STATE OF MICHIGAN

COURT OF APPEALS

MARY ANN LAMKIN, STEVEN LAMKIN, CYNTHIA SWALLA, ANTHONY SWALLA, FREDDERICK WARK, PATRICIA BRAIDWOOD, DOUGLAS BRAIDWOOD, FOSTER L. CROSS, and VIRGINIA SEITZ,

Plaintiffs-Counter-Defendants-Appellees,

v

HAMBURG TOWNSHIP PLANNING COMMISSION, HAMBURG TOWNSHIP BOARD OF TRUSTEES, STANLEY J. CHLEBEK, RITA CHLEBEK, KIM M. WECKESSER, PAUL SCHENK, TIMOTHY DAVID PERKINS, THOMAS READ, d/b/a READ ENTERPRISES, ALFRED HARO, NICHOLAS HARO, JOHN C. BOSSORY, NANCY PAMPLIN, WILLIAM PAMPLIN, BETTY PAMPLIN, MARK A. HUEY, BRENDA J. HUEY, SALLY GOSS LIVING TRUST, PENNY A. GARTHWAITE, DAVID W. MCALISTER, LYNN J. RORABACHER, ELAINE J. RORABACHER, DENNIS P. MCCOMB, GLORIA A. MCCOMB, EUGENE HARTMEIR, CYNTHIA HARTMEIR, EDWARD G. BROWN, J.M. BEAUDOIN, JOAN BEAUDOIN, LEROY LAUDENSLAGER, CECILE LAUDENSLAGER, DENISE SPITLER, BARRY R. HEWELT, PATRICIA E. HUCKIN, KATHRYN E. MALY, ANGELA CHRISTIE, MICHAEL T. BENNETT, TONIA BENNETT, FLORAMAE S. HANCOCK, DANIEL ENGRAM, D'ANNE ENGRAM, RICK ROGOWSKI, RITA ROGOWSKI, KIMBERLY KRASKA, JAMES A. GLOVER, THOMAS A. JORGENSEN, and JEANNE JORGENSEN,

Defendants,

UNPUBLISHED
November 29, 2007

No. 265225
Livingston Circuit Court
LC No. 03-020334-AW

and

BJD DEVELOPMENT CORPORATION,

Defendant-Counter-Plaintiff-
Appellant.

Before: Fort Hood, P.J., and White and Borrello, JJ.

PER CURIAM.

In this declaratory judgment action, decided after a bench trial, defendant-counter-plaintiff-appellant BJD Development Corporation (hereinafter "BJD") appeals as of right the trial court's judgment in favor of plaintiffs-counter-defendants-appellees (hereinafter "plaintiffs"). We affirm in part and reverse and remand in part.

Plaintiffs sought to enjoin BJD's development of its thirteen-acre parcel into a seven-unit site condominium project pursuant to Hamburg Township's approval of BJD's site plan under the open space ordinance. Plaintiffs objected on the basis that the development would unreasonably increase the burden on Island Shore Drive, the road that runs around Oneida Lake and provides access to plaintiffs' property and BJD's property. The original plaintiffs all owned property on the east end of Island Shore Drive. The circuit court directed plaintiffs to add all property owners who abut or use Island Shore Drive. Some of these additional parties owned property to the east of plaintiffs' parcels. Some owned parcels to the west. The westerly parcels were located between BJD's property and the main road. Most of these added parties were later dismissed by stipulation of the instant parties. Several realigned themselves with plaintiffs. None of the parties who realigned themselves with plaintiffs were westerly lot owners.

The litigation focused on the nature of BJD's easement over plaintiffs' properties and whether the proposed development unreasonably burdened that easement. However, during trial, the trial court questioned the nature of BJD's easement over the westerly parcels. The court then ruled that it need not address the nature of BJD's easement over plaintiffs' parcels or whether the development would unreasonably burden the easement, because BJD had only a prescriptive easement over the westerly parcels.

BJD first argues that the trial court abused its discretion in granting plaintiffs' motion to amend the pleadings to conform to the evidence under MCR 2.118(C)(2). We review for an abuse of discretion a trial court's decision on a motion to amend. *Grzesick v Cepela*, 237 Mich App 554, 563; 603 NW2d 809 (1999). MCR 2.118(C)(2) provides:

> If evidence is objected to at trial on the ground that it is not within the issues raised by the pleadings, amendment to conform to that proof shall not be allowed unless the party seeking to amend satisfies the court that the amendment and the admission of the evidence would not prejudice the objecting party in maintaining his or her action or defense on the merits. The court may grant an adjournment to enable the objecting party to meet the evidence.

As to the easement over the easterly portion of Island Shore Drive, we find no abuse of discretion. BJD argues that plaintiffs alleged an *express* easement, never alleged that the express easement was invalid, defective, or prescriptive in nature, and that the trial court's grant of plaintiffs' motion to amend the pleadings to conform to the proofs regarding a claim of prescriptive use over the property constituted an abuse of discretion. However, plaintiffs alleged that Island Shore Drive was "a private *undefined* easement" that was "*initially* an easement by reservation." (Emphasis added.) Thus, plaintiffs never characterized the easement as express in their pleadings. Further, BJD moved in limine seeking to limit plaintiffs' claims to the allegation that BJD's proposed development would unreasonably overburden the *express* easement, and to prohibit plaintiffs from admitting any evidence regarding the validity of the easement. This belies BJD's argument that granting plaintiffs' motion to conform the pleadings to the proofs prejudiced it because it was not apprised that the validity of the easement was in issue.

Further, BJD presented an expert witness at trial who specifically testified to that point: Thomas Pais, qualified as an expert in the area of title examination and title documents, testified that he reviewed the chain of title for BJD's property, and that in his opinion, the recorded documents evidenced an express reservation of easement.

Under the plain language of MCR 2.118(C)(2), plaintiffs had the burden of satisfying the trial court that admission of the objected-to evidence would not prejudice BJD in maintaining its defense. See *In re Neubeck*, 223 Mich App 568, 572-573; 567 NW2d 689 (1997). BJD had notice of plaintiffs' claim regarding the nature of the easement, and the claim could be reasonably inferred from plaintiffs' pleadings. See *Froede v Holland Ladder & Mfg Co*, 207 Mich App 127, 136; 523 NW2d 849 (1994). Accordingly, the trial court did not abuse its discretion in granting plaintiffs' motion to amend the pleadings to conform to the proofs, and therefore implicitly finding that BJD was not prejudiced by the amendment.

As to the westerly portion of Island Shore Drive, we find that the court abused its discretion in permitting the amendment. The nature of the easement to the westerly portion was never at issue in the case until raised by the trial court. Further, in answer to the court's questions, BJD's expert testified that his title examination was limited to the parcels in Section 21, which shared a common grantor, and that he had not completed a title search as to an easement over the westerly portion of Island Shore Drive.[1] Thus, permitting amendment regarding this issue clearly prejudiced BJD.

BJD also argues that the trial court erred in its determination that plaintiffs had standing to seek an adjudication of BJD's interests vis-à-vis the westerly portion of Island Shore Drive, and that it had the authority to adjudicate the rights of all parties to the action, including those of property owners with land abutting the westerly portion of Island Shore Drive.

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[1] BJD's counsel argued in response to the trial court's questions during closing arguments, which is when it became clear that this would be an issue, that this issue was not properly before the court and that Pais' research was not concerned with the westerly parcels.

Standing is a question of law that we review de novo. *Homer Twp v Billboards By Johnson, Inc*, 268 Mich App 500, 504; 708 NW2d 737 (2005). "[I]t is essential in an action for declaratory judgment that all parties having an apparent or possible interest in the subject matter be joined so that they may be guided and bound by the judgment." *Allstate Ins Co v Hayes*, 442 Mich 56, 65-66; 499 NW2d 743 (1993) (internal quotations omitted). "Standing is the legal term used to denote the existence of a party's interest in the outcome of the litigation," and "when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request adjudication of a particular issue . . . ." *Id*. at 68 (internal quotations omitted).

MCL 600.2932(1) provides:

> Any person, whether he is in possession of the land in question or not, who claims any right in, title to, equitable title to, interest in, or right to possession of land, may bring an action in the circuit courts against any other person who claims [or might claim] any interest inconsistent with the interest claimed by the plaintiff, whether the defendant is in possession of the land or not.

MCR 2.605(A)(1) provides that "[i]n a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." Our Supreme Court has explained:

> Assuming the existence of a case or controversy within the subject matter of the court, the determination to make such a declaration is ordinarily a matter entrusted to the sound discretion of the court. Moreover, in exercising its discretion, the court must keep in mind the purposes to be served by a declaration of rights. At least one of the tests of right to resort to a declaratory proceeding is the necessity for present declaratory judgment as a guide to plaintiff's future conduct in order to preserve its legal rights. Moreover, the declaratory action is appropriate where it will serve some practical end in quieting or stabilizing an uncertain or disputed jural relation. [*Allstate*, *supra* at 74 (internal citations and quotations omitted).]

MCR 2.601(A) provides that "every final judgment may grant relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded that relief in his or her pleadings." The trial court was, thus, vested with authority to address the rights of all parties to this declaratory action.

Notwithstanding the court's authority to address the rights of the parties, the court erred in granting relief to plaintiffs on the basis of rights belonging to added parties who were dismissed and who did not align themselves with plaintiffs. The westerly owners did not object to BJD's development of the property. Even assuming that the trial court properly addressed the issue of the nature of BJD's easement over the westerly portion of Island Shore Drive, and properly concluded that it was prescriptive only, the nature of plaintiffs' easement over that portion of Island Shore Drive is identical to BJD's. As owners of separate servitudes over the westerly portion of the road, as distinguished from owners of the servient properties, plaintiffs can only be heard to complain if BJD's development unduly interferes with their use and

enjoyment of the easement. See 1 Restatement Property, 3d, § 4.12, p 626 ("holders of separate servitudes creating rights to use the same property must exercise their rights so that they do not unreasonably interfere with each other").

BJD next argues that the trial court erred in dismissing its highway by user counterclaim. We review de novo the legal requirements for establishing a highway by user. *Cimock v Conklin*, 233 Mich App 79, 84; 592 NW2d 401 (1998). However, we review for clear error a trial court's findings of fact. *Id*.; MCR 2.613(C).

MCL 221.20, the highway by user statute, provides:

> All highways regularly established in pursuance of existing laws, all roads that shall have been used as such for ten [10] years or more, whether any record or other proof exists that they were ever established as highways or not, and all roads which have been or which may hereafter be laid out and not recorded, and which shall have been used eight [8] years or more, shall be deemed to be public highways, subject to be altered or discontinued according to the provisions of this act. All highways that are or that may become such by time and use, shall be four [4] rods in width, and where they are situated on section or quarter section lines, such lines shall be the center of such roads, and the land belonging to such roads shall be two [2] rods in width on each side of such lines.

"The highway by user statute, MCL 221.20, treats property subject to it as impliedly dedicated to the state for public use." *Kalkaska Co Bd of Co Rd Comm'rs v Nolan*, 249 Mich App 399, 401; 643 NW2d 276 (2001). "Establishing a public highway pursuant to the highway by user statute requires (1) a defined line, (2) that the road was used and worked on by public authorities, (3) public travel and use for ten consecutive years without interruption, and (4) open, notorious, and exclusive public use." *Id*. at 401-402. BJD concedes that the trial court's dismissal of its highway by user claim was consistent with Michigan case law, but argues that the requirement of "public maintenance and/or repair of the road" is not found in the express words of the statute, and thus Michigan courts have inappropriately written an additional requirement into the statute to establish highway by user. We decline to overturn this well-settled interpretation of the statute. See *Parker v Port Huron Hosp*, 361 Mich 1, 10; 105 NW2d 1 (1960). Accordingly, we conclude that the trial court properly dismissed BJD's counterclaim.

Affirmed in part, reversed in part and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Helene N. White
/s/ Stephen L. Borrello