

STATE OF MICHIGAN
COURT OF APPEALS

DEVRIES DEVELOPMENT and NM LAND
DEVELOPMENT COMPANY, LLC,

UNPUBLISHED
September 24, 2002

Plaintiffs-Appellees,

v

No. 230055
Kent Circuit Court
LC No. 97-003399-CH

EXTRA ROOM OF KALAMAZOO, INC.,

Defendant-Appellant.

Before: Murphy, P.J., and Hood and Murray, JJ.

PER CURIAM.

Defendant appeals as of right the circuit court's judgment in favor of plaintiffs. We affirm.

I. Facts and Procedural History

This Court had previously affirmed the trial court's earlier decision that plaintiffs "have a prescriptive easement over a six-foot-wide common hallway located between the parties' adjoining [downtown Grand Rapids] buildings," but remanded the case back to the lower court "for a determination of (1) the original purpose of the easement, (2) whether plaintiffs' proposed improvements are necessary for plaintiffs to fulfill the purpose of the easement and, if so, (3) whether the proposed improvements pose an unreasonable burden on defendant's estate." *DeVries Development v Extra Room of Kalamazoo*, unpublished opinion per curiam of the Court of Appeals, (Docket No. 205175, issued 2/2/99), slip op, p 1. At issue is whether plaintiffs would be permitted to modify the existing stairway located within the easement to conform the stairs to applicable building code requirements and thus permit the stairway to serve both general ingress and egress from the upper floors of plaintiffs' building and also serve as an alternate fire escape. On remand, the trial court issued a well-reasoned written opinion affirming its earlier opinion and judgment. The judgment permitted plaintiffs to remove a wall that had been erected in the middle of the easement and also to remove or cover an old, unused, three-foot-square elevator shaft located at the bottom of the steps on defendant's side of the easement-burdened property. Plaintiffs' modifications also widened the stairwell to the full six-foot width of the easement by removing the wall and elevator shaft, and made uniform the tread and riser of the steps that moved them about eight feet closer to the hallway entrance.

II. Standard of Review

We review equitable actions, including actions to quiet title, de novo, but factual findings of the trial court are reviewed for clear error. MCR 2.613(C); *Little v Kin*, 249 Mich App 502, 507; 644 NW2d 375 (2002); *Killips v Mannisto*, 244 Mich App 256, 258; 624 NW2d 224 (2001). Furthermore, the extent or scope of an easement is a question of fact for the trial court and reviewed on appeal for clear error. *Little, supra* at 507, 513. A finding of fact is clearly erroneous if the appellate court is left with a definite and firm conviction that a mistake has been made. *Ypsilanti Twp v General Motors Corp*, 201 Mich App 128, 133; 506 NW2d 556 (1993).

III. Analysis

Defendant first argues that the trial court clearly erred by finding that the original purpose of the reciprocal easement was for general ingress and egress to and from the parties' buildings' upper floors, and that the stairway, as the only "ready" access, was also intended as a means to escape in the event of a fire. We disagree. In this Court's first opinion in this case, the panel remanded to the trial court for a determination of "the original purpose of easement," because the record was insufficient to apply the two-part test as stated in *Mumrow v Riddle*, 67 Mich App 693, 699; 242 NW2d 489 (1976): (1) whether plaintiffs' improvements in the stairway were necessary to effectively enjoy the easement and (2) whether plaintiffs' improvements imposed an unreasonable burden on defendant's property. *DeVries, supra* at slip op 1-3. This Court did not remand to the trial court to specifically decide whether the easement had in fact been used as a fire escape, but rather, remanded to the trial court for a determination of whether the use of the stairs as a fire escape was within the original purpose of the easement because plaintiffs justified their modifications on the need to permit the stairs to be used for that purpose. *Id.* at 3. This Court suggested, however, that if the stairs had not been used as a fire escape in the past, the modification of the stairs for that purpose would not be necessary to enjoy the easement, but rather for a purpose never before ascribed to the easement. *Id.* This Court's comments, however, merely stated the general rule that "[t]he use of an easement must be confined strictly to the purposes for which it was granted or reserved." *Delaney v Pond*, 350 Mich 685, 687; 86 NW2d 816 (1957).

Furthermore, this Court's comments concerning the use or non-use of the stairway as a fire escape are not controlling as the law of the case because that doctrine applies only to questions actually decided in the prior decision, or necessarily determined to arrive at the prior decision. It does not apply to issues raised but not decided by the appellate court. *Kalamazoo v Dep't of Corrections (After Remand)*, 229 Mich App 132, 135; 580 NW2d 475 (1998). Similarly, an order remanding a case because a material issue of fact must be determined cannot establish the law of the case because the issue was not decided. *Brown v Drake-Willock International, Ltd*, 209 Mich App 136, 144; 530 NW2d 510 (1995).

Michigan case law addressing easements refers to the purpose, scope, or extent of an easement interchangeably as establishing the parameters of the permitted use of the servient estate by the dominant estate. See, e.g., *Little, supra* at 507, and *Dobie v Morrison*, 227 Mich App 536, 541; 575 NW2d 817 (1998) (using the term "extent"); *Killips, supra* at 261, and *Mumrow, supra* at 699 (using the term "scope"); *Delaney, supra* at 687, and *Cheslek v Gillette*, 66 Mich App 710, 715; 239 NW2d 721 (1976) (using the term "purpose"). As noted above, the

determination of the scope of an easement is a question of fact to be determined by the trial court and reviewed on appeal for clear error. *Little, supra* at 507, 513; *Dobie, supra* at 541. “Since the scope of the dominant owner’s privilege is so largely a function of the circumstances, opposite conclusions on varying sets of facts are to be expected.” *Mumrow, supra*.

In compliance with this Court’s prior opinion, the trial court presided over an evidentiary hearing and concluded that the purpose of the easement has always been for general ingress and egress, but the easement was also intended to provide a means of escape in the event of a fire. Further, the trial court found that the easement was in all probability used in 1901 as a fire escape, and that the hallway and stairway, as modified by plaintiffs, did not exceed the scope of the reciprocal easement. These findings of fact by the trial court were supported by the evidence, and therefore, are not clearly erroneous. MCR 2.613(C); *Little, supra* at 507.

The fact that the original easement was for general ingress and egress to the upper floors of the parties’ buildings was undisputed by defendant and supported by the evidence. Further, the testimony established that the stairs in the easement, until recent renovations of plaintiffs’ buildings, served as the only means, apart from outside fire escapes on the back of the buildings, of getting into and out of the upper floors of the east side of plaintiffs’ building. The trial court reasoned that, “as the only means of general egress from, as well as access to, the upper floors, the easement has always been intended to be a ‘fire escape,’ as well as a means of coming and going in routine circumstances.” The trial court applied common sense to deduce that if “confronted by a need to quickly evacuate a building, occupants use the most readily available escape route,” and that, “as the only means of general egress from . . . the upper floors, the easement has always been intended to be a ‘fire escape,’ as well as a means of coming and going in routine circumstances.” The trial court properly applied common sense in evaluating the evidence presented to it at the hearing. See *People v Simon*, 189 Mich App 565, 567-568; 473 NW2d 785 (1991). Moreover, the trial court’s common sense inference was supported by the City of Grand Rapids building inspection supervisor, Dennis Klein, who testified that modern building codes do not recognize traditional outside fire escapes because people do not use them. Therefore, the trial court did not clearly err in its finding of fact in this regard.

Although it was not necessary to establish that the common stairs were in fact used as a fire escape, the trial court found that “the easement was in all probability used in 1901 as a fire escape.” This finding was supported by the evidence discussed above, and reasonable inferences from contemporary newspaper reports of a July 18, 1901 fire that destroyed the Luce block across Ottawa Street to the west of plaintiffs’ building. The trial court’s conclusion that it was more probable than not that residents of plaintiffs’ and defendant’s buildings were among the neighborhood block dwellers that evacuated to the street, and did so by way of the enclosed stairway easement that exited away from the fire and permitted carrying belongings, is supported by the evidence and reasonable inferences from the evidence. The circumstances, including the direction of the fire, the location and nature of the exits and the report of the residents carrying belongings to the street, made the trial court’s conclusion reasonable and more than mere speculation. See *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994). From the foregoing evidence and reasonable inferences arising therefrom, the trial court did not clearly err in finding that plaintiffs’ proposed use of the easement, for general ingress and egress, and also

as an alternate emergency (fire) exit, was within the original purpose or scope of the easement. *Killips, supra* at 258; *Cheslek, supra* at 715.

Next, defendant argues that the trial court clearly erred by finding that plaintiffs' modifications to the stairway were necessary to achieve and enjoy the original purpose of the easement. We disagree. The undisputed evidence at the hearing established that the stairway in the easement did not comply with applicable building code requirements in numerous ways and that the city of Grand Rapids building inspectors would not permit the stairway to be used without modification. Specifically, the stairway was only thirty-two inches wide between the first and second floor, and at its widest elsewhere, thirty-six inches, less than the forty-four-inch width the building code required, and also in violation of a building code requirement that the stairway not narrow as the stairs descended. The stairs also violated a building code requirement that steps have uniform tread and riser, creating a trip hazard unacceptable to city inspectors. Although there was evidence that city building officials offered to compromise the minimum forty-four-inch width requirement to thirty-six inches, if other modifications were made to the stairway, plaintiffs' appeal of building code requirements was denied, and city officials never actually waived the forty-four-inch minimum width required by the building code. Further, while plaintiffs stipulated that they had other options available to comply with the building code by using non-easement space in their building, plaintiffs faced practical limitations in doing so because the space was leased to a retail business. Thus, the trial court did not clearly err in finding that legal and practical necessity required modification of the stairway to permit using the easement for its original purpose, which as noted above, included both general ingress and egress to the upper floors and also serving as exit stairway in the event of a fire. *Little, supra*.

Moreover, the evidence presented to the trial court established that the original stairs occupied the full six-foot width of the easement-burdened property. "One who holds an easement by prescription is allowed to do such acts as are necessary to make effective the enjoyment of the easement, and the scope of this privilege is determined largely by what is reasonable under the circumstances." *Killips, supra* at 261, citing *Mumrow, supra* at 699. The trial court here did not clearly err in finding that it was necessary, and thus reasonable, for plaintiffs to lengthen the stairs to the full six-foot width of the original easement stairs, to comply with the building code, and therefore, "to make effective the enjoyment of the easement." *Id.* For the same reasons, removing the empty elevator shaft and wall and extending the stairs into the hallway were necessary to comply with building code requirements so that the stairway easement could be used for its original purpose. *Delaney, supra*; *Cheslek, supra*. Accordingly, review of the record on this issue does not leave us with a definite and firm conviction that a mistake has been made. *Ypsilanti Twp, supra*.

Finally, defendant argues that the trial court clearly erred in finding that plaintiffs' modifications did not impose an unreasonable burden on defendant's property. We disagree. Our Supreme Court has stated that a "principle which underlies the use of all easements is that the owner of an easement cannot materially increase the burden of it upon the servient estate or impose thereon a new and additional burden." *Delaney, supra*. Thus, in *Mumrow, supra*, this Court stated the general rule that "one who has an easement by prescription has the privilege to do such acts as are necessary to make effective the enjoyment of the easement, unless the burden upon the servient tenement is thereby unreasonably increased." Repairs and improvements to the

servient estate may be necessary to permit the effective enjoyment of the prescriptive easement, but particularly the latter, will not be permitted if they unreasonably increase the burden on the servient estate. *Id.* at 700. Thus, the key factual determination is the reasonableness of the imposition on the servient estate in light of all the facts and surrounding circumstances. *Id.* at 699-700; see also *Killips, supra* at 261.

In the present case, the evidence established that the elevator shaft and the wall supporting it were actually obstructions placed in the original easement stairway. Removing them only returned the stairs to their original full width. Further, the elevator had long since fallen into an unusable state and created a dangerous impediment to the use of the easement. The record here established that the wall was used only to support the useless elevator shaft. Thus, widening the stairs and removing the elevator shaft and wall imposed no new or additional burden on the servient estate. Rather, the trial court correctly noted that the servient estate was actually improved by removing useless, dangerous obstructions and replacing them with useable stairs.

The extension of stairs eight feet toward the Monroe Center entrance also imposed no burden on the servient estate beyond that already imposed by the easement's original purpose. The hallway was intended to access the stairway, which permitted ingress and egress to and from the upper floors. Under applicable building code requirements, use of the hallway and stairs for ingress and egress precluded their use for any other purpose, including storage. Thus, the trial court did not clearly err by finding that plaintiffs' modifications imposed no burden regarding using the hallway for storage because that was not an easement use.

This Court remanded this matter after our first review because the record was insufficient to apply the twofold test set forth in *Mumrow, supra* at 700, where this Court opined:

The first determination is whether the repair or improvement is necessary to effective enjoyment of the easement. The second determination is whether the repair or improvement, if necessary, unreasonably increases the burden on the servient tenement. Obviously, there will be some interdependence between and balancing of the two determinations. Also, "improvements" may be expected to receive somewhat closer scrutiny than "repairs".

In the case at bar, the modifications implemented by plaintiffs were necessitated by applicable building code requirements to permit use of the stairs for their original purpose. Further, plaintiffs' modifications returned the stairs to their original full hallway-width scope, and therefore, were necessary and reasonable repairs and improvements. *Id.* at 699. In light of the reasonableness of plaintiffs' actions, defendant presented no evidence or argument that the modifications imposed an unreasonable burden beyond the scope of the original prescriptive easement. See *Killips, supra*. Thus, we do not find clear error warranting reversal.

Affirmed.

/s/ William B. Murphy
/s/ Harold Hood
/s/ Christopher M. Murray