STATE OF MICHIGAN

COURT OF APPEALS

ANDREW W. BOCHI, BETTY JANE BOCHI, RAY J. WEST, JUDITH A. WEST, WILFRED D. JACKSON, PETER TOMA, JR., ELSIE TOMA, RAY FARHAT, JOYCE E. FARHAT, EDWARD J. LEPPLER, MABEL M. LEPPLER, DONALD E. CLOSSER and DORIS J. CLOSSER,

Plaintiffs-Appellants/
Cross-Appellees,

v

DOUGLAS L. SHAFFER and CINDA A. SHAFFER,

Defendants-Appellees/
Cross-Appellants.

UNPUBLISHED
July 9, 1999

No. 201553
Cheboygan Circuit Court
LC No. 95-005366 CH

Before: Fitzgerald, P.J., and Doctoroff and White, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court judgment denying in part their claims of an easement across defendants' property. Defendants cross-appeal. We affirm the judgment as modified.

I. Prescriptive Easement

Plaintiffs first claim that the trial court erred in ruling that they failed to establish an easement by prescription across defendants' property. This Court reviews equitable actions under a de novo standard. *Webb v Smith (After Second Remand)*, 224 Mich App 203, 210; 568 NW2d 378 (1997). We review for clear error the findings of fact supporting the decision. *Id*.

An easement is the right to use the land of another for a specified purpose. *Schadewald v Brulé*, 225 Mich App 26, 35-36; 570 NW2d 788 (1997). Where an easement becomes annexed to land, either by grant or prescription, it passes as an appurtenance with a conveyance or devise of the dominant estate, although not specifically mentioned in the deed or will, or even without the use of the

term "appurtenances." *VonMeding v Strahl*, 319 Mich 598, 611; 30 NW2d 363 (1948); *Dyer v Thurston*, 32 Mich App 341, 344; 188 NW2d 633 (1971). An easement by prescription arises from a use of the servient estate that is open, notorious, adverse, and continuous for a period of fifteen years. *Goodall v Whitefish Hunting Club*, 208 Mich App 642, 645; 528 NW2d 221 (1995); MCL 600.5801(4); MSA 27A.5801(4). A use is "adverse" when it would entitle the landowner to a cause of action against the trespasser. *Goodall*, *supra* at 646.

The testimony established that plaintiffs, as well as others, used the road in question openly and without permission from defendants' predecessors in title. "The circumstances were such that the owners of the [property] should have been aware of this use of [it]." *Mumrow v Riddle*, 67 Mich App 693, 696-697; 242 NW2d 489 (1976). Accordingly, we find no clear error in the trial court's determination that plaintiffs' use of the road was "open, notorious, adverse, and continuous."

Plaintiffs also claim that either themselves, or their predecessors in title, all acquired an easement by prescription through their use of the property for the required fifteen year period. We agree. The evidence showed that, before defendants challenged plaintiffs' use of the subject road, all plaintiffs either owned their property for fifteen years or more, or purchased their properties from prior owners who had owned the property for more than fifteen years. It was not necessary then for the trial court to consider the question of "tacking" of prior ownership. An easement, once established, passes between successive owners, even without mention of it in the deed. *VonMeding*, *supra* at 611; *Dyer*, *supra* at 344.

The trial court ruled that plaintiffs successfully established a prescriptive easement over defendants' property for emergency vehicles and pedestrian traffic, but not for non-emergency vehicular travel. We find no error in the trial court's ruling regarding emergency vehicles and pedestrian traffic. We conclude, however, that the trial court erred in ruling that an easement did not exist for non-emergency vehicular traffic. The establishment of an "open, notorious, adverse, and continuous" use by any vehicle for more than fifteen years was sufficient to establish an easement for all vehicles. Accordingly, we modify the trial court's judgment to indicate that plaintiffs have an easement for vehicular traffic over the designated portion of defendants' property.

On cross-appeal, defendants challenge the finding that plaintiffs proved an easement for pedestrian traffic. The court's finding is amply supported by the record. We find no clear error.

II. Easement by Necessity

To establish an implied easement, 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. *Schmidt v Eger*, 94 Mich App 728, 731; 289 NW2d 851 (1980).[1] An easement by implication can arise where either a grant or a reservation of an easement is involved. *Harrison v Heald*, 360 Mich 203; 103 NW2d 348 (1960).

In *Schmidt, supra*, this Court explained that one type of implied easement may arise from a "quasi-easement." A "quasi-easement" is "a use prior to division of the property." *Rannels v Marx*, 357 Mich 453, 458; 98 NW2d 583 (1959). The undisputed testimony established that the original owner of the whole parcel, which included defendants' property, used the subject road himself to go east, before the parcel was split.

In *Schmidt*, this Court stated that an 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 appears to be the position of a majority of jurisdictions that *an implied grant of an easement requires only a showing of reasonable necessity*, while an implied reservation of an easement in the grantor requires a showing of strict necessity. [*Schmidt, supra* at 733. Emphasis supplied.]

Here, the Clossers and Lepplers fall into one group and the remaining plaintiffs fall into another. Both the Clossers' predecessors and the Lepplers' predecessors bought their property from the prior owner, Ungrey, while he still owned what is now defendants' property. An easement over Ungrey's retained land was implied. Thus, the easement these plaintiffs are seeking is an easement implied by grant and they need only show "reasonable necessity," rather than "strict necessity." As the trial court recognized, the intermittent inaccessibility of Bluffs Road makes these plaintiffs' use of the other road "reasonably necessary."

The other plaintiffs, however, did not purchase their properties from Ungrey, but from Ethyl VonSprecken. The only type of implied easement that might have arisen from that conveyance would have been an easement by reservation. In order for an implied easement to arise, therefore, "strict necessity," rather than "reasonable necessity" was required. *Schmidt, supra* at 733.

Michigan law is not uniform regarding the definition of "strict necessity."[2] Compare *Waubun Beach Ass'n v Wilson*, 274 Mich 598, 607; 265 NW 474 (1936); *Kahn-Reiss, Inc v Detroit & N Savings & Loan Ass'n*, 59 Mich App 1, 13; 228 NW2d 816 (1975) and *Todd v Nobach*, 368 Mich 544; 118 NW2d 402 (1962) (access on foot only was "wholly inadequate"); *Rodal v Crawford*, 272 Mich 99; 261 NW 260 (1935) (access by boat only not adequate because the harbor would be frozen over several months a year).

We believe the present case is more similar factually to *Todd* and *Rodal* than to *Wauban* and *Kahn-Reiss*. The trial court did not err in finding an easement implied by necessity when Bluffs Road is impassable. While the form of this remedy, i.e., an "intermittent easement," appears novel, when granting equitable relief, "a court is not bound by the prayer for relief but may fashion a remedy as warranted by the circumstances." *Three Lakes Association v Kessler*, 91 Mich App 371, 377-378; 285 NW2d 300 (1979).

III. Express Easement

An express easement requires "a writing containing plain and direct language evincing the grantor's intent to create a right in the nature of an easement rather than a license." 25 Am Jur 2d, Easements & Licenses in Real Property, § 18.

An examination of the record leads us to conclude that the Clossers have no cognizable claim to an express easement, that the Farhats' predecessor did not obtain a valid easement from Barber, and that the purported easement from VonStrecken to Jackson, the Tomas and the Wests was ineffective. Accordingly, we find no error in the trial court's determination that no express easement existed.[3]

In sum, we affirm the trial court's findings regarding the existence of an easement by prescription and an easement implied by necessity, but modify the trial court's judgment to provide that the scope of the easement includes general vehicular traffic when Bluffs Road is inaccessible. We also affirm the trial court's holdings regarding the existence of an easement for pedestrian traffic, and the absence of any express easement.

Affirmed as modified.

/s/ E. Thomas Fitzgerald
/s/ Martin M. Doctoroff

[1] Both plaintiffs and the trial court attempted to distinguish "implied easement" from "easement by necessity." These terms, however, are not legally distinct, because the only "implied easement" is an easement "implied by necessity." See, e.g., 25 Am Jur 2, Easements & Licenses in Real Property, § 39.

[2] The trial court relied on *Moore v White*, 159 Mich 460; 124 NW 62 (1909). While that case does provide an example of a case of "strict necessity," it does not indicate that only the most stringent construction of "strict" is permitted.

[3] Whether an express easement existed in favor of the Lepplers was decided in a separate ruling, after the instant appeal was filed. The Lepplers have not appealed from that ruling. Accordingly, we express no opinion regarding the Lepplers' claim to an express easement, as that issue is not before us.