusual to have an unpaved lane running close to cottages. The court concluded that the Rosses had not proved their claim of a prescriptive easement because their use of the upper road and the concrete driveway area had always been with plaintiffs' permission. The court granted plaintiffs a permanent injunction barring obstruction of the lower road and dismissed the counterclaim.

Defendants first claim that the trial court clearly erred when it found that the express easement contained in the parties' deeds referred to the lower road. This issue need not be addressed in light of defendants' failure to cite any authority in support of their position. *Winiemko v Valenti*, 203 Mich App 411, 415; 513 NW2d 181 (1994). Regardless, we find the trial court's analysis of the testimony and its conclusions to be supported by the evidence, deferring to the trial court's unique ability to assess the credibility of the witnesses appearing before it. *Tuttle v Dep't of State Highways*, 397 Mich 44, 46; 243 NW2d 244 (1976); *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 171; 530 NW2d 772 (1995); MCR 2.613(C). Moreover, the trial court's conclusion that the lower road was the original easement is supported by the fact that all the parties had a common grantor who did not own the land where part of the upper road is located. Michigan law has long held that "[a] right of way cannot . . . be granted by deed, estoppel, or otherwise, by anyone but the landowner." *Von Meding v Strahl*, 319 Mich 598, 606; 30 NW2d 363 (1948); *Goodman v Brenner*, 219 Mich 55, 59; 188 NW 377 (1922). Therefore, the upper road could not have been the easement referred to in the deeds because the common grantor was without authority to grant an express easement over a third party's land.

Next, defendants claim that the trial court clearly erred when it concluded that the easement had not been abandoned through non-use. We find no error because defendants identified no affirmative act by plaintiffs that could be interpreted as manifesting an intent to abandon the easement. *Choals v Plummer*, 353 Mich 64,71-72; 90 NW2d 851 (1958); *Ludington & Northern R v The Epworth Assembly*, 188 Mich App 25, 33; 468 NW2d 884 (1991). Moreover, the trial court correctly found that construction of the upper road in the 1960s did not constitute an external manifestation of an intent to abandon the easement by plaintiffs because the road was not constructed by plaintiffs. Plaintiffs' failure to object to debris or temporary placement of portable objects in the easement does not compel a different result. *Choals, supra* at 71-72; *Ludington & Northern R, supra* at 33.

Defendants also contend that the trial court clearly erred in finding that the improvements to the lower road made by plaintiffs did not increase the burden on the servient estates. We disagree. The grant of an easement includes "such rights as are incident or necessary to the enjoyment of such right or passage." *Lakeside Associates v Toski Sands*, 131 Mich App 292, 299-300; 346 NW2d 92

(1983). The reasonableness of the means used to maintain or use an easement is a question of fact to be determined by the trial court or jury. *Id.* at 300. The uncontroverted testimony at trial established that an area variously described as a drainage area, gully, ditch, swale, or low spot existed that occasionally may have interfered with plaintiffs' use of the easement. The testimony indicated that prior to plaintiffs' improvements in 1984, the lower road frequently washed out. Consequently, had plaintiffs not filled in the area and taken steps to preserve the roadway, they would eventually have been deprived of any use of the easement. As the court noted, plaintiffs cannot be held responsible for the increase in the number of cottages that are occupied year-round and the resultant increase in traffic. Moreover, the trial court's conclusion that the road improvements had an insignificant effect on the water drainage problems at defendants' cottage was supported by the testimony. Therefore, we find no error that would require reversal of the judgment in favor of plaintiffs.

Counterplaintiffs [the Rosses] argue that the trial court erred in dismissing their claim because they demonstrated the existence of an implied easement by necessity in the upper road and parking area on plaintiffs' property north of their cottage. In the alternative, the Rosses claim an implied easement by reservation in the upper road and parking area because plaintiffs and the Rosses are the grantees of property once owned by a common grantor and the use of the upper road is reasonably necessary to the enjoyment of the Rosses' property.

A finding of an implied easement by necessity can be supported only by a showing of strict necessity. *Schmidt v Eger*, 94 Mich App 728, 732; 289 NW2d 851 (1980); see also *Dimoff v Laboroff*, 296 Mich 325, 328; 296 NW2d 275 (1941). The rights of the parties with respect to a claimed easement by necessity are to be determined on the facts as they stood when the suit was brought. *Waubun Beach Ass'n v Wilson*, 274 Mich 598, 604; 265 NW 474 (1936). At the time the Rosses' countercomplaint was filed in 1993, the lower road was open and passable. Therefore, the upper road was not the only way to access the Ross property and the trial court correctly concluded that no strict necessity existed. See *Wauben, supra* at 611; *Burling v Leiter*, 272 Mich 448, 456; 262 NW 388 (1935).

Although the trial court made no specific findings with regard to whether the Rosses had shown the strict necessity required for an implied easement by necessity in the parking area north of their garage, the testimony at trial clearly showed that there was no necessity. One of the Rosses' tenants testified that they routinely parked two vehicles in the garage. Moreover, Carol Ross admitted to having potential parking space in the thirty-foot area between the corner of their garage and the lot line if the brush were cleared out. Lee Ross conceded that he never considered clearing the thirty-foot area between the garage and the lot line to provide for parking. Therefore, the trial court did not err when it concluded that the Rosses did not have an implied easement by necessity. See *Wauben, supra* at 609, 611; *Burling, supra* at 456.

"An easement by implied reservation may arise where the portion of the property conveyed was the parcel burdened during unity of title *and no mention of the easement was made in the conveyance*." 1 Cameron, Michigan Real Property, § 6.9, 199 (emphasis added). Additionally, an implied easement arises only where the easement is reasonably necessary for the fair use and enjoyment

of the property it benefits. *Schmidt, supra* at 731. In this case, Carol Ross testified that their deed contained an express easement giving the Rosses a right "of ingress and egress over roadway east to main highway." There is no need to imply an easement over the upper road where defendants have vehicular access of their property over the already existing easement over the lower road. *Id.* Because the trial court reached the correct result when it concluded that the Rosses had no grounds for claiming an implied easement, its decision is affirmed in regard to this issue. *Gray v Pann*, 203 Mich App 461, 464; 513 NW2d 154 (1994).

Finally, the Rosses assert that the express easement contained in their deed conveyed an easement over the upper road because that road was in use at the time of the conveyance. We need not address this issue because the Rosses have failed to cite any authority in support of their position. *Winiemko, supra* at 415. The Rosses have set forth no facts suggesting that the easement contained in their deed is not the same easement that originally attached to the property in 1947, with which our analysis began.

Affirmed.

/s/ Richard Allen Griffin
/s/ Martin M. Doctoroff
/s/ Stephen J. Markman