

STATE OF MICHIGAN
COURT OF APPEALS

JAMES E. HARRISON, MARILEE A.
HARRISON and the JAMES E. HARRISON &
MARILEE A. HARRISON REVOCABLE
TRUST,

UNPUBLISHED
June 28, 2011

Plaintiffs/Counterdefendants-
Appellants,

v

No. 296532
Iron Circuit Court
LC No. 09-004082-CH

RAYMOND KUDWA,

Defendant/Counterplaintiff-
Appellee.

Before: RONAYNE KRAUSE, P.J., and SERVITTO and GLEICHER, JJ.

PER CURIAM.

After a bench trial in this real property dispute, the court entered judgment in favor of defendant Raymond Kudwa. Plaintiffs, James Harrison, his wife Marilee Harrison, and the James E. Harrison and Marilee A. Harrison Revocable Trust, appeal as of right. We affirm.

The nature of the parties' disagreement concerns the precise scope of a 1957 easement entered into by the parties' predecessors in interest. The easement granted "a right of way over and across" property currently owned by Kudwa, as a route "of ingress and egress" "to the lands . . . [currently owned by plaintiffs] as and for a private access road and for no other purpose." The easement also contained the following relevant terms and conditions:

(2) That the said parties of the second part [plaintiffs' predecessors in interest] shall provide and put in place any additional fencing that may be found necessary to protect the live-stock of the said first parties [Kudwa's predecessors in interest] by reason of the building of said private road, including gate and such cattle guards as may be necessary, all in a manner that shall meet with the approval of said first parties.

* * *

(5) That the parties hereto pledge each to the other to work together and stand together in all [sic] matters affecting their mutual interest in said lands

and that they will at all times use their best efforts to protect and preserve the private character of the road and the rights granted by this easement.

Plaintiffs acquired their dominant parcel in August 2000. Following plaintiffs' acquisition of additional nearby acreage several years later, plaintiffs removed a gate that had stood close to one end of the private road. Kudwa subsequently erected a new, similarly sized gate across the easement on his property. Plaintiffs then filed a complaint seeking damages and declaratory and injunctive relief.

After a two-day bench trial, the court entered a written opinion containing the following pertinent factual findings:

It is clear from the testimony that at one time, there were two gates on the road. One gate was just west of the end of McClaren Road and one gate approximately on the line between the NE ¼ of the SW ¼ and the NW ¼ of the SW ¼. The gate on the west was removed, but there was no testimony as to when. The gate on the east end of the easement remained on the road until it was removed by . . . plaintiff[s] in 2006. At times, it was locked, and at other times, it was unlocked but remained there even though the Kudwas stopped raising cattle in 1972. Of all the forties subject to the easement, the one owned by Raymond Kudwa has the biggest burden, as the road crosses the forty all the way from east to west and approximately three-fourths of the way from north to south.

The court then turned to a consideration of the legal issues raised by plaintiffs:

A. Whether the defendant has the right to place a gate at any location on the portion of the private easement road passing through the property the defendant owns for the purpose of preserving and protecting the private character of the road and the rights granted by the easement pursuant to the 1957 easement agreement.

When answering this question, one should first look to the easement itself, which the court did. It is clear from the easement, that the parties intended to have the easement be private and let the public know that it was not a public road, but a private easement and this was done by maintaining the gates. Both counsel . . . cite *Cantienny v Friebe*, 341 Mich 143; 67 NW2d 102 (1954), which stands for the proposition that whether or not the owner of a servient estate has the right to erect gates across an easement depends on the intent and understanding of the parties when the easement was created. It is evident from the court review of the easement and the actions of the parties since the easement was created, that the parties intended and understood that the easement would be gated when the easement was created.

The easement has been granted for 50 years, until 1972 to retain cattle. However, from 1972 to 2006, the gate was used to give notice to the public of the private nature of the road. The current gate is not the same gate that gave notice until 2006, yet defendant has a right to have the road gated. Therefore, defendant may leave the gate in its current position unless plaintiffs erect and maintain a

gate at or near McClaren Road, at which time defendant shall remove the gate on the east end of his property.

B. Whether the defendant has the right to stop and/or question anyone using the easement road across his property about their intentions with regard to where they are going or what their business is when the easement road is being used to gain ingress or egress from the properties lying west of the defendant's property.

This easement is a private road and the defendant does have a right to ask users of the road as to the nature of their use[;] to hold, otherwise would in effect make the road a public road.

* * *

Defendant further requests . . . [he] be allowed to maintain no trespassing signage on the easement road. The court finds that he may do so as long as it does not interfere with plaintiffs' right to ingress and egress.

Plaintiffs maintain that the trial court incorrectly found defendant entitled to place a gate across the private roadway easement. "The extent of a party's rights under an easement is a question of fact, and a trial court's determination of those facts is reviewed for clear error." *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 40; 700 NW2d 364 (2005). "The clear error standard provides that factual findings are clearly erroneous where there is no evidentiary support for them or 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." *Hill v City of Warren*, 276 Mich App 299, 308; 740 NW2d 706 (2007).

The rights of the parties to an easement

must be measured and defined by the purpose and character of the easement. There must be a due and reasonable enjoyment by both parties—those who hold the dominant right, as well as those who own the fee. The 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. [*Unverzagt v Miller*, 306 Mich 260, 265; 10 NW2d 849 (1943).]

"It is settled that the owner of a fee, subject to an easement, may rightfully use the land for any purpose not inconsistent with the rights of the owner of the easement." *Cantienny*, 341 Mich at 147 (internal quotation and citation omitted). "[W]hether or not the owners of a servient estate have the right to erect gates across a way of necessity depends on the intent and understanding of the parties at the time the right of passage arose . . ." *Id.* at 147 (internal quotation omitted). "[G]ates will not be permitted except where the right has been reserved, and where the owner of the servient estate, acting in good faith, is able to show that the gates are reasonably necessary to provide some substantial and legitimate benefit to himself . . ." *Id.* (internal quotation omitted). "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.” *Id.* at 147 (internal quotation and citation omitted).

The “terms and conditions” set forth in the 1957 easement specifically contemplated the placement of a gate across the easement road. The easement language also repeatedly emphasized the “private” character of the easement road. The bench trial record established that two gates had long crossed the easement road, and that the gate removed by plaintiffs in 2006 had stood in its approximate location for almost 50 years, during which period the gate was intermittently left open, but usually closed, either locked or unlocked. The record further reflected that Kudwa’s parents farmed cattle until 1972, and that thereafter, during a period when the original parties to the 1957 easement still lived on the dominant and servient estates, the gates remained in place, notwithstanding the disappearance of the cattle. One gate was in place for over 30 years after the cattle were no longer farmed. Moreover, the easement directed the holders of the dominant and servient estates “to work together . . . to protect and preserve the private character of the road”

In light of the language comprising the 1957 easement, the trial court did not clearly err in finding Kudwa’s placement of an unlocked gate across the private easement roadway on his property consistent with the intent of the parties to the easement. *Blackhawk Dev Co*, 473 Mich at 42; *Cantienny*, 341 Mich at 147. The trial court reasonably concluded on the basis of the 1957 easement’s terms that the parties to the easement contemplated and intended the use of gates when they created the easement. Because Kudwa’s erection of a gate does not qualify as a use of the servient estate “inconsistent with the easement,” especially given the lengthy historic presence of a gate, we conclude that the trial court correctly ruled Kudwa had a right to maintain a gate. *Greve v Caron*, 233 Mich 261, 266; 206 NW 334 (1925).

Plaintiffs additionally challenge the trial court’s finding that Kudwa had the right to stop users of the easement and inquire into “the nature of their use.” This claim stems from an incident that occurred while plaintiffs’ home was under construction. Kudwa approached a workman traveling on the easement and asked about the reason for the man’s presence on the private road. Kudwa allowed the workman to proceed after the worker explained that he was headed to plaintiffs’ property. Plaintiffs complain that Kudwa’s interference with their invitees will impair their “quiet use and enjoyment of their property.”

“The existence of an easement necessitates a thoughtful balancing of the grantor’s property rights and the grantee’s privilege to burden the grantor’s estate.” *Blackhawk Dev Corp*, 473 Mich at 41. “In this state the rights of the owner of the easement are paramount, to the extent of the grant, to those of the owner of the soil.” *Cantienny*, 341 Mich at 146 (internal quotation and citation omitted). However, an easement does not displace an owner’s general possession or rights with respect to her property. *Schadewald v Brule*, 225 Mich App 26, 35; 570 NW2d 788 (1997). Those protected property rights include the “essential” “right to exclude others from one’s property.” *Risko v Grand Haven Charter Twp Zoning Bd of Appeals*, 284 Mich App 453, 461; 773 NW2d 730 (2009).

Kudwa’s brief detention of the motorist occurred on his property and involved a worker unknown to Kudwa who was traveling on the private road. Kudwa’s conduct at least arguably served the twofold purposes of verifying that a trespasser had not entered his property and working to maintain the private nature of the easement. Notably, Kudwa made no further efforts

to prevent the use of the easement after verifying the workman's rightful presence. Because the trial court's decision to allow this type of limited inquiry acted as an appropriate balance between the parties' rights relative to the easement, we conclude that the trial court did not clearly err in this facet of its ruling.

Affirmed.

/s/ Amy Ronayne Krause
/s/ Deborah A. Servitto
/s/ Elizabeth L. Gleicher