STATE OF MICHIGAN

COURT OF APPEALS

ANDREW W. BOCHI and BETTY JANE BOCHI, husband and wife, RAY J. WEST and JUDITH A. WEST, husband and wife, WILFRED D. JACKSON, a single man, PETER TOMA, JR., and ELSIE TOMA, husband and wife and RAY FARHAT and JOYCE E. FARHAT, husband and wife, EDWARD J. LEPPLER and MABEL M. LEPPLER, husband and wife, and DONALD E. CLOSSER and DORIS J. CLOSSER, husband and wife,

Plaintiffs-Appellants,

v

DOUGLAD L. SHAFFER and CINDA A. SHAFFER, husband and wife,

Defendants-Appellees..

UNPUBLISHED
July 9, 1999

No. 201553
Cheboygan Circuit Court
LC No. 95-5366 CH

Before: Fitzgerald, P.J., and Doctoroff and White, JJ.

WHITE, J. (concurring in part and dissenting in part).

I agree that the trial court did not err in concluding that a prescriptive easement existed over defendants' property for pedestrian traffic and that no express easement existed.

Because I conclude that the trial court's findings and rulings are unclear and inadequate to facilitate review, I would remand for clarified findings and to permit defendants to complete their proofs, if necessary.

As the majority observes, we review equitable actions de novo, reviewing for clear error the findings of fact supporting the decision. *Webb v Smith (After Second Remand)*, 224 Mich App 203, 210; 568 NW2d 378 (1997). In the instant case, the findings are insufficient to enable adequate review.

The court made a partial ruling on the last day of trial, cutting off defendant Shaffer's testimony. The court stated:

> There is evidence of user [sic]. There is all kinds of evidence of occasional use.
>
> But let me do this, in order to expedite this proceeding, because I think it's fair. And I think we have been wrestling and piecemealing this case long enough.
>
> I would make a determination at this time that no plaintiff has the right of prescriptive easement over the Closser Road. Period. I will make findings to support that later.
>
> . . . . The easement, if any, is by necessity. There may be exceptions to that, but they don't deal with prescription.
>
> * * *
>
> Let me make this qualification. My ruling goes to vehicular easements. I'm not talking about pedestrian easement because there is ample evidence the parties back and forth walked across and visited each other. All of the history of this –
>
> But if you want, I will render my ruling on the easement by necessity at this time and my other findings.

The trial court stated from the bench at the conclusion of trial:

> The gist of this suit is to determine what, if any, right the plaintiffs have to use the right leg of that U or the Closser-Shaffer Road. The Closser Road, it is important to note, did not connect, except in perhaps the more primitive of senses, with the end of the Bluffs Road until after a culvert was placed in a creek, Grandfathers Creek, to enable vehicle use. Vehicle use had been attempted but was largely unsuccessful, although some vehicles may have succeeded in getting through there. That's not the point. The point is that the creek has, through nature, generated a bog-like condition which could enable [sic] vehicular traffic.
>
> So, as I said, the Closser Road did not initially connect with the end of the Bluffs Road until after 1988 because there was no road there, and because Grandfathers Creek acted as a wetland creek to transit at least until that culvert was built in '88 or '89.
>
> As the years passed, beginning in about 1988, Leppler and others built garages and improved the vehicular travel by upgrading and connecting the Bluffs Road to the Closser Road. The road was originally I would suppose a two track, which caused an impassible [sic] area but not so in such a manner to enable [sic?] transit. At least not in the wet season.

> But for the reason that the road was not really occupied by these parties and developed for regular transit, the plaintiffs can have no vehicular easement by prescription over Closser Road. That would be my opinion.
>
> * * *
>
> . . . there is no easement by prescription in favor of any plaintiff to use Closser Road except for pedestrian purposes. There is only an easement by strict necessity in favor of each plaintiff during . . . emergencies or when Bluffs Road is impassible [sic]. That would be during winter months or during washouts.
>
> The easement by necessity is seasonal from roughly November 1st through April 31st each year. It's based on the strict necessity when the Bluffs Road is impassible [sic]. When I say impassible [sic], I mean it can't be safely negotiated.
>
> * * *
>
> The easement over Closser Road is secondary to the primary access use of Bluffs Road for plaintiffs' ingress and egress except when an emergency has arisen [e.g., somebody has a heart attack and calls for an emergency vehicle].
>
> * * *
>
> The defendants may maintain a fence and an unlocked gate, locking the plaintiffs use of Closser Road during the summer. In winter they can't do that. And during emergencies such as fire, police, or ambulance calls, plaintiffs are enjoined from using Closser Road in the summer or for a nonemergency purpose. Defendants are enjoined from preventing plaintiffs' use of Closser Road in winter or during emergencies. Plaintiffs may only use Closser Road during an actual emergency or when . . . Bluffs Road is impassible [sic]. And then only to gain access and egress from the premises.

Thus, at the conclusion of trial, the court found that no prescriptive easement was established for vehicle use of any kind, because there was no real road until after 1988, and Grandfather's Creek was impassable until a culvert was built in 1988 or 1989, and "for the reason that the road was not really occupied by these parties and developed for regular transit, the plaintiffs can have no vehicular easement by prescription over Closser Road." The court found that "[t]here is only an easement by strict necessity in favor of each plaintiff during . . . emergencies or when Bluffs Road is impassible [sic]."

In its final judgment, however, the court changed its mind about granting plaintiffs an easement by necessity when Bluffs Road is impassable, and for the first time found a prescriptive easement for emergency vehicles:

> . . . it is hereby ordered . . . that from November 1 through April 31 of each year, Plaintiffs, with the exception of [Donald and Doris] Closser, their heirs, successors, assigns, family, employees, business and social guests, shall have an *easement by*

necessity for emergency vehicular traffic for ingress and egress to premises which they own over the property of the Defendants . . .

* * *

It is further ordered and adjudged that Plaintiffs have proven, by use over fifteen years, *a prescriptive easement for emergency vehicles to use the roadway over Defendants' lands irrespective of whether "Bluffs Road" is impassable.* Moreover, the Court concludes that, at times, it is unsafe to use "Bluffs Road" so that emergency use of Closser Road is the only safe alternative. It is further the judgment of this court that emergency vehicles may travel unimpaired over the roadway and easement described above at all times by reason of prescriptive use for over fifteen years, such use having been proved by Plaintiffs.

It is further ordered and adjudged that Plaintiffs shall have an *easement for foot travel* over the "Closser Roadway" . . . This easement is based upon the *prescriptive use* the Plaintiffs and their predecessors have made of the "Closser Roadway" for a period greater than fifteen years.

It is further ordered that the real property of Plaintiffs West, Jackson, Farhat, Bochi, Toma and Leppler is seasonally landlocked each winter when the steep hill on Bluffs Road is rendered impassable by snowfall and ice . . . .and further, because the Fire Chief, Clayton Innis, testified[1] he would not allow a fire truck to go to a fire down Bluffs Road in the winter because it would be unsafe. Therefore the Court concludes that Bluffs Road is at times impassilbe [sic], *but notwithstanding that impassibility [sic], the said Plaintiffs have no lawful right to use Closser Road for regular ingress and egress to their property.* The controlling case is Moore v White (1909), 159 Mich 460. That case has never been reversed or modified. . . . seasonal impassability [sic] of "Bluffs Road" is not such a strict necessity as would bring this case within the rule of the Moore. Case. . . . Plaintiffs never bargained for nor received such a right, nor under the Moore case, can it fairly be imposed in strict necessity. [Emphasis added.]

At the February 3, 1997 hearing on plaintiffs' motion to clarify or amend the judgment, which was denied, the trial court stated:

. . . . I did not grant [in the judgment] a general easement during the winter months, and I think I defined emergency vehicles as ambulance, utility vehicles, fire vehicles, police vehicles, and . . . I granted a pedestrian easement, because that had been historically been proven, but I did not grant a general easement during the winter months. That's a change from what I previously announced and that's why I put the language in the judgment saying that notwithstanding the prior pronouncements of the court I had further considered the case Mr. McArthur cited [Moore v White] and I did not grant an easement because this simple reasoning. The reasoning was *I admit and I find that the plaintiffs have no other way of accessing their property during the winter months, and if they're excluded from using Closser Road, then they have to find some other way to get to their premises, but I can't invent an easement where there is not prescriptive use for ingress and egress over fifteen years.*

The problem arises in this case, according to my recollection, is that the cottages which were originally summer cottages, and as long as they remain so, there was no winter use of the Closser Road. It became a road that was subsequently used when the character of the cottage usage changed from summer use to year around use, and that period was not long enough to qualify as a prescriptive easement and therefore it's not fair, for example, to the Clossers or people deriving [sic] under them that they have to, in effect rebuild Bluffs Road. I mean, that wasn't their bargain and I saw that argument because of the case Mr. MacArthur [sic] pointed out. That's why I changed accordingly.

* * *

Always been accessible in the summertime. Now, suddenly in the wintertime it becomes inaccessible, depending on the amount of ice and snow, *and it can be cured by changing the Bluffs Road.*

* * *

MR. HOFFMAN: . . . in the next paragraph [of the judgment] you grant emergency vehicles for the entire year; not through April. . .

THE COURT: . . . . Historically, they've always allowed emergency vehicles to come in either road and so there is no change in that. The change comes when you change the usage of the home from a seasonable [sic seasonal] summer dwelling to a year 'round dwelling and now you want to use a different road that belongs to somebody else, because it's passable and your road is not. I think the answer to that is very simple. You change your road to make it a passable road. . . .

* * *

MR. HOFFMAN: They [plaintiffs] don't own that property [on which Bluffs Road sits]. [Emphasis added.]

Thus, although the majority states that "[t]he trial court did not err in finding an easement implied by necessity when Bluffs Road is impassable," the trial court did not find such an easement. Rather, the court found that strict necessity was not established, and refused to grant such an easement except for emergency vehicles.

Further, the majority concludes that the trial court, having found a prescriptive easement for emergency vehicles, erred in ruling that an easement did not exist for non-emergency vehicular traffic, because "[t]he establishment of an 'open, notorious, adverse, and continuous' use by any vehicle for more than fifteen years was sufficient to establish an easement for all vehicles." However, in light of the court's original findings, it is not clear that the court found an open, notorious, adverse, and continuous use by emergency vehicles.

Lastly, I observe that there was considerable evidence that persons did, in fact, drive on the trail between Bluffs Road and Closser Road, in winter as well as summer, for many years prior to 1988, notwithstanding Grandfather's Creek, and that there was a culvert or bridge over the creek allowing vehicular travel long before 1988.[2] However, because it is unclear whether the court rejected plaintiffs' claims because it did not believe their and their witnesses' testimony or because it concluded that the testimony, although credible, did not establish the necessary use, the requisite review is impossible. I would therefore remand for additional findings and conclusions.

/s/ Helene N. White

[1] There is no testimony by a fire chief in the transcripts before us, and neither party mentions such testimony.

[2] The testimony included that of Michael Donovan, foreman for the Cheboygan County Road Commission, who testified that he had lived in Cheboygan for twenty seven years and had frequently visited the Black Lake area in the 1960s and 1970s because a friend had a cottage there. He also did some work there for Ungrey, who previously owned the Leppler property. Donovan testified that he had not frequented the area in about eighteen years. He testified that he had frequently driven over the "trail" at issue, was familiar with the ingress and egress to the homes in that area, and that it was "very obvious" that other people were driving on that road because "it was packed down pretty good." Donovan testified that the roadway had holes that were patched up with dirt**,** and that it was wet and swampy, but that a four-wheel drive vehicle was not necessary to get through. He testified that he was always in a two-wheel drive truck when he drove the trail and never did so in a passenger car.

Clare Bullis, owner of a private excavating company, testified that he knew the area because he was hired (by a number of the plaintiffs and predecessor owners) to do a lot of tractor and bulldozer work there since the early 1970s, and had worked on the trail in question, filling in holes. Bullis testified that he was first in the area in the early 1970s and went there approximately weekly. He testified that the plaintiffs used Closser Road in the winter because the hill on Bluffs Road was impossible to negotiate in the winter. He further testified that he observed persons other than the Clossers use Closser Road and that Closser Road "appears to be used quite a bit" since 1972. Bullis testified that Bluffs Road had been washed out two or three times in the summertime and that he was hired to bring in gravel to remedy it. He testified that he last did so about two years before trial, and that he had been there several days before trial and "it wasn't even walkable" because of the steepness of the hill and a sixty or seventy foot embankment. Bullis testified that he was familiar with the stream on the defendants' property.

Regarding a culvert, Bullis was asked:

> Q Who paid you for putting the culvert, installing the culvert at the – at the creek location?

A Mr. Smith.

Q How long ago was that?

A About five years ago, six years ago.

Q So the road existed there?

A Oh, yeah.

Q Long before the culvert?

A Well, the culvert was just a tool pipe across the road. That's all it was, and I lowered it. The water was banked up there. In other words, was banked up at the culvert because the culvert was much higher than the water, so I dug it down and Mr. Smith paid me for that.

On recross examination, Bullis testified as follows:

Q Just a couple on – on what Mr. Hoffman – you say you put a culvert in. Then you say you just lowered a culvert five years ago?

A That was just a tube.

Q So five years ago, which would have been what – '91 or so?

A It could have been, yes.

Q You say you went on to Max Smith's property and you lowered the culvert that was there?

A That's right.

Q Okay. Was there already a culvert there?

A There was this culvert. You can call it a culvert – a tube.

Q Talking about one of those corrugated steel tubes, right?

A Yeah.

Q That was already in the creek, as far as you can –

A That was already there.

Q But you don't know when that was put in?

A No.

* * *

Q Okay. So before you lowered the tube five years ago, the Smith property was very wet?

A Quite wet.

Elmer Dixon testified that he had lived in the area since 1946 and hauled stone and dirt to do construction work on roads. He testified that he is familiar with the area of the plaintiffs' and defendants' homes because he worked there since about 1950, stoning virtually all the properties along the lakefront. He testified that people drove on the drive, in cars or pickups, and that he had as well "but not with a full load on the truck." Dixon testified that in 1950 the drive in question was "like a two-track road" and that it had not changed much from then until he last saw it around 1990. He testified that the cottage owners to the east of the Ungrey (now Leppler) property paid to maintain Bluffs Road and that Ungrey did not use Bluffs Road, he used Closser Road. Dixon testified that there was a tube put in at the creek, that he did not know when, but that he believed it was in "the earlier years."

Plaintiff Peter Toma testified that he built his cottage between 1960 and 1965, and that two of his brothers had had cottages on the lake since 1950. Toma testified that before building his cottage, he visited his brothers' cottages, and that from the time he began building his cottage, he and his family went there all through the summers and parts of the winters. He testified that he and his brothers accessed their lots through either Bluffs or Closser Road, using both evenly. He testified that in the early 1950s and 1960s the private drive was a "two-track" from the base of Closser Road through and past Bluffs Road and that he has used both roads since that time. When asked about the road being low around Mrs. Davies' home (the predecessor owner of the Closser property), Toma testified that in 1955 or 1956 he went through there with a pickup truck without engaging the four-wheel and that he also drove his car, a Ford Fairlane, through there. He testified that when he bought the property there was already some kind of culvert there, perhaps fifty gallon drums with the ends cut out, and vehicles could pass over the creek. He testified that Smith drove to his property from both Closser and Bluffs Road.

Plaintiff Ray Farhat testified that he had been to the area every summer since 1963, at which time his father-in-law owned a cottage that his wife inherited nineteen years before trial, and that he had driven both Bluffs and Closser Road in the summer, mostly on his motorcycle. In the winter he would use Closser Road. His in-laws used both roads and when his mother-in-law had cancer from 1972-1975 they used Closser Road. He never asked anyone permission to use Closser Road. Farhat testified that the Shaffers put a culvert in and that there was a wooden bridge-like structure there before that, but he did not know who put it in.

Plaintiff Joyce Farhat, Raymond's wife, testified that her parents used the drive when there was a wooden bridge across the Shaffer/Smith property creek and she recalled using it since 1963, year round.

Plaintiff Wilfred Jackson testified that he used Closser Road when he went to buy a newspaper and when he took his wife, who had cancer, to the hospital in Petoskey. Since buying his cottage in 1983, he had used both roads and no one ever said he could not. Before he owned the property, he visited his brother-in-law beginning in 1975 and drove his snowmobile trailer and pickup truck in from Closser Road. Jackson testified that he and the Shaffers discussed his going across their property in the winter but only after they put up a fence. He testified that a gas truck once got stuck in the creek around 1993. He testified that the drive looks about the same now as it did thirteen years ago. He testified that he did not know who put the culvert in, but that it was there when he moved in thirteen years ago, i.e., 1983.

Plaintiff Ray West testified that he bought a cottage in 1988 and drove on the drive from the cottage to both Closser and Bluffs road, in a car, truck, and four-wheel Honda. No one ever told him he could not. He testified that the drive looks the same now as it did in 1988, except it is fenced and that the culvert was already there when he moved in.

Plaintiff Betty Bochi testified she and her family had lived in her cottage since 1966, and used both roads. No one told them they could not. The drive would be muddy after it rained, but cars still could get through and used it. She testified that the planks were over the creek when she moved in 1966, and that someone took the planks off and put in a metal pipe at some point, but she could not remember when.

Plaintiff Mabel Leppler testified she'd lived in her cottage since 1970. There were a couple of years when she did not use Closser Road, when the Davies' were living at their cottage permanently, because Mrs. Davies asked her to use it less often and she respected her wishes, even though she believed she had a right to use it. She is using the road now and had except when the Davies were there and asked her not to.