STATE OF MICHIGAN

COURT OF APPEALS

GAROLD L. WHITEHEAD and JANICE M. WHITEHEAD,	UNPUBLISHED May 25, 2004
Plaintiffs-Appellants,	
v	No. 247064 Alger Circuit Court
LELAND ROSS and COLLEEN G. ROSS,	LC No. 01-003697-CH
Defendants-Appellees.	

Before: Whitbeck, C.J., and Griffin and Borrello, JJ.

PER CURIAM.

I. Overview

Plaintiffs Garold and Janice Whitehead appeal as of right from judgment in favor of defendants Leland and Colleen Ross. The Whiteheads are purchasers of property benefited by an easement alleged to have been moved by the parties' predecessors in interest to a road crossing a corner of land owned by the Rosses. The case arose when the Rosses erected a fence blocking the road. Following a bench trial, the trial court found that Whiteheads did not have an easement over the road and they appealed. We affirm.

II. Basic Facts And Procedural History

Both parties own land on the west side of Highway 13 near Spot Lake in Munising Township in Alger County. Lois and Robert Curtis, who acquired it in 1958, originally owned all the relevant property. The parties stipulated to the admission of a survey drawing of the property as it was eventually subdivided along with a drawing of the road and easement at issue. In 1973, the Curtises had the land surveyed and subdivided. When the Curtises purchased the property, there had been a single road on the property since 1925. However, the Curtises created a second road at some point during their ownership. It is these two roads that are the subject of the parties' dispute.

Much of the testimony concerning the roads and the property involved deponents or witnesses pointing to things on, presumably, the drawing. However, other testimony appears to refer to a drawing of what is presumably the "survey" done in 1973. The survey contains a "hash mark" referring to the presumed location of the first road, twenty feet north of the south property line. This description was contained in the deeds the Curtises later used to sell the

subdivided parcels. However, at her deposition, Lois Curtis noted that no attempt was ever made to determine the first road's actual location or even if it was actually located within those twenty feet. The more northerly second road is also marked on the latter drawing, but that road curves north in a question-mark shape.

In 1972 or 1973, the Curtises sold a parcel of land to the Jacobsens. Harold Jacobsen indicated that at that time, the only road on the property did not curve north, but rather "it went straight through to [his] property." The deed contained an easement referring to an "established road," but it did not identify the road. However, Jacobsen identified the straight east-west hatched line on a drawing as "the original road that ran behind all the cabins and right down into [his] property." He further indicated that he understood the "established road" language to refer to the original road.

The conveyance involved two deeds, one of which was a "correction deed" that Curtis testified was to correct the legal description of the land. The correction deed altered the description of the easement by deleting a reference to the top of a ridge, but did not change the reference to "established road."

Jacobsen stated that he used the property very infrequently. In 1977, Curtis conversed with Jacobsen and told him that the new access road to the property was north, where the question-mark-shaped road now is and where, at the time, a bulldozer was sitting. Jacobsen also stated that Curtis claimed to have taken care of recording the new road with the Register of Deeds. However, Mrs. Curtis testified that no such conversation had occurred. Instead, she stated that Jacobsen had asked her permission to use the other road and that the Curtises had given that permission as long as there was no "trouble." In any event, Jacobsen stated, he used the new road to access his property thereafter and that before that day he had used the original road. He also used the original road to leave the property that day, because the new road was not yet completed, a statement with which Curtis agreed.

In 1983 and 1988, the Curtises sold another parcel to the Halfhills. The deeds to the Halfhills provided the same easement as in the Curtises' other deeds, across the land twenty feet north of the south property line. The Halfhills were also allowed to use the north road as long as no trouble arose; if it did, they would be required to use the easement. Halfhill, in his deposition, stated that the purchase had been by land contract and started in 1978, when the north road was already constructed on the land. His understanding was that the north road was a common road to be used by everyone, but also that the use was consensual and pursuant to a "gentleman's agreement . . . by everybody." Halfhill stated that he used the road from 1978 on and never denied anyone the use of it, but stated that Curtis forbade subsequent purchasers of another parcel to use it when those purchasers started taking trucks down the road.

In 1989, Jacobsen sold the property to the Elliotts. The Jacobsens and the Elliotts never met each other so they had no conversation regarding which road to use to access the property. However, Lois Curtis told the real estate dealer that there was no easement over the north road, so the Elliotts would have to put in a road "where the surveyor said it should go." The Curtises intended to prohibit the use of the road by the Elliotts because they were concerned about traffic from the Elliotts' motel. Curtis testified that the Elliotts then built their own road. Sandra Butler, who was married to Michael Elliott at the time the Elliotts purchased the property and who later received the property by quit claim deed, confirmed that the Curtises and the Halfhills

told her that the north road was not the legal easement. The Elliotts hired a surveying company to determine the location of the legal easement. Because the Elliotts did not wish to open up the easement, they purchased a different tract of land to connect to other property they already owned with access to Highway 13. Butler stated that the Elliotts did not wish to open up the easement because they did not wish to invade the privacy of cabins nearby.

In 1993, the Rosses purchased another parcel of land from the Curtises. That parcel also contained language granting a right of way on the twenty-foot easement. Leland Ross testified that part of the north road crossed a corner of this parcel at the time he purchased it, that he was aware of the road at that time, and that the road has not been moved since he purchased the land. He further testified that Curtis told him that a property owner farther back, Halfhill, had permission to use that corner but that the legal easement was actually south of his property. The Rosses later purchased a second parcel of property from Halfhill so they would have room to build a garage. Curtis also testified that she told the Rosses that Halfhill had permission to use the road for as long as Halfhill owned it and as long as no problems arose. Halfhill and the Rosses agreed that as long as Halfhill owned the property, Halfhill could continue to drive across the corner, but that if Halfhill had not sold the 0.31 acres needed for the garage, Halfhill would have had to move the road.

In 1995, Butler sold the Jacobsen property to the Whiteheads. Because the road over the legal easement was not open, Butler stated that she gave the Whiteheads a "temporary easement" across her remaining property for access, but that only the Whiteheads personally were allowed to use it. Janice Whitehead testified, however, that the temporary easement was because Butler and Halfhill were not getting along at that time. She denied ever having been told that she had no right to use the road. She stated that she had been visiting the area for the previous twenty-six years and was familiar with the north road during that time. In any event, the Whiteheads did not use the north road until 1996 when they obtained, and filed with the register of deeds, an affidavit from Jacobsen stating that he had been told by Curtis to use the north road.

The Whiteheads also purchased other land allowing them to reach the property without using the north road, and the road is therefore unnecessary to them. However, Janice Whitehead pointed out that if she sold the relevant parcel without the other land containing the alternate access, she would rather the purchasers used the north road instead of her land. She indicated that the land under the easement was rough and inaccessible even to a jeep or a snowmobile. In 1997 or 1998, the Whiteheads sold the relevant property to Ralph and Nancy McLaughlin but reacquired the property approximately one year later. While the McLaughlins owned the land, they accessed it by the north road.

Leland Ross testified that he had no problems at all with the use of the north road until 1999, when the Whiteheads purchased Halfhills' land. Leland Ross testified that, at that point, he would find tire tracks cutting across his front yard, instead of going through the road, when he visited his property. He also complained that people were driving all-terrain vehicles from the Whiteheads' property into his back yard and that renters of the Whiteheads' property were making noise. In September of 2000, the Rosses told the Whiteheads that they did not want a campground in the area.

The Rosses installed a fence across the portion of the road crossing their property in June of 2001. Janice Whitehead testified that the first she heard of the fence was when her son told

her about it but that she went out during its construction to ask what was going on. Leland Ross testified that he told her that her easement was south of his property. However, he also testified that he told both Halfhill and the Whiteheads that if they wished to place a road around the corner of the fence, he would help them do that.

The Rosses filed suit in July of 2001 asking for declaratory judgment that they possessed a valid easement over the road, an injunction against the Whiteheads' continued interference with that easement, and damages resulting from the fence the Whiteheads had constructed over the road but they withdrew the spite-fence count at trial. The Rosses, the Whiteheads and the original owners of all relevant parcels of property testified. The parties stipulated to additional testimony in the form of deposition transcripts. The trial court issued a memorandum of decision and order on February 21, 2003 granting judgment to the Rosses. This appeal followed.

III. Standard Of Review

On appeal from a bench trial, this Court reviews for clear error the trial court's findings of fact, and reviews de novo the trial court's findings of law.[1] The trial court's findings of fact are "clearly erroneous" if this Court, after reviewing the entire record, "is left with the definite and firm conviction that a mistake has been committed."[2]

IV. Statute Of Frauds

The Whiteheads allege that the trial court incorrectly found "some formality" to be required to move the easement from its original location to the road in question. Parties may agree to alter a right of way.[3] However, easements are interests in land subject to the statute of frauds.[4] In fact, any permanent interest in land must generally be in writing to be enforceable.[5] Further, it is a settled rule of law that if an original agreement is required by the statute of frauds to be in writing, any modification to that agreement must also be in writing.[6] Because a modification of an easement is therefore a modification of an interest in land required by the statute of frauds to be in writing, the modification must also be in writing. It is clear that there was no writing in this case.

Part performance and detrimental reliance may take a relocation of a right of way out of the statute of frauds,[7] although an easement can never be created by estoppel unless there is also

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[1] *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001).

[2] *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

[3] *Douglas v Jordan*, 232 Mich 283, 287; 205 NW 52 (1925).

[4] *Forge v Smith*, 458 Mich 198, 205; 580 NW2d 876 (1998).

[5] *Kitchen v Kitchen*, 465 Mich 654, 659; 641 NW2d 245 (2002).

[6] *Abell v Munson*, 18 Mich 306, 311 (1869).

[7] *Kent Furniture Mfg Co v Long*, 111 Mich 383, 390; 69 NW 657 (1897)

a writing.[8] The parties did use the road subject to the allegedly modified easement. However, none of the owners of the relevant land relied on the alleged modification to their detriment. Therefore, neither the "formality" of writing nor a situation taking the transaction out of the statute of frauds was present in this case. We conclude that there was no clear error by the trial court on this point.

V. Permissive Use

The Whiteheads argue that the trial court committed clear error when it found that the use of the road – since the alleged modification of the easement – was permissive. According to the testimony of the original parties to the alleged modification, the grantee stated that the grantor told him to use the new road, while the grantor stated that the grantee asked permission to use the new road. Other testimony supported the grantor's testimony that she believed the use of the road was permissive or that use of the road was pursuant to a "gentleman's agreement" among the involved landowners. Although the testimony was not entirely clear or consistent, we conclude that on the whole it supports the conclusion that the use of the road was permissive.[9] Moreover, issues of credibility should be left to the trial court's determination.[10] We are therefore not definitely and firmly convinced that the trial court made a mistake.[11]

Affirmed.

/s/ William C. Whitbeck
/s/ Richard Allen Griffin
/s/ Stephen L. Borrello

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[8] *Kitchen, supra* at 660.

[9] *Walters, supra*.

[10] *Sparling Plastic Industries, Inc v Sparling*, 229 Mich App 704, 716; 583 NW2d 232 (1998).

[11] *Walters, supra* at 456.