STATE OF MICHIGAN

COURT OF APPEALS

ANDREW J. BOYLE and ANNE T. BOYLE,

Plaintiffs-Appellants,

v

RAYMOND D. LOFGREN, TRUDY A. LOFGREN, LOFGREN HARBORSIDE, INC., and FRANK FATA & SONS, L.L.C.,

Defendants-Appellees,

and

RICHARD W. BUELL, CYNTHIA A. BUELL, PAMELA K. MCCABE, BRYAN D. LOFGREN, JULIE LOFGREN, JOHN M. SELLA, DEBRA KAY SELLA, and CONLON PROPERTIES, L.L.C.,

Defendants.

UNPUBLISHED
September 28, 2010

No. 291818
Cheboygan Circuit Court
LC No. 07-007785-CH

Before: MURPHY, C.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

In this action seeking an easement by necessity for utility access, plaintiffs appeal as of right the trial court's order denying their motion for summary disposition and granting defendants'[1] motion for summary disposition pursuant to MCR 2.116(C)(10). Based on the circumstances of the present case, we decline to adopt anew the holding of *Tomecek v Bavas*

[1] The term "defendants" as used in this opinion refers only to appellees Raymond and Trudy Lofgren and their development company, appellee Lofgren Harborside, Inc. Neither appellee Frank Fata & Sons, LLC, nor any of the other defendants listed in the caption have been active participants in the proceedings.

(*Tomecek I*), 276 Mich App 252; 740 NW2d 323 (2007), which was vacated by our Supreme Court. We therefore affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Plaintiffs own adjacent landlocked lots on Lake Huron in Cheboygan. A portion of an easement for ingress and egress benefiting plaintiffs' lots runs over an adjoining residential parcel owned by defendants. Plaintiffs, who have obtained a building permit to construct a home on their unimproved lots, wish to use the existing ingress/egress easement to access utilities from a public roadway, Duncan Avenue, which lies to the south.

At one time, plaintiffs' and defendants' properties were part of a large, undeveloped parcel owned in common by Edwin Marx and Olive Marx Last (the Marxes). In 1971, the Marxes sold much of the parcel to defendants' predecessors in title, retaining for themselves the lots that now belong to plaintiffs. Defendants purchased their property in 1981 and have since developed much of it into a residential subdivision.

In 1984, Last sued defendant Raymond Lofgren and his construction company, asserting that she had an easement for the purpose of ingress and egress over a roadway that was located on the Lofgrens' land and that the Lofgrens had blocked Last's use of the roadway. The dispute ultimately concerned which of two possible access routes would be used by Last: one leading northeast from Duncan Avenue or one starting at Harrison Avenue and leading north over trails. In 1985, Last and Lofgren entered into a settlement agreement that was memorialized in a judgment entered in September 1986:

> NOW, THEREFORE, IT IS ORDERED that [Last] . . . her successors and assigns, are hereby granted an easement for ingress and egress over the existing trails from Harrison Avenue . . . to [her two] parcels of real estate . . . .
>
> IT IS FURTHER ORDERED that [Last] is deemed to have surrendered all claims she has or has had to any and all easements of any kind from Duncan Avenue to her aforesaid property.

In July 1986, plaintiffs and Last entered into a land contract for the purchase of the two parcels. The contract stated that "[Last] has obtained an easement from Harrison Avenue for ingress and egress only . . . and the issue of utility easements remains unresolved." Plaintiffs obtained deeds to the parcels in 1990 and 1996; the 1990 deed recites that the parcel is granted "[t]ogether with an easement for ingress and egress over existing trails from Harrison Avenue . . . ." Currently, the only part of the Harrison Avenue easement remaining in use is a portion extending over defendants' property between plaintiffs' property and a parcel owned by Dr. Dennis Paull. Plaintiffs have an easement over the Paull property.

Plaintiffs desire to obtain utility access from Duncan Avenue through the Paull easement and the remaining portion of the Harrison Avenue easement crossing defendants' property, a

distance of approximately 420 feet.[2] To this end, plaintiffs initiated the present action in November 2007, seeking a declaration that in light of a recent change in Michigan property law as announced in *Tomecek I*, 276 Mich App 252, their rights in the Harrison Avenue easement include utility access "over, upon and under" the easement. Plaintiffs moved for summary disposition under MCR 2.116(C)(9) and (C)(10), arguing that, on the undisputed facts, *Tomecek I* established that they were entitled to an easement by necessity for utility access. Defendants counter-moved for summary disposition under MCR 2.116(C)(10), arguing, in part, that the facts of *Tomecek I* were distinguishable from those of this case and that plaintiffs' ingress/egress easement could not be expanded to include utility rights because such would materially increase the burden on the servient estate by increasing the traffic and noise associated with a year-round residence.

The trial court granted summary disposition to defendants. It stated that the relevant portion of *Tomecek I*, which was the sole impetus behind plaintiffs' decision to sue defendants, no longer controlled the issue because it had been vacated by the Supreme Court in *Tomecek v Bavas* (*Tomecek II*), 482 Mich 484; 759 NW2d 178 (2008). The trial court further stated that plaintiffs' easement, which was conveyed via the judgment entered upon settlement of the Last/Lofgren litigation, clearly granted only ingress and egress rights and did not include utility access.

II. ANALYSIS

Plaintiffs claim that the trial court erred in denying them an easement by necessity for utilities. They request that we adopt the reasoning in *Tomecek I* that was vacated by the Supreme Court, as the reasoning recognizes that utilities are necessary to the use and enjoyment of residential property and that utilities impose minimal burden on the servient estate.[3]

We review de novo a trial court's decision to grant or deny summary disposition. *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 40; 700 NW2d 364 (2005). Summary disposition is proper under MCR 2.116(C)(10) if, considering the evidence in a light most favorable to the nonmoving party, there is no genuine issue concerning any material fact and the moving party is entitled to judgment as a matter of law. *Lind v Battle Creek*, 470 Mich 230, 238; 681 NW2d 334 (2004). A trial court's dispositional ruling on equitable matters is also subject to de novo review. *Blackhawk Dev Corp*, 473 Mich at 40.

In *Tomecek I*, 276 Mich App at 278, this Court held, as a matter of first impression, that the common-law doctrine of easement by necessity "includes not only physical access to landlocked property, but also access to utilities for property landlocked from utilities unless . . . the parties to the conveyance that left the property without such access clearly indicated that they

[2] Sometime after the Last/Lofgren settlement, Duncan Avenue was extended eastward as a public road. As extended, it contains utilities up to and through the southern portion of the Paull property. The record is silent regarding Paull's position on plaintiffs' request for utility access.

[3] Plaintiffs do not claim that the scope of their easement for ingress/egress includes access to utilities.

intended a contrary result" (quotation and alteration omitted). However, our Supreme Court vacated our holding in *Tomecek I* regarding easement by necessity. *Tomecek II*, 482 Mich at 487 (opinion by KELLY, J.).[4]

"A Court of Appeals opinion that has been vacated by the majority of the Supreme Court without an expression of approval or disapproval of this Court's reasoning is not precedentially binding." *People v Akins*, 259 Mich App 545, 550 n 8; 675 NW2d 863 (2003). Thus, there is no longer a basis in existing law for plaintiffs' contention that they are entitled to an easement by necessity for utilities.

Moreover, under the distinguishable facts of this case, we decline plaintiffs' invitation to adopt anew the holding of *Tomecek I*. In *Tomecek I*, 276 Mich App at 276, we looked to case law from other jurisdictions which, in acknowledgement of factors including "the need to effectuate the presumed intent of grantors of property," determined that it is appropriate to extend the doctrine of easement by necessity to include utility access. In *Tomecek*, there was substantial evidence that the original grantors, as well as the plaintiffs, envisioned that the subject parcel would be used for residential purposes and have utility access. For example, the original grantors reserved an easement for utilities for the subject parcel when they conveyed an adjoining lot, two drawings by the original grantors showed a house on the subject parcel, the subject parcel was subject to a restrictive covenant that prohibited the building of a house until the parcel had access to a municipal sewer system, and another easement labeled "drive easement" was used for access to utilities. See *Tomecek II*, 482 Mich at 491-493 (opinion by KELLY, J.); *Tomecek I*, 276 Mich App at 257. However, in the present case, there is no evidence showing any indication that the Marxes intended that plaintiffs' lots would ever be used for residential purposes or have access to utilities. It is undisputed that the lots have never been occupied by any sort of residential structure and that the lots have only been used sporadically during the summer months. In addition, the Marxes failed to retain an easement for utilities when they divided their property. Therefore, under the circumstances of this case, "the need to effectuate the presumed intent of grantors of property," *Tomecek I*, 276 Mich App at 276, would not be served by recognizing an easement by necessity for utility access.

Affirmed.

/s/ William B. Murphy
/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens

[4] Justice KELLY, joined by then Chief Judge TAYLOR, stated that in light of the Supreme Court's ultimate resolution of the case it was unnecessary to address whether an easement by necessity for utilities should be recognized in Michigan. *Tomecek II*, 482 Mich at 487, 497 (opinion by KELLY, J.). Justice YOUNG, joined by Justices CORRIGAN and MARKMAN, joined Justice KELLY's decision not to address the common-law doctrine of easement by necessity. *Id.* at 505 (opinion by YOUNG, J.)