

STATE OF MICHIGAN  
COURT OF APPEALS

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ROBERT K. COWELL and KATHLEEN M.  
OLIVIER,

UNPUBLISHED  
October 16, 2003

Plaintiffs-Appellees,

v

No. 242394  
Marquette Circuit Court  
LC No. 00-037702-CH

GEORGE SCHMIDT and NAN C. SCHMIDT,

Defendants-Appellants.

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Before: Meter, P.J., and Saad and Schuette, JJ.

PER CURIAM.

Defendants appeal as of right from an order granting plaintiffs' request for an implied easement over defendants' property. We affirm.

Defendants do not dispute the trial court's findings that a preexisting servitude existed across defendants' lot and that it was in continuous use since the sale of Lot C to plaintiffs in 1988. However, defendants argue that because plaintiffs have alternate access to their lot, the trial court erred in finding that an implied easement (involving a shared driveway) was reasonably necessary. We review the trial court's findings of fact for clear error and review de novo the court's conclusions of law. *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339, (2001)

In *Schmidt v Eger*, 94 Mich App 728, 735; 289 NW2d 851 (1980), this Court held that the extra effort and expense of installing a new drainage system amounting to \$30,000 to \$35,000 were great enough to constitute reasonable necessity. The trial court relied on *Schmidt's* cost analysis as the basis for deciding the present case. In its findings of fact and conclusions of law, the trial court in the instant case stated that the need for additional roadwork and improvements and the need to plow and maintain the northern right of way in the winter constituted extra costs to plaintiffs that made continued use of the shared driveway reasonably necessary.

Defendants object to this conclusion, arguing that a proper interpretation of *Schmidt* requires a finding of *significant* additional cost and effort, not merely nominal extra cost. Defendants claim that the testimony concerning the effort and expense required of plaintiffs to construct another driveway concerned more difficult and costly alternatives than the one

proposed by defendants. Defendants point out that plaintiffs presented no evidence that the extra costs to them of constructing a new driveway amounted to the tens of thousands of dollars that were decisive in *Schmidt*. We agree.

The decision in *Schmidt* was based on a showing of significant extra cost and effort. *Id.* at 735. According to the Restatement of Property, “[r]easonable necessity usually means that alternative access or utilities cannot be obtained without a *substantial* expenditure of money or labor.” 1 Restatement Property, 3d, Servitudes, § 2.12, comment e, p 162 (emphasis added). Virtually all of the testimony about the effort and expense of constructing another driveway concerned more difficult and costly alternatives than the one proposed by defendants. That testimony was not relevant to defendants’ proposed alternative, which was merely to build a driveway to Fleury Road and to access Bensinger Street using the northern right of way. The sum of the testimony regarding the effort and expense of creating a driveway along the route proposed by defendants was that some fill and approximately 6 to 10 feet of grading would be required. That evidence, standing alone, does not amount to significant extra cost and effort and cannot support the trial court’s finding of reasonable necessity.

However, the trial court also found that access to plaintiff’s lot via Fleury Road would involve a longer way to Bensinger Street and a need to maintain that route in the winter. We find this fact dispositive because of the substantial extra burden it places on plaintiffs.

Defendants stress to this Court that a determination of reasonable necessity must be based on the condition of the driveway in 1988 before it was graded, graveled, and paved. When plaintiffs purchased their lot, the existing driveway, like Fleury Road, was an unimproved two-track road that was not suitable for residential purposes or for anything but seasonal access to plaintiff’s property. Defendants claim that using the proposed alternate route of access would involve no significant extra costs over using the driveway as it existed in 1988.

Defendants are correct that reasonable necessity must be evaluated in terms of the driveway as it existed in 1988. See *Schmidt, supra* at 732. Because implied easements are based on the presumed intent of the parties, we consider what the contracting parties intended when Lot C was sold to plaintiffs.

“The parties are presumed to have contracted with reference to the condition of the property at the time of the sale, and to have intended that the grantee should have the means of using the property granted, and, therefore, that he should have such rights and privileges in, or over, the premises remaining in the grantor as might be requisite for that purpose.” [*Rannels v Marx*, 357 Mich 453, 456-457; 98 NW2d 583 (1959), quoting *Kamm v Bygrave*, 356 Mich 189, 196; 96 NW2d 770 (1959)].

Plaintiff Cowell testified that when he originally inspected Lot C in 1988, the sellers escorted him to it by way of the two-track driveway, which was in obvious use as the means of vehicular access to Lot C. Under *Rannels*, plaintiffs and their sellers are presumed to have contracted with reference to that driveway because it was a condition of the land at the time plaintiff bought Lot C. The sellers are also presumed to have intended that plaintiffs have a means of accessing and using their property. *Id.* at 458 There was and is no existing roadway on

the platted southern right of way that borders plaintiffs' lot. Although Fleury Road runs past the northernmost corner, the sellers did not mention it to plaintiffs as the expected means of access to Lot C. According to one of the developers, there was no other entrance to Lot C at the time plaintiffs purchased their property. From this we conclude that the sellers, who also owned Lot B, must have intended that the established roadway over Lot B serve as the means of access to Lot C.

Defendants claim that plaintiffs have, at most, a right to a seasonal trail road over Lot B because that was the condition and use of the two-track road at the time of severance. However, this argument ignores the sellers' use of the road before sale as a driveway for access to Lot C. Both developer Gotschall and plaintiff Robert Cowell testified that the condition of the road was an obvious, driveable two-track road at the time Lot C was sold. Defendants do not contest this; they only contest whether the road was reasonably necessary. Defendants could not argue, with respect to Lot B, that the two-track road was merely a seasonal road. As a shared means of access to both lots B and C, the condition and use of the road was identical for both parcels – it was a driveway.

Therefore, the issue is whether the two-track trail, as a driveway, was reasonably necessary for the fair enjoyment of plaintiffs' lot. Although the driveway was not a year-round means of access in 1988, it was, as a private way, susceptible of improvement, which the northern right of way was not. This Court has held that “[t]he party who enjoys the easement is entitled to maintain it so that it is capable of the use for which it was given.” *Carlton v Warner*, 46 Mich App 60, 61; 207 NW2d 465 (1973). In *Carlton*, we upheld the lower court's determination that bulldozing a roadway to make it passable at all times of the year was “reasonable maintenance.” *Id.* at 62.

The two-track road, as an improvable private driveway in 1988, provided the only direct access to a paved and maintained highway. Although access to an improved street might be of little consequence in some areas of Michigan, access to a paved and plowed road in the winter is reasonably necessary in Marquette County. A driveway connecting to Fleury Road would involve significant extra effort and expense because Fleury Road and the northern right of way are not maintained or plowed by the county. According to the evidence adduced at trial, the road is only kept clear in the winter by private individuals when they have need to use it. Plowing is sometimes difficult or impossible. Using defendants' proposed alternate route of access, plaintiffs would have to plow and maintain not only their own driveway but also Fleury Road on the northern right of way. This extra effort and expense would be incurred year after year, unless or until the county decided to maintain Fleury Road. Moreover, it would require plaintiffs to provide a benefit to the public at their own expense. The trial court was correct in holding that the need to maintain Fleury Road and the northern right of way in the winter makes continued use of the driveway connecting directly to Bensinger Street reasonably necessary, and the grant of an implied easement was appropriate.

Affirmed.

/s/ Patrick M. Meter  
/s/ Henry William Saad  
/s/ Bill Schuette