STATE OF MICHIGAN

COURT OF APPEALS

PAMELA B. JOHNSON TRUST, ELDON E. JOHNSON, and EUGENE SAENGER, JR.,

Plaintiffs-Appellants,

and

JOHN REIS and NORMA CAMP,

Plaintiffs,

v

JAMES ANDERSON, PATRICIA ANDERSON, and APJ PROPERTIES, LLC,

Defendants-Appellees.

UNPUBLISHED
June 4, 2013

No. 309913
Charlevoix Circuit Court
LC No. 11-040723-CH

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

PER CURIAM.

Plaintiffs appeal by right the trial court's judgment of no cause of action. We vacate and remand for clarification.

The parties own real property lots on the north shore of Round Lake in Charlevoix. Although most of the lots in the area are not landlocked, the land slopes sharply downward midway between Dixon Avenue to their North and the edge of the water. Historically, some kind of pathway existed across the lower part of the lots, running between Michigan Avenue[1] to the West and Burns Avenue to the East. This pathway, a "two-track" referred to as Lower Drive,[2] was used by lot owners to access the lower, waterfront area of their lots, including accessing their docks for boating, service, and maintenance purposes. It was not, however,

[1] Michigan Avenue is also sometimes referred to as Bridge Street and M-31.

[2] Although a portion of Lower Drive is paved, it is not an official street. Its name is reflective of its physical location across the lower portion of the properties it traverses.

reflected in all of the deeds for the lots in the area, and the area appears to be unplatted. The pathway to the West of defendants' property has been closed by development for some considerable time, but in a prior action, defendants were awarded a prescriptive easement over the two-track to the East to Burns Avenue across plaintiff's property. *Anderson v Johnson*, unpublished opinion per curiam of the Court of Appeals, issued January 16, 2007 (Docket No. 263972). That easement conferred upon defendants a right to use the easement "as historically used" and "without restrictions" for "motor vehicle traffic, foot traffic and non-motorized vehicle traffic."

The instant action arises out of defendants' commencement of construction of a large boathouse. Although defendants conveyed most of the necessary equipment and materials to the construction site by barge, the contractor made some use of the easement for heavy trucks and equipment. Plaintiffs commenced this suit, asserting generally that defendants' use of the easement for a major construction project was beyond the scope of the easement. The trial court concluded, after a three-day bench trial, that the two-track had historically been used by the parties for motor vehicle access to the lakefront, which was consistent with the use of the two-track for construction purposes. The trial court also observed that defendants incurred significant expenses in minimizing use of the two-track, and future use of the two-track was expected to decline upon completion of the boathouse. The trial court ruled in favor of defendants and dismissed plaintiffs' complaint.

Plaintiffs argue that the trial court erred in determining that defendants did not exceed the scope of the easement. Plaintiffs also argue that the trial court erred in admitting or considering evidence about uses of the two-track by any person other than defendants and defendants' predecessor in title. We review the scope, extent, and violation thereof of an easement for clear error as a question of fact. *Wiggins v City of Burton*, 291 Mich App 532, 550; 805 NW2d 517 (2011). We review a trial court's admission of evidence for an abuse of discretion. *Augustine v Allstate Ins Co*, 292 Mich App 408, 424; 807 NW2d 77 (2011). "Error in the admission of evidence is not cause for reversal unless it affects a substantial right of the party opposing admission." *Stitt v Holland Abundant Life Fellowship* (*On Remand*), 243 Mich App 461, 469; 624 NW2d 427 (2000), citing MRE 103. We conclude that the trial court abused its discretion in admitting the challenged evidence. Because we cannot determine the extent to which doing so affected the outcome of the proceedings, we decline to review whether defendants did in fact exceed the scope of the easement. Instead, we vacate the trial court's decision and remand for clarification and other proceedings as the trial court deems necessary.

"An easement is a right to use the land of another for a specific purpose." *Bowen v The Buck & Fur Hunting Club*, 217 Mich App 191, 192; 550 NW2d 850 (1996). "An easement by prescription is based upon the legal fiction of a lost grant, and results from action or inaction leading to a presumption that the true owner of the land, by his acquiescence, has granted the interest adversely held." *Slatterly v Madiol*, 257 Mich App 242, 260; 668 NW2d 154 (2003) (citations and internal quotation marks omitted). The scope of a prescriptive easement is limited "by the manner in which it was acquired and the 'previous enjoyment.'" *Heydon v MediaOne of Southeast Mich, Inc*, 275 Mich App 267, 271; 739 NW2d 373 (2007), quoting 25 Am Jur 2d, Easements and Licenses, § 81, p 579. "The owner of an easement cannot materially increase the burden of it upon the servient estate or impose thereon a new and additional burden." *Schadewald v Brule*, 225 Mich App 26, 36; 570 NW2d 788 (1997). Nevertheless, the easement

holder may "make effective enjoyment of the easement," limited "largely by what is reasonable under the circumstances." *Killips v Mannisto*, 244 Mich App 256, 261; 624 NW2d 224 (2001). Although easements were historically only conferrable by an express grant, courts enforce prescriptive easements "'because public policy and convenience require that long-continued possession shall not be disturbed.'" *Coolidge v Learned*, 8 Pick (Mass) 504, 509 (1829); see also *Frandorson Properties v Northwestern Mut Life Ins Co*, 744 F Supp 154, 156 (WD Mich, 1990).

The property owners having the right to use the prescriptive easement are the "dominant owners," while the property owners owning the land upon which the prescriptive easement was granted are the "servient owner[s]." *Bowen*, 217 Mich App at 192. A prescriptive easement arises when the servient owner effectively grants the dominant owner a legal right to use the land consistent with the dominant owner's actual use of the land. See *Slatterly*, 257 Mich App at 260. The critical facts are therefore the use to which the dominant owner, and, if applicable, the dominant owner's predecessors in title, put the land.

Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. We appreciate that the use of the easement by other lot owners in the area might be relevant to what the other property owners might generally have expected of the scope of the easement. Furthermore, those uses might be relevant to the scope of the easement across lots further to the East, beyond plaintiff's property. However, those uses are not relevant to the prescriptive easement in favor of defendants across plaintiff's property. Because irrelevant evidence is inadmissible, MRE 402, the trial court abused its discretion by admitting evidence of the use of the easement by persons other than defendants and their predecessors in title for determining the scope of the easement in defendants' favor across plaintiffs' property. We additionally note that the trial court's consideration of the "extreme discretion" defendants exercised to minimize their use of the easement is equally irrelevant: whether an easement is overburdened is determined by the actual use of the easement by the dominant owner, and whether that use constitutes a "material increase" or a "new and additional burden." See *Schadewald*, 225 Mich App at 36.

We do not hold that the trial court's decision was necessarily wrong, but we are unable to determine from the trial court's opinion whether the above evidentiary errors were harmless. The trial court's conclusion that "defendants are doing nothing that has not been done before on Lower Drive" appears entirely supported by the record, and we could certainly not find clear error in that finding. However, the more specific and pertinent question remains unanswered: whether defendants' use of the easement over plaintiffs' property is consistent with the historical use by defendants' predecessors in interest of that portion of the easement. That question must be answered irrespective of the use to which any other owners put any other portion of the easement and irrespective of how carefully defendants avoided burdening the easement even further.

We note in this regard that the trial court determined in 2005, in awarding the prescriptive easement to defendants, that defendants' predecessors had used the two-track for various purposes, including (a) "for access to the water-front portion of their parcels for water related activities such as boating, swimming, fishing, servicing docks, mowing grass, landscaping, dredging, etc," (b) for "[d]ock construction and maintenance," including use by "[h]eavy marine

construction equipment," (c) for access by "several other boaters" who rented dock space on defendants' property; and (d) for access by "landscapers, guests, maintenance workers, and workers who built a dock and sea wall." These *types* of uses indeed are relevant in determining whether there has been a "material increase" or a "new and additional burden" on the property. However, also pertinent to that inquiry is whether the *degree* of use has sufficiently changed to a level that constitutes a "material increase" or "new and additional burden" on the property, balanced by defendants' right to "make effective enjoyment of the easement," limited "largely by what is reasonable under the circumstances." *Schadewald*, 225 Mich App at 36; *Killips*, 244 Mich App at 261.

Because the trial court is the appropriate venue for deciding factual questions, we vacate the trial court's decision and remand for clarification. See, e.g., *Fed Deposit Ins Corp v Garbutt*, 142 Mich App 462, 470; 370 NW2d 387 (1985). On remand, the trial court should assess the evidence relative to the above-stated inquiry, based upon the type and degree of use by defendants and their predecessors, and without regard to use by other property owners.

We note that we find no clear error in the trial court's determination that injunctive relief was unwarranted because the complained-of use of the easement would shortly cease. Nonetheless, on remand the trial court is free to assess whether that prediction proved accurate and, if the court wishes, reconsider accordingly. Finally, we also find no clear error in the trial court's determination that Lower Drive has not ultimately been degraded by the complained-of use to which defendants put it. Consequently, we do not express any opinion whether the trial court should enter the same result upon remand.

Vacated and remanded for further proceedings consistent with this opinion as the trial court deems necessary and appropriate. We retain jurisdiction.

/s/ Amy Ronayne Krause
/s/ Elizabeth L. Gleicher
/s/ Mark T. Boonstra