STATE OF MICHIGAN

COURT OF APPEALS

GLEN E. WEISHUHN, JACQUELINE A. WEISHUHN and GERALD R. FOOR,

Plaintiffs-Appellees,

v

MICHIGAN GYPSUM COMPANY,

Defendant-Appellant.

UNPUBLISHED
August 22, 2000

No. 215057
Iosco Circuit Court
LC No. 96-000264-CH

Before: Bandstra, C.J., and Cavanagh and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right from a declaratory judgment acknowledging that plaintiffs have a right of way for ingress and egress to their land across land owned by defendant. We reverse and remand for entry of judgment in favor of defendant.

Plaintiffs own two undeveloped[1] adjacent parcels of land south of and adjacent to two parcels owned by defendant. Keystone Road forms the north boundary of defendant's parcels. A two-track road known as Putnam Road extends south from Keystone Road through defendant's two parcels to the northern portion of plaintiffs' parcels. Plaintiffs allege Putnam Road is the only means of ingress and egress to their land. Following plaintiffs' discovery that the southern-most 31.38 foot section of Putnam Road was no longer certified by the county to the state, plaintiffs sought a declaration of their vested rights to continue to access their parcels by way of the 31.38 foot strip over defendant's property. Following a bench trial, the trial court ruled that plaintiffs have a right to continue to use the two-track because they have vested rights in the road.

On appeal, defendant argues that plaintiffs failed to establish their right to continued access under any legal theory and that the trial court's ruling had no basis in law. We agree.

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[1] Trial testimony suggests that, at one time, a small house stood on the parcel owned by plaintiffs Glen and Jacqueline Weishuhn.

We review de novo a trial court's determination of equitable issues, while the findings of fact supporting its determination are reviewed for clear error. *Cipri v Bellingham Frozen Foods, Inc*, 235 Mich App 1, 9; 596 NW2d 620 (1999), citing *Webb v Smith (After Remand)*, 204 Mich App 564, 568; 516 NW2d 124 (1994). A finding is clearly erroneous if we are left with a definite and firm conviction that a mistake has been made. *Cimock v Conklin*, 233 Mich App 79, 84; 592 NW2d 401 (1998); *Kent Co Rd Comm v Hunting*, 170 Mich App 222, 233; 428 NW2d 353 (1988).

There is no legal basis for the trial court's determination that plaintiffs have an interest in the disputed portion of the road. First, the evidence did not support a finding that an easement existed across the disputed portion of defendant's property.[2] "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), citing *Bowen v Buck & Fur Hunting Club*, 217 Mich App 191, 192; 550 NW2d 850 (1996). Easements may be created by express language or by implication of law. There is no evidence in the present case suggesting an express easement was created. An implied easement by necessity may be established by showing: "(1) that during 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 v Eger*, 94 Mich App 728, 731; 289 NW2d 851 (1980); see *Siegel v Renkiewicz Estate*, 373 Mich 421, 425; 129 NW2d 876 (1964). The party asserting the easement carries the burden of proving the claim by a preponderance of the evidence. *Schmidt, supra*. Here, there is no evidence to suggest there was the necessary unity of title over the parcels at issue. It is undisputed the parties did not receive their parcels from a common grantor and it is clear that no party was the grantor of another party's parcel. In addition, there is no evidence that any of the parties' predecessors in title recognized the disputed portion of land as an easement. Under these circumstances, plaintiffs cannot establish an easement by necessity. *Id*.

We note that plaintiffs abandoned the prescriptive easement claim expressed in their original complaint when they failed to assert the claim in their first-amended complaint. MCR 2.118(A)(4).[3]

[2] Although the court appeared to distinguish between the private road interest it found for plaintiffs and rights in an easement, the right that the trial court found for plaintiffs was in the nature of an easement. Indeed, during the September 28, 1998, motion hearing, the trial court described the right as a way of necessity.

[3] Furthermore, plaintiffs' counsel conceded below that they were not bringing a prescriptive easement claim, stating during the March 3, 1998, hearing on defendant's motion for summary disposition:

> So - - and as I filed this case - - filed this case who we were going to bring in and how this thing lays and easements by prescription that I've done. We're not trying to - - we got to change our thinking here. We're not trying to - - I was on the wrong track. Maybe we're all on the wrong track. I'm not now trying to assert an easement by prescription.

Plaintiffs' counsel specified that their action was based on the county's certification of Putnam Road as a county road and plaintiffs' use under a claim of right as a public road.

Moreover, even had plaintiffs asserted a prescriptive easement claim, that claim would have failed given the lack of evidence suggesting plaintiffs continuously used the road for fifteen years. See *Goodall v Whitefish Hunting Club*, 208 Mich App 642, 645-646; 528 NW2d 221 (1995); *Mumrow v Riddle*, 67 Mich App 693, 696-698; 242 NW2d 489 (1976). Trial testimony suggesting plaintiffs used Putnam Road periodically to gain access to their parcels for recreational use does not establish continuous use for the required period of time.

To the extent the trial court determined plaintiffs have rights in Putnam Road as a private road, the trial court clearly erred. There was no evidence that any party filed an application to designate Putnam Road a private road pursuant to MCL 229.1; MSA 9.281; see *McKeighan v Grass Lake Twp Supervisor*, 234 Mich App 194, 198-200; 593 NW2d 605 (1999).

Furthermore, plaintiffs have not established that the disputed portion of Putnam Road is a section of a public road.[4] The evidence at trial suggested Iosco County certified .25 miles of Putnam Road as part of its county road system in 1936 pursuant to the McNitt Act, MCL 247.1; MSA 9.141. Beginning in 1957, the county certified only .24 miles of Putnam Road extending south from Keystone Road. The certified portion of the road ends 31.38 feet north of plaintiffs' parcels. Plaintiffs contend that the county's original certification of the length of road extending from Keystone Road to the northern portion of plaintiffs' parcels establishes that the disputed portion of the road is public property. While the trial court did not to make specific findings as to whether the road is a "public road," see MCL 221.20 *et seq.*; MSA 9.21 *et seq.*, it clearly relied on the county's prior certification of the disputed portion of the road in deciding plaintiffs have a vested right in the road. The trial court erred in relying on the county's historical recognition of the road as a basis for rendering judgment in plaintiffs' favor.

Plaintiffs contend that Putnam Road should be deemed a public road by way of dedication and acceptance and pursuant to the highway by user statute, MCL 221.20; MSA 9.21.

> For a statutory dedication under the Land Division Act, MCL 560.101 *et seq.*; MSA 26.430(101) *et seq.*, the well-established rule is that two elements are required: a recorded plat designating the areas for public use, evidencing a clear intent by the plat proprietor to dedicate those areas to public use, and acceptance by the proper public authority. Public acceptance must be timely and must be disclosed through a manifest act by the public authority either formally confirming or accepting the dedication and ordering the opening of the street, or by exercising authority over it, in some of the ordinary ways of improvement or regulation. Similarly, a valid common law dedication of land for a public purpose requires (1) intent by the property owners to offer the land

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[4] While we recognize that the trial court refused to make specific findings as to whether Putnam Road is a public road, apparently because Iosco County is not a party to this action, the present case involves an equitable determination that we review de novo. In order to fully analyze plaintiffs' claim of right to traverse the disputed portion of the road, we must consider the parties' arguments regarding whether the road is public property.

> for public use, (2) an acceptance of the offer by the public officials and maintenance of the road by public officials, and (3) use by the public generally. [*Beulah Hoagland Appleton Qualified Personal Residence Trust v Emmet Co Rd Comm*, 236 Mich App 546, 554; 600 NW2d 698 (1999) (citations omitted).]

Here, there is no evidence defendant or its predecessors recorded any plat or otherwise had a clear intent to offer any portion of the parcels for public use. In fact, trial testimony suggested defendant's representatives installed a gate consisting of two stanchions and a cable and hook to discourage individuals from entering their land via Putnam Road.

A public highway may be established pursuant to the highway by user statute, MCL 221.20; MSA 9.21, by showing: "(1) a defined line, (2) that the road was used and worked on by public authorities, (3) public travel and use for ten consecutive years without interruption, and (4) open, notorious and exclusive public use." *Beulah, supra* at 554-555 (citation omitted). While the evidence in the present case suggests individuals used at least part of the Putnam Road to dump waste on surrounding properties and that plaintiffs used the road sporadically to access their land for recreational purposes, there is no evidence that plaintiffs or other members of the public used the road continually for ten years. Moreover, it is undisputed that 31.38 feet of the road north of plaintiffs' parcels has not been certified by the county since 1956. As a result, the county has not received state funds to maintain that portion of the road since that time. Consequently, there is no basis for finding the disputed portion of Putnam Road is public property.[5]

Given there is no basis for finding plaintiffs have a right to traverse the disputed portion of the road that lies on defendant's property, we conclude that judgment should be entered in favor of defendant. To hold otherwise under these circumstances would undermine defendant's right to enjoy exclusive control over its property. See *Beulah, supra* at 556-557.[6]

Reversed and remanded for entry of judgment in favor of defendant. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Mark J. Cavanagh
/s/ Brian K. Zahra

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[5] Although plaintiffs suggested below that they possessed a right to traverse the disputed portion of the road as a result of a condemnation, plaintiffs' counsel conceded during oral argument on appeal that no condemnation occurred in this case.

[6] While Putnam Road is apparently the only existing road providing ingress and egress to plaintiffs' parcels, we note that plaintiffs have not provided evidence that access to their parcels could not be gained by way of any other neighboring parcel. In fact, plaintiff Glen Weishuhn testified that he had not approached the owners of the land located east and west of his parcel and did not know whether he could obtain a right of way across their land. Moreover, our holding does not preclude an action by plaintiffs to designate Putnam Road a private road pursuant to MCL 229.1; MSA 9.281.