STATE OF MICHIGAN

COURT OF APPEALS

PAT NORTON and ROGER NORTON,

Plaintiffs/Counter-defendants-Appellants,

v

CHIPPEWA COUNTY ROAD COMMISSION, LES LAITINEN, and EASTERN UPPER PENINSULA TRANSPORTATION AUTHORITY,

Defendants/Counter-plaintiffs-Appellees.

UNPUBLISHED
December 4, 1998

No. 205275
Chippewa Circuit Court
LC No. 91-009624 NI

Before: Saad, P.J., and Hood and Gribbs, JJ.

PER CURIAM.

In this appeal as of right, plaintiffs challenge the trial court's order setting aside both an earlier declaratory judgment regarding the scope of a right-of-way across their property and a jury verdict in plaintiffs' favor on their trespass claims. The trial court issued a new declaratory judgment and ordered a new trial on plaintiffs' trespass claims against defendants Chippewa County Road Commission (CCRC), Les Laitinen, and Eastern Upper Peninsula Transportation Authority (EUPTA). We reverse and reinstate the original declaratory judgment and verdict from the first trial.

Since 1968, plaintiffs have owned certain waterfront property in Chippewa County along the St. Mary's River across from Neebish Island. In 1950, plaintiffs' predecessors in title, John and Gladys Dueben, conveyed to Chippewa County a "release of right-of-way" to establish a roadway for public access to a ferry dock to be constructed at the terminal point of the roadway. The release was executed by the Duebens in consideration of $1,600 and provided that the "sole and only purpose" of the conveyance was "a right of way over the above described lands for highway purposes. . . ." Thereafter, a ferry dock and 66-foot wide roadway were installed to service traffic between Neebish Island and the mainland.

The gravamen of this appeal requires a determination if the phrase "highway purposes" in the release of right-of-way granted to defendants (and the public) includes the right to park motor vehicles overnight as part of the easement.[1]

The most significant factor concerning the extent of an easement is the manner in which the easement is created. 4 Powell on Real Property, § 34.12[1], p 34-177 The extent of a party's right under an easement is a question of fact, which is reviewed on appeal for clear error. *Bang v Forman,* 244 Mich 571, 576; 222 NW 96 (1928). Where an easement is created by an express grant in a written instrument, as in this case, the extent or scope of the rights granted depends upon a proper interpretation of the terms of the grant. Powell, *supra* at § 34.12[2], p 34-178; 25 Am Jur 2d, Easements, § 82. If the grant is specific in its terms, it is decisive of the limits of the easement. *Delaney v Pond*, 350 Mich 685, 687; 86 NW2d 816 (1957). Here, the phrase "highway purposes" is ambiguous and subject to multiple interpretations. Accordingly, we must look beyond the terms of the conveyance to determine if parking was a right granted in the conveyance.

The primary goal of judicial interpretation of the language of any written instrument is to effectuate the intent of the original contracting parties. Where the grantor's intent as to the scope of an easement cannot be determined from the four corners of the instrument, the contemporaneous and subsequent conduct or acts of the parties may be considered in determining its scope. Powell, *supra* at § 34.12[2], p 34-183; *Curran v Maple Island Resort Ass'n,* 308 Mich 672, 680; 14 NW2d 655 (1944); *Bang, supra* at 576. Where the scope of an easement is unclear, the servient tenant in the first instance, and the dominant tenant secondarily, has the power to define the scope by reasonable action. Powell, *supra* at § 34.12[2], p 34-184.

Here, the testimony presented at the November 1992, declaratory judgment bench trial provided strong evidence of the Duebens' intent in limiting the easement solely for highway purposes. In particular, Walt Sanford, a resident of Neebish Island and a friend of the Duebens, testified that, after the road commission approached the Duebens about granting a release of right-of-way, Mr. Dueben expressed concerns to him about a lack of privacy and the parking of vehicles in the right-of-way so as to block his view. According to Sanford, the road commission informed the Duebens that "no parking" signs could be installed and the sheriff's department could be instructed to issue tickets to parking violators. After the transaction was finalized, four metal "no parking" signs were installed. Subsequently, when someone parked in the easement, Mrs. Dueben was known to chase them out, sometimes at the point of a gun. Sanford opined that the Duebens would not have granted the release if they had been told at the outset that parking would be permitted in the easement.

In 1968, when plaintiffs purchased the property, Mrs. Dueben informed them that parking was not permitted in the easement. A chronic parking problem developed in the mid to late 1980s after defendant Laitinen began mooring his boat at the ferry landing and parking his vehicle in the easement for extended periods of time. Prior to that time, parking was only an occasional problem, which plaintiffs solved by informing the violator personally or by placing a note on the vehicle indicating that no parking was allowed. Plaintiffs also placed logs and large rocks along one side of the road to prevent people from parking in that location. In 1990, they installed a chain link fence between their property and the road, and placed a couple of "no parking" signs on the fence that were given to them by a

EUPTA representative. In the year after plaintiffs filed this lawsuit in 1991, the number of cars parked in this area increased to an average of three to five at a time, but went as high as eight to ten.

Apart from the strong evidence of the Duebens' intent to preclude overnight and long-term parking, we would further conclude that such use, as sanctioned by defendants CCRC and EUPTA, materially increased the burden on plaintiffs' servient estate. An express conveyance of an easement grants to the holder of the easement qualified possession only to the extent necessary for reasonable enjoyment of the rights conferred by the easement. *Unverzagt v Miller,* 306 Mich 260, 265; 10 NW2d 849 (1943); *Schadewald v Brule,* 225 Mich App 26, 35; 570 NW2d 788 (1997). In determining the scope of an easement granted by express conveyance, the parties are generally presumed to have contemplated a scope that would reasonably serve its purposes. Once granted, an easement holder cannot materially increase the burden on the servient estate or impose a new and additional burden, *Delaney, supra* at 687, nor can it be modified by either party unilaterally, *Schadewald, supra* at 36; *Douglas v Jordan,* 232 Mich 283, 287; 205 NW 52 (1925).

Here, the release of right-of-way was instigated and drafted by the county. It provided for a standard 66-foot wide access road to the ferry landing; it did not provide for a parking lot or space along the road for long-term parking. A conveyance of a primary easement—e.g. "highway purposes"—may be construed also to convey so-called secondary easements—e.g., incidental parking—necessary for the full enjoyment of the primary easement. See Powell, *supra* at § 34.12[2], pp. 34-188 to 34-190. As owners of prime waterfront property, plaintiffs are entitled to an unobstructed view of the water and surrounding area, yet they rightfully concede that short-term parking, incident to operation of the ferry, is a reasonably anticipated use of the right-of-way. While there may be limited times when public parking on the mainland is *necessary* as opposed to merely convenient—such as when ice dams form in the river or other times when the ferry is not running—the public does not have the right to burden plaintiffs' estate by parking overnight or long-term in the easement.[2] See *Jacobs v Lyon Twp (After Remand),* 199 Mich App 667, 671-672; 502 NW2d 382 (1993); *Bang, supra* at 576; *Delaney, supra* at 687-688; *Cabal v Kent Co Road Comm,* 72 Mich App 532, 536-537; 250 NW2d 121 (1976). As noted by the initial presiding judge in this matter, if defendants CCRC and EUPTA need space for long-term public parking on the mainland to service the Neebish Island ferry landing, they can exercise eminent domain.

Following the initial jury trial the plaintiffs were awarded compensatory and exemplary damages. Defendants then moved for a new trial. The trial court granted a new trial, set aside the prior declaratory judgment and entered a new declaratory judgment. In its written opinion, the trial court's analysis was fundamentally flawed inasmuch as it considered interpretation of the phrase "highway purposes" in the context of the Duebens' release of right-of-way to be a legal question, rather than a fact question. The four cases cited and relied on by the court are inapposite because they did not involve an express grant of an easement or right-of-way as is present here. *In re Widening of Fulton Street,* 248 Mich 13; 226 NW 690 (1929); *Cleveland v Detroit,* 324 Mich 527; 37 NW2d 625 (1949); *The Detroit City Railway v Mills,* 85 Mich 634; 48 NW 1007 (1891)[3]; *Eyde Brothers Development Co v Eaton County Drain Comm'r,* 427 Mich 271; 398 NW2d 297 (1986).

Finally, a comment on the position of amicus curiae County Road Association of Michigan (CRAM) is in order. CRAM contends that, unless prohibited by local government regulation, the

public's right to park vehicles in the right-of-way of a highway is not lost because the parking is long-term rather than short-term. Indeed, pursuant to the general highway statute, MCL 233.14; MSA 9.390, ferry landings and roads terminating at a river or other body of water are considered public highways, subject to regulation by local authorities. Here, the parties conceded that no local ordinance restricted parking in the right-of-way across plaintiffs' property. As indicated previously, defendant CCRC chose to establish an access road to the ferry landing by obtaining a limited-use easement from the Duebens in 1950, rather than by exercising eminent domain. Therefore, the county (as well as the public) is subject to the limits of the easement that it bargained for, and plaintiffs are entitled to rely on the county's duty to enforce those limits. We find no basis in fact for CRAM's contention that a ruling in favor of plaintiffs will result in chaos as to the status of parking on Michigan roads.

In sum, this Court concludes that the trial court clearly erred in finding that the release of right-of-way was unambiguous and that the scope of the easement included overnight or long-term parking, where such use was not contemplated by the original parties to the easement. Accordingly, we vacate the trial court's October 13, 1995, declaratory judgment and order of a new trial, as well as the July 18, 1997, judgment on the jury verdict in the second trial, and reinstate both the declaratory judgment dated July 22, 1994, and the judgment on the jury verdict, entered October 12, 1994, following the first trial.

Plaintiffs' remaining issue is rendered moot as a consequence of our decision.

The October 13, 1995, declaratory judgment and order of a new trial, and the judgment on the jury verdict in the second trial, dated July 18, 1997, are vacated. The July 22, 1994, declaratory judgment, and the judgment on the jury verdict following the first trial, entered October 12, 1994, are reinstated. Plaintiffs, being the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ Henry William Saad
/s/ Harold Hood
/s/ Roman S. Gribbs

[1] The issue whether the effect of the language in the "release" was merely to convey to the county a limited-use easement or a fee interest in the property was raised below. The trial court ruled that the instrument conveyed only an easement. The parties do not directly challenge this ruling on appeal.

[2] A public parking lot on Neebish Island is available to residents and visitors.

[3] One justice concurred with the authoring justice, and another justice concurred in the result. Two justices dissented. A plurality decision, in which no majority of the justices participating agree as to the reasoning, is not binding on this Court under the doctrine of stare decisis. *Negri v Slotkin*, 397 Mich 105, 109; 244 NW2d 98 (1976).