

STATE OF MICHIGAN
COURT OF APPEALS

PANHANDLE EASTERN PIPELINE
COMPANY,

UNPUBLISHED
October 9, 2007

Plaintiff-Appellee,

v

VIRGIL MUSSELMAN and MARGARET
MUSSELMAN,

No. 268910
Livingston Circuit Court
LC No. 00-017866-CZ

Defendants-Appellants.

Before: Jansen, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Defendants appeal by right from the order of the circuit court holding that plaintiff was entitled to a 53-foot wide clearing of its easement on defendants' property. This case was previously before this Court when plaintiff appealed the trial court's grant of summary disposition to defendants. 257 Mich App 477; 668 NW2d 418 (2003). This Court determined "that the right-of-way agreement itself permits plaintiff to clear the property to an extent necessary for reasonable maintenance, repair, and inspection, including aerial inspection" *Id.* at 486. But this Court also found questions remained which necessitated "remand to the trial court . . . to determine the extent of the obstruction and the necessary width of the right-of-way." *Id.* at 487. Therefore, this Court reversed and remanded the case to the circuit court for proceedings consistent with the Court's opinion. *Id.* Following a bench trial, the trial court found as noted above. We affirm.

Defendants argue that the conclusion that plaintiff was entitled to a 53-foot wide clearing of its easement was against the great weight of the evidence. The extent of a party's rights under an easement is a question of fact reviewed for clear error. *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 40; 700 NW2d 364 (2005). Clear error is only found where, after review of the entire record, an appellate court is left with a firm and definite conviction that a mistake has been made. *Amb's v Kalamazoo Co Rd Comm*, 255 Mich App 637, 652; 662 NW2d 424 (2003). But we defer to the superior ability of the trial court to determine the credibility of the witnesses who appeared before it. *Id.*; MCR 2.613(C).

The parties presented disputed testimony regarding the size of the clearing needed to provide plaintiff with effective maintenance, repair, and inspection of its pipeline. Plaintiff's employee, Mitchell Putnam, testified at trial that plaintiff's and the industry's standard for

clearing right-of-ways for a pipeline the size of the one in issue is “30 feet on each side of the . . . line.” He also stated in his deposition testimony that at a minimum, a 53-foot area needed to be cleared. Defendants’ expert, Daniel Cooper, testified at his deposition that a cleared width of ten feet on each side of the pipeline was all that was needed. Cooper also opined that limiting the height of the trees for an additional twenty feet on either side of the pipeline would be sufficient to allow for aerial surveillance.¹ Cooper further testified that if additional cleared space were needed for emergency repairs, an area up to 30 feet on either side of the pipeline could be cleared as part of those repairs.

Considering the entire record, we do not believe that the trial court clearly erred by concluding plaintiff needed to clear 53 feet. Putnam’s testimony supported this conclusion. Moreover, a comparison of the Cooper and Putnam diagrams of their proposed excavations shows that both men recommend a clear-cut area of 20 feet immediately around the pipeline, ten feet on either side. The Cooper diagram does not include an area on which to place the excavated material, which Putnam estimated to be 20 feet wide and set back three feet from the pipeline trench. The Putnam diagram also includes a ten-foot strip on which maintenance vehicles could pass. Cooper testified such an area could be cleared when a repair was needed, but Putnam stated that waiting until this time to clear an area for the maintenance vehicles would mean a delay in repair of two or three days. In light of this evidence, we are not left with a firm and definite conviction that a mistake has been made.

Defendants also allege that the court’s decision is contrary to law. Defendants cite Federal Energy Regulatory Commission guidelines providing that the protection of natural resources and vegetation should be considered when clearing a right-of-way. But plaintiff notes that these guidelines were never effectuated, and that the Department of Transportation enacted alternative guidelines that now control. Specifically, plaintiff asserts that 49 CFR 192.705 applies to this case. Although that rule addresses proper methods of surveillance and requires the operator of a pipeline to implement a regular patrol program, it does not address the issue of when or whether it is advisable or appropriate to clear the right-of-way along the pipeline.

Defendants also argue that the trial court’s ruling amounts to an unconstitutional taking. Both the United States and Michigan Constitutions prohibit the taking of private property for public use without just compensation. US Const, Am V; Const 1963, art 10, § 2; *Tolksdorf v Griffith*, 464 Mich 1, 2; 626 NW2d 163 (2001). The instant case does not fit the definition of a taking because the property is being used by a private business entity pursuant to a private grant.

We also reject defendants’ argument that reversal is required because the trial court did not make adequate findings with respect to how much of the vegetation they planted obstructed the maintenance, repair, and inspection of the pipeline. When this case was previously before this Court, the Court found that “by the express language in the agreement, defendants cannot place anything on or near the right-of-way or in anyway interfere with plaintiff’s maintenance of

¹ Cooper recommended a 5/3 slope from ten feet out to 30 feet out on either side of the pipeline. The result is a v-shaped area in which tree height extends from 16 or 17 feet at ten feet out from the pipeline to 50 feet high at a distance of 30 feet from the pipeline.

the right-of-way.” 257 Mich App at 486. Further, the Court found that “in its present state, the property is not sufficiently clear to allow for reasonable maintenance, repair, and inspection.” *Id.*

“However,” this Court was “troubled by defendants’ claim that many of the trees that are near the right-of-way existed at the time the pipeline was constructed.” *Id.* Further, the Court opined, “because questions remain with regard to how much of the vegetation defendants planted and how much the vegetation creates an obstruction for plaintiff, remand is necessary to determine the extent of the obstruction that must be cleared.” *Id.* at 486-487. In context, what vegetation defendants planted was merely a subset of the main question of “the extent of the obstruction and the necessary width of the right-of-way.” *Id.* at 487. Given the Court’s conclusion that plaintiff is permitted by the grant “to clear the property to an extent necessary,” the precise identification of the vegetation planted by defendants does not impact the need to clear it within the 53-foot right-of-way. In other words, regardless of its source or age, any vegetation causing an improper obstruction could be cleared pursuant to the right-of-way grant.²

We affirm.

/s/ Kathleen Jansen
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey

² Moreover, the court did find that there was no evidence that defendants had taken any action to purposefully obstruct plaintiff’s access to the pipeline. The court also noted Virgil Musselman’s testimony regarding the three fruit trees he recalled planting, as well as an Arborvitae. But the court ultimately concluded that there was “no credible evidence regarding which trees on Defendants’ property existed prior to or at the time that the pipeline was laid”