# STATE OF MICHIGAN

# COURT OF APPEALS

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NEZIH N. SALEM and CAROLE G. SALEM,

Plaintiffs-Appellants,

v

FRANCIS ROGERS, VIRGINIA D. ROGERS, KOK CHI CHAU, and KAN YAM CHAU,

Defendants-Appellees.

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UNPUBLISHED
June 27, 1997

No. 193471
Wayne Circuit Court
LC No. 94-425492 CH

Before: Taylor, P.J., and Griffin and Saad, JJ.

PER CURIAM.

Plaintiffs appeal by leave granted the October 26, 1995, order of the Wayne Circuit Court granting summary disposition in favor of defendants Francis and Virginia Rogers pursuant to MCR 2.116(C)(10). We reverse.

The instant case concerns plaintiffs' right to an easement implied by necessity over defendants' property. Joseph Elias was the owner of a parcel of land adjacent to Plymouth Road in the City of Livonia. On or about June 19, 1986, Elias split the land into two parcels. Elias sold Parcel 2, which was adjacent to Plymouth Road, to defendants Francis and Virginia Rogers. Elias retained Parcel 1, which was now landlocked. Elias thereafter stopped paying taxes on Parcel 1 and lost his interest in Parcel 1 at a tax sale. On August 2, 1989, plaintiffs purchased Parcel 1 at a tax sale and received a tax deed from the state. On December 14, 1993, Elias executed a quit claim deed of Parcel 1 to plaintiffs. In September, 1993, defendants Francis and Virginia Rogers, as land contract vendors, entered in to a land contract with defendants Kok Chi Chau and Kan Yam Chau, as land contract vendees, with respect to Parcel 2. The Chaus operate a doughnut shop on Parcel 2.

Plaintiffs filed the instant action on August 25, 1994, seeking a declaration that they are entitled to a reasonable ingress/egress easement over Parcel 2 to allow access to and from Plymouth Road. Defendants Rogers filed a motion for summary disposition pursuant to MCR 2.116(C)(10), which the trial court granted. Before the order granting defendants Rogers' motion for summary disposition was entered, the court entered a default against defendants Chaus for failure to comply with discovery. The

order granting summary disposition in favor of the Rogers expressly stated that it did not preclude plaintiffs from obtaining the requested relief from the Chaus. Thereafter, the trial court issued a declaratory judgment entitling plaintiffs to an ingress/egress easement upon the property interest of the Chaus.

Plaintiffs first argue that the trial court erred in determining that they were not entitled to an easement over Parcel 2. We agree.

On appeal, an order granting summary disposition is reviewed de novo. *Michigan Mutual Ins Co v Dowell*, 204 Mich App 81, 86; 514 NW2d 185 (1994). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests whether there is factual support for a claim. *Michigan Mutual*, *supra* at 85. The motion may be granted when, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id*. The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence presented. *Id*. Giving the benefit of reasonable doubt to the nonmoving party, the court must determine whether a record might be developed that would leave open an issue upon which reasonable minds might differ. *Id*.

An easement implied from necessity arises when an estate has been severed, leaving the dominant estate without a means of access. *Schmidt v Eger*, 94 Mich App 728, 732; 289 NW2d 851 (1980). Easements implied in necessity are based on the presumption that a party who conveys property conveys whatever is necessary for the beneficial use of the property, and that the party retains whatever is necessary for the beneficial use of the land he or she still possesses. *Waubun Beach Ass'n v Wilson*, 274 Mich 598, 607; 265 NW 474 (1936); Am Jur 2d, Easements and Licenses, § 37, pp 607-608 (1996). Before such an easement will be implied, the party asserting the easement must establish that the easement is strictly necessary for the enjoyment of the property. *Schmidt*, *supra* at 732. Mere convenience or reasonable necessity will not be sufficient if there are alternate access routes available, even if those routes are more difficult or more expensive. *Id*. An implied easement is based on the presumed intent of the parties and is supported by the public policy favoring the productive use of property. *Id*. An implied easement arises from the intent of the parties making the conveyance, and all circumstances of the conveyance should be considered. *Koller v Jorgensen*, 76 Mich App 623, 628; 257 NW2d 192 (1977).

It was undisputed in the instant case that both Parcel 1 and Parcel 2 were owned by Joseph Elias. When Elias sold Parcel 2 to the Rogers, Parcel 1 became landlocked. Furthermore, the record indicates that the parties intended an easement implied by necessity at the time of the conveyance. Francis Rogers stated at his deposition that Joseph Elias "always had the right" to an easement over Parcel 2. Furthermore, Joseph Elias' deposition testimony indicates that he believed he had the right to an easement over Parcel 1. Therefore, plaintiffs established the existence of an easement implied by necessity over Parcel 2.

Plaintiffs next argue that the trial court erred in determining that, even if an easement implied by necessity existed, it was extinguished by abandonment. We agree.

To abandon an easement means "to relinquish it with the intent of never again resuming or claiming a right or interest in it, to give it up absolutely, to forsake it entirely, and to relinquish all

connection with or concern in the easement." 25 Am Jur 2d, Easements and Licenses, § 112, p 683. To prove abandonment of an easement, both an intent to relinquish the property and external acts putting that intention into effect must be shown. *Ludington & Northern Railway v Epworth Assembly*, 188 Mich App 25, 33; 468 NW2d 884 (1991). Nonuse, by itself, is insufficient to show abandonment. *Ludington*, *supra* at 33. The nonuse must be accompanied by some act showing a clear intent to abandon. *Id*.

In the instant case, Joseph Elias stated at his deposition that he stopped paying taxes on Parcel 1 because he "had no use for it," and indicated that he knew that by not paying the taxes, he would be relinquishing the property to the state. However, Elias also stated at his deposition that he assumed that, because Parcel 1 was landlocked, the right to the easement over Parcel 2 would continue to exist even if he lost the property to the state. Elias apparently never used the easement from the time he sold Parcel 2 to the Rogers in 1987 through the time he lost his interest in Parcel 1 to the state in approximately August, 1989. However, Elias' deposition testimony indicates that he never denied the existence of the easement. Compare *Goodman v Brenner*, 219 Mich 55, 59; 188 NW 377 (1922) (finding abandonment of easement implied in necessity where the defendant did not use easement for thirty years and denied having a right to use easement during the thirty years). Elias' deposition testimony clearly indicates that he did not intend to abandon the easement.

Therefore, we find that the trial court erred in granting summary disposition in favor of defendants Rogers. Instead, we find that plaintiffs were entitled to summary deposition pursuant to MCR 2.116(C)(10). Because we find that plaintiffs are entitled to an easement implied by necessity over the Rogers' interest in Parcel 2, we need not address plaintiffs' remaining argument.

Reversed.

/s/ Clifford W. Taylor
/s/ Richard Allen Griffin
/s/ Henry William Saad