STATE OF MICHIGAN

COURT OF APPEALS

J & H PROPERTIES, a Michigan copartnership,

Plaintiff/Counterdefendant-Appellee,

v

MICHIGAN NATIONAL CORPORATION,

Defendant,

and

PHILLIP CAVILL,

Defendant/Counterplaintiff-Appellant.

UNPUBLISHED
January 8, 1999

No. 204781
Oakland Circuit Court
LC No. 93-451887 CH

J & H PROPERTIES, a Michigan copartnership,

Plaintiff/Counterdefendant-Appellee,

v

MICHIGAN NATIONAL CORPORATION,

Defendant-Appellant,

and

PHILLIP CAVILL,

Defendant/Counterplaintiff-Appellant.

No. 204897
Oakland Circuit Court
LC No. 93-451887 CH

Before: Young, Jr., P.J., and Murphy and Hoekstra, JJ.

PER CURIAM.

Defendants, Phillip Cavill and Michigan National Corporation ("MNC"), appeal as of right from the trial court's judgment for plaintiff, J & H Properties, following a bench trial. Defendant Cavill appeals the trial court's findings supporting its conclusion that an easement implied by reservation exists over his property. Defendant MNC appeals the trial court's findings supporting its conclusion that MNC is liable to plaintiff for innocent misrepresentation with regard to the existence of the easement at the time MNC sold the neighboring property to plaintiff. We affirm.

This case involves a dispute over the existence of an easement implied by reservation, specifically a quasi-easement, across defendant Cavill's lot, which is used by plaintiff's tenants as a driveway to access plaintiff's property.

Before 1972, the entire parcel was owned by one manufacturing company, and the company used the claimed easement. During its ownership, the manufacturing company occupied the large parcel and leased the smaller parcel to the former owner of the Good Year Service Center, which is now owned by defendant Cavill. In December 1977, defendant MNC acquired ownership of the entire parcel and began to occupy space in the building for its bank offices in early 1978. The manufacturing company continued to occupy a portion of the building as defendant MNC's tenant. In 1978, defendant Cavill acquired ownership of the Good Year Service Center business and began leasing the southeastern quarter of the parcel from defendant MNC. The lease reserved a right of ingress and egress for plaintiff's "employees, guests, supplies, tenants, and other invitees." In 1981, defendant MNC sold the smaller parcel to a party by warranty deed, subject to the 1978 lease between defendants MNC and Cavill. In 1986, that party sold the smaller parcel to defendant Cavill by land contract, which was later replaced by a warranty deed. In 1988, defendant MNC sold the larger parcel to plaintiff. Although the claimed easement was not recorded, plaintiff's tenants continued to use the claimed easement.

I

Defendant Cavill argues that several of the trial court's findings supporting its conclusion that an implied easement exists are clearly erroneous. We disagree.

This Court reviews the trial court's findings of fact at a bench trial for clear error. MCR 2.613(C); *Featherston v Steinhoff*, 226 Mich App 584, 588; 575 NW2d 6 (1997). A finding is clearly erroneous when, although evidence supports it, this Court is left with a definite and firm conviction that a mistake was made. *Id*. Appellate courts must give regard to the trial court's superior ability and special opportunity to judge the credibility of the witnesses who appeared before it. MCR 2.613(C); *Brooks v Rose*, 191 Mich App 565, 570; 478 NW2d 731 (1991).

An easement is the right to use the land of another for a specified purpose. *Schadewald v Brule*, 225 Mich App 26, 35; 570 NW2d 788 (1997). A claim of implied easement arises where two or more tracts of property are created from a single tract, and the use of the smaller estate for the benefit of the dominant estate is apparent, continuous, and necessary. *Harrison v Heald*, 360 Mich

203, 206-207; 103 NW2d 348 (1960); *Rannels v Marx*, 357 Mich 453, 458; 98 NW2d 583 (1959). An easement implied from quasi-easement requires a showing that, at the severance of the estate, an obvious and apparently permanent servitude already exists over one part of the property in favor of the other property, and that the easement is reasonably necessary for the use and enjoyment of the property it benefits. *Schmidt v Eger*, 94 Mich App 728, 731; 289 NW2d 851 (1980).

In order to prevail, the party asserting an easement by implied reservation must show: (1) that during the unity of title an apparently permanent and obvious servitude was imposed on one part of an estate in favor of another; (2) continuity; and (3) that the easement is reasonably necessary for the fair enjoyment of the property it benefits. *Schmidt*, *supra*. The party asserting the easement has the burden of proving the claim by a preponderance of the evidence. *Id.*; *Kahn-Reiss, Inc v Detroit & Northern Savings & Loan Ass'n*, 59 Mich App 1, 12; 228 NW2d 816 (1975).

The trial court's findings supporting its conclusion that, during the unity of title, an apparently permanent and obvious easement was imposed on defendant Cavill's property are not clearly erroneous. The evidence showed that during the unity of title the claimed easement was used for the benefit and enjoyment of what is now plaintiff's property and that such use was apparent and obvious. Over 3-1/2 years before the two parcels were created, defendant Cavill leased the smaller parcel from defendant MNC. The open and obvious nature of the easement is demonstrated by defendant MNC's reservation of an easement in the 1978 lease between it and defendant Cavill. Contrary to defendant Cavill's claim, there is no evidence that the claimed easement was limited to only the manufacturing company. Rather, the focus is on the apparent, obvious and continuous nature of the use of the claimed easement by the *dominant estate.* See e.g., *Harrison* and *Rannels*, *supra*. In addition, there was evidence presented that the easement was used continuously by the dominant estate since at least 1972 to the present. Finally, it is apparent that no one had ever attempted to block or otherwise impede the use of the easement.

Defendant Cavill does not dispute the trial court's finding that use of the easement was continuous. We nevertheless note that the evidence clearly showed that from 1972 until the present, the use of the claimed easement was continuous by the dominant estate.

We further find that the trial court's finding that the use of defendant Cavill's driveway was reasonably necessary for the enjoyment of plaintiff's property is not clearly erroneous. From 1972 to 1988, the former owner of the entire parcel used the claimed easement for its shipping and receiving needs, which required the use of large trucks. After the former owner left the premises, plaintiff's tenants continued to use the claimed easement for their shipping and receiving needs. It appears that, without the use of the easement, plaintiff's tenants would be forced to enter and exit through the Crooks Road driveway on plaintiff's property. Such an undertaking, particularly for the large trucks, would be impractical, unreasonable, and dangerous given the limited available space in plaintiff's service drive area to turn around, and the dangers of backing onto a heavy trafficked street or onto plaintiff's property from a heavily trafficked street. Further, plaintiff's tenants testified that they rely on the use of the easement and some could not perform their business without use of the easement. Finally, we note that defendant Cavill failed to present any evidence in the trial court contradicting plaintiff's proffered costs of modifying its building.

We also reject defendant Cavill's claim that the trial court's finding that his property has not been burdened beyond that contemplated at the time the easement was created is clearly erroneous. Once granted, an easement cannot be modified by either party unilaterally. *Schadewald, supra* at 36. Equity will enjoin an increase in the burden on the servient estate beyond that contemplated at the time of the creation of the easement. The question whether the acts complained of increased the burden is a question of fact. *Bang v Forman*, 244 Mich 571, 573; 222 NW 96 (1928); *Soergel v Preston*, 141 Mich App 585, 588; 367 NW2d 366 (1985).

As the trial court noted, the language in the lease was broad in that it reserved an unlimited right of ingress and egress and did not, as defendant Cavill suggests, limit it to a certain number of trucks per day or week or to only the former owner of the entire parcel. In fact, defendant Cavill failed to point to any evidence that supports a finding that the claimed easement was limited to only certain individuals. We further find that defendant Cavill's claim that his business was severely hindered by the use of the claimed easement was weakened by the fact that he was willing to let the use of the easement continue so long as plaintiff paid a fee for such use, and that defendant Cavill has successfully expanded his business since plaintiff acquired its property.

Finally, we reject defendant Cavill's claims questioning the trial court's determination of the weight of certain evidence. It is the province of the trial court, sitting as the trier of fact in a bench trial, to weigh the evidence and to believe or disbelieve any testimony, and this Court gives due regard to the trial court's superior ability and special opportunity to judge the credibility of the witnesses who appear before it. MCR 2.613(C); *Brooks, supra*; *Gorelick v Department of State Highways*, 127 Mich App 324, 333; 339 NW2d 635 (1983). We likewise reject those claims that were not raised in the trial court and those which defendant Cavill has failed to provide authority to sustain his position. See *People v Grant*, 445 Mich 535, 546-547; 520 NW2d 123 (1994); *Winiemko v Valenti*, 203 Mich App 411, 415; 513 NW2d 181 (1994).

II

Defendant Cavill next argues that the trial court violated the doctrine of stare decisis when it relied on this Court's decision in *Schmidt*, *supra*, for the proposition that an implied easement by reservation can be granted on a showing of reasonable necessity as opposed to strict necessity. Again, we disagree. We review this issue de novo as a question of law. *Rapistan Corp v Michaels*, 203 Mich App 301, 306; 511 NW2d 918 (1994).

The rule of stare decisis establishes uniformity, certainty, and stability in the law. Under the doctrine of stare decisis, a decision deliberately made will not be overruled unless the court is convinced that the case was wrongly decided, and that less injury would result from overruling than from following it. *Brown v Manistee County Rd Comm*, 452 Mich 354; 550 NW2d 215 (1996); *Boyd v W G Wade Shows*, 443 Mich 515, 524-525 n 15; 505 NW2d 544 (1993).

In *Schmidt*, this Court relied on our Supreme Court's decisions in *Harrison* and *Rannels*, *supra*. The holding in *Schmidt* has not been overruled or reversed by our Supreme Court, nor has the Supreme Court (or later decisions of this Court) altered the reasoning employed. The publication of an

opinion of this Court creates binding precedent statewide, and the opinion remains binding until it is contradicted by another panel of this Court or until reversed, overruled,

altered or questioned by the Supreme Court. *Straman v Lewis*, 220 Mich App 448, 451; 559 NW2d 405 (1996); *Mitchell v General Motors Acceptance Corp*, 176 Mich App 23, 34; 439 NW2d 261 (1989). Further, although two cases decided before *Schmidt* stated that "strict necessity" must be shown, at the time of the *Schmidt* decision, one panel of this Court was not bound by the decision of another panel of this Court. See *Topps-Toeller, Inc v Lansing*, 47 Mich App 720, 730; 209 NW2d 843 (1973). Finally, two of the three Supreme Court cases on which defendant Cavill relies were decided before *Harrison* and *Rannels*, *supra*. The third case, *Ketchel v Ketchel*, 367 Mich 53; 116 NW2d 219 (1962), involved a prescriptive easement and did not address the holding in *Schmidt*.

III

Defendant MNC argues that the trial court's findings supporting its conclusion that MNC is liable to plaintiff for innocent misrepresentation is clearly erroneous. We disagree.

A claim of innocent misrepresentation is shown if a party detrimentally relies upon a false representation in such a manner that the injury suffered by that party inures to the benefit of the party who made the representation. *Forge v Smith*, 458 Mich 198, 211-212; 580 NW2d 876 (1998); *United States Fidelity & Guaranty Co v Black*, 412 Mich 99, 118; 313 NW2d 77 (1981). While it is unnecessary to prove that the person making the representation had knowledge that the statements were false, it is necessary to show privity of contract. *Forge*, *supra* at 212.

The testimony at trial showed that MNC's representative assured plaintiff's representative that there was an easement through defendant Cavill's property. In fact, MNC's representative testified at trial that he believed that there was an easement, and intended that plaintiff would rely on the documentation showing an easement. Plaintiff's representative claimed that plaintiff would not have purchased the property but for the documentation given to him indicating the existence of the easement. Based on the evidence presented, the trial court's findings of fact with regard to innocent misrepresentation are not clearly erroneous.

We reject defendant MNC's claim that it is not liable because plaintiff had a duty to use due diligence regarding the purchase of the property. As the trial court observed, MNC has not cited any authority for the proposition that due diligence is a defense to innocent misrepresentation under these circumstances. This Court will not search for authority to sustain or reject a party's position. *Winiemko*, *supra*. Further, contrary to defendant MNC's claims, it is unnecessary to prove that the person making the representation had knowledge that the statements were false, *Forge*, *supra*, and it is apparent that the trial court found that damages are an element of innocent misrepresentation.

Affirmed.

/s/ Robert P. Young, Jr.
/s/ William B. Murphy
/s/ Joel P. Hoekstra