

STATE OF MICHIGAN
COURT OF APPEALS

CASCADE CHARTER TOWNSHIP,

Plaintiff/Counterdefendant-
Appellee,

v

KRYSTYNA W. COTTER,

Defendant/Counterplaintiff-
Appellant.

UNPUBLISHED
November 15, 2011

No. 299404
Kent Circuit Court
LC No. 09-011637-CZ

Before: JANSEN, P.J., and SAWYER and SHAPIRO, JJ.

JANSEN, P.J. (*concurring*).

I fully concur with the majority's determination that the central issue in this case is whether plaintiff's intended use of the easement as a driveway for its park will materially increase the burden on the servient estate, *Delaney v Pond*, 350 Mich 685, 687; 86 NW2d 816 (1957), and that this question must be initially decided by the circuit court. I write separately to point out that, in answering this question on remand, it may be useful for the circuit court to consider whether plaintiff has impermissibly attempted to convert the private easement into a public easement or public road.

"In every instance of a private easement, that is, an easement not enjoyed by the public, there exists the characteristic feature of two distinct tenements, one dominant and one servient; public easements on the other hand are in gross, and in this class of easements there is no dominant tenement." 28A CJS, Easements, § 11, pp 198-199; see also *Middleton Dev Corp v Gust*, 44 Mich App 71, 78; 205 NW2d 39 (1973) (HOLBROOK, J., dissenting).

I fully acknowledge that the language of the easement at issue in this case states that it is to be used for "ingress, egress, and utilities." But there is no doubt that the easement is not open to ingress and egress *by members of the public at large*. After all, the easement encumbers defendant's parcel (the servient estate) and runs in favor of plaintiff's parcel (the dominant estate). It is accordingly a *private* easement. See 28A CJS, Easements, § 11, pp 198-199.

Notwithstanding the private nature of the easement, I believe that plaintiff has attempted to convert it into a public easement, i.e., a public road. "The ultimate distinction between a public road and a private easement . . . is that a private easement is limited to specific individuals and/or specific uses, while a public road is open to all members of the public for any uses

consistent with the dimensions, type of service, and location of the roadway.” 28A CJS, Easements, § 11, p 199. To create a public road in Michigan, there must be (1) statutory dedication and acceptance on behalf of the public, (2) common-law dedication and acceptance, or (3) a finding of highway by public user. *2000 Baum Family Trust v Babel*, 488 Mich 136, 147; 793 NW2d 633 (2010). There certainly has been no statutory dedication or finding of highway by user with respect to the easement in this case. Moreover, common-law dedication requires “intent by the property owner to offer the land for public use[.]” *Id.* Without question, defendant has demonstrated no such intent here.

In short, there has been no public dedication of the easement and no finding of highway by public user. Therefore, the easement simply cannot be considered a public roadway, *id.*, and it necessarily remains a private easement with both a dominant and servient estate, 28A CJS, Easements, § 11, pp 198-199. Unless plaintiff can somehow demonstrate that the easement has been condemned and publicly dedicated (which it obviously cannot do), there can be no showing that the easement is open to ingress and egress by members of the public at large. It follows that plaintiff may not allow members of the general public to access its park by way of the private easement on defendant’s land. In my opinion, such a use would entirely alter the nature of the easement, which remains a *private* easement rather than a public road.

/s/ Kathleen Jansen