STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL DAVID CORBIN and MARILYN J. CORBIN, Plaintiffs-Appellees, V DAVID KURKO and ISABEL KURKO, Defendants-Appellants.	UNPUBLISHED August 30, 2002 No. 229712 Oakland Circuit Court LC No. 97-002592-CH

Before: Holbrook, Jr., P.J. and Jansen and Wilder, JJ.

PER CURIAM.

This is a declaratory action to enforce an easement on commercial property. Defendants appeal as of right from a judgment entered after a bench trial. We affirm in part and reverse in part.

I. LEGAL DESCRIPTION OF PROPERTY

The dispute in this case affects the following four lots:

> Lots 123, 124, 125 and 126, Townsend's Subdivision, a subdivision of part of the SW ¼ of Section 33, Town 4 North, Range 9 East, Independence Township, Oakland County, Michigan, according to the Plat thereof as recorded in Liber 31 of Plats, Page 12, Oakland County Register of Deeds records.

II. FACTUAL BACKGROUND

Four adjoining parcels of land on Dixie Highway in Independence Township were owned by plaintiff's father and mother. The senior Mr. Corbin ran a barber shop on Lot 126. In 1965, he conveyed three parcels, Lots 123, 124 and 125, to defendants. Defendants have operated a tavern on the property since 1962.

Concerned that he would lose valuable parking space for his barber shop, Mr. Corbin created easements along the common boundary of Lots 125 and 126. Each easement was a strip ten feet wide and was designated "for parking of motor vehicles" for people using any of the four

parcels. For the most part, those parking areas were unpaved, except for a portion of the parking area on Lot 126 near the barber shop.

After Mr. Corbin's death, Mrs. Corbin in 1986 conveyed Lot 126 to her son and daughter-in-law, the plaintiffs in this action.

Around 1996, plaintiffs paved their parking area on Lot 126. Plaintiffs did not pave the part of defendants' Lot 125 where they benefited from the easement. In 1997, defendants paved a parking area on Lot 125, but did not pave the ten-foot easement on Lot 125. Thus, they left a ten-foot unpaved strip at the boundary line. The unpaved section was not plowed in the winter and became muddy. In addition, there was a drop-off from the paved section to the unpaved section.

Plaintiffs felt this deprived their customers of the parking area on Lot 125 because there was no longer a single parking area accessible from either lot. As a result, they brought this lawsuit claiming that the condition of the unpaved area restricted access to parking, contrary to the terms of the easement, and asking (among other relief) that the court order the "free flow of traffic" restored.

At trial, plaintiffs also claimed that, based on the wording of the easement, they had an easement to travel over Lots 123, 124, and the entire Lot 125 to get to the parking area (although parking would be limited to the ten-foot strip).

The court ruled that defendants' paving job left a "morass of mud" which frustrated the purpose of free access across the easements. The court ordered the unpaved portion paved. Because "the unpaved portion is all on Defendant's lot and could more easily have been paved when Defendant was paving the rest of his lot," the court ordered defendants to bear the greater expense, two thirds of the cost of paving, and plaintiffs to contribute one-third. The parties were directed to jointly select a contractor to commence paving as soon as the weather permitted. Enforcement was stayed pending appeal.

III. SCOPE OF EASEMENT

Defendants present several arguments regarding the findings and relief ordered by the trial court. Although plaintiffs asked that easements be extended across Lots 123, 124 and the remainder of Lot 125 to permit access to Lot 126, we do not read the trial court's order as granting that relief. While the expert witness testified that "it does no good to have the easements without access to it," he also testified that he would examine curb cuts and other characteristics to determine whether Lot 126 already had road access or whether there was no commercially feasible access other than recognizing an easement by implication ("implicit access" easement, in the witness' words) across the other lots conveyed by the common grantor (i.e., Lots 123 and 124). Thus, the expert witness never opined that that Lot 126 was landlocked or that an easement arose by implication; he merely recognized that a written easement does not alone determine the rights of parties.

In fact, Lot 126 is not landlocked. It has access to Dixie Highway. The law does not create an easement by implication, but, more importantly, the trial court's order did not purport to create one.

The court also did not rule that defendants would be unable to sell their land in the future because a sale would deprive plaintiffs' customers of access across other lots, that defendants lacked an easement on Lot 126, or that defendants' customers could not park in the easement because it would block access by plaintiffs' customers. Therefore, we do not need to consider these arguments further.

IV. INTERFERENCE WITH EASEMENT

Defendants argue that the trial court erred when it found that a "morass of mud" interfered with plaintiffs' use of the easement. We disagree. We review the trial court's findings of fact for clear error. *Chadelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001).

Plaintiff testified that "[h]e [defendant] doesn't even snow plow it, which makes it more of a mud hole, makes it more difficult for some of the older people to come and go because of the narrowness of my parking area." Plaintiff also characterized the area as a "muddy ditch that's unplowed in the wintertime." Although plaintiff did not use the word "morass," we find no clear error in the trial court's findings.

V. REMEDY

Defendants argue the trial court erred by ordering them to pave the property. We agree. The respective duties of the parties is a legal question, which we review de novo. *Chadelaine, supra.*

The beneficiary of an easement (the owner of the dominant tenement) has the duty to maintain the easement. *Harvey v Crane*, 85 Mich 316, 322; 48 NW 582 (1891); 1 Cameron, Michigan Real Property Law (2d ed), § 6.24, p 215; 1 Restatement Property (Servitudes), 3d, § 4.13(1), p 631.[1] The owner of the property cannot take steps that unreasonably interfere with the beneficiary's enjoyment of the easement. 25 Am Jur 2d, Easements & Licenses, § 98, p 670; Restatement Property (Servitudes), 3d, § 4.9, p 581. An illustration in the Restatement fits quite nicely within the facts of this case:

> Power Company properly installed poles and a power line across Blackacre pursuant to an easement. O, the owner of Blackacre[,] then built a road crossing under the power line. If proper drainage is provided and maintained, the road does not interfere with the power line, but if the drainage becomes inadequate, the foundations for the poles may be undermined. Unless the easement document provides to the contrary, O has the duty to maintain the drainage to avoid interfering with the power poles. [*Id.* § 4.13, Illustration 4, p 634].

Here, the trial court found that the method of pavement, i.e., leaving an unpaved gap, interfered with the easement's use as a parking lot by creating a "morass of mud." Just as erection of a fence would unreasonably interfere with the easement's use, an inadequate paving job would do

[1] The rules stated here are general rules applicable when the document creating the easement does not further define rights and obligations.

the same. Thus, although defendants had no obligation to pave their lot (just as they have no obligation to build fences), if they undertake such construction they must do so in a way that does not unreasonably interfere with the beneficiary's right to use the easement.

Defendants caused water drainage problems when they had Lot 125 paved, and they are responsible for correcting the problem. They are not obligated to correct it through *paving*, though. If they can correct the drainage problem with gravel or other means while still allowing the use of the strip for parking, they will have complied with the easement's requirements. Defendants are not obligated to improve the property beyond that which eliminates the interference.

Joint use by the beneficiary and the owner of the land may create an obligation to jointly bear the costs of repair, maintenance, or improvements to areas used in common. *Bowen v Buck & Fur Hunting Club*, 217 Mich App 191; 550 NW2d 850 (1996); 1 Restatement Property (Servitudes), 3d, § 4.13(3), p 631. The circuit court found that defendants had no need for additional paved parking, yet the court imposed upon defendants the obligation to pay for two-thirds of the improvement because defendants owned the underlying property and it would have been easier for defendants to have the easement paved when they had their other parking area paved. The court's inquiry was misplaced, however. Ownership of the servient tenement does not create a duty to improve the land any more than it creates a duty to maintain or repair. Likewise, the ease with which defendants could have paved the property is immaterial. "Use" is the material fact. If parties jointly use an easement, they can be expected to pay for repair, maintenance, and improvements proportionate to their usage.[2]

The circuit court found that defendants did not "need" the easement, but made no findings on "use." On remand, the court must determine the proportion of use by defendants before imposing upon them the burden of paying for any additional improvements.

The proper remedy is to have defendants bear the cost of eliminating the drainage problem that interferes with the easement. Plaintiffs must bear the cost of any additional improvement such as paving unless it is shown that defendants use or will use the easement. If joint use is shown, costs of further improvements beyond correction of the drainage problem should be allocated based on use. There was no evidence to support the allocation of costs on a one-third/two-thirds basis, so that formula is vacated in favor of one directly related to actual costs and usage.

Any further interference caused by uneven pavement or a lip in the pavement was not specifically addressed in the trial court's order. If any problem in this regard is not addressed when the drainage problem is rectified, the trial court would also be required to resolve the factual question whether the pavement edge constituted an unreasonable interference with the beneficiary's rights. While the proofs showed that the unpaved section and the pavement near the barber shop had a three-inch difference, the record is not clear whether the unevenness was created by the initial paving job done on behalf of the plaintiffs as owners of the barber shop, or

[2] This is true for the cost of plowing snow as well. The servient owner has no duty to keep it plowed for the dominant owner's benefit. *Muxworthy v Mendick*, 66 AD2d 1017; 411 NYS2d 737 (1978).

because of the excavation by the defendants. In part, there is ambiguity on this point because there was no evidence about any height difference between the unpaved area and defendants' paved tavern parking lot.

We do not address defendants' argument that paving would create additional drainage problems because that aspect of the issue is not preserved for appeal.

VI. CONCLUSION

The circuit court did not err when it found that defendants' actions caused a muddy drainage problem that interfered with plaintiffs' use of the easement. Defendants must bear the cost of eliminating the problem. If plaintiffs desire additional improvements, such as paving, they must bear that additional cost unless joint use is shown.

Affirm in part, reversed in part, and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction. Costs shall not be taxed, neither party having prevailed in full.

/s/ Donald E. Holbrook, Jr.
/s/ Kathleen Jansen
/s/ Kurtis T. Wilder