

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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ANTRIM COUNTY,

Plaintiff/Counter-Defendant-  
Appellee,

and

GARY RUSH and ELYSE FULLER,

Intervening Plaintiffs-Appellees,

V

DOUG'S UNDERGROUND SERVICES, INC.,

Defendant-Not Participating,

and

VONEBER VEIT and JANET VEIT,

Intervening Defendants/Counter-  
Plaintiffs/Third Party Plaintiffs-  
Appellants,

V

EFRAIN ROSALES, personally and in his official  
capacity as ANTRIM COUNTY SOIL EROSION  
OFFICER,

Third Party Defendant-Appellee.

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Before: Schuette, P.J., and Sawyer and Wilder, JJ.

PER CURIAM.

Intervening defendants appeal as of right the trial court's order denying their motion for summary disposition and granting intervening plaintiffs' cross motion for summary disposition. We affirm.

## I. Facts and Proceedings

Intervening plaintiffs and intervening defendants own adjacent parcels of land in Antrim County on Intermediate Lake that are bordered on the north by East Intermediate Lake Road. In 1999, after filling wetlands on their property without the proper permits, intervening defendants received a permit after the fact from the Michigan Department of Environmental Quality (MDEQ) which authorized intervening defendants to build a single family residence on their parcel. This permit, however, required intervening defendants to use off-site septic disposal. In order to satisfy this requirement, intervening defendants obtained an easement for a septic field on property northeast of their property, located on the other side (the north side) of East Intermediate Lake Road. Intervening defendants intended to bore a private septic line from their property to the septic field, running diagonally underneath East Intermediate Lake Road.

In February 2000, intervening defendants obtained a soil erosion permit from the Antrim County Conservation District for this project and then obtained permission from the Antrim County Road Commission to complete the work. The road commission, however, wanted the septic line to run perpendicularly under the road and then laterally to the septic field, rather than diagonally under the road. This change in the proposed path of the septic line required a modification of the previously obtained permits. The MDEQ approved the permit modifications, and on July 20, 2000, intervening defendants requested that the Antrim County Conservation District also approve the modifications.

That same day, intervening plaintiff Gary Rush, on his own behalf as well as that of his sister, intervening plaintiff Elyse Fuller, sent a letter to the county conservation district office, other county officials, and intervening defendants, asserting that his family owned the sixty-six foot strip of land that the pertinent section of East Intermediate Lake Road covers.<sup>1</sup> Rush stated in the letter that over the years, his family had given written permission to the county to cut brush growth on the land, had leased the mineral rights for production of natural gas, and had worked with the state concerning forest conservation on their property. Rush claimed that these acts demonstrated that his family in fact owned the property and that his predecessors in interest had granted only an easement to the county. Rush indicated that because his family opposed the subsurface boring, they would not give intervening defendants their permission to run the septic line across their property and would consider any boring on their property to constitute a trespass.

On July 26, 2000, the Antrim County Conservation District denied intervening defendants' request for modification of the soil erosion permit because intervening defendants could demonstrate neither that they owned the property nor that the property owner granted permission to use the land. Intervening defendants contended that the county conservation district was not authorized to deny the modification on these bases. Intervening defendants also

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<sup>1</sup> In support of their claim that plaintiff owns easements across the relevant sections of land, intervening plaintiffs rely on two documents titled "Release of Right of Way," both executed in July 1932, that convey property interests to plaintiff. The nature of the property interest conveyed is at the heart of the dispute in this case. Although the record reflects no evidence of the chain of title from the original grantors to intervening plaintiffs, plaintiff does not dispute that intervening plaintiffs have title to the property in question.

contended that the original permit was sufficient to permit the project to go forward, and notified the office of the Antrim County prosecuting attorney of their intention to proceed with the project. In reply to intervening defendants' expressed intention, Antrim County, through its general civil counsel, noted that in connection with the issuance of the soil erosion permit, the county road commission had advised intervening defendants that it "has right-of-way only for road purposes and makes no claim to ownership of the property it includes," and, further, that "other permits may be required in connection with this work from other governmental agencies, public utilities[,] corporations and individuals, including property owners."

Subsequently, intervening defendants contracted with defendant, Doug's Underground Services, Inc., for completion of the project. Work on the project began on August 9, 2000. After watching defendant begin the work and eventually break ground on intervening plaintiffs' property, third party defendant, Efrain Rosales, the soil erosion officer for the county, ordered defendant to stop work on the project. Defendant refused this directive, and plaintiff filed a petition for a temporary restraining order. The trial court issued an ex parte order to show cause why an injunction should not issue and also required defendant to "refrain from making any earth changes without a permit under the Soil and Erosion Act."

Thereafter, the trial court heard and granted plaintiff's motion for preliminary injunction and simultaneously denied defendant's motion for summary disposition. In its written opinion issued August 23, 2000, the trial court found that plaintiff had established a prima facie case of a violation by defendant of the Michigan Environmental Protection Act. The trial court therefore prohibited defendant and its agents from engaging in further work on the project until further order of the court. The trial court also found that plaintiff was likely to prevail on its claim that it possessed only an easement to use the property and that, because a public right of way cannot be used for placement of a private utility without a legislative declaration, the road commission lacked authority to authorize defendant to continue the project without the express permission of the property owners.

The trial court also granted defendant's motion to add necessary parties, opining that while ownership of the sixty-six foot wide strip of land was a central issue in the litigation, not all persons and entities asserting and contesting ownership were parties to the case. Eventually, these parties intervened by permission of the trial court. Intervening plaintiffs subsequently filed a statement of claims against intervening defendants in which they asserted that intervening defendants' use of the land interfered with intervening plaintiffs' use and enjoyment of their property. Intervening plaintiffs further requested that the trial court declare that intervening defendants' acts were unlawful. Intervening defendants filed a counterclaim and third party complaint against counter-defendant and third party defendant. Count I requested a writ of mandamus, asserting that intervening defendants had a clear legal right to a permit and that counter-defendant had a clear legal duty to issue it. Count II alleged an improper taking of their property by counter-defendant and stated a claim for damages incurred as a result of the project's interruption.<sup>2</sup>

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<sup>2</sup> Intervening defendants make no specific allegations against third party defendant.

On December 11, 2000, defendant and intervening defendants filed a motion to dissolve the preliminary injunction and a motion for summary disposition pursuant to MCR 2.116(C)(10), asserting that under the language used in the conveyances, plaintiff owned the land in fee. In response, intervening plaintiffs requested summary disposition in their favor pursuant to MCR 2.116(I)(2) and MCR 2.116(C)(10), asserting that the documents in question conveyed easements, not fee simple interests, to plaintiff. Intervening plaintiffs also argued that even if plaintiff owned the property in fee simple, plaintiff could not consent to the project because the project amounted to a private use of public land that first required intervening plaintiffs' permission. Intervening plaintiffs also asserted that intervening defendants were required to obtain the township's permission to proceed with the project as well because the township must consent to such a use of its highways.

The trial court heard arguments on these motions on March 12, 2001,<sup>3</sup> and issued its written opinion on May 4, 2001 granting intervening plaintiffs' motion for summary disposition and denying intervening defendants' motion. The trial court found that there were no genuine issues of material fact and that intervening plaintiffs correctly asserted that the documents unambiguously conveyed easements to plaintiff rather than fee simple interests. In its analysis, the trial court recognized that it was presented with "the highly unusual case of a third party disputing the state of title where the real parties in interest are in agreement."

The trial court also concluded that because intervening defendants' septic system would not be located entirely within the easement and was not for public benefit, as the land owners affected by the project, intervening plaintiffs' permission to construct the septic line was required.<sup>4</sup> However, the trial court rejected intervening plaintiffs' argument that consent of the township was also required because the township had not enacted an ordinance requiring a permit.<sup>5</sup>

Intervening defendants now appeal, challenging the trial court's construction of the conveyance documents. Intervening defendants do not appeal the other findings of the trial court.

## II. Standard of Review

We review de novo the trial court's decision on a motion for summary disposition. *Hinkle v Wayne Co Clerk*, 467 Mich 337, 340; 654 NW2d 315 (2002). Summary disposition

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<sup>3</sup> That same day, the trial court heard and denied defendant's motion to dismiss pursuant to MCR 2.207, in which it argued that it was neither a proper nor necessary party to the action because its only involvement was as intervening defendants' contractor. The trial court ruled on defendant's motion from the bench at the conclusion of oral arguments. This decision has not been appealed to this Court.

<sup>4</sup> In light of its finding that the documents unambiguously conveyed easements, the trial court did not address intervening plaintiffs' argument that even if the documents conveyed fee simple interests, intervening plaintiffs' permission to construct the septic system was required nevertheless.

<sup>5</sup> The parties' remaining claims were later resolved by a settlement agreement.

pursuant to MCR 2.116(C)(10) is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Veenstra v Washtenaw Country Club*, 466 Mich 153, 164; 645 NW2d 643 (2002).

### III. Analysis

The trial court correctly concluded that the intent of the parties as expressed in the conveyance documents at issue was to convey easements and not fee simple interests. As noted above, each document is titled “Release of Right of Way.” The first of the two documents, executed on July 7, 1932,<sup>6</sup> states:

For and in consideration of the sum of One and no/100 Dollars to me in hand paid by the Board of County Road Commissioners, of the County of Antrim, State of Michigan, we, or I, the undersigned, do hereby release and convey to the County of Antrim, all right, title and fee in and to so much of the following described parcel of land, to-wit:-

A strip of land 66 ft. in width, the center line of which is described as follows: [Each document then states the property description for the subject property.] It is understood and granted that the existing highway can be used as a detour until the relocated highway is completed for, and opened for traffic.

This release is executed for the sole purpose of conveying to the said County of Antrim a right of way over the above described lands for highway purposes and to permit the altering of the existing line of road and to the parcel of land above described.

This conveyance includes a release of any and all claims to damages arising from or incidental to the [altering] of said road aforesaid and to the relocation thereof across the parcel thereby granted.

Our primary objective in construing these documents is to determine the intention of the parties as expressed by the language used in the documents. *Putnam v Pere Marquette R Co*, 174 Mich 246, 252; 140 NW 554 (1913); *Purlo Corp v 3925 Woodward Ave, Inc*, 341 Mich 483, 487; 67 NW2d 684 (1954); *Westman v Kiell*, 183 Mich App 489, 493; 455 NW2d 45 (1990). No language in the document may be needlessly rejected as meaningless; rather, if possible, the Court should give meaning to each word. *Purlo Corp, supra* at 487-488. “[T]he only purpose of rules of construction of conveyances is to enable the court to reach the probable intent of the parties when it is not otherwise ascertainable.” *Id.* at 488.

Intervening defendants contend that the use of the words “release and convey . . . all right, title and fee” in the subject documents mandates a finding, under the provisions of MCL

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<sup>6</sup> Other than some minor differences in syntax, the second document, executed just twenty days after the first, mirrors the first document, except that the second document states that “[t]he undersigned reserves the right to all timber along above described Right of Way” immediately following the property description.

565.151 and MCL 565.153, that fee simple interests were conveyed to plaintiff. We disagree. MCL 565.151 provides:

That any conveyance of lands worded in substance as follows: “A.B. conveys and *warrants* to C.D. . . .” shall be deemed and held to be a conveyance in fee simple to the grantee, his heirs and assigns, with covenant from the grantor for himself and his heirs and personal representatives, that he is lawfully seized of the premises, has good right to convey the same, and guarantees the quiet possession thereof; that the same are free from all incumbrances, and that he will *warrant* and defend the title to the same against all lawful claims. [Emphasis added.]

As is clear from the language of the statute, MCL 565.151 describes language by which a *warranty* deed will convey a fee simple interest in property. Contrary to intervening defendants’ argument, the statute does not provide that every document purporting only to “convey” an interest in property transfers a fee simple interest. See *McCausey v Ireland*, 253 Mich App 703, 704, 706; \_\_\_ NW2d \_\_\_ (2002); *Ruell v Goodell*, 355 Mich 337, 338; 94 NW2d 812 (1959); see also *Bainton v Clark Equipment Co*, 210 Mich 602, 608; 178 NW 51 (1920) (stating that although “the word ‘grant’ under our statute is sufficient to pass title in fee, its use in a conveyance may be restricted by the other language employed”).

Similarly, MCL 565.153 does not require us to construe the documents as conveying fee simple interests. That statute provides that “[i]t shall not be necessary to use the words ‘heirs and assigns of the grantee’ to create in the grantee an estate of inheritance; and if it be the intention of the grantor to convey any lesser estate, it shall be so expressed in the deed.” Because this statute addresses only the issue of inheritance, and the documents at issue do not concern an inheritance, MCL 565.153 is inapplicable here. Even if the statute did apply, interests other than fee simple interests, including easements, may be inherited. See *Collins v Stewart*, 302 Mich 1, 5; 4 NW2d 446 (1942). Therefore, this statute does not mandate that all interests less than fee interests be stated in the deed.

Moreover, contrary to intervening defendants’ argument, the use of the term “fee” in the documents is not dispositive. As our Supreme Court has noted, the term “right-of-way” has two different meanings. A “right-of-way” can be a 1) strip of land on which railroad track, or in this case a highway, exists or 2) the legal right to use a strip of land. *Quinn v Pere Marquette R Co*, 256 Mich 143, 150; 239 NW 376 (1931). As the Court stated in *Quinn*, “[w]here the grant is not of the land, but is merely of the use or of the right of way, *or in some cases, of the land specifically for a right of way*, it is held to convey an easement only. . . . Where the land itself is conveyed, although for railroad purposes only, without specific designation of a right of way, the conveyance is in fee and not of an easement.” *Id.* at 150-151 (Emphasis added). Accordingly, even if the “fee” or entire estate was conveyed, an easement may still result, particularly because the land was conveyed specifically for use as a right of way.

Intervening defendants also claim that the rules for construing deeds articulated by the Michigan Supreme Court in *Thompson v Thompson*, 330 Mich 1; 46 NW2d 437 (1951), compel a finding in their favor. We disagree. As the *Thompson* Court stated:

(1) if a fee was intended by the grantor, inconsistent limitations thereon are void because it is impossible to give effect to both the fee absolute and the limitations;

(2) in cases of inconsistencies between the granting clause and the habendum the former will be deemed, as a rule of construction, to control when it is impossible to determine from the instrument in question and surrounding circumstances which the grantor intended to control; (3) when the granting clause contains language sufficient to convey a fee, but the habendum contains language limiting the conveyance to some lesser estate, the habendum will control if the court finds from the entire conveyance or attendant circumstances that the grantor so intended; and such intent may be found even though expressed nowhere else than in the habendum. [*Id.* at 8-9.]

Even if the granting clause used in these deeds is sufficient to convey a fee interest, the habendum clauses in the documents clearly restrict the interests granted to a right of way. Pursuant to *Quinn, supra*, the documents' restriction to a right of way indicates that an easement was intended. *Quinn, supra* at 150-151. Reading the documents in their entirety, we find that the parties intended the language in the habendum to control. We arrive at this conclusion after examining the title of the documents, the language indicating that a right of way *over* the land for highway purposes was the "sole purpose" of the release, *Westman, supra* at 494, and the reservation of rights to timber in the second document, which is identical to the first document in all other relevant respects. Because the habendum clauses control, we find that the documents conveyed only the legal right to use the strip of land to plaintiff.

In light of our conclusions and because the trial court did not address it, we decline to rule on intervening plaintiffs' claim that even if fee simple interests were conveyed, intervening defendants still required intervening plaintiffs' permission to complete the project.

Affirmed.

/s/ Bill Schuette  
/s/ David H. Sawyer  
/s/ Kurtis T. Wilder