STATE OF MICHIGAN

COURT OF APPEALS

JOHN SURGENER, and LAURA SURGENER,
Plaintiffs–Appellants,

v

H. L. SCOTT, a/k/a HERSCHEL L. SCOTT, and NANCY A. SCOTT,

Defendants–Appellants.

UNPUBLISHED
February 25, 1997

No. 181312
Wayne Circuit Court
LC No. 93-302891 CH

Before: Gribbs, P.J., and Young and W.J. Caprathe,* JJ.

PER CURIAM.

In this easement dispute between neighbors, the trial court issued a declaratory judgment, following a bench trial, stating that: (1) absent agreement between the parties, construction of any new road would be at the sole expense of the Surgeners; and (2) the route of any new route would be required to curve (within the easement) around certain structures on the Scotts' property. The Surgeners now appeal as of right. We affirm.

The parties are adjoining landowners, and the sixty-six foot wide easement in dispute straddles their mutual property line; thus, each parcel is burdened with a thirty-three foot easement. The parties do not dispute that the easement exists, or that the stated purpose of the easement is for ingress and egress; the dispute is over permissible changes in the use of the easement. A gravel road, approximately ten to twelve feet wide, was constructed by a previous owner of both parties' properties; that road lies entirely within the sixty-six foot easement, but almost exclusively on the portion of the thirty-three foot easement which burdens the Surgeners' property. The Surgeners want to improve the road and relocate it down the center of the easement -- the parties' property line.

The Surgeners first argue that they are entitled to "free reign" over the entire thirty-three foot easement which burdens the Scotts' property, that the existing "structures" located within the easement on the Scotts' property (trees, a garden and a split-rail fence) diminish the extent of the Surgeners' easement over the Scotts' property, and therefore that the trial court erred: (1) by not requiring the

* Circuit judge, sitting on the Court of Appeals by assignment.

Scotts to remove these structures, and (2) by requiring the route of any new road to avoid these structures. We disagree.

Although the rights of the owner of the easement are paramount to the rights of the owner of the burdened parcel, *Cantieny v Friebe*, 341 Mich 143, 146; 67 NW2d 102 (1954), the use of an easement must be confined strictly to the purposes for which it was granted. *Cheslek v Gillette*, 66 Mich App 710, 715; 239 NW2d 721 (1976) (quoting *Delaney v Pond*, 350 Mich 685, 687; 86 NW2d 816 (1957)). Moreover, "a principle which underlies the use of all easements is that 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*. The dominant estate can make necessary and reasonable use of the easement, and what may be considered necessary and reasonable is a question of fact. *Cantieny, supra*, 341 Mich 146-147. Hence, because the Surgeners' claim that they should have "free reign" use of the easement burdening the Scotts' would not be consistent with necessary and reasonable use, the court's conclusion that any new road avoid these structures was not in error.

Further, given the location of the Scotts' concrete parking slab, it should have been evident to the Surgeners that the route of any new road to be constructed would probably not go directly "down the center line" of the easement. Given this fact, there was no error in the trial court's extension of the deviation from the center line to permit the road to avoid the county water valve (surrounded by a rock garden) and the other challenged structures. Again, the trial court apparently concluded that if it had ordered the Scotts to remove the "structures" (some of which predated the Scotts' purchase of the property), so that a new road could be laid down the center line of the easement, such a result would have burdened the Scotts' property beyond that which was reasonably necessary for ingress and egress.

The Surgeners next argue that the trial court erred in requiring that any new road to be constructed, be at least forty-five feet away from the easternmost point of the Scott's residence. The Surgeners argue that there was no evidentiary basis for this "arbitrary" set-back distance. We find this argument to be without merit. The Township Administrator testified from memory that the Township's set-back requirement for a private road was either forty or fifty feet. He also testified that, absent agreement of the parties, or a court order, the Township would not approve a new road through the parties' property. Given this testimony, it appears that the trial judge reasonably took forty-five feet as an average of the forty to fifty foot Township set-back requirement testified to, and made a ruling consistent with the Township's set-back requirement. The trial court's decision was fair and reasonable and should be upheld. *See Borsvold v United Dairies*, 347 Mich 672, 682; 81 NW2d 378 (1957).

Affirmed.

/s/ Roman S. Gribbs
/s/ Robert P. Young, Jr.
/s/ William J. Caprathe