STATE OF MICHIGAN

COURT OF APPEALS

RICHARD N. SHAFER and
KAREN J. SHAFER,

Plaintiffs/Appellants/Cross Appellees,

v

MALCOLM J. MCLEOD, Trustee,

Defendant-Appellee,

and

JACQUELINE Y. SOVA,

Defendant/Appellee/Cross Appellant.

UNPUBLISHED
December 10, 1996

No. 182138
LC No. 94-002454

RICHARD N. SHAFER and
KAREN J. SHAFER,

Plaintiffs-Appellants,

v

MALCOLM J. MCLEOD, Trustee,

Defendant-Appellee,

and

JACQUELINE Y. SOVA,

Defendant.

No. 186570
LC No. 94-002454

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* Circuit judge, sitting on the Court of Appeals by assignment.

Before: Fitzgerald, P.J., and Cavanagh and Lambros,* JJ.

PER CURIAM.

This is a consolidated appeal where, in No. 182138, plaintiffs appeal as of right from the trail court's order granting defendant Jacqueline Y. Sova's motion for summary disposition, while Sova cross appeals from the trial court's order denying her costs and attorney fees. In No. 186570, plaintiffs appeal as of right from the trial court's order granting defendant Malcolm J. McLeod's motion for summary disposition. We affirm in part, reverse in part, and remand.

Plaintiffs claim that the trial court erred in granting Sova summary disposition because the court erroneously found that no genuine issue of fact existed that an implied easement ran with plaintiffs' property, and that plaintiffs were equitably estopped from asserting a claim of trespass/encroachment against Sova. We disagree.

We review a motion for summary disposition granted under MCR 2.116(C)(10) de novo, to determine whether there is factual support for a claim. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1994). We review a finding of equitable estoppel de novo, while reviewing the judge's findings of fact for clear error. *Webb v Smith (After Remand)*, 204 Mich App 564, 568; 516 NW2d 124 (1994).

Three factors must be proven by the party asserting an implied easement: (1) that during the unity of title, an apparently permanent and obvious servitude was imposed on one part of an estate in favor of another, (2) continuity, and (3) that the easement is reasonably necessary for the fair enjoyment of the property it benefits. *Schmidt v Eger*, 94 Mich App 728, 731; 289 NW2d 851 (1980). We agree that no genuine issue of fact remains that an implied easement exists on the parcel in question (lot 22). First, plaintiffs do not dispute that McLeod owned both lot 22 (servient lot) and lot 23 (dominant lot) at the time the easement was created. Second, plaintiffs have admitted that there was continuity of use in that they pleaded that lot 22 has been used for parking for the tenants located on lot 23. Also, the third factor was proven in that, in a prior suit, the lower court declared that, for zoning purposes, the use of lot 22 as a parking lot must continue. Accordingly, the easement is reasonably necessary. Therefore, we agree that no genuine issue of fact remains regarding whether an implied easement ran with lot 22. In addition, we reject plaintiffs argument that, because the implied easement was not recorded on plaintiffs' warranty deed, it did not exist. An implied easement is just that, implied, and need not be recorded to pass to subsequent owners. See *Reed v Blum*, 215 Mich 247, 249; 183 NW 766 (1921).

We also reject plaintiffs argument that the trial court clearly erred in finding that plaintiffs were equitably estopped from asserting a claim of trespass/encroachment against Sova. "Equitable estoppel arises where a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, the other party justifiably relies and acts on that belief, and the other party

will be prejudiced if the first party is allowed to deny the existence of those facts." *Soltis v First of America Bank-Muskegon*, 203 Mich App 435, 444; 513 NW2d 148 (1994). We find that the trial court did not clearly err in finding that plaintiffs were equitably estopped from asserting a claim of trespass/encroachment against Sova, the subsequent owner of lot 23. Sova justifiably relied upon plaintiffs' silence as to the easement in question during McLeod's ownership of lot 23, and during the time in which plaintiffs knew that Sova was suing McLeod for title to lot 23. *Soltis, supra*, at 444.

Plaintiffs next argue that the trial court erred in granting McLeod's motion for summary disposition, pursuant to MCR 2.116(C)(8), regarding plaintiffs claims against McLeod for fraud and trespass/encroachment. We disagree.

We review a motion for summary disposition granted under MCR 2.116(C)(8) de novo, where such a motion tests the legal sufficiency of a claim by the pleadings alone. *Ladd v Ford Consumer Finance Co, Inc*, 217 Mich App 119, 125; 550 NW2d 826 (1996); *Plieth v St Raymond Church*, 210 Mich App 568, 571; 534 NW2d 164 (1995). All well-pleaded factual allegations in a complaint are taken as true, as well as any reasonable inferences or conclusions that can be drawn from the allegations. *Peters v Dep't of Corrections*, 215 Mich App 485, 486; 546 NW2d 668 (1996). A motion for summary disposition under MCR 2.116(C)(8) should be granted only when a claim is unenforceable as a matter of law because no factual development could justify a right of recovery. *Peters, supra* at 486-487.\

To succeed on a claim for fraud, a plaintiff must plead and prove the following: (1) that the defendant made a material representation; (2) that the representation was false; (3) when the defendant made the representation, the defendant knew it was false, or made it recklessly without knowledge of its truth or falsity; (4) that the defendant made it with the intent that the plaintiff would act upon it; (5) that the plaintiff acted in reliance upon it; and (6) that the plaintiff suffered injury. *Baker v Arbor Drugs*, 215 Mich App 198, 208; 544 NW2d 727 (1996). Pursuant to MCR 2.112(B)(1), a claim for fraud must be pleaded with specificity. See *Nederlander v Nederlander*, 205 Mich App 123, 128; 517 NW2d 768 (1994). Because plaintiffs' claim failed to allege any reliance on plaintiffs part, and failed to specify a material false representation that McLeod knowingly made to induce plaintiffs to act, we find that plaintiffs failed to plead a viable claim of fraud against McLeod. MCR 2.112(B)(1). In addition, we find that plaintiffs failed to plead a viable claim of trespass/encroachment against McLeod because McLeod was not the owner of lot 23 (the lot with the alleged encroachments) at the time of suit.

Finally, as cross appellant, Sova argues that the trial court clearly erred in finding that Sova should be denied costs and attorney fees pursuant to MCR 2.114(E), (F), MCL 600.2591; MSA 27A.2591, and MCR 2.625(A)(2). We agree. We will not reverse a trial court's finding that a claim is frivolous for purposes of awarding costs, including reasonable attorney fees, unless clearly erroneous. *LaRose Market v Sylvan Center*, 209 Mich App 201, 210; 530 NW2d 505 (1995).

Pursuant to MCR 2.114(E),(F), MCL 600.2591; MSA 27A.2591, and MCR 2.625(A)(2), a prevailing party may be awarded costs, including attorney fees, for filing a frivolous lawsuit. MCL 600.2591(2)(a)(iii); MSA 27A.2591(2)(a)(iii), defines "frivolous" as being where, "[t]he party's legal

position was devoid of legal merit." Further pursuant to MCR 2.625(A)(1), a trial court must state in writing its reasons for denying costs. See *McMillan v Auto Club Insurance Ass'n*, 195 Mich App 463, 466; 491 NW2d 593 (1992). Because we conclude that plaintiffs' claims against Sova were devoid of any legal merit, and because Sova prevailed below, we hold that the trial court clearly erred in denying Sova costs and attorney fees. MCL 600.2591(3)(a)(iii); MSA 27A.2591(3)(a)(iii). Therefore, we remand for determination of the amounts to be imposed.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Mark J. Cavanagh
/s/ Nicholas J. Lambros