STATE OF MICHIGAN

COURT OF APPEALS

GEORGE T. KRUPP and DAWN I. KRUPP,

Plaintiffs-Appellants,

v

JAMES M. DOYLE LIVING TRUST, by its trustee, JAMES M. DOYLE, JAMES M. DOYLE, individually, and KELLY R. DOYLE,

Defendants-Appellees,

and

KAY KORFF ENTERPRISES, L.L.C., RAYMOND MCCAHILL TRUST, MARK MICHO, and FAITH MICHO,

Defendants.

UNPUBLISHED
December 21, 2010

No. 293504
Kent Circuit Court
LC Nos. 05-004722-CZ
06-005187-CZ

Before: MURRAY, P.J., and HOEKSTRA and SERVITTO, JJ.

PER CURIAM.

Plaintiffs George T. Krupp and Dawn I. Krupp appeal as of right the trial court's judgment of dismissal in favor of defendants-appellees James M. Doyle Living Trust, James M. Doyle, and Kelly R. Doyle (Doyles). We affirm.

I. BASIC FACTS

In a previous lawsuit, plaintiffs were granted a prescriptive easement in Mercer Court, a private road, to access the back portion of their property. In 2005, pursuant to a consent judgment with Grand Rapids Charter Township, plaintiffs split off a lot from the back portion of their property with the intent to build a home on the lot. However, because § 27.6 of the township zoning ordinance, which took effect on September 26, 1990, requires that a private

road be in compliance with current minimum standards when the road is used to access a new lot or dwelling unit, Mercer Court needed to be improved before the road could be used by plaintiffs to access the new lot.[1]

In the present case, plaintiffs sought an order that reaffirmed their easement in Mercer Court and that granted them permission to improve the road. They also requested that, because the Doyles failed to improve Mercer Court when the Doyles built a driveway that connected to Mercer Court, an order be entered requiring the Doyles to comply with the ordinance and prohibiting the Doyles from using Mercer Court until the road was improved.

Following a bench trial, the trial court concluded that plaintiffs' prescriptive easement did not entitle them to improve Mercer Court, because improvement was not necessary for effective enjoyment of the easement. In addition, the trial court concluded that plaintiffs did not prove by a preponderance of the evidence that the Doyles connected their driveway to Mercer Court after September 26, 1990. It therefore declined to order the Doyles to improve Mercer Court.

II. PLAINTIFFS' PRESCRIPTIVE EASEMENT

Plaintiffs argue that the trial court erred in denying their petition to compel the improvement of Mercer Court when improvement of the road was necessary for the effective enjoyment of their easement. We disagree.

We review de novo a trial court's decision whether to grant declaratory relief. *Menken v 31st Dist Court*, 179 Mich App 379, 380; 445 NW2d 527 (1989). However, "[t]he extent of a party's rights under an easement is a question of fact, and a trial court's determination of those facts is reviewed for clear error." *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 40; 700 NW2d 364 (2005). "Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake has been made." *Massey v Mandell*, 462 Mich 375, 379; 614 NW2d 70 (2000).

Plaintiffs have an easement by prescription to use Mercer Court.[2] A prescriptive easement arises from the "use of another's property that is open, notorious, adverse, and

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[1] Section 27.6 of the township zoning ordinance provides:

> After the effective date of this Chapter (September 26, 1990), no private road shall be constructed, extended, improved or relocated, nor shall an existing private road be used or extended to provide access to a lot, building or dwelling unit which was not existing and which was not provided access by the private road as of the effective date of this Chapter, except in accordance with the minimum standards and requirements of this Chapter.

[2] We recognize that "courts speak through their judgments and decrees, not their oral statements or written opinions." *Tiedman v Tiedman*, 400 Mich 571, 576; 255 NW2d 632 (1977), and that in the previous lawsuit, the trial court's order granting plaintiffs an easement in Mercer Court did

continuous for a period of fifteen years." *Plymouth Canton Community Crier, Inc v Prose*, 242 Mich App 676, 679; 619 NW2d 725 (2000). "A prescriptive easement is generally limited in scope by the manner in which it was acquired and the 'previous enjoyment.'" *Heydon v MediaOne of Southeast Mich, Inc*, 275 Mich App 267, 271; 739 NW2d 373 (2007) (citation omitted). "An easement does not displace the general possession of the land by its owner, but merely grants the holder of the easement qualified possession only to the extent necessary for enjoyment of the rights conferred by the easement." *Schadewald v Brulé*, 225 Mich App 26, 35; 570 NW2d 788 (1997). "Once granted, an easement cannot be modified by either party unilaterally. The owner of an easement cannot materially increase the burden of it upon the servient estate or impose thereon a new and additional burden." *Id*. at 36 (internal citations omitted).

This Court in *Mumrow v Riddle*, 67 Mich App 693, 700; 242 NW2d 489 (1976), established a twofold test with regard to repairs and improvements to a prescriptive easement:

> The first determination is whether the repair or improvement is necessary to effective enjoyment of the easement. The second determination is whether the repair or improvement, if necessary, unreasonably increases the burden on the servient tenement . . . . Also, "improvements" may be expected to receive somewhat closer scrutiny than "repairs".

The first prong of the *Mumrow* test is that the improvement be necessary for effective enjoyment of the easement. Plaintiffs' previous enjoyment of their easement included them using Mercer Court to access the back portion of their property and using the road to ride their bikes. In particular, plaintiffs accessed the back portion of the property via Mercer Court "for standard maintenance for beautification, for gardening, for lawn mowing, for attending shrubs and plants and greenery, and generally just to get to their property and maintain it." Nothing in the record supports that it would be necessary to improve Mercer Court in order for plaintiffs to be able to continue the same uses and effectively enjoy their easement in Mercer Court. Accordingly, the first prong of the *Mumrow* test is not met. The trial court correctly concluded that plaintiffs' easement in Mercer Court did not entitle them to improve the road.[3]

We reject plaintiffs' argument that because Mark and Faith Micho, the owners of the servient estate, do not oppose the relief requested by them, the trial court should have granted their requested relief. Plaintiffs filed their complaint so that the trial court could issue an order "declaring that they have a right to have the road widened to comply with the ordinance, thereby

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not specifically state that the easement was one by prescription. However, plaintiffs do not dispute that their easement in Mercer Court was obtained by prescription.

[3] Based on its conclusion that improvement of Mercer Court was not necessary for plaintiffs' effective enjoyment of the easement, the trial court did not address the second prong of the *Mumrow* test, whether the improvement would unreasonably increase the burden on the servient estate. Because we affirm the trial court's conclusion that plaintiffs' easement does not give them the right to improve Mercer Court, we need not address plaintiffs' arguments that improving Mercer Court would not result in any unreasonable burdens.

enabling them to plat off another lot behind their house." "Declaratory relief is available to a party when necessary to guide the party's future conduct in order to preserve his legal rights." *Menken*, 179 Mich App at 380. Thus, it is not pertinent whether the Michos opposed the relief requested. It is only pertinent whether plaintiffs had the right to improve Mercer Court pursuant to the easement that they acquired by adversely using the road for 15 years. Accordingly, the trial court did not err in determining plaintiffs' rights under the easement even though the Michos did not oppose plaintiffs' requested relief.

III. THE DOYLES' DRIVEWAY

Plaintiffs argue that the trial court erred in denying their petition that the Doyles be compelled to improve Mercer Court or to be enjoined from using Mercer Court until the road is improved. Specifically, plaintiffs contend that the trial court erred in finding that the evidence regarding when in 1990 the Doyles built a driveway that connect to Mercer Court was "essentially tied" and in allowing James Jarvis and Peaches McCahill to testify regarding when the driveway was built.[4]

We review a trial court's findings of fact in a bench trial for clear error. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). The decision whether to allow a witness to testify falls within the discretion of the trial court, and we review a trial court's decision for an abuse of discretion. *Pollum v Borman's, Inc*, 149 Mich App 57, 61; 385 NW2d 724 (1986). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Barnett v Hildago*, 478 Mich 151, 158; 732 NW2d 472 (2007).

We find no merit to plaintiffs' claim that the trial court abused its discretion in allowing McCahill and Jarvis to testify. Plaintiffs objected to their testimony because the Doyles, in response to interrogatories whether they intended to offer testimony "at the trial of this case on behalf of" McCahill and Jarvis, stated that they did not intend to offer any testimony "on behalf of" McCahill and Jarvis. We agree with the trial court that the Doyles, by calling McCahill and Jarvis as witnesses, did not act contrary to their answers to plaintiffs' interrogatories. The Doyles offered the testimony of McCahill and Jarvis on behalf of them, the Doyles, not on behalf of McCahill and Jarvis.

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[4] Imbedded in plaintiffs' discussion of this issue is the additional claim that the trial court "totally overlooked" the Doyles' violation of the township zoning ordinance when the Doyles built a gateway that allowed access to their garden from Mercer Court in 2002. However, plaintiffs did not raise this claim in their complaint. They also did not raise the trial court's failure to address the claim in the statement of questions presented in their appellate brief. Consequently, the issue has not been properly presented for consideration either in the trial court or in this Court. See MCR 2.111(B)(1); MCR 7.212(C)(5); *Ammex, Inc v Dep't of Treasury*, 273 Mich App 623, 646; 732 NW2d 116 (2007); *Kloian v Schwartz*, 272 Mich App 232, 240; 725 NW2d 671 (2006).

In addition, McCahill and Jarvis were listed as witnesses on the Doyles' witness list. The witness list included "[a]ll of the defendants," which at the time included McCahill, and Jarvis. Further, the trial court reasonably surmised that McCahill and Jarvis may have relevant and helpful information about the case because they lived on Mercer Court for years. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. "All relevant evidence is admissible[.]" MRE 402. We also note that the trial court left open the possibility of granting a continuance to plaintiffs if necessary for them to rebut the testimony of McCahill and Jarvis. Under the circumstances, the trial court's decision to allow McCahill and Jarvis to testify did not fall outside the range of reasonable and principled outcomes. *Barnett,* 478 Mich at 158.

In addition, we are not left with a firm and definite conviction that a mistake was made when the trial court determined that plaintiffs had not met their burden of proving by a preponderance of the evidence that the Doyles moved their driveway after September 26, 1990. An issue of fact in a civil case is to be determined by the preponderance of the evidence standard with the burden of persuasion on the party asserting the claim. *Blue Cross & Blue Shield of Mich v Governor*, 422 Mich 1, 89; 367 NW2d 1 (1985). "Proof by a preponderance of the evidence requires that the factfinder believe that the evidence supporting the existence of the contested fact outweighs the evidence supporting its nonexistence." *Id.*

George Krupp testified that the Doyles connected their driveway to Mercer Court after September 26, 1990, because he remembered seeing asphalt being laid for the driveway while listening to a football game while riding his lawnmower and vacuuming up leaves. And according to him, there are no leaves to vacuum in September. The trial court did not find his testimony to be compelling, as it was not "particularly precise" as to a calendar date of when the driveway was built. In addition, the trial court noted that Rick Sprague, the township planning director, testified that he was unable to determine when the Doyles moved their driveway. Although the trial court found it "almost inconceivable" that the Doyles could not produce any documents establishing when they connected their driveway to Mercer Court, we find no clear error in the trial court's finding that plaintiffs failed to establish by a preponderance of the evidence that the Doyles moved their driveway after September 26, 1990. The trial court's finding involved determinations regarding witness credibility and the relative weight to be assigned to the testimony, and we defer to the trial court's determinations. MCR 2.613(C); *Berger v Berger*, 277 Mich App 700, 715; 747 NW2d 336 (2008); *In re Clark Estate*, 237 Mich App 387, 395-396; 603 NW2d 290 (1999). Consequently, we are not left with a firm and definite conviction that the trial court made a mistake in determining that the plaintiffs failed to establish by a preponderance of the evidence that the Doyles moved their driveway after the effective date of the ordinance. *Massey,* 462 Mich at 379.

Affirmed.

/s/ Christopher M. Murray
/s/ Joel P. Hoekstra
/s/ Deborah A. Servitto