

STATE OF MICHIGAN
COURT OF APPEALS

RED RUN WILDLIFE SANCTUARY, LLC,

Plaintiff/Counter-Defendant-
Appellee,

UNPUBLISHED
May 14, 2013

v

RED RUN INTERCOUNTY DRAINAGE
DISTRICT,

Defendant/Counter-Plaintiff-
Appellant.

No. 307742
Macomb Circuit Court
LC No. 2011-001884-CH

Before: CAVANAGH, P.J., and SAWYER and SAAD, JJ.

PER CURIAM.

Defendant, Red Run Intercounty Drainage District, appeals as of right the trial court's opinion and order granting injunctive relief in part to plaintiff, Red Run Wildlife Sanctuary, LLC. We affirm the decision of the trial court.

Plaintiff is the owner of real property located in the City of Warren along the Red Run Drain. Defendant holds an easement over plaintiff's property, which was originally granted to the United States under the Flood Control Act. Defendant uses the easement to access the drain with its vehicles and equipment, patrol, respond to emergency situations, and perform routine maintenance. Routine maintenance includes mowing; weed control; and the removal of snow, debris, trees, and vegetation. The United States Army Corps of Engineers (USACE) and its subcontractors also use the easement for federally funded projects. The relevant portion of the easement granted from plaintiff's predecessors to the United States, provides:

[P]arties of the first part do hereby grant . . . unto the party of the second part . . . a perpetual and assignable easement and right-of-way in, on, under, over, and across the land hereinabove described for [t]he following purposes, . . . to construct, occupy, maintain, repair, operate and patrol Red Run Channel, together with the rights to dig or cut away, and remove therefrom any and all of the land within the limits of the right-of-way and the right to trim, cut, fell and remove therefrom all trees and underbrush and obstructions and any other vegetation, structures or obstacles within the limits of the right-of-way as may be required at any time in the prosecution and maintenance of the work of improvement or any

enlargement thereof, and the right to enter upon, occupy, and use any portion of said land not so cut away for the deposit of dredged material and for such other purposes as may be necessary in the preservation, maintenance and operation of the improvement work . . . reserving, however, to the parties of the first part, . . . all such rights and privileges in said tract of land as may be used and enjoyed without interfering with or abridging the rights and easements conveyed to the party of the second part . . . except that the parties of the first part may not, without express permission of the party of the second part . . . , remove spoil from the easement area or deposit spoil, refuse or any other material therein. [Easement Deed: April 8, 1952 at 3.]

After buying the property, plaintiff erected a fence along its boundary to keep trespassers out. The fence includes two unlocked gates at the east and west ends of the property and crosses defendant's easement. Plaintiff's members testified that they found garbage, hunters, ATVs, snowmobiles, and a trap on the property. On a couple of occasions, trespassers threatened the members. One member was chest-butted by a teenager, verbally threatened by an ATV rider, and later physically threatened by having gasoline thrown in their driveway.

Plaintiff subsequently filed its complaint and motion for temporary restraining order and order to show cause why a preliminary injunction should not issue. Plaintiff's complaint sought injunctive and declaratory relief to stop defendant from removing the fence and gate[s]. On May 10, 2011, the trial court entered an order to show cause and granted plaintiff's request for a temporary restraining order prohibiting the removal of the fence and gates. On May 19, 2011, the trial court entered an order converting the temporary restraining order to a preliminary injunction. An evidentiary hearing was held on July 8, 2011.

In its final order, the trial court held the following: (1) the northern portion of plaintiff's fence is not an encroachment or trespass; (2) the southern portion of plaintiff's fence is an encroachment or trespass and must be removed; (3) the gate crossing the easement is an encroachment or trespass but did not adversely affect the operation or maintenance of the drain, provided plaintiff maintain the area; and (4) defendant has the right to remove the gate as necessary for preservation, maintenance, and operation of the drain. Defendant appeals by right the final order entered on November 30, 2011.

Defendant first argues that the trial court erred in granting plaintiff injunctive relief because the plain language of defendant's easement unambiguously grants defendant paramount rights to maintain, operate, repair, and patrol the drain over plaintiff's right to the quiet use and enjoyment of its property. We disagree.

Party rights under an easement are questions of fact over which this Court reviews for clear error. *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 40; 700 NW2d 364 (2005), citing *Unverzagt v Miller*, 306 Mich 260, 266; 10 NW2d 849 (1943). A trial court's finding is clearly erroneous where "although there is evidence to support the finding, the reviewing court is left with the definite and firm conviction that a mistake has been made." *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523, 531; 695 NW2d 508 (2004), citing *Ambs v Kalamazoo Co Rd Comm*, 255 Mich App 637, 652; 662 NW2d 424 (2003). A fee owner's reasonable and proper use as well as beneficial use and enjoyment of land are questions

of fact. *Cantienny v Friebe*, 341 Mich 143, 145; 67 NW2d 102 (1954), citing *Harvey v Crane*, 85 Mich 316, 322; 48 NW 582 (1891). Similarly, whether the scope of an easement has been exceeded is generally a question of fact. *Bang v Forman*, 244 Mich 571, 576; 222 NW 96 (1928).

Further, this Court reviews a trial court's grant of injunctive relief for an abuse of discretion. *Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 105; 662 NW2d 387 (2003); *Taylor v Curie*, 277 Mich App 85, 93; 743 NW2d 571 (2007). An abuse of discretion standard is more deferential than de novo review and recognizes that "there will be more than one reasonable and principled outcome." *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). As long as the trial court selects one of these principled outcomes, it has not abused its discretion. *Id.*, citing *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

To determine party rights under an easement, this Court first looks to the language of the easement itself to determine the intent of the parties. *Little v Kin*, 468 Mich 699, 700; 664 NW2d 749 (2003); *Hasselbring v Koepke*, 263 Mich 466, 477-478; 248 NW 869 (1933). If the language used is "plain and unambiguous," then the trial court's inquiry stops, and the easement should "be enforced as written." *Little*, 468 Mich at 700. In its review, the trial court should apply common and approved uses of the terms found in the easement. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 354; 596 NW2d 190 (1999). By applying common and approved uses, the easement language is unambiguous and required no additional inquiry. As the trial court aptly illustrated, the language of the easement expressly grants to defendant the right to use the easement as follows:

- (1) to "construct, occupy, maintain, repair, operate and patrol" the drain;
- (2) to "dig or cut away, and remove therefrom any and all of the land within the limits of the . . . way;"
- (3) to "remove obstructions and any other . . . structures or obstacles within the limits of the . . . way as may be required at any time in the prosecution and maintenance of the work of improvement or any enlargement" thereof;
- (4) to "enter . . . occupy, and use any portion . . . not so cut away for the deposit of dredged material;" and
- (5) "for . . . other purposes as may be necessary in the preservation, maintenance and operation of the improved work, and the right to ingress and egress."

But these rights are limited to the express reservation of rights and privileges granted to plaintiff "as may be used and enjoyed without interfering with or abridging the rights and easements" of defendant. "An easement is, by nature, a limited property interest." *Dep't of Natural Resources v Carmody-Lahti Real Estate, Inc*, 472 Mich 359, 378; 699 NW2d 272 (2005). Use of an easement is limited to its specific purpose and does not include the right to "occupy and possess the land" as does the fee owner. *Id.* at 378-379. While the rights of an easement owner are paramount to the rights of a fee owner, those paramount rights are limited to

the degree in which they were granted. *Cantienny v Friebe*, 341 Mich 143, 146; 67 NW2d 102 (1954).

Plaintiff testified to a number of trespass problems which have, in its opinion, been adequately resolved by the existence of its fence. Moreover, plaintiff's gate provides sixteen feet of clearance for passage by defendant's vehicles and equipment. Likely, defendant's equipment is no wider than the excavator that was used by USACE's contractors and, similarly, will not have difficulty traversing plaintiff's fence or gate.

Defendant also argues that by allowing plaintiff's fence to remain, other property owners around the drain will erect fences too, burdening defendant with the negative cumulative effects of additional obstacles around the drain. We disagree. Here, the unambiguous language of the easement does not expressly restrict a fence. Furthermore, the record does not reflect that additional fences are reasonably anticipated.

Defendant also argues that the trial court's order fails to provide a workable solution because it fails to provide a standard by which defendant can determine when it has the right to remove the gate. We disagree. The trial court's order is a generous grant of recourse to defendant, especially since the gate has not yet impeded defendant's rights under the easement. Defendant can seek enforcement of its easement rights when its injuries are more than merely speculative and the fence actually interferes with or abridges its rights.

Finally, defendant argues that the trial court erred when it failed to consider defendant's authority and responsibility under applicable Michigan Drain Code provisions, MCL 280.85 and MCL 280.421, which require defendant to remove obstacles that interfere with the operation of the drain and increase the cost of performing work on the drain. We disagree. This Court reviews de novo questions of statutory interpretation. *State Farm Fire & Cas Co v Corby Energy Servs, Inc*, 271 Mich App 480, 483; 722 NW2d 906 (2006). Congressional intent to federally preempt is a determination involving statutory interpretation which this Court reviews de novo. *Konynenbelt v Flagstar Bank*, 242 Mich App 21, 27; 617 NW2d 706 (2000). Defendant relies on an opinion by the Attorney General in making its argument. But an opinion of the Attorney General does not have precedential effect upon this Court. *Kalamazoo Police Supervisors' Ass'n v City of Kalamazoo*, 130 Mich App 513, 522; 343 NW2d 601 (1983); *People v Waterman*, 137 Mich App 429, 439; 358 NW2d 602 (1984).

The drain at issue in this case was constructed as part of the Federal Flood Control Act of 1970. As such, it is subject to federal rules. But because the drain is a Chapter 21 drain, the Michigan Drain Code of 1956 is also applicable. The relevant provisions of the Michigan Drain Code provide as follows:

[T]he commissioner or drainage board may use, enter upon and preserve such easement or right of way for maintenance of the . . . drain and any other lawful activity with respect to the same not requiring a larger or different easement or right of way and may exercise any rights granted in the written easement or right of way on file in the office of the commissioner. [MCL 280.6.]

The owner of . . . land over, through or across which a district has . . . right of way for the construction and maintenance of . . . drain by grant . . . may use the land . . . in any manner not inconsistent with the easement of the district. Any use . . . which will interfere with the operation of the drain or will increase the cost to the district of performing any of its work thereon is deemed to be inconsistent with the district's easement. [MCL 280.85.]

In making its argument, defendant fails to apply a necessary principle of statutory construction: “when construing a statute, a court must read it as a whole.” *In re McLeodUSA Telecom Servs, Inc*, 277 Mich App 602, 610; 751 NW2d 508 (2008), citing *Apsey v Mem Hosp*, 477 Mich 120, 130; 730 NW2d 695 (2007). When read together, the drain code provisions refer this Court back to the language of the easement itself which was already interpreted by the trial court.

The trial court's breakdown of the fence into three portions and grant, in part, of injunctive relief was one of the reasonable and principled outcomes available to it under the circumstances of this case. As a result, the trial court did not abuse its discretion or clearly err in its order.

Affirmed.

/s/ Mark J. Cavanagh
/s/ David H. Sawyer
/s/ Henry William Saad