STATE OF MICHIGAN

COURT OF APPEALS

EUGENE D'ANDREA and GINA LIVERPOOL, Plaintiffs-Appellants, v AT&T, Defendant-Appellee.	UNPUBLISHED August 19, 2014 No. 315385 Wayne Circuit Court LC No. 07-732049-CZ

Before: MURPHY, C.J., and WHITBECK and TALBOT, JJ.

PER CURIAM.

In this case involving the legality of AT&T's placement of equipment on a public utility easement, Eugene D'Andrea and Gina Liverpool appeal as of right the trial court's March 4, 2013 order after a bench trial finding in favor of AT&T; and the trial court's March 20, 2013 order granting in part AT&T's motion for directed verdict as to D'Andrea that dismissed his claims in their entirety. We reverse and remand for proceedings consistent with this opinion.

In 1986, AT&T placed a cross box on a six foot public utility easement located on the rear property line of the property at issue, which is located at 484 Elizabeth Court in Grosse Pointe in the Deserrano Grosse Pointe Farms subdivision ("the Property"). The cross box provides AT&T customers with "plain old telephone service" and sits on a pad measuring five feet by seven feet.

D'Andrea inherited the Property from his mother-in-law in 1999, but never lived there. In 2000, the Property was sold to a couple and D'Andrea held the $220,000 land contract for the Property. The couple filed for bankruptcy, vacated the house, and the Property was quit claimed back to D'Andrea in September 2004. The house was vacant and listed for sale.

In late 2005, a V-RAD[1] cabinet, a power pedestal (that provides power to the cabinet), and a below ground handhold (which stores the fiberoptic cables serving the cabinet) (collectively "new equipment") were installed by AT&T on the public utility easement on the Property. The new equipment was installed next to the cross box "behind the side of the garage

[1] V-RAD – Video Ready Active Device.

that faces the back of the property line," and cannot be seen from the kitchen, bedroom, or front yard of the home. The new equipment was installed to "enhance the existing facilities that fed out of the [cross]-box" and supplies the neighborhood with voiceover internet, high-speed internet, and U-verse services. The new equipment sits on a pad measuring six feet by six feet.

To determine where to place the new equipment, AT&T confirmed that a public utility easement existed on the Property, identified any obstructions above and below ground, and assessed the proximity the new equipment needed to be to the cross box. AT&T confirmed that the location chosen would allow the new equipment to rest entirely on the public utility easement. It was also important that the new equipment was installed as close to the existing cross box as possible to allow it to serve the most customers and avoid putting existing customers out of service. By placing the new equipment near the cross box it also kept all of AT&T's equipment consolidated to one area of the Property's backyard. When choosing where the new equipment would be installed, AT&T did not consider how the homeowner was going to use the backyard after its installation.

D'Andrea tried to speak with someone from AT&T before the new equipment was installed, but he was unsuccessful. On one occasion, AT&T came to the Property to discuss the installation, but no one was home. AT&T did not attempt to contact the homeowner in writing regarding the pending installation, and did not believe that it was required to do so. Had the homeowner been home when someone from AT&T came by, the project would have been discussed, which would have included: how much space the new equipment would occupy, how to make the backyard more usable with the new equipment present, and the homeowner's preference regarding landscaping to camouflage the new equipment. AT&T also would have addressed any questions the homeowner might have had.

Liverpool moved onto the Property after Thanksgiving 2005. She purchased the Property from her father, D'Andrea, for $180,000 in January 2006, and by that time the new equipment had been installed. After the installation, D'Andrea and Liverpool complained to AT&T about the location of the new equipment on the Property and requested that all of AT&T's equipment, including the cross box, be removed. AT&T informed D'Andrea and Liverpool that the equipment was placed on a public utility easement and that the appropriate permits had been obtained, so AT&T was within its legal rights.[2]

[2] Before trial, D'Andrea requested that all of AT&T's equipment be moved onto the Wayne County right of way, which AT&T testified was not a viable option in part because there was a water main and a sanitary sewer main running through that area. Another option that was suggested before trial was that all of AT&T's equipment be placed in the Mack Avenue corner of the Property's backyard, but it was determined that was not possible because there were guy wires coming down in that area, and there was not enough space on the easement to place all of the equipment in front of the guy wires. A third suggested alternative was that all of the equipment be moved to the Mack Avenue corner of the Property's backyard and be placed to rest partially on the Property's easement and partially on the easement for the house behind it,

To help resolve D'Andrea and Liverpool's complaints about the new equipment, AT&T planted Arborvitaes around the cabinets in order to conceal them and erected a fence along the property line adjacent to Mack Avenue.[3] AT&T also offered to install a second gate so its technicians would have direct access to the equipment without crossing the easement, but D'Andrea declined.

Liverpool described AT&T's equipment as being in the middle of the usable space of the backyard occupying an area measuring approximately 25 feet by 13 feet, purportedly leaving only eight feet of usable space between the garage and the equipment, which does not include the space in the back of the yard. Liverpool testified that the size and placement of the equipment and the surrounding bushes results in her backyard being mostly unusable. The use of the backyard is allegedly further restricted because Liverpool does not want her three children playing unsupervised near equipment which is noted to be high voltage.[4] The new equipment also makes a buzzing sound that the cross box does not.[5] Liverpool explained that as a result of the placement of the new equipment, her children only use the backyard occasionally and it is difficult for the family to use the backyard as intended.

Liverpool testified that had she been consulted regarding the placement of the new equipment, she would have suggested that it be placed in the corner of the backyard near Mack Avenue.[6] Liverpool indicated that her preferred placement would result in the new equipment being approximately 32 feet from the cross box. She further testified that if such placement resulted in the new equipment being slightly outside of the easement, she would have provided the requisite approval to AT&T to place the new equipment partially on her property free of charge. Liverpool stated that she is not sure if where she recommended the new equipment to be placed is technologically feasible or whether it would result in her neighbors losing AT&T service.

AT&T indicated that it did not consider placing the new equipment in the Mack Avenue corner of the Property's backyard as requested at trial because AT&T wanted the new equipment as close to the cross box as possible. Additionally, it would not be possible for the new

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however, it is unclear based on the testimony elicited at trial whether the house behind the Property has a public utility easement.

[3] The fence was not erected to conceal the new equipment but rather was installed as a courtesy to the homeowner.

[4] Testimony was elicited that the voltage of the V-RAD cabinet is the same voltage as the electricity meter located on the side of the house on the Property and is not a dangerous amount of voltage to have in one's backyard.

[5] Liverpool testified that the buzzing sound the new equipment makes is slightly reduced by the presence of the Arborvitaes, and cannot be heard from inside the home or while on the patio.

[6] The relief requested at trial, which was to move the new equipment to the Mack Avenue corner of the Property's backyard, was different from what was requested shortly after the new equipment was installed and in the complaint, which was to move all of AT&T's equipment off of the Property.

equipment to be installed in that corner of the Property because of the presence of guy wires in that area. Moreover, Liverpool's suggested placement would result in AT&T's equipment occupying two different areas of the Property's backyard. In AT&T's opinion, it would not be feasible to move all of its equipment, and if it were moved, it would cause an interruption in service for at least a week, which would include access to 911. Moving AT&T's equipment would also necessitate the purchase and installation of a new cross box, V-RAD cabinet, and the V-RAD cabinet's associated equipment; the service of the existing AT&T customers to be "roll[ed]" from the existing equipment to the purchased equipment; and then the old equipment to be removed. It would cost approximately $155,489 to move all of AT&T's equipment off of the Property.

D'Andrea's expert testified that the presence of AT&T's equipment on the Property diminished the property value $32,000-$42,000. The estimated diminution in property value was based on the narrowing of the backyard caused by the presence of all of AT&T's equipment, including the cross box, as well as the Arborvitaes. AT&T's expert testified, however, that the property value was diminished less than ten percent by AT&T's equipment.[7]

On December 4, 2007, D'Andrea and Liverpool filed an action against AT&T for trespass related to the placement of the new equipment on the public utility easement on the Property. In addition to requesting the removal of all of AT&T's equipment, the complaint requested an injunction preventing any additional burden on their land by AT&T, as well as damages for diminution in value to the Property and for AT&T's alleged continuing trespass.

A bench trial occurred on September 24 and September 25, 2012, the Honorable Kathleen Macdonald presiding. The trial court found in favor of AT&T. The trial court additionally granted AT&T's motion for a directed verdict in part and dismissed D'Andrea's claims with prejudice in their entirety. This appeal ensued.

D'Andrea and Liverpool challenge the trial court's decision to find in favor of AT&T. We agree that reversal is warranted. "When reviewing a trial court's decision after a bench trial, we review its findings of fact for clear error and review de novo its conclusions of law."[8] Factual findings will be found to be clearly erroneous "where there is supporting evidence but the reviewing court is nevertheless left with a definite and firm conviction that the trial court made a mistake."[9]

In 2010, this Court reviewed the trial court's order granting AT&T's motion for summary disposition.[10] In its opinion, which reversed and remanded the case to the trial court for further

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[7] There was no expert testimony elicited at trial regarding the diminution in property value related to the placement of the new equipment only.

[8] *Butler v Wayne Co*, 289 Mich App 664, 671; 798 NW2d 37 (2010).

[9] *Hill v City of Warren*, 276 Mich App 299, 308; 740 NW2d 706 (2007).

[10] MCR 2.116(C)(10).

proceedings, this Court provided the applicable law for determining trespass in the instant case. As aptly noted by this Court:

> A trespass is an unauthorized invasion upon the private property of another. Our courts have held that [a]ctivities by the owner of the dominant estate that go beyond the reasonable exercise of the use granted by the easement *may* constitute a trespass to the owner of the servient estate.[11]

This Court further noted that:

> [T]he use of an easement must be confined strictly to the purposes for which it was granted or reserved. Not surprisingly, these purposes are determined by the text of the easement. Where the language of a legal instrument is plain and unambiguous, it is to be enforced as written and no further inquiry is permitted. If the text of the easement is ambiguous, extrinsic evidence may be considered by the trial court in order to determine the scope of the easement.[12]

In its opinion and order after the subsequent trial, the trial court, citing *Adams v Cleveland-Cliffs Iron Co*,[13] noted that "in order for a plaintiff to succeed on a claim for trespass to land, a Plaintiff must prove: ' . . . an unauthorized direct and immediate intrusion of a physical, tangible object onto land over which the Plaintiff has right of exclusive possession.' " The court then found that there was no physical intrusion and that "Plaintiff does not have the exclusive right of possession of the area consisting of the public utility easement." Thus, "[d]efendant's actions that may diminish the use and enjoyment of a servient property cannot constitute a trespass." Moreover, the trial court noted that, pursuant to case law:[14]

> AT&T's use of the easement cannot be found to unreasonably damage[] or unreasonably interfere with Plaintiff's property. The broad easement in this case permits it to place its enhanced equipment on the easement, particularly since there has been equipment in the same location since 1986.

This Court's clear recitation of the law applicable to this case in its prior opinion shows that the trial court's determination that the circumstances of this case "cannot constitute a trespass" was incorrect.[15]

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[11] *D'Andrea v AT&T Mich*, 289 Mich App 70, 73; 795 NW2d 620 (2010) (citations and quotation marks omitted; emphasis added).

[12] *Id*. (citations and quotation marks omitted).

[13] 237 Mich App 51, 67; 602 NW2d 215 (1999).

[14] The trial court cited *Detroit Edison Co v Zoner*, 12 Mich App 612, 618; 163 NW2d 496 (1968); and as instructive case law, *Copeland v Genoa Twp*, unpublished opinion per curiam of the Court of Appeals, issued June 30, 2011 (Docket No. 301442), p 4.

[15] See *Grace v Grace*, 253 Mich App 357, 362-363; 655 NW2d 595 (2002) (providing the law of the case doctrine).

Subsequent to the above finding, the trial court correctly acknowledged the existence of a two-step inquiry to determine whether certain improvements made by an easement holder to the servient estate were permitted, which includes: (1) "whether the proposed developments are necessary for [AT&T's] effective use of its easement" and (2) "if the developments are necessary, whether they unreasonably burden plaintiffs' servient estate."[16] The trial court found and it is undisputed that "[a]t trial Plaintiff agreed AT&T's installation of the enhanced telecommunications equipment was necessary to the effective use of the easement" satisfying the first step. The trial court, however, failed to make an adequate finding regarding the second step; whether where AT&T chose to place the new equipment unreasonably burdened the Property.[17] Rather, the trial court noted that it was "unable to find any case that holds a lawful use of an easement could be an unreasonable burden on a servient estate based upon a property owner's preference that the equipment be placed in a different location outside the easement." Such a statement by the trial court incorrectly presumes that the uniqueness of this case prohibits a finding that the location in which AT&T installed the new equipment was an unreasonable burden on the Property. The statement also inaccurately implies that the location where D'Andrea and Liverpool are requesting the equipment to be moved to is pertinent to the determination of whether where the new equipment is currently placed is an unreasonable burden on the Property.

D'Andrea and Liverpool assert that it is necessary that AT&T's use of the easement place "as little burden as possible" on the Property. First, while the case law cited by D'Andrea and Liverpool makes that assertion,[18] those cases are distinguishable because they involve easements by necessity (which are implied easements)[19] as opposed to express easements, similar to this case.[20] Second, our Supreme Court in its review of easement principles, including the proposition that " '[t]he use exercised by the holders of the easement must be reasonably necessary and convenient to the proper enjoyment of the easement, *with as little burden as possible to the fee owner of the land*,' " acknowledged that such principles evolved into the "two-step inquiry" which does not contain such language.[21] Finally, the two-step inquiry is consistent with the applicable law as outlined by this Court in *D'Andrea*[22] and thus, pursuant to the doctrine of the law of the case, it will be applied.[23]

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[16] *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 42; 700 NW2d 364 (2005).

[17] *Id*.

[18] *Unverzagt v Miller*, 306 Mich 260, 265; 10 NW2d 849 (1943); *Schumacher v Dep't of Natural Resources*, 275 Mich App 121, 131; 737 NW2d 782 (2007).

[19] *Schmidt v Eger*, 94 Mich App 728, 732-733; 289 NW2d 851 (1980).

[20] *Forge v Smith*, 458 Mich 198, 205; 580 NW2d 876 (1998).

[21] *Blackhawk Dev Corp*, 473 Mich at 42 (emphasis added).

[22] *D'Andrea*, 289 Mich App at 73.

[23] *Grace*, 253 Mich App at 362-363.

The trial court's opinion also erroneously discusses its need to "balance each party's interest that protects the easement holder's right to effectively use the easement and protects the private property owner's rights" in determining whether AT&T trespassed. The court concluded that the $145,489 it would cost to move some or all of the equipment is an "unreasonable burden on AT&T and interferes with its right to effective use of the easement." The financial burden on AT&T to move the new equipment is not relevant to the determination of whether AT&T's placement of the new equipment is an unreasonable burden on the Property.[24] As this Court has noted,

> [G]ranting injunctive relief is within the sound discretion of the trial court. The general rule is that the court will balance the benefit of an injunction to plaintiff against the inconvenience and damage to defendant, and grant an injunction or award damages as seems most consistent with justice and equity under all the circumstances of the case.[25]

Thus, if a trespass is found, the financial burden on AT&T to move the equipment would then be applicable to whether injunctive relief is an appropriate remedy.[26]

D'Andrea also challenges the trial court's partial grant of AT&T's motion for directed verdict which dismissed D'Andrea's claims in their entirety with prejudice. We agree that the ruling was made in error.

The trial court granted in part AT&T's motion for directed verdict regarding D'Andrea's claims against AT&T because there was no evidence that D'Andrea "lived in the house while this was supposedly burdening the homeowner[.]" It is well-settled that "[i]n order to maintain [an action for] trespass, one must have the legal title or be in actual possession of the premises."[27] Testimony was elicited that Liverpool purchased the Property from D'Andrea via a land contract dated January 1, 2006. Pursuant to the case law, upon paying part of the purchase price and taking possession of the Property, the buyer, Liverpool, acquired equitable title; and the seller, D'Andrea, retained legal title to the property in trust until the purchase price is paid in full.[28] As such, because D'Andrea had legal title to the Property, he had the right to bring an action for trespass and the trial court's dismissal of his claims in their entirety was improper.

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[24] *Blackhawk Dev Corp*, 473 Mich at 42.

[25] *Wiggins v City of Burton*, 291 Mich App 532, 559; 805 NW2d 517 (2011) (citations and quotation marks omitted).

[26] It is unnecessary that this Court address D'Andrea and Liverpool's argument regarding equitable relief because the trial court must first determine whether a trespass occurred and relief is warranted.

[27] *Gates v Comstock*, 107 Mich 546, 548; 65 NW 544 (1895). See also *Mable Cleary Trust v Edward-Marlah Muzyl Trust*, 262 Mich App 485, 508; 686 NW2d 770 (2004), overruled in part on other grounds *Titan Ins Co v Hyten*, 491 Mich 547, 555 n 4; 817 NW2d 562 (2012).

[28] *Steward v Panek*, 251 Mich App 546, 555-556; 652 NW2d 232 (2002).

Based on the above, this Court reverses both the trial court's March 4, 2013 order after a bench trial finding in favor of AT&T; and the trial court's March 20, 2013 order granting in part AT&T's motion for directed verdict as to D'Andrea that dismissed his claims in their entirety. On remand, the trial court shall make findings, in compliance with MCR 2.517(A), regarding whether a trespass by AT&T occurred. As the trial court previously found that the installation of the new equipment on the Property was necessary for AT&T's effective use of the easement, such findings by the trial court shall be regarding whether where AT&T placed the new equipment on the Property was an unreasonable burden on the Property.[29]

This Court declines to remand this matter to a different judge. The reversible errors in this case were caused by the trial court's misapplication of the law. Thus, there is no demonstrable bias to guard against, and the appearance of justice will not be better served by a different judge deciding the case on remand.[30]

Reversed and remanded for proceedings consistent with this opinion.[31] We do not retain jurisdiction.

/s/ William B. Murphy
/s/ William C. Whitbeck
/s/ Michael J. Talbot

[29] *Blackhawk Dev Corp*, 473 Mich at 42.

[30] *Bayati v Bayati*, 264 Mich App 595, 602-603; 691 NW2d 812 (2004); *Daniels v Daniels*, 165 Mich App 726, 733; 418 NW2d 924 (1988).

[31] D'Andrea and Liverpool challenge several of the trial court's findings of fact as clearly erroneous. Because the trial court has not determined whether or not the location where the new equipment was installed was an unreasonable burden on the Property, the impact of such findings of facts on the resolution of this case is unclear. Thus, the Court will decline to address those arguments at this time as they are premature.