STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0557

Wilderness Resort Villas, LLC,
Respondent,

vs.

Thomas G. Miller, et al.,
Appellants.

Filed July 15, 2008
Affirmed
Toussaint, Chief Judge

Crow Wing County District Court
File No. C9-06-1925

Marcus P. Beyer, Gadtke & Beyer, LLC, 680 Southdale Office Centre, 6600 France Avenue South, Edina, MN 55435 (for respondent)

Richard A. Ohlsen, 417 Laurel Street, Post Office Box 366, Brainerd, MN 56401 (for appellants)

Considered and decided by Toussaint, Chief Judge; Halbrooks, Judge; and Johnson, Judge.

U N P U B L I S H E D O P I N I O N

TOUSSAINT, Chief Judge

Appellants Thomas G. and Beverly L. Miller challenge the district court's decision to enjoin them from traveling across the land of respondent Wilderness Resort Villas,

LLC, to deny them an easement across respondent's land for the portion of a driveway providing access to their land that encroaches on respondent's land, and to give appellants a choice between requiring respondent to adjust the driveway to remove the encroachment or an award of $6,250. Because the district court's findings of fact are supported by the record and because the court did not otherwise abuse its discretion, we affirm.

D E C I S I O N

Absent a posttrial motion, the scope of appellate review is the substantive legal issues properly raised to and considered by the district court, whether the evidence supports the findings of fact, and whether those findings support the conclusions of law and the judgment. *Alpha Real Estate Co. v. Delta Dental Plan of Minn.*, 664 N.W.2d 303, 310 (Minn. 2003); *Gruenhagen v. Larson*, 310 Minn. 454, 458, 246 N.W.2d 565, 569 (1976).

I.

Appellants challenge the district court's ruling that they are not entitled to an easement by necessity or implication. The terms "easement by necessity" and "easement by implication" are interchangeable. *Bode v. Bode*, 494 N.W.2d 301, 304 n.1 (Minn. App. 1992). Of the various factors considered in addressing whether to grant such an easement, the only required element is necessity. *Olson v. Mullen*, 244 Minn. 31, 40-41, 68 N.W.2d 640, 647 (1955). The burden of proving necessity is on the party claiming the easement, and the necessity that must be proven is a reasonable necessity at the time the lots in question are severed from each other. *Clark v. Galaxy Apartments*, 427 N.W.2d

723, 726 (Minn. App. 1988). Also, because the propriety of creating an easement by necessity is determined as of the time of severance, a post-severance change of conditions does not affect whether to allow an easement by necessity. *Olson*, 244 Minn. at 41, 68 N.W.2d at 647.

Appellants assert that necessity is present because their home is on the lower portion of their lot near a lake, there is a steep grade between their home and the road, and the curvature of the driveway across respondent's lot is required to create a grade that will be safe for year-round use.[1] But a manager of a construction company testified that his firm could install a driveway on appellants' property for about $6,250 if the "rough grade" work was done by somebody else and that his firm has constructed driveways "a lot steeper than this." This testimony, plus the fact that appellants contracted to have a driveway built on their property, supports the district court's determination that appellants "cannot establish an easement by necessity [across respondent's land because] there are other areas on [appellants'] property where a driveway can be constructed that will adequately serve the property." Appellants lack the necessity for an easement across property they do not own.[2]

[1] Because one boundary of appellants' lot is the road, we reject their assertion that their lot is landlocked and that they must use the driveway currently cutting across respondent's lot.

[2] The record supports the district court's determinations that appellants failed to satisfy other, nonessential elements of the test for determining the propriety of an easement by necessity. *See Rosendahl v. Nelson*, 408 N.W.2d 609, 611 (Minn. App. 1987) (reciting elements of easement by necessity), *review denied* (Minn. Sept. 18, 1987).

II.

Appellants challenge the district court's refusal to award them a prescriptive easement, arguing that "the two driveways that [previously] served [appellants'] house and garage had continuously served as access to the house and garage for many years."

> A prescriptive easement claimant must prove by clear and convincing evidence that the property for which she is requesting the easement was used in an actual, open, continuous, exclusive, and hostile manner for 15 years. The claimant has the burden of proof, but if she proves actual, open, continuous, and exclusive use, then hostility of the use is presumed.

Boldt v. Roth, 618 N.W.2d 393, 396 (Minn. 2000) (quotation omitted). Appellants' argument seems to refer to the un-realigned driveway and the now-removed first driveway, neither of which are at issue here. Further, as the district court noted: "[Appellants] did not even take possession of their property and the [realigned] driveway was not constructed until 2005, well short of the 15-year time period necessary to make a claim for a prescriptive easement." Failure to satisfy the 15-year time period is fatal to a claim for a prescriptive easement. *Magnuson v. Cossette*, 707 N.W.2d 738, 745 (Minn. App. 2006).

III.

Appellants challenge the district court's refusal to reform their purchase agreement or deed to include either an easement over the land subject to the encroachment or title to that land. Whether to reform a written instrument is discretionary with the district court. *See In re Estate of Savich*, 671 N.W.2d 746, 751 (Minn. App. 2003).

> A written instrument, including a deed, can be reformed by a court using its equitable powers only when it is proved that (1) there was a valid agreement between the parties expressing their real intentions; (2) the

> written instrument allegedly evidencing the agreement failed to express the real intentions of the parties; and (3) this failure was due to a mutual mistake of the parties, or a unilateral mistake accompanied by fraud or inequitable conduct by the other party.

Theros v. Phillips, 256 N.W.2d 852, 857 (Minn. 1977). "The evidence supporting reformation of a written instrument, including a deed, must be consistent, clear, unequivocal, and convincing." *Kleis v. Johnson*, 354 N.W.2d 609, 611 (Minn. App. 1984). The district court's reformation-related findings of fact will not be altered unless clearly erroneous. *See Theisen's Inc. v. Red Owl Stores, Inc.*, 309 Minn. 60, 66, 243 N.W.2d 145, 149 (1976). An appellate court will reverse a reformation, however, if the facts do not support the legal conclusion as to reformation. *See Kleis*, 354 N.W.2d at 612.

In refusing to reform appellants' deed, the district court stated:

> There is no evidence of any mutual mistake in the drafting of the contract or in the fact that a "realigned driveway" was to be installed on the Miller Property. The [parties'] Purchase Agreement provided for a driveway to be installed and [appellants] were furnished with a copy (Exhibit 6) of a survey showing the proposed location of the realigned driveway prior to closing. The only mistake made in this case was the installation of a portion of the driveway in the encroaching location.

Thus, because the district court ruled that the parties' purchase agreement accurately reflected their agreement that respondent would convey to appellants land with a driveway, it ruled that the second and third *Theros* elements for reformation, requiring a written instrument to inaccurately reflect the parties' agreement and requiring that the inaccuracy be the result of mutual or unilateral mistake, were not satisfied. The district court also ruled that while there may have been a mistake in this case, that mistake was a

subcontractor's placement of the driveway, rather than the purchase agreement's recitation of the parties' agreement.

Appellants also argue that "all parties believed that the driveway was on the land being sold to [appellants]" and that (1) because the principal of respondent was an attorney, he had an ethical duty to appellants; (2) they relied on the principal's status as an attorney to conclude that the property they purchased included the driveway as required by the purchase agreement; and (3) they were surprised by both a request for a shared-driveway easement and by the fact that the law firm of respondent's principal drafted the proposed easement. These arguments, however, do not address the *Theros* reformation factors. Therefore, these arguments do not show that the district court abused its discretion in refusing reformation.

Appellants further state that they are innocent in this matter and that they refused to close on their purchase of their property until the realigned driveway was in place. How these assertions bear on the *Theros* reformation factors is neither identified nor clear. Also, after the error was discovered, respondent offered to construct a driveway entirely on appellants' property at no expense to them and later renewed its offer to install a driveway on appellants' property that would not impact appellants' drain field, would result in minimal tree loss on appellants' lot, and would help reduce water run-off on appellants' property. Appellants, however, rejected these offers. Thus, they are apparently not seeking reformation to accurately reflect the parties' agreement but instead are seeking to obtain either an easement that was not part of the original agreement or title to land not part of the original agreement. Reformation for either purpose would be

inconsistent with the idea that reformation contemplates alteration of an instrument to reflect the parties' agreement. *Jablonski v. Mut. Serv. Cas. Ins. Co.*, 408 N.W.2d 854, 857 (Minn. 1987).

IV.

The district court gave appellants the option of requiring respondent to install, on appellants' property and in a place of appellants' choosing, that portion of a new driveway necessary to allow removal of the encroachment, or a judgment against respondent for $6,250 for construction purposes.

Although not entirely clear, appellants seem to argue that $6,250 understates the cost of a new driveway because (1) that amount is the amount testified to by the construction manager who testified that it would be the cost of a new driveway if "the rough grade [work is] done by others," (2) a new driveway will require engineering services, and (3) the construction manager testified that engineering services are included in the "rough grade [work]." First, appellants cite no authority requiring the district court to award them a choice between a new driveway and a money judgment, rather than simply a new driveway. Therefore, any error in the gratuitously-awarded option of a money judgment is harmless. *See* Minn. R. Civ. P. 61 (requiring harmless error to be ignored). Second, because the construction option was only for that portion of a driveway required to remove the encroachment and because the current record does not show that removing the encroachment will require an entirely new driveway, awarding less than the cost of an entire driveway achieves some parity between the options given to appellants in the judgment.

Appellants argue that the evidence regarding the proposed alternate route for a driveway on appellants' property is not credible because it does not consider the "shore land issues, Conditional Use Permit issues, access in wintertime and safety issues." Appellate courts defer to district court credibility determinations. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988). If the undescribed shore-land issues involve water runoff from a new driveway, the construction manager testified that he had considered water runoff, that the cost estimate states that it assumes that the "rough grade will be done by others," and that settling ponds would be done with the rough-grade work. Regarding conditional-use-permit issues, appellants' expert testified that he could not be sure that a new driveway would require a conditional-use permit, and the city's zoning administrator testified that because the driveway would be beyond the setback distance from the lake, the city would not require a conditional-use permit. The reference to winter and safety issues is unclear. The construction manager testified both that the proposed driveway would be no steeper, and possibly less steep, than the existing driveway and that his firm had constructed driveways "a lot steeper than this."

Appellants argue that they did not slander the title to land. Because the district court did not address slander of title or grant slander-of-title relief against appellants, they lack standing to appeal this question, and we decline to address it. *See Hammerlind v. Clear Lake Star Factory Skydiver's Club*, 258 N.W.2d 590, 592 (Minn. 1977) (dismissing appeals of parties not aggrieved by district court's order and who therefore lacked standing to appeal).

Affirmed.