STATE OF MICHIGAN

COURT OF APPEALS

TIMOTHY M. COLLINS and SUZETTE P. COLLINS, Trustees of the COLLINS FAMILY TRUST, Plaintiffs-Appellants,	UNPUBLISHED October 24, 2017
v	No. 336967 Gogebic Circuit Court
MICHAEL SCHMIDT, Defendant-Appellee.	LC No. 2014-000213-CZ

Before: K. F. KELLY, P.J., and BECKERING and RIORDAN, JJ.

PER CURIAM.

This is a property dispute in which plaintiffs, Timothy Collins and Suzette Collins, as Trustees of the Collins Family Trust, allege that defendant, Michael Schmidt, interfered with their use and enjoyment of an easement appurtenant over defendant's property. Plaintiffs appeal by right the trial court's order, following a bench trial, concluding that they have no cause of action and dismissing their request for relief. For the reasons stated below, we affirm in part, vacate in part, and remand the matter for further proceedings.

I. RELEVANT FACTS AND PROCEDURAL HISTORY

Plaintiffs and defendant own adjacent properties[1] bordered on the east by Lake Gogebic, and on the west by highway M-64. Both properties are accessed by an L-shaped private road that runs east from M-64 for 320 feet, crossing from plaintiffs' property onto defendant's property, and then turns north for approximately 130 feet before crossing back onto plaintiffs' property. At issue is the easement appurtenant over the north-south portion of the private drive granted by defendant's predecessor in interest to plaintiffs' predecessor in interest. The grant gave the grantees "the full and free right . . . for all purposes connected with the use of [the grantee's property] to pass and repass upon [the grantor's property] along said private road."

[1] Plaintiffs own lots 20 and the northern half of lot 19 on the west shore of Lake Gogebic, while defendant owns the southern half of lot 19 and lot 18.

In the fall of 2013, defendant constructed a garage on his property adjacent to the north-south leg of the road. To gain access to his garage, defendant elevated a portion of the private road with sand and gravel, thus creating a "hump" in the road. In September 2014, plaintiffs filed a complaint alleging that raising the level of the private road increased the grade "from 3% to 16%" and rendered their property inaccessible in the summer months without a four-wheel drive vehicle and inaccessible in the winter months because they could not plow the snow off the private road. They asked the trial court to order defendant to return the private road to its prior condition, to enjoin defendant from doing anything to the road other than maintaining it at his own expense, and to pay plaintiffs damages for the loss of use and enjoyment of the easement, as well as their costs and attorney fees. After several delays requested by the parties, the trial court held a two-day bench trial in October 2016.

Plaintiff Timothy Collins testified at the bench trial that at the turn onto the north-south leg of the private road leading to his property, the road went uphill about 2½ feet and then after 50 feet, went downhill about 5 ½ feet, creating a grade of 14.4% as opposed to the 3% grade that previously existed. He asserted that this grade created a problem when he was coming from his property and that although a truck with positraction could make it up the hill, his two-wheel drive vehicle would not make it up the hill.[2] However, a witness who lived nearby and was familiar with the road explained that whereas before a vehicle could stop in the middle and start up again, now "you can't stop in the middle, but you, you know, if you just give it the gun you get up." To illustrate the alleged difficulties caused by the increased grade, Timothy presented videos and photos showing tires spinning on the grade and trailer jacks gouging through the grade. Timothy also testified to his belief that he would be unable to bring his motorhome to the property because it might bottom out on the grade.

After visiting the site at issue, reviewing the documentary evidence the parties submitted, and hearing testimony from witnesses at the bench trial, the trial court concluded that the road was still passable, albeit with "some minor difficulty." Further, the trial court found that the alterations made by defendant did not "unreasonably interfere with plaintiffs' reasonable use of the easement and was not inconsistent with plaintiffs' rights," as plaintiffs could still "gain ingress and egress to their property over the private road" and "changes to the road's contour did not significantly inhibit that access." The trial court noted that the 14.4% grade was less than the 15.4% grade on portions of the east-west leg. The trial court further noted that two-wheel drive vehicles had difficulty negotiating the east-west portion of the road during times of unusual rain and wintry conditions, and observed that that particular "difficulty did not increase because of defendant's project." Concluding that plaintiffs had exaggerated the impairments caused by defendant's project, the trial court found no significant impairment.

II. ANALYSIS

A. MODIFICATION OF THE EASEMENT

[2] The excavator who worked on defendant's project indicated that to get rid of the hump they would have had to spread more gravel down but he was instructed not to cross the property line, presumably referring to the property line between the parties' two properties.

Plaintiffs first argue that defendant unilaterally modified the easement and that the court erred in concluding that defendant was permitted to do so by necessity. We review a court's decision on an issue of law de novo. *Morley v Automobile Club of Michigan*, 458 Mich 459, 465; 581 NW2d 237 (1998). Likewise, we review de novo issues regarding the scope and use of an easement. *Schadewald v Brule*, 225 Mich App 26, 35; 570 NW2d 788 (1997).

Plaintiffs err by assuming that elevating the private drive by adding sand and gravel constitutes modification of the easement. Adding sand and gravel is an alteration to the roadway, not a modification of the easement. "An easement is the *right to use* the land of another for a specified purpose." *Id*. (emphasis added). An easement grants the holder of the easement possession to the extent necessary for the enjoyment of the rights granted in the easement. *Id.* An appurtenant easement benefits one parcel of land, the dominant easement holder, to the detriment of another parcel of land, the servient easement holder. *Heydon v MediaOne*, 275 Mich App 267, 270; 739 NW2d 373 (2007). "An easement appurtenant is necessarily connected with the use or enjoyment of the benefited parcel and may pass with the benefited property when the property is transferred." *Id.* A party cannot unilaterally modify an easement. *Schadewald*, 225 Mich App at 36.

In 1937, defendant's predecessor in interest (Mary W. Strom) granted an easement appurtenant to plaintiffs' predecessor in interest (Alwin W. Ehrhardt) as follows:

> WHEREAS, the said MARY W. STROM has agreed, in consideration of the expense of said roadway being paid by said ALWIN W. EHRHARDT, to grant an easement or right of way over said private road.
>
> THIS INDENTURE WITNESSETH that, in pursuance of said agreement and in consideration of one dollar paid and the expense of the construction of said roadway being paid by said ALWIN W. EHRHARDT, the said Mary W. Strom hereby grants unto said ALWIN W. EHRHARDT, his heirs and assigns, the full and free right for him and them, and his and their tenants, servants, visitors and licensees in common with all others having the like right at all times hereafter, with or without automobiles, or other vehicles, for all purposes connected with the use of said ALWIN W. EHRHARDT's lot to pass and repass upon said Lots 18 and 19 along said private road as hereinbefore described, granting ingress and egress to said Lot 20 from said State Highway over said private road . . . .

The right granted by the appurtenant easement was for plaintiffs, as successors in interest to Alwin W. Ehrhardt, to be able to "pass and repass" and have "ingress and egress" to Lot 20, plaintiffs' property. The alteration that defendant made to the roadway that resulted in an increase in the steepness of the roadway did not change the scope of plaintiffs' rights and, therefore, did not constitute a modification of plaintiffs' easement appurtenant. Whether the alteration interfered with plaintiffs' use and enjoyment of the easement by affecting ingress and egress to their lot is a separate question, which the plaintiffs also raise and we address. With regard to whether defendant modified the easement, we conclude that he did not. Further,

because no modification to the easement was made, it follows that no unilateral modification was made out of necessity or otherwise.[3]

B. UNREASONABLE INTERFERENCE WITH USE OF THE EASEMENT

The gravamen of plaintiffs' claim on appeal is that the trial court erred in concluding that defendant's alteration to the road's grade did not unreasonably interfere with plaintiffs' use of the easement. We affirm in part and vacate and remand in part.

"What may be considered a proper and reasonable use by the owner of the fee as distinguished from an unreasonable and improper use, and what may be necessary to plaintiff's beneficial use and enjoyment, are questions of fact to be determined by the trial court or jury." *Hasselbring v Koepke*, 263 Mich 466, 476; 248 NW 869 (1933). "We review a trial court's findings of fact in a bench trial for clear error and its conclusions of law de novo." *Chelsea Inv Group LLC v Chelsea*, 288 Mich App 239, 250; 792 NW2d 781 (2010). "The clear-error standard requires us to give deference to the lower court and find clear error only if we are nevertheless left with the definite and firm conviction that a mistake has been made." *Arbor*

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[3] Plaintiffs contend that the instant case is factually similar to *Tittiger v Johnson*, 103 Mich App 437; 303 NW2d 26 (1981). In *Tittiger*, the defendant relocated a portion of a roadway over which the plaintiffs had an easement, and then obstructed and levelled the grade of that portion that he had not relocated. *Tittiger*, 103 Mich App at 438. The plaintiffs "sought damages for intentional interference with their easement, treble damages pursuant to MCL 600.2929[,] …and recovery for emotional distress." *Id*. The trial court rendered judgment in favor of the plaintiffs following a bench trial and ordered the defendant to restore the road, "both as to width and crown, at his own expense." Plaintiffs contend that *Tittiger* stands for the proposition that merely being able to access one's property is not determinative with regard to whether there is interference in the use and enjoyment of an easement.

Plaintiffs' reliance on *Tittiger* is unavailing. They derive their proposition of law from the remedy imposed by the trial court, not from any reasoning set forth by the trial court regarding the defendant's interference with the plaintiffs' use and enjoyment of the easement at issue. The trial court did not find that altering the grade of the roadway interfered with the plaintiffs' use of the easement, but that defendant's acts of relocation and obstruction interfered with the plaintiffs' use of the easement, and that restoring the roadway to its prior condition was the remedy. Most significantly, the trial court's rulings and remedy relative to the defendant's interference with the plaintiffs' use and enjoyment of their easement were not appealed in this Court. The primary question on appeal was whether MCL 600.2919 entitled the plaintiffs to treble damages because defendant had intentionally obstructed or interfered with enjoyment of the easement. *Id*. at 439. Therefore, contrary to plaintiffs' implication, this Court did not establish the proposition of law upon which they rely, and, even if we assume for the sake of argument that the proposition is derivable from the trial court's ruling, this Court is not bound by a trial court's conclusions of law. See *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 195; 761 NW2d 293 (2008) (indicating that this Court reviews de novo a trial court's conclusions of law).

Farms, LLC v GeoStar Corp, 305 Mich App 374, 386-387; 853 NW2d 421 (2014) (quotation marks and citation omitted). Further, we give due regard "to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C).

An easement grants the holder of the easement possession to the extent necessary for the enjoyment of the rights expressed in the easement. *Schadewald*, 225 Mich App at 35. An owner of land that is subject to an easement may rightfully use the land for any purpose, so long as that use is consistent with the rights of the easement owner. *Hasselbring*, 263 Mich at 476. Stated differently, "[t]he owner of the servient estate retains the right to use [the servient estate] in any manner that does not interfere with the easement" and it is not the "concern" of the easement holder "what use was made [of the servient estate] by the owner of the soil so long as such use did not obstruct the way." *Greve v Caron*, 233 Mich 261, 267; 206 NW 334 (1925). The rights of an owner of the easement are paramount. *Hasselbring*, 263 Mich at 475. Thus, defendant was free to build his garage, he just could not interfere with plaintiffs' easement rights.

Plaintiffs argue that the grade, or slope, of the road after defendant's garage project substantially interfered with their use of the road. Timothy claimed at the bench trial that the grade created by the fill made it difficult if not impossible to traverse the road, at least at times, without four-wheel drive vehicles. However, in the videos Timothy made and submitted to the court, he was able to drive up and down the hump in the road with a pickup truck and trailer. Further, based on pictures submitted during trial, the trial court stated that it seemed as if plaintiffs were attempting to exaggerate the difficulty posed by the road by using a drop-down hitch to make the hitch lower to the ground so that it would drag on the road. The court noted that plaintiffs were still able to cross the hump with relative ease. Further, there was testimony that the slope could affect the ability of certain vehicles to get in and out but only in that, "you can't stop in the middle, but you, you know, if you just give it the gun you get up." Also, the excavator who raised the road to meet the garage so that the garage could be accessed from the road testified that he was able to get a dump truck and pickups across the hump without bottoming out. Specifically, he said that he hauled stumps and other "stuff" out from plaintiffs' property line after the hump was in place. In light of the trial court's having viewed the property at issue, evidence that plaintiffs were able to traverse the hump with their pickup truck and trailer, albeit with some initial difficulty, and testimony that other vehicles could negotiate the hump, and giving due regard for the trial court's special opportunity to make credibility determinations, MCR 2.613(C), we find no clear error in the trial court's determination that the grade of the roadway did not "obstruct the way" to a degree that constituted interference with plaintiffs' use of the easement "for all purposes"[4] with the only exception being with regard to plaintiffs' access by motorhome, which requires a remand for further determination.

[4] Plaintiffs assert, without supporting evidence, that the slope of the roadway renders snow plowing impossible. Nevertheless, defendant testified that he had plowed the snow up to the top of the garage with no issues, admitting that there has been no reason to plow down to plaintiffs' property line since they did not come in the winter and no one had ever asked to have it plowed. Thus, plaintiffs' assertion to the contrary, without more, does not leave us "with the definite and firm conviction that a mistake has been made." *Arbor Farms, LLC*, 305 Mich App at 387.

Plaintiffs claim that they are no longer able to get their motorhome onto their property. Timothy testified that he purchased the motorhome in 2007, brought it to the property three years in a row, and planned to have it at the property when he retired. He explained that the motorhome was 38 feet long with an overhang of slightly more than 11 feet, and that, given its size and the fact that the slope of the road changed significantly over a short distance, it would likely "bottom out" on the hump. He testified that, because of the motorhome's power, he guessed it would make it up the hump, although it might plow the roadway and defendant might "end up with a grade going to his garage that he doesn't want." Timothy said that coming down the hump would produce the same result. Timothy did not testify that he had tried but been unable to use the motorhome to access his property, but he analogized the difficulties he suspected he would have with the motorhome to the difficulties he demonstrated in the video evidence he submitted to the court with regard to use of a trailer hitch. With regard to the latter, the trial court opined that plaintiffs' demonstrations "did not show impassibility, but only some minor difficulty." The trial court further observed, "It was apparent from these demonstrations that plaintiffs went to great lengths to create impairments allegedly caused by defendant's project."

But when rendering its factual findings and conclusions, the trial court erroneously stated that the motorhome was 24 feet long[5], and it is not clear from the record that the trial court even made a conclusion as to whether plaintiffs could still access their property with the motorhome. Under the terms of the easement grant, plaintiffs have the "full and free right" to use and enjoy the easement "for all purposes connected with the use of [their] property to pass and repass upon [defendant's property]" along the subject road. Considering the terms of the easement grant, Timothy's testimony regarding his past and future use of the motorhome and its size, and the trial court's error regarding the motorhome's length, we are "left with a definite and firm conviction that a mistake had been made," as it is not clear that the trial court accurately assessed this use. *Arbor Farms, LLC*, 305 Mich App at 387 (quotation marks and citation omitted). Accordingly, we remand the matter to the trial court for the limited purpose of assessing whether defendant's alterations to the road unreasonably interfere with a reasonable use of the easement associated with plaintiffs' ability to bring their motorhome onto their property.

C. TRESPASS

[5] The trailer depicted in plaintiffs' videos was 24-feet long.

Finally, plaintiffs contend that the trial court violated their right to due process by not addressing defendant's trespass onto their property and overlooking "the request that the issue of runoff from the modified easement be remediated." This issue comes to the Court unpreserved. We review an unpreserved claim of constitutional error for plain error affecting a party's substantial rights. *In re Application of Consumers Energy Co*, 278 Mich App 547, 568; 753 NW2d 287 (2008).

Plaintiffs have failed to establish a due-process violation with respect to any trespass claim. "Recovery for trespass to land in Michigan is available only upon proof of an unauthorized direct or immediate intrusion of a physical, tangible object onto land over which the plaintiff has a right of exclusive possession." *Adams v Cleveland-Cliffs Iron Co*, 237 Mich App 51, 67; 602 NW2d 215 (1999). "A complaint, counterclaim, cross-claim, or third-party complaint must contain . . . [a] demand for judgment for the relief that the pleader seeks." MCR 2.111(B)(2).

We first note that the trial court was under no obligation to make findings specific to the runoff. It is sufficient in a bench trial that the trial court make "[b]rief, definite, and pertinent findings and conclusions" with regard to contested matters, "without overelaboration of detail or particularization of facts." MCR 2.517(A)(2). Plaintiffs assert in their brief to this Court that "erosion on the Collins property is uncontested." Additionally, in their complaint, plaintiffs did not "request that the issue of runoff from the modified easement be remediated." MCR 2.111(B)(2) (a complaint must contain "[a] demand for judgment for the relief that the pleader seeks"). Plaintiffs averred in the general allegations of their complaint that "[o]n 24 October 2013, Plaintiffs sent a letter to Defendant indicating that the access to Plaintiffs' property was blocked, further indicating that silt was spilling onto Plaintiffs' property, and requesting Defendant to remove the approximately 200 cubic yards of fill dirt placed on the private road." However, plaintiffs did not allege a count of trespass in their complaint or request a remedy for runoff from alterations to the roadway, nor did they move to amend their complaint to include a count of trespass and a corresponding request for relief. Plaintiffs have cited no authority supporting their implied position that the trial court's failure to grant the relief they did not request on a count they did not bring constitutes a due-process violation. "A party may not leave it to this Court to search for authority to sustain or reject its position." *Magee v Magee*, 218 Mich App 158, 161, 553 NW2d 363 (1996).

Plaintiffs imply that the trial court should have ruled on the erosion and alleged trespass because "the issue of erosion was a subject upon which multiple trial witnesses testified." Issues not raised by the pleadings but "tried by the express or implied consent of the parties . . . are treated as if they had been raised by the pleadings." MCR 2.118(C)(1). In such cases, "amendments of the pleadings to conform to the evidence and to raise those issues may be made on motion of a party at any time, even after judgment." *Id.* Plaintiffs do not claim that the parties tried the issue of erosion by express or implied consent. In addition, they cite no authority for their position that, the trial court having heard testimony about the runoff onto plaintiffs' property, the court's failure to provide a remedy where none was requested constituted a violation of plaintiffs' right of due process. See *Magee*, 218 Mich App at 161.

III. CONCLUSION

We conclude that the trial court did not clearly err in finding that defendant's alteration to the private drive over which plaintiffs have an access easement appurtenant did not constitute a "modification" of the easement. In addition, we conclude that the trial court did not violate plaintiffs' constitutional rights of due process when it did not provide relief that the plaintiffs did not request. However, we vacate the trial court's ruling with regard to whether defendant's changes to the road interfered with plaintiffs' use of the easement with respect to bringing their motorhome onto their property.

Affirmed in part, vacated in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Jane M. Beckering
/s/ Michael J. Riordan