STATE OF MICHIGAN

COURT OF APPEALS

RONALD HELMER and ELAINE HELMER,

Plaintiffs-Appellees,

v

GARY LEFF and CARA LEFF,

Defendants-Appellants.

UNPUBLISHED
October 20, 2009

No. 288684
Saginaw Circuit Court
LC No. 06-062481-CH

Before: Fort Hood, P.J., and Sawyer and Donofrio, JJ.

PER CURIAM.

Defendants appeal as of right from the trial court opinion and order that recognized an implied easement for continued use, access, and enjoyment by plaintiffs of defendants' pond, and permanently enjoining defendants from constructing any structure that would interfere with plaintiffs' access, use, and enjoyment. Because the trial court did not err in finding that the original owner intended plaintiffs' parcel to have pond access, that such use on the part of plaintiffs and their predecessors in interest was continuous, that defendants had constructive notice of the easement at the time of purchase, and that the use of the pond was reasonably necessary to the enjoyment of plaintiffs' property, we affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

In an appeal from a bench trial, this Court reviews the trial court's findings of fact for clear error and its legal holdings de novo. *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed." *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

A party seeking recognition of an implied easement must prove three elements: (1) during unity of title, an apparently permanent and obvious servitude was imposed on one part of the estate for the benefit of another part, (2) continuity, and (3) and the easement is reasonably necessary for the fair enjoyment of the property it benefits. *Schmidt v Eger*, 94 Mich App 728, 731; 289 NW2d 851 (1980). "The party asserting the easement has the burden of proving the claim by a preponderance of the evidence." *Id.*

Defendants argue that the trial court erred in recognizing an implied easement for pond access on the ground that plaintiffs have failed to show that, during unity of title, an apparently permanent and obvious servitude was created on defendants' parcel for the benefit of plaintiffs'

parcel. Defendants additionally assert that any intent to grant pond access to plaintiffs' property was based on the grantor's mistaken belief that riparian rights adhere to property bordering a small man-made pond. An implied easement can arise from the intention of the parties to the conveyance. *Koller v Jorgensen*, 76 Mich App 623, 628; 257 NW2d 192 (1977). In this case, the previous owners of the parties' respective parcels testified that they understood the intention of the original owner of both was that subsequent property owners would continue to have access to the pond after severance. The trial court did not clearly err in crediting this testimony.

Defendants argue that the alleged easement was not apparently permanent or obvious, because there was no visible sign that the servitude existed other than that part of the pond was on plaintiffs' property, which would only provide notice to defendants if they believed, mistakenly, that riparian rights attached to the owners of the plaintiffs' parcel. We disagree, because the trial court correctly charged defendants with constructive notice of the easement in light of statement in documents provided to defendant Gary Leff at closing that described plaintiffs' pond access. A person who purchases land with actual or constructive notice of an easement takes the property subject to that encumbrance. *Butterfield v Brezina*, 3 Mich App 437, 442-443; 142 NW2d 900 (1966). As the trial court noted, a landowner is charged with constructive notice of an easement where documents received at the close of sale describe an easement encumbering the purchased property. See generally *Royce v Duthler*, 209 Mich App 682; 531 NW2d 817 (1995). Because the trial court correctly applied *Royce* in charging defendants with constructive notice of the easement at the time of purchase, the court did not err in finding that plaintiffs carried their burden of showing that the easement was apparently permanent and obvious.

Given that there was uncontested testimony from plaintiffs and their predecessors in title that they had used the pond for recreation for approximately twenty-eight years, the trial court did not err in concluding that continuity element was established. See 1 Cameron, Michigan Real Property Law, § 6.9, pp 200-201 (2d ed) (defining "continuous" as "without a break in regular usage").

Defendants also argue that the easement was not "reasonably necessary" because plaintiffs could access all of their property without using defendants' property, and only desired to use defendants' property for recreational purposes. Reasonable necessity can be shown when the plaintiff's property would not be suitable for the purposes for which it was purchased without the easement. *Koller, supra* at 629. Defendants attempt to distinguish *Koller* on the ground that it and its progeny dealt with cases involving access to Lake Michigan. See *id.* at 624-625. This is a distinction without a difference.

The necessity element of implied easements concerns reasonable necessity, not necessarily strict necessity. *Schmidt, supra* at 735. In *Koller, supra* at 629, this Court upheld a finding of reasonable necessity from the substantial reduction of the use and value of a parcel without an easement for recreational access to Lake Michigan. In the instant case, the trial court found that plaintiffs purchased their home in part because they believed they were purchasing access to a pond, and that they made full recreational use of the pond after purchase. The trial court concluded that plaintiffs' intended use of the property, and its value to them, would be substantially reduced without pond access. In light of the testimony of plaintiffs concerning the value and use of their property, with and without the easement, this finding is not clearly erroneous.

Defendants' argument concerning the possibility that the original grantor operated under the mistaken impression that ownership of land abutting a pond included riparian rights is unavailing. As defendants' correctly point out, no riparian rights adhere to property bordering a small man-made pond. See MCL 324.30101(h) (a lake or pond having a surface area of less than 5 acres is not defined as an "[i]nland lake or stream"); MCL 324.30101(o) ("[r]iparian rights" are those rights "associated with the ownership of the bank or shore of an inland lake or stream"); *Thompson v Enz*, 379 Mich 667, 679-81; 154 NW2d 473 (1967) ("Land abutting on an artificial watercourse has no riparian rights."). At issue in this case is the intention of the original grantor, Lewis Hetherington, not the motivation behind that intention. Indeed, if there were solid proof that Hetherington thought that operation of law established riparian rights in both parcels resulting from his severance of his master parcel, it would only confirm the trial court's conclusion that he intended that both parcels have use of the pond.

In sum, because the trial court did not err in finding that the original owner intended plaintiffs' parcel to have pond access, that such use on the part of plaintiffs and their predecessors in interest was continuous, that defendants had constructive notice of the easement at the time of purchase, and that the use of the pond was reasonably necessary to the enjoyment of plaintiffs' property, we affirm the trial court's determination that plaintiffs have carried their burden of proving they have an implied easement to access the pond.

Affirmed. Costs to plaintiffs.

/s/ Karen M. Fort Hood
/s/ David H. Sawyer
/s/ Pat M. Donofrio