STATE OF MICHIGAN

COURT OF APPEALS

NANCY BATES RICKEL and THOMAS RICKEL,

Plaintiffs/Counterdefendants/
Appellees,

v

KEITH PERRIN and JAMES PERRIN,

Defendants/Counterplaintiffs/
Appellants.

UNPUBLISHED
October 27, 1998

No. 196374
St. Clair Circuit Court
LC No. 94-002767 CZ

Before: Gribbs, P.J., and Sawyer and Doctoroff, JJ.

PER CURIAM.

In this property dispute, defendants appeal as of right from the judgment for plaintiffs awarding damages for trespass and destruction of property following a jury trial. We affirm.

Plaintiffs filed suit seeking damages for trespass after defendants removed trees, shrubs, plants and soil from their property. Plaintiffs also obtained an order enjoining defendants from further trespass. Defendants filed a countercomplaint in which they sought to quiet title to an easement across plaintiffs' property pursuant to a 1936 deed and damages for defamation and tortious interference with business relationships. The trial court granted plaintiffs' motion for partial summary disposition after concluding that defendants had no rights in the easement under the terms of the grant. Defendants' subsequent attempts to raise claims of easement by prescription, easement by necessity, and public road were rejected by the trial court. Following a trial, the jury awarded plaintiffs $4,000 in damages, which was trebled to $12,000 plus interest, pursuant to MCL 600.2919(1); MSA 27A.2919(1), based on the jury's finding that the trespass was intentional.

Defendants first claim that the trial court erred in continuing the preliminary injunction, arguing that plaintiffs suffered no irreparable harm and that an adequate legal remedy was available in the form of money damages. Defendants further claim that the trial court erred in denying their subsequent

motion to vacate the injunction. We disagree. We review a trial court's decision to grant injunctive relief for an abuse of discretion. *Schadewald v Brulé*, 225 Mich App 26, 39; 570 NW2d 788 (1997).

Where an injury is irreparable, the interference is of a permanent or continuous nature, or the remedy at law will not afford adequate relief, an injunction is a proper remedy. MCL 600.2919(3); MSA 27A.2919(3); *Schadewald, supra,* 225 Mich App 40. In this case, the fact that continuous trespasses were threatened was demonstrated by defendants' continued claim of right to the use of the easement. Accordingly, we do not believe the trial court abused its discretion in continuing the preliminary injunction. We further conclude that the trial court did not abuse its discretion in denying defendants' subsequent motion to vacate the preliminary injunction where defendants' rights with respect to the easement had yet to be adjudicated. Moreover, even if defendants had a right to use the easement, they could still be held liable for unilateral modifications of the easement that increased the burden on plaintiffs' property. *Schadewald, supra,* 225 Mich App 36. Defendants also argued below that posting of security was required under the court rules. However, contrary to defendants' arguments, requiring a party to post security is within the court's discretion. MCR 3.310(D)(1). We find no abuse of discretion in the trial court's failure to order plaintiffs to post security.

Defendants next contend that the trial court clearly erred in finding that they violated the preliminary injunction in November, 1994. We decline to address this issue because defendants stipulated to the violation on the record and have failed to cite any authority in support of their argument. MCR 2.507(H); *Blue Cross & Blue Shield of Michigan v Eaton Rapids Community Hospital,* 221 Mich App 301, 307; 561 NW2d 488 (1997); *Davenport v Grosse Pointe Farms Bd of Zoning Appeals*, 210 Mich App 400, 405; 534 NW2d 143 (1995).

Next, defendants claim that the trial court erred in setting aside a default that was entered when plaintiffs failed to timely send defendants an answer to the countercomplaint. We disagree. We review a trial court's decision to set aside a default for an abuse of discretion. *Marposs Corp v Autocam Corp,* 183 Mich App 166, 171; 454 NW2d 194 (1990).

It is well-established that "[t]he policy of this state favors the meritorious determination of issues and encourages the setting aside of defaults." *Marposs, supra,* 183 Mich App 170. Except when grounded on lack of jurisdiction over the defendant, a motion to set aside a default or default judgment shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed. MCR2.603(D)(1); *Marposs, supra,* 183 Mich App 171. Here, the trial court did not abuse its discretion in setting aside the default because plaintiffs acted in a timely manner to cure the default, there was no prejudice to defendants as a result of the setting aside of the default, and entry of the default would have resulted in manifest injustice to plaintiffs. *Id.* Although there is no indication that plaintiffs filed an affidavit of meritorious defense as required by MCR 2.603(D)(1), plaintiffs did file a copy of their answer to the countercomplaint before the hearing. While not formally denominated as an affidavit of meritorious defense, the answer substantively fulfilled the requirement of the court rule. We therefore conclude that the trial court did not abuse its discretion in setting aside the default. Furthermore, defendants' claim that Judge Kelly was without authority to hear the matter is moot in light of the fact that no order was entered as a result of that hearing and a second hearing on the matter was later brought before Judge Adair.

Defendants next argue that the trial court erred in granting plaintiffs' motion for partial summary disposition pursuant to MCR 2.116(C)(10), and denying defendants' motion for summary disposition pursuant to MCR 2.116(C)(8), in September 1995. We disagree. A trial court's decision on a motion for summary disposition is reviewed de novo. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995).

In their motion for summary disposition, defendants argued that the express language of the 1936 deed granted them rights in the easement. In the alternative, defendants argued that an easement by prescription existed because the gravel road had been used by the public for fifty-nine years, and that the dedication was intended to create a public road. Plaintiffs brought a cross-motion for summary disposition, arguing that the express language of the grant compelled the conclusion that defendants had no rights in the easement. After hearing oral arguments on the motions, the court found that "[t]he intent of the parties [to the deed] was to create an easement by reservation and an express easement for the exclusive use of the owners, heirs and assigns of lots 15 and 16." The court further found that there was no indication in the deed that the parties intended to dedicate the property for use as a public road and that defendants' claim of a prescriptive easement was not supported by the record. Defendants now argue that the trial court erred in its interpretation of the 1936 deed and with regard to its finding that defendants had not acquired a prescriptive easement.

First, we agree with the trial court that the express language of the 1936 deed did not grant defendants the right to use the easement. The trial court's interpretation of the terms of the grant are consistent with the language used and the circumstances surrounding the grant. *Wisniewski v Kelly*, 175 Mich App 175, 178; 437 NW2d 25 (1989). The grantors in the 1936 deed reserved an easement in favor of themselves and their heirs and assigns across the conveyed property, and conveyed to the grantee an express easement across the property retained by the grantors. There is no mention of lot 14 in the deed. It is well settled that easements cannot be construed to include strangers to the deed. *Choals v Plummer*, 353 Mich 64, 71; 90 NW2d 851 (1958). Defendants rely exclusively on a portion of the grant that permits use of the easement by "all persons going through and from any part of the same." However, defendants' interpretation is inconsistent with the remainder of the grant, which speaks exclusively of the parties to the agreement and their owners, heirs and assigns. Construing the agreement as a whole, as we must, the provision must be interpreted as an attempt to restrict the owner of the servient estate from preventing the use of the easement by persons having business with the owner of the dominant estate, and as benefiting the owner of the dominant estate. *Czapp v Cox*, 179 Mich App 216, 219-220; 445 NW2d 218 (1989). Furthermore, there is no indication in the deed that the parties intended to dedicate the easement as a public road where there is no evidence of an intention on the part of the owners of the easement to dedicate the land to a public use or of an acceptance of such a dedication by the public authorities. *Choals, supra*, 353 Mich 70.

Second, defendants' claim that a prescriptive easement was established by the long use of the property by the public misconstrues the law with regard to prescriptive easements. It is the person claiming adverse possession, or those with whom he is in privity, that must have fulfilled the elements of the claim for the statutory period, and occupation by unrelated third parties cannot be used a basis for a prescriptive claim. *Siegel v Renkiewicz Estate*, 373 Mich 421, 425; 129 NW2d 876 (1964). In this

case, defendants are not in privity with the members of the public who may have been using the easement during the last fifty-nine years. Therefore, defendants may not rely on that use to support their claim. Consequently, we find that the trial court did not err in denying defendants' first motion for summary disposition and granting plaintiffs' motion for partial summary disposition because defendants had no rights in the easement as a matter of law, either pursuant to the deed or under a claim of prescriptive use.

Next, defendants challenge the trial court's finding that they violated the terms of the preliminary injunction on three occasions in May, 1995. We disagree. We will not reverse a trial court's finding of fact unless it was clearly erroneous. MCR 2.613(C); *Berry v State Farm Mutual Automobile Ins Co*, 219 Mich App 340, 345; 556 NW2d 207 (1996).

Plaintiffs presented evidence that a bulldozer or other heavy equipment trespassed on their property on three occasions as it graded defendants' property. Although defendant James Perrin testified that the terms of the preliminary injunction were not violated, the trial court apparently found his testimony to be less than credible in light of the eyewitness testimony and photographic evidence presented by plaintiffs. We give deference to the trial court's unique opportunity to judge the credibility of witnesses. MCR 2.613(C); *Berry*, *supra*, 219 Mich App 345. Accordingly, we cannot conclude that the trial court's finding that defendants violated the terms of the preliminary injunction on three occasions was clearly erroneous. Moreover, defendants were not, as they claim, denied due process or an opportunity to challenge the validity of the injunction where their motion to vacate the injunction was heard and denied by the trial court.

Defendants also claim that the trial court erred by failing to award costs in connection with its order compelling discovery. We disagree. This Court gives great deference to a trial court's decision to grant or deny discovery sanctions, and will not reverse the trial court's decision absent an abuse of discretion. *Merit Mfg & Die, Inc v ITT Higbie Mfg Co*, 204 Mich App 16, 21-22; 514 NW2d 192 (1994).

Contrary to defendants' assertions, the imposition of discovery sanctions is not mandatory where the motion is granted only in part, but lies within the trial court's discretion. MCR 2.313(A)(5)(c). The trial court did not abuse its discretion in denying defendants' motion for costs where plaintiffs had previously been forced to bring a motion to compel and one of the documents of which defendants sought discovery had not yet been provided to plaintiffs.

We next address defendants' argument that the trial court erred in denying their motion to disqualify Judge Adair and to change venue. Defendants' argument that the trial court erred in denying their motion to disqualify Judge Adair is not preserved for review because defendants did not appeal Judge Adair's decision not to disqualify himself to the chief judge. MCR 2.003(C)(3); *Welch v District Court*, 215 Mich App 253, 257; 545 NW2d 15 (1996). Furthermore, defense counsel stipulated on the record to Judge Adair hearing the case. MCR 2.507(H). Consequently, we decline to address the issue. Furthermore, we conclude that the trial court did not abuse its discretion in denying defendants' motion for a change of venue because the motion was untimely and because the reasons given for the change involved incidents that had occurred more than fourteen days before the

motion was filed. MCR 2.221(A) and (B); *Chilingirian v City of Fraser,* 182 Mich App 163, 165; 451 NW2d 541 (1989).

Defendants next assert that the trial court abused its discretion when it denied their motion for a restraining order to prevent plaintiffs from erecting a fence along the lot line. We decline to address this issue because defendants have failed to cite any authority in support of their position. *Davenport*, *supra,* 210 Mich App 405. Furthermore, we find no merit in defendants' motion where the trial court had already correctly concluded two months earlier, pursuant to plaintiffs' motion for partial summary disposition, that defendants had no right to use the easement.

Next, defendants claim that the trial court erred when it denied defendants' second motion for summary disposition, in which defendants claimed an easement by prescription, an easement by necessity, and that the easement was a public road. With respect to defendants' claims of an easement by prescription and that the easement was a public road, we conclude that the trial court properly denied the motion on the basis of its conclusion that these claims had either been previously raised and dismissed in defendants' first motion for summary disposition or that the facts pleaded did not support the claims. In addition, even if defendants properly pleaded a claim for an implied easement by necessity, they could not have possibly demonstrated the strict necessity required to prevail on such a claim at trial where their property fronts on a public road. *Schmidt v Eger*, 94 Mich App 728, 732-733; 289 NW2d 851 (1980). Consequently, reversal is not required on the basis of this issue.

Defendants next argue that the trial court abused its discretion when it denied their motion in limine to exclude evidence of plaintiffs' damages. We disagree. A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Szymanski v Brown*, 221 Mich App 423, 435; 562 NW2d 212 (1997).

Specifically, defendants claimed that evidence of plaintiffs' damages caused by defendants' removal of soil, trees, plants, and grass from plaintiffs' property was not admissible where defendants "only did what others may lawfully do" in grading the easement. In support of their motion, defendants relied on *Carlton v Warner*, 46 Mich App 60; 207 NW2d 465 (1973), in which, like case now before us, the defendants bulldozed an easement. However, in *Carlton*, the defendants were the owners of the easement and had the right to maintain the easement in a passable condition. *Carlton*, *supra,* 46 Mich App 61. *Carlton* does not remotely stand for the proposition, as claimed by defendants, that anyone can bulldoze an easement merely because the owners of the easement have the right to maintain the easement. Furthermore, we agree with the trial court's reasoning that "[t]he rights and uses that the proper holders of the easement possess have no bearing on Defendants' liability for damage caused to plaintiffs' property." Thus, we conclude that the trial court did not abuse its discretion in denying defendants' motion.

Defendants next argue that the trial court erred in denying their motion to amend their complaint to add claims based on "an express easement, easement by reservation, implied easement, easement by prescription, easement by necessity, or public road." We disagree. We will not reverse a trial court's decision on a motion to amend a complaint absent an abuse of discretion. *Weymers v Khera,* 454 Mich 639, 654; 563 NW2d 647 (1997).

If a court grants summary disposition of a claim pursuant to MCR 2.116(C)(8), (9) or (10), it must give the parties an opportunity to amend their pleadings unless the amendment would be futile. MCR 2.116(I)(5); *Weymers, supra,* 454 Mich 658. We agree with the trial court that defendants' proposed amendment would have been futile where the claims defendants sought to include were claims that had already been considered by the court and were found to be unsupported by the facts.

We decline to consider defendants' arguments with regard to the trial court's dismissal of the remaining counts of the countercomplaint, the court's evidentiary rulings admitting plaintiffs' trial exhibit 31 and excluding evidence regarding the use of the easement by others, and the claim that the verdict form denied defendants due process, because defendants have failed to cite any authority in support of these arguments. *Davenport, supra,* 210 Mich App 405.

Defendants further claim that the trial court erred by admitting into evidence the court's previous orders finding that defendants repeatedly violated the preliminary injunction. Defendants claim that admission of the evidence was precluded under MCL 600.1721; MSA 27A.1721, which provides that payment and acceptance bar any action to recover damages for that injury. Defendants do not, however, explain how that provision is relevant to this issue. While defendants paid fines that were imposed as a consequence of their violations of the order, those fines were punitive sanctions for defendants' violations, not payment for the damages to plaintiffs' property that gave rise to this suit. Therefore, we find that the trial court did not abuse its discretion in admitting the evidence because it was probative of the intentional and willful nature of the trespass. MRE 402; MRE 404(b)(1); *Szymanski, supra,* 221 Mich App 435.

Finally, defendants contend that the trial court abused its discretion by failing to allow defendants to introduce evidence regarding their good faith beliefs. In support of this argument, defendants rely on *Allison v Chandler*, 11 Mich 542 (1863), in which it was held that a trespass committed by a defendant who acted in good faith and under an honest belief based on probable cause that he had a legal right to do the act complained of could not be held liable for treble damages. However, in order for evidence of a defendant's good faith belief to be relevant in a trespass case, a defendant must show that he had probable cause to believe the property was his own. *Governdale v City of Owosso*, 59 Mich App 756, 759-760; 229 NW2d 918 (1975). In this case, defendants' only claim was that they had rights in the easement that ran across plaintiffs' property. Defendants had an obligation to determine exactly what rights, if any, they held in the easement before making alterations to the property. *Governdale, supra,* 59 Mich App 760. Thus, evidence of good faith beliefs was properly excluded.

Affirmed. Plaintiffs, being the prevailing parties, may tax costs pursuant to MCR 7.219(A).

/s/ Roman S. Gribbs
/s/ David H. Sawyer
/s/ Martin M. Doctoroff