STATE OF MICHIGAN

COURT OF APPEALS

THOMAS L. WILLIAMSON, Plaintiff-Appellee,	UNPUBLISHED April 26, 2016
v	No. 326367 Sanilac Circuit Court
ANTHONY J. HEWITT and LETICIA T. HEWITT, Defendant-Appellant.	LC No. 13-035379-CH

Before: MURRAY, P.J., and STEPHENS and RIORDAN, JJ.

PER CURIAM.

This case involves a property dispute arising from defendants Anthony J. Hewitt ("Anthony") and Leticia T. Hewitt's use of a waterline that connects their residence to a crock well located on plaintiff Thomas L. Williamson's property. Plaintiff is defendant Anthony's uncle.

Following a bench trial, the trial court issued a judgment in favor of plaintiff, which enjoined defendants from using the well and waterline and awarded plaintiff $186.04 in costs. Defendants appeal as of right. We affirm.

I. FACTUAL BACKGROUND

In 1964, Lillian and Wendell Williamson, who are plaintiff's parents as well as defendant Anthony's grandparents, purchased by land contract 120 acres of land in Sanilac County, Michigan. In 1974, the land contract was paid in full, and the Williamsons received a warranty deed to the property. During their ownership of the property, the Williamsons allowed family members and renters to utilize a mobile home next to a house that stood on the property when it was purchased. The mobile home received water from the nearby house, which received water via a waterline connected to a crock well located elsewhere on the Williamson property.

Defendants began renting the mobile home from the Williamsons in approximately 2000. In 2002, the Williamsons "gave" the mobile home and the two acres on which it was located to defendants. The Williamsons' crock well continued to be the source of water for defendants' parcel via the waterline that was connected to the nearby house. Later that year, defendants removed the mobile home and built a new house. During this process, defendants terminated the

old waterline and installed a new waterline from the crock well to the newly constructed home. In effect, defendants created a new system through which they could tap into the Williamsons' crock well.

In 2012, Lillian Williamson conveyed the rest of the land, except for the two acres owned by defendants, to plaintiff. As a result, plaintiff owned the property on which the crock well was located. Plaintiff initiated this case in November 2013 after defendants failed to comply with his request that they terminate their use of the crock well. Plaintiff alleged that defendants' conduct constituted a continuing trespass on his property and that he had terminated any license that defendants previously held to use the well. Accordingly, plaintiff requested, *inter alia*, that the trial court enjoin defendants from further use of the well and waterline and enter an order terminating defendants' license to use the well. In their answer, defendants argued that they held an easement that permitted their use of the waterline, so that their act of using the waterline and crock well did not constitute a trespass, and that the "water source [was] a life necessity," so that a license to use the well was not revocable at will. The only issue disputed at trial was whether Wendell Williamson participated in the installation, or approved, of the new waterline in 2002.

The trial court concluded that defendants' claim that they held an easement or irrevocable license to use the waterline and crock well was barred by the statute of frauds, see MCL 566.106, because permanent interests in land must be in writing in order to be enforceable, and there was no document memorializing such an interest. The trial court also found that any license held by defendants was revocable at the will of plaintiff and was, in fact, revoked in August 2013. Finally, the trial court rejected defendants' claims that they held an easement by necessity, a quasi-easement, or a prescriptive easement.

On appeal, defendants do not contest the trial court's holding that the statute of frauds precluded the existence of an express easement or irrevocable license. Likewise, they do not challenge the trial court's application of *Kitchen v Kitchen*, 465 Mich 654, 658-661; 641 NW2d 245 (2002), in ruling that they do not hold an irrevocable license to use the well and waterline. As such, defendants only argue on appeal that the trial court erred in finding that they failed to establish the existence of an easement by necessity, quasi-easement, or easement by prescription.

II. STANDARD OF REVIEW

"We review a trial court's findings of fact in a bench trial for clear error and its conclusions of law de novo." *Charles A Murray Trust v Futrell*, 303 Mich App 28, 50; 840 NW2d 775 (2013). "A finding is clearly erroneous if there is no evidentiary support for it or if this Court is left with a definite and firm conviction that a mistake has been made." *Id*. (quotation marks and citation omitted). Similarly, "[a]n action for a prescriptive easement is equitable in nature. This Court reviews de novo the trial court's holdings in equitable actions. In addition, this Court reviews the trial court's findings of fact for clear error." *Mulcahy v Verhines*, 276 Mich App 693, 698; 742 NW2d 393 (2007) (citations omitted).

III. ANALYSIS

The outcome of this appeal is dependent solely on the merits of defendants' alternative theories that they hold an easement by implication or by prescription.[1] Defendants have failed to establish that they hold either type of easement.

A. EASEMENT BY IMPLICATION

An implied easement arises essentially in two ways: "(1) an easement by necessity and (2) an easement implied from a quasi-easement." *Charles A Murray Trust*, 303 Mich App at 41, quoting *Schmidt v Eger*, 94 Mich App 728, 732-733; 289 NW2d 851 (1980). A party claiming a right to an easement has the burden of proving the claim by a preponderance of the evidence. *Schmidt*, 94 Mich App at 731.

1. EASEMENT BY NECESSITY

> An easement by necessity may be implied by law where an owner of land splits his property so that one of the resulting parcels is landlocked except for access across the other parcel. An easement by necessity may arise either by grant, where the grantor created a landlocked parcel in his grantee, or it may arise by reservation, where the grantor splits his property and leaves himself landlocked. This sort of implied easement is not dependent on the existence of any established route or quasi-easement prior to the severance of the estate by the common grantor; it is first established after the severance. A right of way of necessity is not a perpetual right. It ceases to exist when the necessity for its continuance ceases. [*Charles A Murray Trust*, 303 Mich App at 41-42 (quotation marks and citations omitted).]

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[1] We decline plaintiff's invitation to decide this appeal based on whether defendants failed to properly plead their easement claims as affirmative defenses.

Pursuant to MCR 2.111(F)(3), a defendant must state the facts supporting any affirmative defenses under a separate and distinct heading in its first responsive pleading, unless such defenses were previously raised in an earlier motion for summary disposition. *Stanke v State Farm Mut Auto Ins Co*, 200 Mich App 307, 312; 503 NW2d 758 (1993). It is not apparent that defendants' claim of an easement by implication or prescription fulfills the definition of affirmative defense under *Stanke*, 200 Mich App at 312, in light of the allegations in plaintiff's complaint. However, MCR 2.111(F)(3)(c) requires a party to state, "under a separate and distinct heading," "the facts constituting . . . a ground of defense that, if not raised in the pleading, would be likely to take the adverse party by surprise." Without deciding this issue, we note that defendants may have waived their easement-related defenses by failing to comply with MCR 2.111(F)(3)(c), as it appears likely that these claims were not evident from their answer and took plaintiff by surprise, especially in light of the stipulated facts and the proofs admitted at trial and the parties' trial briefs, which were submitted after the close of proofs. See *Stanke*, 200 Mich App at 312 ("The failure to raise an affirmative defense as required by the court rule constitutes a waiver of that affirmative defense."). Regardless, defendants' claims have no merit for the reasons stated in this opinion.

See also *Tolksdorf v Griffith*, 464 Mich 1, 10; 626 NW2d 163 (2001). Contrary to the authority cited by defendants on appeal, we recently clarified that the necessity requirement is one of strict or absolute necessity under Michigan law. *Charles A Murray Trust*, 303 Mich App at 45, 48, 55. Accordingly, "[m]ere convenience, or even reasonable necessity, will not be sufficient if there are alternative routes, even if these alternatives prove more difficult or more expensive." *Schmidt*, 94 Mich App at 732; see also *Charles A Murray Trust*, 303 Mich App at 55. Additionally, "an easement by necessity ceases to exist when the necessity for its continuance ceases." *Charles A Murray Trust*, 303 Mich App at 51 (quotation marks and citation omitted).

Here, even if we assume, without deciding, that defendant may establish an easement by necessity for the use of water from a well,[2] defendants' claim must fail because they do not make the requisite showing of necessity. It was defendants' burden to establish by a preponderance of the evidence that at the time of the severance there were no alternative water sources, such as water obtained by drilling a well on the two acres granted to defendants, see *Charles A Murray Trust*, 303 Mich App at 45, 48, 55; *Schmidt*, 94 Mich App at 731, 733, and that the necessity continues to exist, see *Charles A Murray Trust*, 303 Mich App at 42. Plaintiff is correct that the stipulated facts, admitted exhibits, and witness testimony at trial included no evidence on the issue of necessity. Rather, defendants focused almost exclusively on the Williamsons' intent with regard to the installation and use of the old and new waterlines. Following the close of proofs, defendants merely asserted in their trial brief, without any evidentiary support, that "[t]he area in which the [d]efendants live is void [sic] of a good water supply[,] . . . this crock well is the only water to [their] home," and they "require the water line easement to have water to their home." While the parties' intent may have been relevant, see *Schumacher v Dep't of Nat Res*, 275 Mich App 121, 130-131; 737 NW2d 782 (2007), defendants still were required to establish the element of strict necessity, see *Charles A Murray Trust*, 303 Mich App at 42, 45, 48, 55; *Schmidt*, 94 Mich App at 731.

Thus, the trial court properly found that defendants failed to establish an easement by necessity.

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[2] As plaintiff argues, the facts in this case differ from the traditional rule because defendants assert an easement by necessity for the use of water and not an easement by necessity for physical access to a landlocked parcel. See, e.g., *Charles A. Murray Trust*, 303 Mich App at 46. In *Tomecek v Bavas*, 276 Mich App 252, 278; 740 NW2d 323, aff'd in part, rev'd in part, vacated in part 482 Mich 484 (2008), this Court held that "the common-law doctrine of easement by necessity includes not only physical access to landlocked property, but also access to utilities for properties landlocked from utilities unless, consistent with the traditional principles of easement by necessity, the parties to the conveyance that left the property without such access clearly indicate[d] that they intended a contrary result." (Quotation marks and citation omitted; alteration in original). However, the Michigan Supreme Court, in deciding the case on different grounds, stated that the portion of this Court's opinion recognizing an easement by necessity for utilities was dicta and declined to consider whether such an easement exists under Michigan law. *Tomecek v Bavas*, 482 Mich 484, 497; 759 NW2d 178 (2008).

2. QUASI-EASEMENT

> [A]n easement implied from a quasi-easement requires that at the severance of an estate an obvious and apparently permanent servitude already exists over one part of the estate and in favor of the other. It also requires a showing of [reasonable] necessity . . . . Thus, three things must be shown: (1) that during the unity of title an apparently permanent and obvious servitude was imposed on one part of an estate in favor of another, (2) continuity, and (3) that the easement is reasonably necessary for the fair enjoyment of the property it benefits. [*Charles A Murray Trust*, 303 Mich App at 42 (quotation marks and citations omitted; alterations in original)].

See also *Rannels v Marx*, 357 Mich 453, 456; 98 NW2d 583 (1959); *Schmidt*, 94 Mich App at 731.

Defendants failed to meet the burden of proving the elements of a quasi-easement. See *Schmidt*, 94 Mich App at 731. As explained *supra*, defendants failed to proffer *any* evidence on the issue of necessity, whether reasonable or strict. For example, defendants failed to identify or provide any evidence regarding the effort or expense that would be required for them to obtain a separate water source for their two-acre parcel. See *id*. at 735 (noting the trial court's finding of reasonable necessity, which was consistent with evidence in the record regarding the effort and expense associated with alternative drainage options). Likewise, they provided no evidence in support of their claim that no other source of water was available.

Accordingly, because defendants failed to meet their burden of showing that an easement was "reasonably necessary" for their enjoyment of the land, the trial court did not err in concluding that they failed to establish the existence of a quasi-easement.

B. EASEMENT BY PRESCRIPTION

"An easement by prescription results from use of another's property that is open, notorious, adverse, and continuous for a period of fifteen years." *Mulcahy*, 276 Mich App at 699 (quotation marks and citations omitted); see also MCL 600.5801(4). "The burden is on the party claiming a prescriptive easement to show by satisfactory proof that the use of the [owner's] property was of such a character and continued for such a length of time that it ripened into a prescriptive easement." *Mulcahy*, 276 Mich App at 699. We have recognized two types of prescriptive uses:

> (1) a use that is adverse to the owner of the land or the interest in land against which the servitude is claimed, or
>
> (2) a use that is made pursuant to the terms of an intended but imperfectly created servitude, or the enjoyment of the benefit of an intended but imperfectly created servitude. [*Id*. at 700, quoting 1 Restatement Property, 3d, Servitudes, § 2.16, pp 221-222 (emphasis omitted).]

Given defendants' asserted "claim of right adverse to the original owner" in the lower court, as well as their arguments on appeal, it appears that defendants maintain the existence of a

prescriptive easement based on the first type of prescriptive use, a use adverse to the Williamsons' interest. There is no indication that defendants claim a prescriptive easement on the basis of an intended, but imperfectly created, express easement.

Nevertheless, regardless of the type of use asserted by defendants, and regardless of whether defendants' use of water from the old waterline should be considered in determining whether defendants established an easement by prescription, the record clearly shows that defendants' use of the property did not continue for the requisite 15-year time period. "[T]he adverse use essential to creating a prescriptive easement cannot occur when one common owner owns the dominant and servient tenements." *Slatterly v Madiol*, 257 Mich App 242, 261; 668 NW2d 154 (2003), citing *Morgan v Meuth*, 60 Mich 238, 254; 27 NW 509 (1886). Accordingly, we held in *Slatterly* "that the [plaintiffs] cannot claim to have gained a prescriptive easement appurtenant over the disputed area when both lots [were] owned by [the same resort association]." *Id*. at 261.

Here, it is undisputed that the Williamsons owned the entire 120-acre parcel—including the two acres of property on which the mobile home was originally located as well as the property on which the crock well is located—until 2002, at which time defendants acquired ownership of the two-acre portion. Accordingly, less than 12 years passed between (1) the time at which defendants acquired ownership of the two-acre parcel in June 2002 and the Williamsons no longer owned both tenements and (2) the filing of plaintiff's complaint in November 2013.[3] Thus, defendants' use of the land did not establish a prescriptive easement. See *Mulcahy*, 276 Mich App at 699; *Slatterly*; 257 Mich App at 261.

Thus, the trial court did not err in concluding that defendants failed to demonstrate an easement by prescription.[4]

IV. CONCLUSION

The trial court properly concluded that defendants failed to establish they held an easement by necessity, a quasi-easement, or an easement by prescription.

Affirmed.

/s/ Christopher M. Murray
/s/ Cynthia Diane Stephens
/s/ Michael J. Riordan

[3] Notably, the requisite 15-year period still has not passed as of the date of this opinion.

[4] Although the trial court relied on different grounds in holding that a prescriptive easement does not exist in this case, "[a] trial court's ruling may be upheld on appeal where the right result issued, albeit for the wrong reason." *Gleason v Michigan Dept of Transp*, 256 Mich App 1, 3; 662 NW2d 822 (2003).