STATE OF MICHIGAN

COURT OF APPEALS

THOMAS HARVEY, MARY P. HARVEY, DAVID S. BOYER, GREG KATALENICH, Personal Representative for the Estate of KATHLEEN MICK BROWN, Deceased, HUGH HOWLETT, LORI HOWLETT, and DAVID DISMONDY,

Plaintiffs/Counter-Defendants-Appellees,

v

ROGER L. CURTIS and SUSAN CURTIS,

Defendants/Counter-Plaintiffs-Appellants.

UNPUBLISHED
April 3, 2008

No. 272433
Oakland Circuit Court
LC No. 2004-055238-CH

Before: Wilder, P.J., and Borrello and Beckering, JJ.

PER CURIAM.

In this dispute over a private road, defendants appeal as of right a judgment in plaintiffs' favor on plaintiffs' claims, as well as on defendants' counterclaims. Defendants argue that the trial court erred in determining the existence and location of easements for the road. We affirm.

The parties own neighboring properties on a small peninsula located on the western shore of Walled Lake. A private road runs over their properties from the western end of the peninsula to the peninsula's tip (the private road is a continuation of West Lake Drive), providing the only means of ingress and egress over land to plaintiffs' properties. This dispute is over the width of the private road.

The Curtises' property, which consists of three parcels, lies in the northwest corner of the peninsula on the northern side. Plaintiffs Thomas and Mary Harvey own adjoining property in the southwest corner of the peninsula on the southern side of the road. Plaintiff David Boyer's property lies on the southern side of the road east of the Harvey property and south of the Curtis property. The other plaintiffs own properties northeast of the Curtis and Boyer properties, toward the tip of the peninsula.

In 1922, "a perpetual right of way" was granted by Daniel Bentley and his wife, over and across the panhandle of a parcel known as lot 17, "to enable parties using said right of way to

conveniently enter upon said land of second parties. Today, the panhandle of lot 17 is owned by the Curtises. This right of way was recorded in 1924.

On June 2, 1949, a quit claim deed was executed by five members of the Bentley family to the Shankins, for lot 17 of Lake Wall Subdivision. There is no mention of an easement or right of way, although the conveyance is "subject to Recorded restrictions." This deed was recorded on June 7, 1949.

The following day, the Shankins began conveying the parcels, or selling them by land contract, each time reserving easements for ingress and egress. First, on June 8, 1949, the Shankins executed a land contract to sell the Curtis parcels[1] to Inez Parks.[2] This land contract was not recorded and was not presented at trial.

In 1961, the Shankins executed a warranty deed to the Wiricks for the Boyer property, containing a metes and bounds description, but "*excepting therefrom an easement over the N.W.'ly 5 feet of said parcel for a private road. Excepting [also] the rights of others in and to Right of Way over and across said lot 17 of Lake Wall Subdivision as described in Right of Way recorded in Liber 5 Miscellaneous Records, page 387*." (Emphasis added.) This deed was recorded in 1961.

In March 1962, the Shankins deeded 1185 West Lake Drive (the Dismondy property) to the Lefflers. The property description states:

> reserving therefrom an easement over a five foot strip North of and adjacent to the last described boundary line (22.10 feet) and a 10 foot strip being 5 feet on either side of a line running Northeasterly across said parcel from the angle in the South line to a point in the North line distant Westerly 74.57 feet from the Northeasterly corner thereof for a private road.

The Lefflers' deed was recorded in June 1962.

On October 10, 1962, Inez Parks[3] executed a warranty deed for the Curtis property to the Barylaks. This deed was subsequently recorded on October 23, 1962. This deed contains the

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[1] The 1962 deed that was later given in pursuance of the 1949 land contract contains a reservation of an easement *from* the conveyance (an easement in favor of *other* parcels, over the property being conveyed), and *grant* of an easement *in favor of* the Curtis property. Therefore, we must assume that the 1949 land contract, not in evidence, contains the same grant and reservation of easements.

[2] This land contract to Inez Parks eventually resulted in a deed, on October 16, 1962, by the Shankins to Inez Parks.

[3] To the extend that on October 10, 1962, when Inez Parks executed a warranty deed for the Curtis property to the Barylaks, Inez Parks had only equitable title to that property pursuant to the 1949 land contract, Inez Parks later acquired or perfected her legal title to that property on October 16, 1962, pursuant to the deed to her from the Shankins, and would be estopped by the

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same reservation of an easement *from* the conveyance (an easement in favor of *other* parcels, over the property being conveyed), and *grant* of an easement *in favor of* the Curtis property, as the October 16, 1962, deed given to Inez Parks by the Shankins (see below).

On October 16, 1962, the Shankins executed a deed to Inez Parks for the Curtis property, pursuant to the 1949 land contract. This deed was recorded on October 23, 1962. This deed states: "*reserving therefrom an easement 5 feet in width over the Southerly side thereof for a private road*." (Emphasis added.) In addition to reserving the foregoing easement *from* the conveyance, this 1962 deed to Parks also *conveyed* an easement to be used with the Curtis property: "*Also: An easement over a 10.00 foot strip for a private road to be used in common with others* being . . . [metes and bound description]; said above described easement being part of Lots 16 and 17 of Lake Wall Subdivision as recorded . . . and lands to the North thereof." (Emphasis added.)

In August 1989, the Curtises filed a "verified complaint to determine interest in land," against Robert Wirick and his wife, Edward and Ida Laffler, Michael and Mary Celentino, and the city of Novi. In November 1990, a consent judgment was reached. The consent judgment states that the parties

> recognize and acknowledge the continuing existence and propriety of a nonexclusive easement over a ten (10.0') foot strip of land for a road to be used in common with others, which road easement comprises five (5.0') feet on each side of a line running (generally) along their common property boundaries (except the 42' to 45' nearest West Lake Drive, where it lays primarily on the Celentinos' property) as set forth in the deeds under which the parties obtained title . . . .

The judgment also states that the parties "do not contest the status of the easement area as a public road under the jurisdiction of the City of Novi." There is no evidence that this judgment was recorded. The judgment also states that "any fences installed along the easement shall be no closer than twelve (12") inches to the easement area . . . ."

In the spring of 1991, the Curtises built a fence behind their house. The location of the fence, within their southerly parcel, narrowed the width of the private road toward its west end.

In December 2003, plaintiffs commenced this action, claiming that defendants' fence encroached on the recorded easements.[4] In February 2004, defendants filed a counterclaim, stating counts with the following titles: easement by prescription; easement by acquiescence;

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doctrine of estoppel by deed from claiming that she did not have good title to convey.

[4] Plaintiffs stated counts with the following titles: easement by necessity; implied easement; prescriptive easement; "reopening consent judgment" (arguing that the consent judgment cannot affect the rights of the land owners who were not involved in the 1989 action; that the judgment did not extinguish the other easements of record; and that the judgment is not enforceable against those who had no notice of it); "public safety and welfare" (asking the court to confirm plaintiffs' ownership of the easements shown in the 1965 surveyor's drawing for ingress and egress and to order defendants to remove all impediments); injunction; and trespass.

and interference with easement. Defendants argued that the Harveys' apron and curb encroached upon the easements over the Harveys' property, and that the 1990 consent judgment was binding on plaintiffs.

At trial, two experts in land surveying testified: Karol Grove for plaintiffs and Ginger Michalski-Wallace for defendants. According to Grove, defendants' fence encroached on the 1921 right of way by up to eight feet and encroached on a 1962 easement granted by the Shankins by up to four feet. Michalski-Wallace testified that the Curtises' fence did not encroach on the easement described in their land contract. In addition, the trial court visited the site to view the private road and the situation of the properties, homes, fences, driveways, etc.

Following trial, the trial court found in favor of plaintiffs, stating: "the court finds that it is clear that the easement has been encroached upon by Defendants and must be removed and returned to [outside] the 1924, 1962 and 1990 easements." The trial court further found:

> All of the historical witnesses testified and the historical photographs showed that before 1990, the road traveled within a few feet from the back step of Defendants' house. However, in 1990 pursuant to a consent judgment in which none of the plaintiffs were parties, Defendant erected a split rail fence. *The fence significantly changed the shape and narrowed the width of the traveled portion of the roadway*, especially at the entrance at West Lake Drive and at a point between the fence and a telephone pole near the boundary between the property owned by Plaintiffs Harvey and Boyer. [Emphasis added.]

The trial court found that "While the [1922 right of way or] easement appears to have been extinguished by a merger of all the properties under the ownership of Paul and Violet Shankin in the 1940's, the Shankins later revived that easement in 1961 with a recorded deed given to Robert and Frances Wirick," i.e., the easement over the panhandle of lot 17 (the southern parcel owned by the Curtises). Next, the trial court found that "the Shankins created a second easement on the southerly portion of the traveled roadway in 1958." This is an easement over the Harvey property. Third, the trial court found that "the Shankins created an easement on the northerly portion of the traveled roadway in 1962."

The trial court found that plaintiffs' expert, Grove, was more complete in her analysis, and more appropriately defined the easement, than defendants' expert, and that her testimony was therefore more relevant. The trial court then stated: "The court is also satisfied that the roadway was far wider before the fence, based in part on the location of the shrubbery, which shows that the fence narrowed the easement," i.e., narrowed the private road. Based on the foregoing findings, the trial court found in plaintiffs' favor, and ordered defendants to move their fence. Lastly, the trial court ordered that the Harveys' concrete driveway and curb "should be flush with the easement," i.e., with the private road. The trial court provided a description of the combined area covered by the easements ("combined easement").

Defendants first argue that the trial court erred in finding that the 1922 right of way was revived[5] over their property, and in finding that the deeds from 1958, 1961 and 1962 established express easements. We disagree. Following a bench trial, this Court reviews the trial court's conclusions of law de novo, and its findings of fact for clear error. *Ligon v City of Detroit*, 276 Mich App 120, 124; 739 NW2d 900 (2007). A finding is clearly erroneous if panel members are left with a definite and firm conviction that a mistake has been made. *American Federation of State, Co & Muni Employees v Bank One, NA*, 267 Mich App 281, 283; 705 NW2d 355 (2005).

Defendants first argue that the Shankins' 1961 deed to the Wiricks could not validly convey an easement (or "revive" an easement) over the Curtises' property, because the 1949 land contract to Parks has priority over it. We disagree.

Michigan is a race-notice state under the Michigan real property recording act, MCL 565.1 *et seq*. MCL 565.25(4) provides:

> The instrument shall be considered as recorded at the time so noted and shall be notice to all persons except the recorded land owner subject to subsection (2), of the liens, rights, and interests acquired by or involved in the proceedings. *All subsequent owners or encumbrances shall be subject to the perfected liens, rights or interests.* [Emphasis added.]

Thus, a recorded mortgage serves as notice, and all subsequent interests or encumbrances take subject to previously-perfected liens and interests. MCL 565.25(4); *Piech v Beaty*, 298 Mich 535, 538; 299 NW 705 (1941). Thus, the fact that the Wiricks' 1961 deed was recorded first, and the 1949 land contract was not perfected (not recorded), means that the Wiricks did not take their property subject to the 1949 land contract.

MCL 565.29 provides, in pertinent part: "Every conveyance of real estate within the state hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate or any portion thereof, whose conveyance shall be first duly recorded." Thus, a *subsequent* interest holder may take priority over a *previously*-conveyed interest only where the subsequent interest holder takes "in good faith" *and* records first. This is the meaning of race-notice.[6]

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[5] A preliminary issue is whether the 1922 right of way (or "1924 easement") was ever extinguished. We find that it was. Plaintiffs argue that it was never extinguished, and therefore, that there was no need for the Shankins to "revive" the easement in 1961. Plaintiffs' claim is contrary to the outlined above evidence in the form of deeds from 1933 to June 7, 1949. Moreover, plaintiffs conceded in their proposed findings of fact below that the 1924 easement was "apparently" extinguished by merger of title in 1949. A party cannot concede or waive an issue in the trial court and then raise a challenge on the issue on appeal. *Marshall Lasser, PC v George*, 252 Mich App 104, 109; 651 NW2d 158 (2002).

[6] A "conveyance" is "every instrument in writing, by which any estate or interest in real estate is created, aliened, mortgaged or assigned." MCL 565.35. "A good faith purchaser is one who (continued…)

Here, the 1949 land contract was never recorded. The 1961 deed was recorded "first," i.e. before Parks recorded anything. Therefore, the easement created in the 1961 deed must take priority over the 1949 land contract, unless the recipient of the 1961 deed had notice of the 1949 land contract. We find no evidence that the recipients of the 1961 deed, the Wiricks, had notice of the 1949 land contract. The Curtises cite to no such evidence.

Based on the trial court's conclusion that the 1962 easements were valid, the trial court necessarily found that the 1949 unrecorded land contract did not have priority over the 1961 deed. Implicit in this finding is the factual finding that the Wiricks did not have notice of the 1949 land contract. This implicit factual finding has not been shown to be clearly erroneous.

Where a deed is given in pursuance of a land contract, the deed secures and perpetuates the rights conferred by the contract, and an intermediate conflicting deed given by the same grantor has no priority against a vendee in possession. *Seager v Cooley*, 44 Mich 14, 17-19; 5 NW 1058 (1880). Possession by a land contract vendor is constructive notice of his rights. *Wild v Wild*, 266 Mich 570, 573; 254 NW 208 (1934). However, here there would have been no way for the Wiricks to know what was being possessed, since it is not the Curtises' land that is at issue, but easements over their land.[7] And there is no evidence that the Wiricks had notice that Parks was possessing the land over which the private road existed. Thus, the general rule that possession by a land contract vendor is constructive notice of her rights does not apply, since it is not possession of land that is at issue, but an easement.

In support of their position that the unrecorded 1949 land contract has priority over the 1961 recorded deed, defendants rely on *Bixby v Giesy*, unpublished opinion per curiam of the Court of Appeals, issued June 12, 2005 (Docket no. 261163). However, we are not bound by unpublished decisions. MCR 7.215(C)(1). Also, we find *Bixby* distinguishable, because it involved a land contract being given, and then subsequently the recording of a memorandum of land contract, and the two documents contained differing descriptions of an easement. That scenario differs from the case at bar, which involves various properties, various conveyances, and various easements.

Even if the unrecorded 1949 land contract had priority over the 1961 deed to the Wiricks, the 1949 land contract was not in evidence. Therefore, the only way to know what was in the 1949 land contract was the 1962 deed given pursuant to it.[8] And the 1962 deed to Parks *contained the easements at issue here*, including the easement over the southern portion of the Curtises' parcels. Therefore, the trial court necessarily concluded that the 1949 land contract could not defeat the existence of the easements at issue.

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purchases without notice of a defect in the vendor's title." *Michigan National Bank v Morren*, 194 Mich App 407, 410; 487 NW2d 784 (1992).

[7] Also, the trial court clearly believed the witnesses who testified that, historically, the western end of the private road was wider before the Curtises constructed their fence in 1991. The trial court's belief in this testimony has not been shown to be clearly erroneous.

[8] The Curtises admit that the 1962 deed, given pursuant to the 1949 land contract, was admissible to prove the existence of the land contract. We agree.

Defendants next argue that the parties are bound to the easement description contained in the 1990 consent judgment because it created an easement by acquiescence. The trial court did not address defendants' acquiescence claim below. However, the trial court's failure to address the claim does not necessarily preclude appellate review of this issue. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994). This Court may review an issue of law unaddressed by the trial court if the facts necessary for resolution of the issue have been presented. *Pro-Staffers, Inc v Premier Mfg Support Services, Inc*, 252 Mich App 318, 324; 651 NW2d 811 (2002).

Plaintiffs moved in limine to exclude evidence of the 1990 consent judgment. Noting that plaintiffs were not parties to the 1990 consent judgment, the trial court found that plaintiffs were not bound by it. We recognize that consent judgments are products of agreements between the parties and, while approved by a judge, they differ from other judgments in that they do not reflect the considered judgment of the court after litigation of the issues. See *Sylvania Silica Co v Berlin Twp*, 186 Mich App 73, 75-76; 463 NW2d 129 (1990). In any event, defendants do not argue that the trial court's reasoning in regard to the consent judgment was in error. Rather, defendants claim that the parties must abide by terms of the 1990 consent judgment because it created an easement by acquiescence.

The doctrine of acquiescence promotes peaceful resolution of boundary disputes and applies when property owners are mutually mistaken about a property line. *Killips v Mannisto*, 244 Mich App 256, 260; 624 NW2d 224 (2001); *Walters*, *supra* at 458. Because there is no evidence that the parties in this case were mistaken about their property lines or that the location of their property lines was ever in dispute, the doctrine of acquiescence is inapplicable. Defendants cite no authority suggesting that the doctrine may be applied outside the context of a boundary dispute, and a party may not announce a position and then leave it to this Court to discover and rationalize the position. *Kelly*, *supra* at 640-641. Accordingly, we reject defendants' argument on appeal.

The Curtises also argue that the trial court erred in awarding plaintiffs a prescriptive easement over the Curtises' property. Because we affirm the trial court's ruling regarding express easements, the issue of an easement by necessity is moot. A court need not decide moot questions. *Ewing v Bolden*, 194 Mich App 95, 104; 486 NW2d 96 (1992).

Finally, the Curtises argue that the testimony showed that plaintiffs seek to improperly overburden the historical easement, as opposed to demonstrating that plaintiffs acquired an easement by necessity. In light of our upholding the express easements, this issue, too, is moot, and we decline to address it.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Stephen L. Borrello
/s/ Jane M. Beckering