

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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KYLE HINGSTON and SUE HINGSTON,

Plaintiffs-Appellants,

v

SHEPLER DEVELOPMENT, L.L.C.,

Defendant-Appellee.

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UNPUBLISHED

October 22, 2002

No. 232514

Cheboygan Circuit Court

LC No. 95-005265-CH

Before: Hoekstra, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's judgment and order awarding no damages pursuant to MCR 3.411(F) and denying a motion for a new trial or reconsideration. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

In 1979, plaintiffs, then husband and wife, purchased a piece of property and moved a house onto the land. Plaintiffs were aware that the property was located east of a railroad right of way but were mistaken as to the correct location of their boundary line; as a result, eighty percent of the home was located on the railroad right of way. In 1995 defendant purchased 28.75 acres of land that included the right of way adjacent to plaintiffs' property.

Plaintiffs sued to quiet title based on adverse possession and acquiescence. The trial court held that plaintiffs provided sufficient evidence to support their claim of adverse possession to a specific boundary line, and that the parties acquiesced to that boundary line. The parties appealed, and in *Hingston v Shepler Development, LLC*, unpublished opinion per curiam of the Court of Appeals, issued February 5, 1999 (Docket No. 199031), another panel of this Court reversed in part and affirmed in part the decision of the trial court. The *Hingston* Court found that plaintiffs did not present sufficient evidence to establish their claims of adverse possession and acquiescence, and that defendant had superior title to the property.

In a judgment on remand the trial court held that defendant had superior title to the property, and that plaintiffs had not gained title by adverse possession or acquiescence. The judgment provided that plaintiffs were entitled to proceed under MCR 3.411(F) and file a claim for the amount that the present value of the premises has been increased by any improvements.

Sue Hingston<sup>1</sup> moved for an evidentiary hearing pursuant to MCR 3.411(F) to determine by what amount the present value of the property deemed to be owned by defendant had been increased by the erection of a portion of the Hingston home on that property. The trial court held that Sue Hingston was not entitled to any damages or monetary award, finding the fact that eighty percent of the home was located on defendant's property actually diminished the value of that property. The judgment provided that Sue Hingston would be given a reasonable time to move the residence if possible.

Sue Hingston moved for a new trial or reconsideration on her claim for the value of improvements, arguing that the trial court's judgment constituted an injunction requiring her to move the house, and that in a case of this type the trial court was required to apply a balancing test such as that articulated in *Kratze v Independent Order of Oddfellows*, 442 Mich 136; 500 NW2d 115 (1993), when fashioning a remedy. She noted that in balancing the hardships and equities a court is to be guided by two central considerations: (1) avoiding judicial approval of private eminent domain by the encroacher; and (2) preventing extortion by the encroachee, who could use the injunction to compromise the claim. *Id.* at 143. Sue Hingston proposed that the trial court either order that defendant pay her \$65,000 for the improvement to the real property in exchange for her conveyance of the property to defendant, or find that the home was a permanent trespass for which defendant was entitled to damages.

The trial court denied the motion for a new trial or reconsideration. The trial court found that Sue Hingston's citation of *Kratze, supra*, was an inappropriate attempt to inject a new theory into the case. Furthermore, the trial court found that even if it applied a balancing test the result would not change. The trial court noted that the encroachment in *Kratze, supra*, was de minimis and did not prevent the plaintiff from fully developing his property, whereas in this case the encroachment of the Hingston residence onto defendant's property prevented the defendant from fully developing the property.

We review a trial court's decisions on motions for a new trial and reconsideration for an abuse of discretion. *Kelly v Builders Square, Inc*, 465 Mich 29, 34; 632 NW2d 912 (2001); *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000). In an equitable action, a trial court looks at the entire matter and grants or denies relief as dictated by good conscience. *Michigan National Bank & Trust Co v Morren*, 194 Mich App 407, 410; 487 NW2d 784 (1992), quoting *Hunter v Slater*, 331 Mich 1, 7; 49 NW2d 33 (1951). We review a trial court's findings of fact in an equitable matter for clear error, and its conclusions of law de novo. *Killips v Mannisto*, 244 Mich App 256, 258; 624 NW2d 224 (2001).

Sue Hingston argues the trial court erred as a matter of law in concluding that *Kratze, supra*, did not apply in this case, and that the error resulted in material injustice. We disagree and affirm the trial court's judgment awarding no damages pursuant to MCR 3.411(F) and order denying the motion for a new trial or reconsideration. In denying the motion for a new trial or reconsideration, the trial court correctly held that a balancing test such as that articulated in

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<sup>1</sup> Kyle Hingston and Sue Hingston were divorced in 1997. Each remains designated as a party plaintiff; however, the trial court file indicates that Sue Hingston, only, actively pursued this matter after this Court issued its original decision.

*Kratze, supra*, did not apply in a case in which a claim for monetary damages was made pursuant to MCR 3.411(F). Nevertheless, the court applied the test and found that reversal of its prior decision that no damages should be awarded was not warranted.

In *Kratze, supra*, the trial court ordered the defendant to remove a building that encroached just over one foot onto the plaintiff's property. Our Supreme Court vacated the order to remove the encroachment and held that because the encroachment was permanent the correct measure of damages was either the diminution in value of the plaintiff's property, or the value of the property itself. The *Kratze* Court noted that in spite of the encroachment, the plaintiff was not precluded from fully developing his property. Furthermore, the evidence showed that the plaintiff knew of the encroachment prior to purchasing his property. *Id.* at 145-148.

In this case, the trial court noted that the encroachment of the Hingston residence would preclude defendant from developing a substantial portion of the property. Moreover, the evidence showed that the Hingstons placed their residence on the property without first obtaining a survey to ascertain the exact location of the right of way. The trial court's finding that the circumstances did not warrant the award of damages to Sue Hingston under MCR 3.411(F) was not clearly erroneous. *Killips, supra*.

Sue Hingston's assertion that the trial court was required to order defendant to pay her \$65,000 in return for her conveyance of the property or to declare the residence a permanent trespass in order to reach an equitable solution is without merit. It was undisputed that Hingston could not convey marketable title to the property. Furthermore, to require defendant to accept trespass damages and convey a portion of its property to Sue Hingston would constitute judicial approval of private eminent domain. Such a result is to be avoided. *Kratze, supra* at 143. The trial court correctly found that Sue Hingston was not entitled to the requested relief.

Affirmed.

/s/ Joel P. Hoekstra  
/s/ Kurtis T. Wilder  
/s/ Brian K. Zahra