STATE OF MICHIGAN

COURT OF APPEALS

BRUCE F. WADEL TRUST NO. 1 and VIRGINIA D. WADEL TRUST NO. 1,

Plaintiffs/Counter-Defendants-Appellants,

v

ROBERT E. BEYER and ANGELIKA H. BEYER,

Defendants/Counter-Plaintiffs-Appellees.

UNPUBLISHED
February 26, 2002

No. 225227
Mason Circuit Court
LC No. 98-008453-CZ

Before: Griffin, P.J., and Holbrook, Jr., and Hoekstra, JJ.

PER CURIAM.

Plaintiffs[1] appeal as of right from the trial court's entry of judgment for defendants/counter-plaintiffs after a bench trial in this real property dispute. Plaintiffs challenge the trial court's judgment that defendants acquired an easement over plaintiffs' land to access Lake Michigan, its rulings admitting certain witness testimony and deposition testimony, and its order awarding defendants expert witness fees. We affirm.

The facts that give rise to this case have transpired over many years, and we need not recount every step along the way. As they relate to resolution of this appeal, the facts are that defendants purchased the at-issue property from the Elliott's in 1984. The Elliott's acquired their lot from plaintiffs in 1975, and thereafter improved the lot by building a home. When the Elliott's purchased their lot, plaintiffs were marketing this lot and the surrounding land that they owned as a proposed subdivision. One of the main features of the promotion was that each lot would enjoy access to Lake Michigan by a common easement that was to be part of the subdivision. Plaintiffs assured the Elliotts that despite the fact that the subdivision had not been approved and therefore plaintiffs could not make the proposed easement part of the sale, they would have access to Lake Michigan. Relying on that promise, the Elliotts purchased and improved the property. For reasons that are not clear and are largely irrelevant to the case,

[1] Plaintiffs originally brought this lawsuit in the names of Bruce Wadel and Virginia Wadel; however, the parties and trial judge signed an order substituting the Wadels' trusts as party plaintiffs.

plaintiffs never obtained approval for the subdivision, but they did honor their promise to the Elliotts regarding lake access. When the Elliotts decided to sell, they obtained assurance from plaintiffs in the form of a letter that beach access would continue, but that whether it was permanent depended on the city's approval of the proposed plat and the formation of an association to share maintenance costs. With this understanding, defendants purchased the property and used the same means of access to the lake as the Elliotts. In 1989, plaintiffs informed defendants that they no longer had permission to access Lake Michigan over plaintiffs' land, but nonetheless defendants continued to use the lake access despite this notification. Finally, in 1998, plaintiffs filed the instant complaint to quiet title and to enjoin defendants continued use of the property; defendants counter-claimed for a permanent easement. Following trial, the trial court awarded defendants an easement. This appeal ensued.

Plaintiffs first claim that the trial court erred in granting defendants an easement based on principles of equitable estoppel and implied easement. Turning first to implied easement, plaintiffs assert that an implied easement did not arise because during the unity of title of defendants' and plaintiffs' properties, no permanent and obvious servitude existed in favor of defendants' property. We disagree. "We review the trial court's findings of fact in a bench trial for clear error and conduct a review de novo of the court's conclusions of law." *Chapdelaine v Sochocki*, 247 Mich App 167, 169 ; __ NW2d __ (2001), citing MCR 2.613(C) and *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

"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), citing *Harrison v Heald*, 360 Mich 203; 103 NW2d 348 (1960), *Rannels v Marx*, 357 Mich 453; 98 NW2d 583 (1959), and *Koller v Jorgensen*, 76 Mich App 623; 257 NW2d 192 (1977). "A claim of implied easement arises where two or more tracts of property are created from a single tract, and the use of the servient estate for the benefit of the dominant estate is apparent, continuous, and necessary." *Forge v Smith*, 458 Mich 198, 211, n 38; 580 NW2d 876 (1998), citing *Rannels, supra*. The burden of proving the claim by a preponderance of the evidence rests on the party asserting the easement. *Schmidt, supra*.

Plaintiffs' argument on appeal focuses on whether the evidence supports a finding that during the unity of title an apparent and obvious servitude existed in favor of the property that defendants now own. Plaintiffs maintain that during the unity of title no "permanent structure" existed. The import of plaintiffs' argument is that something manmade must exist before an apparent and obvious servitude can be found. We reject this notion. Here, during unity of title the entire property that plaintiffs owned had the immense benefit of access to Lake Michigan. The fact that the lake is not manmade makes it no less a benefit to the property from which access to it can be had.

Plaintiffs also argue that the evidence fails regarding whether the easement was reasonably necessary for the fair enjoyment of the property it benefits. Plaintiffs argue that the use of nearby lakes is not a benefit to property. In *Koller, supra* at 629, this Court found to the contrary. Plaintiffs take issue with *Koller* and encourage us to either disregard it or "overrule" it because it is not binding on us. MCR 7.215(H)(1). We decline this invitation because we think the reasoning and holding of *Koller* makes perfect sense. When one purchases property that has

access to a lake, and that access is denied, the very essence as well as the value of the property is changed. If property exists either in whole or in part as recreational property, the continued existence of that characteristic is reasonably necessary to the fair enjoyment of the property. Consequently, we find no grounds upon which to conclude that the trial court in the present case erred in ruling that defendants had met their burden for claiming an easement by implication.[2] Because the easement awarded to defendants is fully supported in law by the trial court's finding of an implied easement, we need not address plaintiffs' argument concerning equitable estoppel.

Next, plaintiffs claim that the trial court erred in admitting another property owner's testimony because it was irrelevant. We review evidentiary decisions for an abuse of discretion. *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 78; 618 NW2d 66 (2000). Evidence is relevant if it tends "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Having reviewed the record here, we cannot say that the trial court abused its discretion because the testimony in question was relevant to show the intent of the parties and the circumstances leading to the dispute.

Plaintiffs next claim that the trial court erred in considering deposition transcripts that defendant submitted to the court during closing argument, but that were not admitted into evidence before the close of proofs, and where one deposition was conducted contrary to court rule. We first note that plaintiffs did not object to the manner or form of the deposition in question before or during its taking, waiving the issue on appeal. MCR 2.308(C); see *Earl v White*, 155 Mich App 152, 157-158; 399 NW2d 40 (1986). Regardless, even if plaintiffs' claim were preserved, we find it is without merit. The record shows that defendants did comply with the court rules for de bene esse depositions, because they filed the deposition notice and the actual deposition with the court to preserve the testimony. MCR 2.301(C); MCR 2.302(H)(1)(b) ("If discovery materials are to be used at trial they must be either filed or made an exhibit); MCR 2.306(B)(1). In any event, MCR 2.308(C) allows improperly taken depositions to be used by the court unless "the court finds that the errors substantially destroy the value of the deposition as evidence or render its use unfair or prejudicial." MCR 2.308(C)(5). Moreover, contrary to plaintiffs' assertion, the attorney who conducted the deposition did not engage in a trial in the court in this state in violation of a State Bar Rule. Given that the trial court expressly stated that it reached its judgment without use of the deposition, reference to it was not clear error. MCR 2.301-2.302; MCR 2.308(C)(5); *Michigan Ass'n of Psychotherapy Clinics v Blue Cross & Blue Shield of Michigan (After Remand)*, 118 Mich App 505, 513; 325 NW2d 471 (1982).

Finally, plaintiffs claim that the trial court erred in awarding expert witness fees for a

[2] To the extent that plaintiffs suggest that the trial court failed to carry out its duties in the analysis of its bench trial opinion, we disagree. The trial court's findings of fact, analysis, and conclusions of law are sufficient. MCR 2.517(A)(1) and (2) ("Brief, definite, and pertinent findings and conclusions on the contested matters are sufficient, without overelaboration of detail or particularization of facts."); *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 176; 530 NW2d 772 (1995). The trial court demonstrated that it was aware of the issues in the matter and properly applied the law; thus, the trial court did not err in its discussion of the easement by implication doctrine. *Id*. at 176-177.

witness defendants did not qualify as an expert. "The qualification of an expert witness, and the admissibility of the expert testimony, are within the trial court's discretion, and the trial court's decision will not be reversed absent an abuse of discretion." *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 400; 628 NW2d 86 (2001). Likewise, "[w]e review for abuse of discretion the trial court's determination to award expert witness fees." *Rickwalt v Richfield Lakes Corp*, 246 Mich App 450, 466; 633 NW2d 418 (2001).

Here, the witness in question testified at trial concerning the value of the property with and without lake access, which was the key inducement. Although defendants asked the witness about his credentials, they did not move to qualify him as an expert; however, plaintiffs did not object at trial to the testimony. After lengthy inquiry at the motion hearing, the trial court determined that the witness had recognized specialized knowledge that would assist the court to understand the evidence or to determine a fact in issue. According to MRE 702, "a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Because this action proceeded as a bench trial, the witness testified to his credentials and obviously was not a fact witness, and plaintiffs had the opportunity to cross-examine the witness, and because the trial judge stated that he knew that the witness would be testifying as an expert from the beginning of his testimony, we cannot say that the trial court abused its discretion.

Affirmed.

/s/ Richard Allen Griffin
/s/ Donald E. Holbrook, Jr.
/s/ Joel P. Hoekstra