STATE OF MICHIGAN

COURT OF APPEALS

DENNIS P. BIRD and PATRICK BIRD,

Plaintiffs-Appellants,

v

MAXINE B. GINGRICH and the ESTATE OF FLORENCE A. PETERSON,

Defendants-Appellees.

UNPUBLISHED
September 16, 2004

No. 250049
Mecosta Circuit Court
LC No. 01-014863-CH

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

PER CURIAM

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Plaintiffs appeal as of right from an order granting defendants' motion for summary disposition under MCR 2.116(C)(10). We affirm.

This case concerns five acres of landlocked property in Mecosta County that plaintiffs purchased from the Michigan Department of Natural Resources on June 29, 2001, for $4,250. Plaintiffs' property is bordered to the north and west by defendants' property, to the east by the Muskegon River, and to the south by government lot 7. The chain of title to plaintiffs' five-acre parcel is not disputed and is significant to the resolution of plaintiffs' issues on appeal. Until 1927, plaintiffs' five-acre parcel was part of a sixty-five acre farm owned by defendants' parents. In 1927, defendants' parents sold the five-acre parcel to the Muskegon River Land Company, which later changed its name to the Muskegon River Light and Power Company. This severance left the five-acre parcel landlocked. In May 1930, the Muskegon River Light and Power Company conveyed its interest in the five-acre parcel to Iosco Land Company. In November 1935, Iosco Land Company conveyed its corporate assets, including the five-acre parcel, to Consumers Power Company. In October 1965, Consumers Power Company conveyed several hundred acres of property to Gerald A. Derks. This conveyance by Consumers Power Company to Derks included the five-acre parcel, as well as government lot 7, which is the property bordering the five-acre parcel immediately to the south. Within two years, Derks conveyed the five-acre parcel and government lot 7 (in addition to other land) to Porter Mulder Land Company, a company that was owned by Derks. In the late 1980s, Porter Mulder Land Company failed to pay the property taxes on the five-acre parcel. The five-acre parcel reverted to the State of Michigan in 1992 because of the tax delinquency. In June 2001, plaintiffs purchased the five-acre parcel from the State of Michigan for $4,250.

Plaintiffs filed a first amended complaint against defendants. The complaint contained counts for an easement by implied grant, an implied easement by necessity, and trespass. Defendants moved for summary disposition under MCR 2.116(C)(10), arguing that an easement by necessity over defendants' property was not absolutely necessary because plaintiffs had access to their five-acre parcel from government lot 7. Defendants also contended that if plaintiffs' predecessors in title had an easement by necessity over defendants' property, any such easement was terminated when plaintiffs' predecessors in title acquired government lot 7, which was contiguous to the five-acre parcel, and which, thus, effectively eliminated the absolute necessity for an easement by necessity over defendants' property. The trial court granted defendants' motion for summary disposition as to all three counts in plaintiffs' complaint.

Plaintiffs first argue that the trial court erred in concluding that there was no genuine issue of material fact regarding whether an easement by necessity over defendants' property was absolutely necessary and, if an easement by necessity did exist, whether it was terminated when Gerald A. Derks acquired plaintiffs' five-acre parcel, as well as government lot 7, in 1965. We disagree.

We review de novo a trial court's grant or denial of summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Summary disposition of all or part of a claim or defense may be granted when

> [e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. [MCR 2.116(C)(10).]

A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Downey v Charlevoix Co Bd of Rd Comm'rs*, 227 Mich App 621, 625; 576 NW2d 712 (1998). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered by the court when ruling on a motion brought under MCR 2.116(C)(10). *Id.* at 626; MCR 2.116(G)(5). When reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), we "must consider the documentary evidence presented to the trial court 'in the light most favorable to the nonmoving party.'" *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 538-539; 620 NW2d 836 (2001), citing *Harts v Farmers Ins Exchange*, 461 Mich 1, 5; 597 NW2d 47 (1999).

An easement by necessity "may be implied by law where an owner of land splits his property so that one of the resulting parcels is landlocked except for access across the other parcel." *Chapdelaine v Sochocki*, 247 Mich App 167, 172; 635 NW2d 339 (2001). Easements by necessity are "supported by the public policy favoring the productive and beneficial enjoyment of property." *Schmidt v Eger*, 94 Mich App 728, 732; 289 NW2d 851 (1980). When plaintiffs' five-acre parcel was severed from defendants' parents' sixty-five acre farm in 1927 and purchased by the Muskegon River Land Company, the five-acre parcel was landlocked: defendants' property bordered the five-acre parcel to the north and west, the Muskegon River bordered it to the east, and government lot 7 bordered it to the south. Because the 1927

severance resulted in no means of access to the five-acre parcel, the Muskegon River Land Company had an easement by necessity over defendants' property. Such an easement by necessity was strictly or absolutely necessary[1] for the enjoyment of the property because there was no other means of access to the five-acre parcel at the time of the initial severance in 1927. *Id.*

However, we hold that this easement by necessity was terminated when Consumers Power Company conveyed both the five-acre parcel and government lot 7 to Gerald A. Derks in October 1965. An easement by necessity is "a way arising by implication of law out of the necessities of the case and which, being based upon necessity, ceases to exist when the necessity for it ceases." *Waubun Beach Ass'n v Wilson*, 274 Mich 598, 608; 265 NW 474 (1936). "The right of way being one of strict necessity, if such right exists at all, and not one of mere convenience, it ceases with the necessity." *Id.* at 609. An easement by "necessity is not a perpetual right"; it terminates if the owner of the dominant estate acquires an alternative way to access the property. *Id.* "A right of way which exists by necessity is based upon an implied grant and a way of necessity is provisionally brought into existence by the necessities of the estate granted. And if the grantee has a new way to the estate previously reached by the way of necessity, the way of necessity is thereby extinguished." *Id.*

We reject plaintiffs' contention that the easement by necessity over defendants' property was not terminated because the alternative access to the five-acre parcel via government lot 7 was impossible, and it would be extraordinarily expensive to render government lot 7 passable. Once an alternative route exists, there is no longer strict necessity "even if these alternatives prove more difficult or more expensive." *Schmidt, supra* at 732. "[T]he fact that a former way of necessity continues to be the most convenient way will not prevent its extinguishment when it ceases to be absolutely necessary." *Waubun, supra* at 611. Once "the owner of a way of necessity acquires other property of his own over which he *may* pass, . . . the right to a way of necessity ceases." *Id.*, emphasis added. Because Derks acquired other property (government lot 7) over which he was legally permitted to pass, the necessity for the easement over defendants' land terminated in 1965, when Derks acquired both the five-acre parcel and government lot 7.

Plaintiffs next argue that the trial court erred in granting summary disposition of plaintiffs' implied easement claim. We disagree.

"[I]mplied easements are based on the presumed intent of the parties." *Schmidt, supra* at 732. "To establish an implied easement, three things must be shown: (1) that during the unity of

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[1] In Michigan, easements implied by necessity require a showing of strict or absolute necessity. *Waubun Beach Ass'n v Wilson*, 274 Mich 598, 609; 265 NW 474 (1936) ("The right of way being one of strict necessity, if such right exists at all, and not one of mere convenience . . . ."). See also *Schmidt, supra* at 732 ("Before an easement will be implied" from necessity, "the party who would assert the easement must establish that it is strictly necessary for the enjoyment of the property. Mere convenience, or even reasonable necessity, will not be sufficient if there are alternative routes, even if these alternatives prove more difficult or more expensive.").

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." *Id.* at 731. The person asserting the easement must establish the right to the easement by a preponderance of the evidence. *Id.*

In this case, the trial court granted defendants' motion for summary disposition of plaintiffs' claim for implied easement because plaintiffs did not establish the continuity element by a preponderance of the evidence. Plaintiffs claimed that they had an implied easement by means of a "two-track" over defendants' property. However, by definition, use of a roadway can never be continuous. As explained by our Supreme Court in *Waubun, supra*:

> A continuous easement is one which may be enjoyed without any act upon the part of the party claiming it, such as a waterspout which discharges the water whenever it rains,—or a drain by which surface water is carried over land,—or windows through which light and heat enter. A noncontinuous easement is one to the enjoyment of which the act of the party is essential, and of this class a way is the most usual.
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> "The distinction made is that a continuous easement is one which operates without the interference of man, such as a water-course or drain pipe. A way is said not to be continuous, because, in the use of it, there is involved the personal action of the owner, in setting his foot upon it or driving his team or cattle upon it. . . ."
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> "This quality or characteristic of continuousness does not belong to a right of way. Such an easement is not self-operating. It is only a place in which its owner operates." [*Id.* at 606-607 (internal citations omitted).]

In this case, pursuant to the definitions of continuous and noncontinuous easements set forth in *Waubun*, the use in this case was not continuous: unlike a waterspout or a drain, the act of a party was essential for the use and enjoyment of the two-track. The trial court, therefore, did not err in granting defendants' motion for summary disposition of plaintiffs' implied easement claim based on the failure to satisfy the continuity element.

Plaintiffs next argue that the trial court erred in excluding some of the affidavits offered by plaintiffs in support of their claims. Generally, to preserve an issue for appellate review, the issue must be raised before and addressed by the trial court. *Fast Air, Inc v Knight,* 235 Mich App 541, 549; 599 NW2d 489 (1999). We decline to address this issue because plaintiffs did not raise the issue before the trial court. It is therefore not properly preserved for appellate review.

Plaintiffs next argue that in granting defendants' motion for summary disposition, the trial court erred in issuing a bench opinion rather than a written opinion. According to plaintiffs, the trial court was unfamiliar with the parties' filings and with the applicable case law and was therefore unprepared to issue a bench opinion. However, because plaintiffs did not raise the

issue of the propriety of a bench opinion with the trial court, this issue has not been preserved for our review. *Id.* In any event, we observe that the record does not support plaintiffs' claim that the trial court was unfamiliar with the parties' filings or with the applicable case law in this case. Moreover, plaintiffs have not cited any authority in support of their contention that the trial court erred in issuing a bench opinion in this case. "[A] mere statement without authority is insufficient to bring an issue before this Court." *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).

Plaintiffs finally argue that the trial court erred in granting defendants' motion for summary disposition on plaintiffs' trespass claim. Plaintiffs contend that, when the trial court purportedly precluded them from entering defendants' property, the court effectively prevented plaintiffs from establishing a genuine issue of material fact regarding their trespass claim.

Plaintiffs' contention that they were precluded from entering defendants' property insinuates that plaintiffs were never permitted to access defendants' property. However, this claim is not supported by the record. In fact, the lower court record reveals that on March 26, 2002, the parties signed a stipulation and order providing that plaintiffs would be allowed access to defendants' property if plaintiffs gave twenty-four hours' notice to defendants' attorney and obtained prior approval. Defendants contend, and plaintiffs do not dispute, that pursuant to this stipulation, plaintiffs entered defendants' land periodically for about six months. Defendants admit that they stopped granting plaintiffs access to their property in October 2002, after plaintiffs entered defendants' property without seeking or obtaining defendants' permission.

On November 13, 2002, plaintiffs filed a motion to compel defendants to permit plaintiffs to enter and inspect their premises. According to plaintiffs' brief on appeal, the trial court denied the motion. However, our examination of the record fails to reveal a court order denying plaintiffs' motion; the resolution of plaintiffs' motion is thus unclear from the record. In any event, we reject plaintiffs' contention that the trial court erred in granting defendants' motion for summary disposition of plaintiffs' trespass claim.

"A trespass is an unauthorized invasion upon the private property of another." *Cloverleaf Car Co v Phillips Petroleum Co,* 213 Mich App 186, 195; 540 NW2d 297 (1995). "However, the actor must intend to intrude on the property of another without authorization to do so. If the intrusion was due to an accident caused by negligence or an abnormally dangerous condition, an action for trespass is not proper." *Id.* "Recovery for trespass to land in Michigan is available only upon proof of an unauthorized direct or immediate intrusion of a physical, tangible object onto land over which the plaintiff has a right of exclusive possession." *Adams v Cleveland-Cliffs Iron Co*, 237 Mich App 51, 67; 602 NW2d 215 (1999).

We conclude that the trial court properly dismissed plaintiffs' trespass claim where defendants submitted evidence, by affidavits, directly contradicting plaintiffs' trespass allegations, while plaintiffs did not present any evidence, beyond mere speculation, to support their claim of trespass. In their brief on appeal, plaintiffs contend that, if they had been permitted to access defendants' property, "it is possible [they] could have found facts to support [their] trespass claim." "A party opposing a motion for summary disposition must present more than conjecture and speculation to meet its burden of providing evidentiary proof establishing a genuine issue of material fact." *Cloverleaf Car Co, supra* at 192-193. "A litigant's mere pledge to establish an issue of fact at trial cannot survive summary disposition under MCR

2.116(C)(10). The court rule plainly requires the adverse party to set forth specific facts at the time of the motion showing a genuine issue for trial." *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). As noted previously, plaintiffs did have access to defendants' property, at least during a portion of the trial court proceedings. However, without competent evidence of a physical intrusion, plaintiffs failed to establish factual support for their trespass claim. *Gelman Sciences, Inc v Dow Chemical Co*, 202 Mich App 250, 253; 508 NW2d 142 (1993). The trial court, therefore, did not err in granting defendants' motion for summary disposition as to plaintiffs' trespass claim.

Affirmed.

/s/ Richard Allen Griffin
/s/ Kurtis T. Wilder
/s/ Brian K. Zahra