

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

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DENNIS J. BRYANT and ELAINE M. BRYANT,

Plaintiffs/Counterdefendants-  
Appellees,

v

ROGER K. ALBERTIE and KAY ALBERTIE,

Defendants/Counterplaintiffs-  
Appellants.

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UNPUBLISHED

August 11, 2005

No. 253207

Oakland Circuit Court

LC No. 2002-046177-CK

Before: White, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

Defendants appeal as of right from the trial court's order denying defendants' motion for summary disposition, granting summary disposition to plaintiffs, enjoining defendants from interfering with plaintiffs' use of an easement across defendants' property, and requiring defendants to remove a gate that they erected across the easement. We affirm.

I

In 1965, the former owners of defendants' property (the Albertie property) granted an easement to the former owners of plaintiffs' property (the Bryant property). The easement provided the owners and successors in title of the Bryant property, along with their guests and other authorized users, a passage across the rear portion of the Albertie property for the sole purpose of providing more convenient ingress and egress to the Bryant property. The grantor specifically reserved for himself and his successors "a right equal to that of Grantees to go upon and use said easement for the purpose of ingress and egress to and from any building now or hereinafter situated upon" the Albertie property.

In 1975, plaintiffs purchased the Bryant property. They continuously used the easement from that point forward for ingress and egress to their property. Even after a paved road access became available, five or six years before this litigation, plaintiffs continued to use the easement on a regular basis. In 1990, defendants purchased the Albertie property. Soon after taking possession, defendants fenced off the easement. Dennis Bryant testified on deposition that he asked defendants to remove the fence, and also requested the City of Orchard Lake to remove it. The fence was removed within one week. According to plaintiffs, however, defendants began a campaign of interference with their use of the easement. Sometime later in 1990, a boulder

appeared in the easement, which prevented vehicular traffic. Plaintiffs rolled the boulder to the side of the easement, but it reappeared on several occasions. Dennis Bryant testified on deposition that brush, saplings, and tree limbs were present on the easement more than fifty times in the years preceding this litigation. Dennis testified that he once observed Roger placing “limbs and debris” on the easement. Dennis testified that when he said to Roger that the easement was being blocked, Roger responded that the easement belonged to him.

In October 2002, defendants placed a locked gate at the entrance to the easement. While defendants claimed that they provided plaintiffs with a key, plaintiffs denied this. Elaine Bryant used a crowbar to remove the lock from the gate. Defendants’ attorney subsequently sent a letter to plaintiffs, which indicated that Roger would not replace the lock on the gate if plaintiffs would agree to keep the gate closed when not in use. Plaintiffs were not amenable to this arrangement. Because plaintiffs did not agree to keep the gate closed, defendants placed a new lock on the gate and provided a key to plaintiffs’ counsel. Plaintiffs refused to accept the key, and Elaine removed the lock with a crowbar.

Roger testified that he placed the gate at issue in the instant case on the property in October 2002, because he was aware of people trespassing on the property. He testified that his wife once observed a mailman parked on the easement, who apparently was sleeping. This occurred a few years before the gate was erected. On a couple of other occasions, several years before the gate was constructed, Roger observed a dump truck on the easement. The driver was sitting and eating in his truck. Roger could not recall seeing any other trespassers on the property, but he believed there were trespassers because he often found litter along the easement. Roger also indicated that he received a letter from the Orchard Lake Police Department in January 2002, which informed citizens that there had been several break-ins in the area and that precautions should be taken. He testified that the letter reaffirmed his feelings that he needed to protect his property from vandals and trespassers. Roger claimed that there were three previous thefts on his property, and that he never reported them to the police because they involved “petty stuff.” Roger claimed that, in order to protect his family and property, he needed to gate off the easement access, and believed that he had the right to place a locked gate across the easement.

Plaintiffs thereafter filed this action to enjoin defendants from interfering with their use of the easement, and defendants filed a counterclaim to determine their rights in the easement. The trial court granted plaintiffs’ subsequent motion for summary disposition and ordered, in relevant part, that no gate would be permitted across the easement and that the gate erected in October 2002 be removed.

## II

Defendants argue that they had the right to place a gate across the easement. We disagree.

“The extent of a party’s rights under an easement is a question of fact for the trial court, which we review for clear error.” *Little v Kin*, 249 Mich App 502, 507; 644 NW2d 375 (2002); *Dobie v Morrison*, 227 Mich App 536, 541; 575 NW2d 817 (1998). Additionally, we review de novo a trial court’s decision on a motion for summary disposition. *Rose v National Auction Group*, 466 Mich 453, 461; 646 NW2d 455 (2002). “Where the language of a legal instrument is

plain and unambiguous, it must be enforced as written.” *Little v Kin*, 468 Mich 699, 700; 664 NW2d 749 (2003). This proposition of law applies to express grants of easement. *Id.*

It is well settled, and the parties agree, that a property owner possesses a right to use and enjoy his property and to exclude others from it. Where a fee owner owns property subject to an easement, he “retains full dominion over his land subject merely to the right-of-way.” *Lee v Fidelity Life & Income Mutual Ins Co*, 2 Mich App 82, 86-87; 138 NW2d 545 (1965). The owner of the easement enjoys possession to the extent necessary for enjoyment of the rights conferred by the easement. *Schadewald v Brule*, 225 Mich App 26, 35; 570 NW2d 788 (1997). The owner of the easement cannot materially increase the burden on the fee holder or impose new and additional burdens. *Id.* On the other hand, the fee owner cannot take steps that unreasonably interfere with the beneficiary’s enjoyment of the easement. 25 Am Jur 2d, Easements & Licenses, § 86, p 584; Restatement Property (Servitudes), 3d, § 4.9, p 581. See also *Lee, supra* at 86-87, wherein this Court held that the fee owner “may make any use of his land which does not interfere with a reasonable use of” the easement.

In this case, the language of the easement makes clear that it was designed for the sole purpose of enabling convenient access to and from the Bryant property, and it reserved in the owners of the Albertie property only a right equal to that given to the grantee, specifically, for purposes of ingress and egress. There was no reservation of a right to erect a gate or maintain any structure across the easement. The trial court did not err in ruling that the language was to be enforced as written and that no gate was permitted.

Additionally, on de novo review, we conclude that, regardless of the plain language of the easement, the gate was not permissible. As previously noted, a fee owner cannot take steps that unreasonably interfere with the easement holder’s use and enjoyment of the easement or which are inconsistent with the easement. *Cantienny v Friebe*, 341 Mich 143, 146; 67 NW2d 102 (1954), *Greve v Caron*, 233 Mich 261, 266-267; 206 NW 334 (1925); *Lee, supra* at 86-87.

In the absence of an express reservation of a right to maintain gates, it is the general rule that whether the servient owner may erect and maintain gates, bars, or fences across or along the easement of way depends on the intention of the parties connected with the original creation of the easement, as shown by the circumstances of the case, the nature and situation of the property subject to the easement, and the manner in which the way has been used and occupied. [25 Am Jur 2d, Easements & Licenses, § 88, p 587.]

In *Cantienny, supra* at 147-148, this Court agreed with the following statement by the trial court:

That in any event, it is settled law that gates will not be permitted except where the right has been reserved, and where the owner of the servient estate, acting in good faith, is able to show that the gates are reasonably necessary to provide some substantial and legitimate benefit to himself; or, to put it another way, that equity will not authorize such structures when they are inspired by ill will, for the purpose of injuring or annoying others, without being of any real benefit to the owner.

In *Todd v Nobach*, 368 Mich 544, 548-550; 118 NW2d 402 (1962), the Court held that the defendants could not limit the plaintiffs' use of the easement by placing a gate across a right-of-way. It found that "such a device appears never to have been in the contemplation of the parties and would tend to curtail considerably free ingress and egress to and from the property." *Id.*

The trial court in this case held that no gate would be permitted unless the parties could agree on an electronically operated gate. In so holding, the trial court implicitly agreed with plaintiffs that the gate at issue was not consistent with the easement, was inconvenient, and was not a reasonable and proper use. It also implicitly disagreed with defendants' arguments that the gate was necessary to protect defendants' property from trespassers.

The evidence presented to the trial court supported the court's determination that a gate was not permissible. There was no express reservation to construct or maintain a gate across the easement. Further, a gate across the easement was not in the contemplation of the original parties to the easement contract. In 1965, the grantors conveyed an easement to the grantees solely to provide more convenient access to the grantees lot for grantees and others, including their guests and licensees. The easement limited the grantor's successors to the use of an easement for a purpose equal to that given the grantee, specifically for purposes of ingress and egress to buildings on their own land. Until 2002, plaintiffs and their predecessors enjoyed the use of the easement continuously in an open and convenient manner, unobstructed by gates, bars, or fences. The evidence fell short of showing that a gate was reasonably necessary to provide a substantial and legitimate benefit to the servient estate. The evidence of trespassing presented was insufficient to show that it was an ongoing problem on the property. Although Roger submitted an affidavit in January 2003, averring that he had observed numerous trespassers on the property in recent months, he acknowledged in his deposition that it had been many years since he actually observed a trespasser on the easement. Also, while he complained that there was minor theft on his property, he never reported these matters to the police. Under the circumstances, the gate was inconsistent with the easement and constituted an unreasonable interference with plaintiffs' convenient use and enjoyment of the easement.

The authorities defendants cite in support of their claim that they are entitled to place a gate across the easement do not compel a different result. None of the cases reject settled law that an owner of a servient estate may not unreasonably interfere with the beneficiary's use or enjoyment of the easement, nor do they abandon the basic proposition of law that a fee holder has an undoubted right to make any use of his premises only if that use is not inconsistent with the easement. See *Harr v Coolbaugh*, 337 Mich 158, 165-166; 59 NW2d 132 (1953); *Greve*, *supra* at 266-267. Moreover, the cases defendants cite involved issues of adverse possession. In *Greve*, the Court held that the "maintenance of a gate across the street, even though continuous, would not constitute an obstruction to the way or result in the loss of the way by ouster or adverse possession." In *Greve*, the Court was addressing whether a gate would suffice as a hostile obstruction against an easement in order to trigger the rules of adverse possession. Whether a gate is an obstruction to an easement as a matter of law and whether a gate is inconsistent with a particular easement and constitutes an unreasonable interference with the use of that easement are different issues. Whether a gate is consistent with a particular easement and whether a gate constitutes a reasonable use of the fee are to be decided on a case by case basis.

On appeal, defendants also argue that the trial court overstepped its bounds when it ordered that the gate be removed in its entirety. Defendants note that when the gate is open, it is

completely on defendants' property, outside the easement, and defendants claim they have an absolute right to their own property. MCL 600.611, however, provides circuit courts with jurisdiction and power "to make any order proper to fully effectuate the circuit courts' jurisdiction and judgments." See *Walworth v Wimmer*, 200 Mich App 562; 504 NW2d 708 (1993). Moreover, a court acting in equity "looks at the whole situation and grants or withholds relief as good conscience dictates." *Michigan National Bank & Trust Co v Morren*, 194 Mich App 407, 410; 487 NW2d 784 (1992). It is apparent from the record that the trial court's order requiring removal of the gate in its entirety was necessary to effectuate the remainder of its order, which prohibited defendants from interfering with plaintiffs' rights to use the easement. Given the long history of conflict between the parties with respect to the easement, and the past efforts to interfere with plaintiffs' use of the easement, removal of the gate will insure that it will not interfere with plaintiffs' use of the easement.

Finally, we find no merit to defendants' argument that the trial court's ruling requiring removal of the gate was, in effect, an unconstitutional taking under the Michigan and United States constitutions. A taking occurs when private property is taken for a public use without just compensation. US Const, Am V; Const 1963, art 10; § 2. There was no issue of private property being taken for public use in this case.

Affirmed.

/s/ Helene N. White  
/s/ Kathleen Jansen  
/s/ Kurtis T. Wilder