

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GLADWIN

ANGELO T. ARMSTRONG, CYNTHIA C.
SNOW-ARMSTRONG, ROBERT D. LANE,
JR., JANET E. LANE, and JOSEPH S.
SAWYER,

Plaintiffs/Counter-Defendants,

File No.: 16-8700-CH
Hon. Thomas R. Evans

v

NICK GARY and LISA GARY, as husband
and wife,

Defendants/Counter-Plaintiffs.

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OPINION AND ORDER

At a session of said court held in the
Courthouse in the City of Gladwin,
County of Gladwin, State of Michigan
on the 8th day of October, 2019.

Present: Honorable Thomas R. Evans
Circuit Judge

This matter having come on to be heard and the Court being fully advised in the
premises;



THOMAS R. EVANS
9TH CIRCUIT COURT JUDGE
401 WEST CEDAR AVENUE
GLADWIN, MI 49834-2062
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I. Procedural History

On December 13, 2017, the Court granted Defendants' Motion for Summary Disposition as to Counts I, II and III of Plaintiffs' Complaint¹, which was filed on October 4, 2016. On February 6, 2019, the Court denied Plaintiffs' Motion for Summary Disposition as to Counts IV, V and VI of their Complaint. The matter proceeded to trial on May 23rd and 24th, 2019. After the closing of the proofs, the Court took the matter under advisement.

II. Factual Issues

This case has a long and complex history, not all of which will be recited here. The property at issue was originally platted as Paige Street² in the Plat of Rio Vista. Paige Street was never accepted by the Gladwin County Road Commission nor developed. In 2005, Tobacco Township resolved to put Paige Street, and the other platted streets within the Plat of Rio Vista, on the tax roll. The township "offered" the predecessors-in-interest of Plaintiffs Armstrong and Lane their respective ½ of Paige Street at this time, but they declined.³ Paige Street was then assigned parcel numbers and had property taxes levied upon it. Property taxes remained unpaid on the Paige Street parcels, and the Treasurer foreclosed upon the parcels in 2009. The Paige Street parcels were then sold at a tax sale to Defendants' predecessor-in-interest, the Harry R. Gary and Brenda L. Gary Trust (Gary Trust), which received said property via Quit Claim Deed from the Gladwin County Treasurer. The Gary Trust later conveyed the property to Defendants in 2015. Defendants later proceeded to construct a dock and seawall on Paige Street, along with making other improvements to the property.

Plaintiffs Angelo Armstrong, Cynthia Snow-Armstrong, Robert Lane, Jr., Janet Lane, and Joseph Sawyer are also the owners of real property in the Rio Vista subdivision. Plaintiffs Armstrong and Snow-Armstrong (hereafter, Plaintiffs Armstrong) purchased their parcel on April 28, 2014; Plaintiffs Lane purchased their parcel on January 27, 2015; and Plaintiff Sawyer

¹ Count I — Request for Declaratory Relief that the Quit Claim Deeds Received by Defendants from the Gladwin County Treasurer Conveyed No Property Interest to Defendants; Count II — Statutory Slander of Title; Count III — Common Law Slander of Title.

² For convenience, the Court will refer to Defendants' property as Paige Street throughout the Opinion & Order.

³ Plaintiffs have argued throughout this case that the procedure used by Tobacco Township and the Treasurer was inappropriate. Plaintiffs might very well be correct. However, as the Court found in its Opinion and Order of December 13, 2017, MCL 211.78k prohibits the Court from setting aside the foreclosure.

purchased his parcel on July 21, 2014. Plaintiffs Armstrong and Lane own the parcels adjacent to Paige Street.

Up to and until the time Defendants purchased Paige Street, the lot was substantially wooded, and impassable by automobile or off-road vehicle.

III. Law

A. Rights of Property Owners in a Recorded Plat

"[A] purchaser of property in a recorded plat receives not only the interest as described in the deed but also whatever rights are indicated in the plat." *Nelson v. Roscommon Cty. Rd. Comm'n*, 117 Mich. App. 125, 132, 323 N.W.2d 621, 624 (1982). See also *Minerva Partners, Ltd v. First Passage, LLC*, 274 Mich. App. 207, 219, 731 N.W.2d 472, 479 (2007) ("By bestowing the right to use streets in a subdivision on the owners of lots in that subdivision, the plat gives these owners a right to use these streets that is independent of the public's right to use these streets once they are dedicated for public use. Accordingly, if the platted streets in a subdivision are abandoned for public use, the lot owners still retain a separate, private right to use the streets in that subdivision. Essentially, the lot owners retain an independent easement over the streets formerly dedicated for public use, which is unaffected by the road commission's abandonment of these streets.").

A public street dedication in a plat grants the owners of the parcels within the plat a private right to use said street, regardless of whether the township ever accepts the street. This easement right continues even if the street is vacated and fee vests in the adjacent lot owners. *Id.* Easement holders have a right to unobstructed passage along the right-of-way at all times. *Harvey v. Crane*, 85 Mich. 316, 322, 48 N.W. 582, 583 (1891).

Removal of the obstruction from the right-of-way is an appropriate remedy, and the mere fact that such removal would subject the defendant to great expense "is of no consequence." *Longton v. Stedman*, 182 Mich. 405, 414, 148 N.W. 738, 741 (1914). See also *Webb v. Smith*, 224 Mich. App. 203, 211, 568 N.W.2d 378, 382 (1997) ("Owners may enforce negative easements regardless of the extent of the owners' damages").

B. Trespass

"[A] trespass occurs where a person interferes with another's right to use an easement." *Amoco Pipeline Co. v. Herman Drainage Sys., Inc.*, 212 F. Supp. 2d 710, 720 (W.D. Mich. 2002). See also *Marathon Pipe Line Co. v. Nienhuis*, 31 Mich.App. 407, 188 N.W.2d 120 (1971). Where a trespass has occurred, the plaintiff is entitled to at least nominal damages. *Adams v. Cleveland-Cliffs Iron Co.*, 237 Mich. App. 51, 67, 602 N.W.2d 215, 222 (1999).

C. Abandonment

"[A]n easement may be lost through abandonment . . . when the owner of the easement relinquishes it with the intention of releasing his or her right to the easement." *Minerva Partners, Ltd*, 274 Mich. App. at 214. "To prove abandonment, both an intent to relinquish the property and external acts putting that intention into effect must be shown." *Ludington & N. Ry. v. Epworth Assembly*, 188 Mich. App. 25, 33, 468 N.W.2d 884, 888 (1991).

Generally, mere nonuse, regardless of its duration, does not constitute the abandonment of an easement "unless accompanied by some act which manifests a clear intent to abandon." *Feldman v. Monroe Twp. Bd.*, 51 Mich. App. 752, 755, 216 N.W.2d 628, 630 (1974); See also *Ludington & N. Ry.*, *supra*, at 33.

The party asserting an affirmative defense has the burden of presenting evidence to support it. *Attorney Gen. ex rel Dep't of Envtl. Quality v. Bulk Petroleum Corp.*, 276 Mich. App. 654, 664, 741 N.W.2d 857, 864 (2007). After such evidence is introduced by the defendant, the burden shifts to the plaintiff to "produc[e] clear and decisive evidence" to negate the defense. *Palenkas v. Beaumont Hosp.*, 432 Mich. 527, 550, 443 N.W.2d 354, 364 (1989).

IV. Analysis, Findings of Fact and Conclusions of Law

A. Easement

First, the Court must determine whether Plaintiffs possess a right-of-way easement over Defendants' property. Defendants concede and the Court nevertheless finds that the Plat of Rio Vista grants Plaintiffs a right-of-way easement over Paige Street.

B. Abandonment

The Court next turns to whether Plaintiffs have abandoned said easement. Defendants contend that the actions of Plaintiffs and their respective predecessors-in-interest manifested an intent to abandon the easement. Plaintiffs respond that Defendants cannot show any intent to abandon the right-of-way by Plaintiffs, and that mere non-use of the easement is not enough to constitute abandonment.

First, the testimony at the trial establishes that Paige Street has not been used as a means of ingress and egress for some time. Regarding Paige Street's use as a right-of-way, Mr. Armstrong testified that, to his knowledge, no one has ever used Paige Street as a road or to access the water, nor has he witnessed anyone using it as such. *Trial Transcript - Volume I*, at 38:11-20; 40:10-15. While Mr. Armstrong testified that the first $\frac{1}{4}$ of Paige Street was relatively clear and could be entered by a car (*Id.* at 61:4-11), Ms. Snow-Armstrong testified that the back $\frac{3}{4}$ of Paige Street was entirely wooded at the time they purchased their property (*Id.* at 79:17-21), did not resemble a street (*Id.* at 83:24 - 84:6), and was impassable by vehicle (*Id.* at 79: 22-25). She also testified that she was unaware of any use of Paige Street for ingress or egress prior to Defendants' purchase of the property (*Id.* at 84:10-12), and that she had not used it for ingress and egress purposes (*Id.* at 87:8-19).

As with Plaintiffs Armstrong, Mr. Lane testified that Paige Street was impassable by vehicle (*Id.* at 96:2-8) and remained undeveloped at the time he purchased his property (*Id.* at 95:16-19; 96:11-13). Mr. Lane testified that he utilizes the existing public access points to get his boat into the water. *Id.* at 97:15-16.

Plaintiff Joseph Sawyer also testified that Paige Street could not be traversed by car or boat trailer. *Id.* at 134:10-17.

Brenda Gary testified that Paige Street was a "wooded lot" since as early as 2005 (*Id.* at 157:4-15), prior to her purchase of the property in 2008 (*Id.* at 157:18-22). Defendant Nick Gary testified that Paige Street was so heavily wooded that "[y]ou couldn't have pushed a bike down there if you wanted to." *Id.* at 188:18-22. Defendant Gary removed several trees and "a lot" of brush. *Id.* at 191:25 - 192:3. Defendant Lisa Gary also testified that Paige Street was heavily

wooded at the time of their purchase, and getting down to the water was difficult even by foot. *Trial Transcript - Volume II*, 8:16-23; 10:15-21.

Next, testimony at trial established that Plaintiffs Armstrong and Lane (and/or their predecessors-in-interest) placed obstructions along Paige Street. Defendants argue that Plaintiffs Armstrong and Lane (and their respective predecessors-in-interest) use of Paige Street as an extension of their own property evidences their intent to relinquish their rights to the right-of-way. Further, Defendants argue that Plaintiff Sawyer's failure to object to any of the obstructions present on Paige Street manifests his intent to relinquish his rights to the right-of-way.

Plaintiff Angelo Armstrong testified that, at the time he moved onto the property, a fence extended from his property onto Paige Street (*Trial Transcript - Volume I*, 32:11-13) and that it ran from the centerline of Paige Street down to the water (*Id.* at 32:14-18). The fence was intact (*Id.* at 32:19-23) and appeared to have been there for "a while" (*Id.* at 33:1). Mr. Armstrong left the fence up after purchasing the property. *Id.* at 33:12-13. While Mr. Armstrong's predecessors-in-interest had placed a woodpile on Paige Street prior to his purchase of his parcel, Mr. Armstrong testified that he removed the woodpile when he moved in. *Id.* at 34:10-16. Additionally, at the time Mr. Armstrong moved in, a drain pipe extended from his property onto Paige Street. *Id.* at 36:3-17. Finally, the seawall in existence at the time Mr. Armstrong purchased his property extended onto Paige Street. *Id.* at 40:5-10. Ms. Snow-Armstrong added that the seawall looked "old." *Id.* at 86:20-21.

Plaintiff Robert Lane denied that his property was located on Paige Street, including his boat and trailer (*Id.* at 98:4-7; 98:10-13), the dog steps (*Id.* at 102:19-24), and the dog fence (*Id.* at 98:21-25). Plaintiff Janet Lane also testified that their jet-ski trailer was never stored on Paige Street. *Id.* at 110:15-19.

Defendant Nick Gary testified that he inspected Paige Street before his mother and father purchased the property in 2008. At that time, Mr. Gary observed the fence that ran down the middle of Paige Street (*Id.* at 182: 1-20) as well as tile running onto Paige Street from what is now Plaintiffs Armstrong's property (*Id.* at 182:25 - 183:12). Mr. Gary also testified that he

witnessed “junk, metal, tire rims, stuff like that” stored on Paige Street by Plaintiffs Armstrong’s predecessor-in-interest prior to his parents’ purchase of the property. *Id.* at 183:21-25.

Following his purchase of the property, Mr. Gary discovered several items occupying Paige Street, including the aforementioned fence, a jet-ski, a jet-ski trailer, a wood pile, cement blocks, and dog fence wire. *Id.* at 184:1-9, 187: 5-8, 188: 23-189:4, 193:14, 194:10-15, 213:12-13. Additionally, at the water, Mr. Gary discovered a jet-ski lift and a set of steps for Plaintiffs Lane’s dog. *Id.* at 193:2-10. At the time of Defendants’ purchase, the seawall from Plaintiffs Armstrong’s property extended approximately twelve feet onto Paige Street. *Id.* 193:19-21. Defendants Gary also had the property surveyed after their purchase. *Id.* at 186:1-6. Mr. Gary asked Plaintiffs Lane on two occasions to remove their jet-ski trailer from Paige Street, but Plaintiffs Lane refused. *Id.* at 187:11-16.

Defendant Lisa Gary also testified that a fence extended onto Paige Street from Plaintiffs Armstrong’s property, and that it would have prevented ingress and egress to the water by way of Paige Street. *Trial Transcript - Volume II*, 9:18 - 10:14. Further, Ms. Gary testified that Plaintiffs Lane’s dog fence wire was wrapped around trees on Paige Street (*Id.* at 13:13-16).

Defendants contend that the obstructions placed on Paige Street by Plaintiffs Armstrong and Lane (and their respective predecessors-in-interest) excluded any and all other property owners in the Plat of Rio Vista from utilizing the right-of-way, that this exclusion was an external act putting into effect their intention to abandon the right-of-way, and that these acts — along with the historic non-use of Paige Street for ingress and egress — constitute the abandonment of the easement by Plaintiffs.

Defendants rely on *LaFave v. McCaleb*, an unpublished opinion per curiam of the Court of Appeals, issued February 1, 2018 (Docket No. 336004) in support of this argument. In *LaFave*, the plaintiffs filed a lawsuit under the Land Division Act to vacate a portion of the plat granting a private easement to lot owners to utilize a vacated subdivision street as a right-of-way. The street at issue was undeveloped, bore no visible signs that it had been traversed, and, at the time the plaintiffs purchased the lot, had a fence running across it. After appeal and remand, the trial court considered whether the easement had been abandoned. The trial court found that, despite

the defendants' claim that they had used the right-of-way, and intended future use of it, the easement had been abandoned:

there was not only nonuse of the property for ingress and egress as evidenced by the grass and shrubs that grew there, the intimidating and bullying conduct of the [defendants] preventing others from accessing [the street] to the lake constitutes affirmative action on their part that they wished to preclude, and essentially abandon, the use of [the street]. As they indicated in their prior pleadings from another action in this Court, [the street] was on paper only as the neighborhood as a whole ignored and failed to develop or use the platted [street].

In reviewing the trial court's determination regarding the abandonment of the easement, the Court of Appeals determined that, "although nonuse alone does not prove abandonment, lengthy nonuse may be considered together with other acts to sufficiently indicate the requisite intent to abandon an easement." *Id.* at 5. Further, the court found that "a party's historical nonuse may be used to explain that party's intent." *Id.*

While the condition of the street in *LaFave*, and its historical nonuse, is similar to that of Paige Street, the actions of the parties are distinct. In affirming the trial court's findings, the Court of Appeals focused on the defendants' historical position that the street was a "paper" road only, and that the defendants actively prevented others from utilizing the right-of-way. The court found that such acts "sufficiently showed [the defendants'] belief and intent that [the street] was not a roadway available for use, and thus demonstrated a clear intent to abandon their easement rights." *Id.* at 6.

Unlike the instant case, the *LaFave* defendants previously litigated the easement issue, and, at that time, argued that the easement was not in use. Further, the defendants actively prevented others from using the road. Therefore, the *LaFave* court could infer from these actions the defendants' belief that the road was not available for use and that their clear intent was to abandon their easement rights.

The court in *Michigan Dept of Nat. Res. v. Carmody-Lahti Real Estate, Inc.*, 472 Mich. 359, 699 N.W.2d 272 (2005) also addressed an easement holder's intent to abandon. The plaintiff, Michigan Department of Natural Resources, used their deeded right-of-way — a former railroad route — as a snowmobile and recreation trail until the "defendant installed a fence that blocked a

portion of the right-of-way, substantially interfer[ing] with its recreational use." *Id.* at 366. The deed limited the use of the right-of-way to railroad purposes. *Id.* at 380. Prior to the plaintiffs purchase, its predecessor-in-interest, a railroad company, sought and obtained federal permission to abandon its railroad. The court then considered whether the railroad company manifested an intent to abandon the underlying easement itself, or just the railway itself. *Id.* at 385. The court reasoned:

[The intent to abandon] cannot necessarily be inferred from the fact that a railroad company sought and obtained permission from the ICC/STB to abandon a railway and took action consistent with that federal authorization. A railway located on an easement is analytically distinct, after all, from the easement itself. But as already shown, the easement in this case is *itself* limited to railroad purposes under the 1873 deed. Therefore, in both seeking federal permission to abandon its railroad and removing the rails themselves, Soo Line manifested an intent to abandon the underlying easement (which was limited to railroad uses) and took action consistent with that intent. [Emphasis in original].

Id. at 385-86. Importantly, the court found a direct connection between the actions taken by the easement holder and the purpose of the easement itself. The easement was limited to railroad purposes, and the easement holder sought and obtained permission to remove, and thereafter did remove, its railway. Therefore, the court could infer the railroad company's intent to abandon its easement.

Here, there is no such direct connection between the actions taken by Plaintiffs and the purpose of the easement. While obstructing a right-of-way with a fence, seawall and boat, among other items, frustrates the purpose of the easement, such actions do not directly demonstrate Plaintiffs' intent.⁴ Defendants argue, essentially, that Plaintiffs were acting as the fee owners of their respective halves of Paige Street rather than as holders of a right-of-way easement. While the fence, boat, boat trailer, woodpile and seawall are obstructions that potentially destroy the object of the easement and the means of its enjoyment, Defendants have not shown that such was Plaintiffs' clear intent. Rather, Defendants pray this Court infers an intent to abandon the easement from the mere presence of those items alone. However, such

⁴ Nor does the failure of Plaintiffs' predecessors-in-interest to object to the foreclosure demonstrate an intent to abandon the easement. MCL 211.78k(5)(e) provides that all easements of record survive a foreclosure judgment; therefore, Plaintiffs' predecessors-in-interest were not required to object in order to preserve their rights.

obstructions — without any other evidence of intent — show only that Plaintiffs exceeded the scope of their easement. The Court, rather than drawing Defendants' proffered inference, could just as reasonably infer from Plaintiffs' acts that they "merely" intended to commit a trespass on the easement by exceeding its scope or that they placed the obstructions on Paige Street because they *believed* that they held greater rights to the property than they actually did. Such inferences, without any other evidence of Plaintiffs' intent, are as well founded as an inference of an intent to abandon.

As to Plaintiff Sawyer, Defendants argue that his failure to object to the obstructions on Paige Street manifests his intent to abandon the easement. Plaintiff Sawyer owned his property for approximately two years before Defendants made improvements to Paige Street. Plaintiff Sawyer does object to the obstructions placed on Paige Street by Defendants. Regardless of Plaintiff Sawyer's true motivations for seeking to enforce his rights against Defendants, rather than against Plaintiffs prior to Defendants' purchase, Defendants have not shown, nor does the Court find, a clear intent by Plaintiff Sawyer to abandon the easement.

The Court finds, therefore, that Defendants have failed to meet their burden to show Plaintiffs' intent to abandon the easement over Paige Street.

C. Equity

Defendants next turn to an equitable argument in support of their request that this Court terminate the right-of-way easement over Paige Street. Defendants argue that they are innocent parties that relied, at their detriment, on alleged statements made to them by township officials. While the Court decides this matter on the merits as discussed above, the Court nevertheless will address the equitable arguments made by Defendants.

The Court finds that neither party is without fault in this matter. The Court does note that perhaps, had Plaintiffs acted more expeditiously in seeking to enforce their rights by way of an injunction, some cost to Defendants might have been mitigated.⁵ Further, the Court is not convinced that Plaintiffs are motivated by a desire to preserve their easement rights so much as they do not wish to have Defendants as neighbors. However, such motivations do not clearly

⁵ Defendants failed to show the amount that any such alleged delay by Plaintiffs cost them.

manifest an intent to abandon the easement. The antagonizing conduct of Plaintiffs towards Defendants also concerns the Court.

Defendants, on the other hand, admit that they never consulted with an attorney or any other professional prior to purchasing Paige Street and making improvements to it. *Trial Transcript - Volume I*, 222:20-25, 224:1-5; *Trial Transcript - Volume II*, 21:21-24, 22:12-18. Rather, Defendants mistakenly, and unfortunately, relied on their understanding that they "own[ed] it in full. It was bought from an auction, legally, clear and free, with no road end on it at all, per the township, per the county, per the state." *Trial Transcript - Volume I*, 223:10-15. Defendants took a quit claim deed from the county treasurer, subject to the easement of record in the Plat of Rio Vista, and Defendants proceeded to make improvements at their own peril.

D. Removal of Improvements from Paige Street

The Court, having found that Plaintiffs possess a right-of-way easement over Paige Street, and that Defendants have not shown any evidence that Plaintiffs intended to abandon said easement, must now address the removal of the improvements Defendants made to Paige Street.

"The owner of the right of way has the right to a reasonably unobstructed passage at all times, and also such rights as are incident or necessary to the enjoyment of such right of passage." *Murphy Chair Co. v. Am. Radiator Co.*, 172 Mich. 14, 29, 137 N.W. 791, 797 (1912). Further, private docks are not permitted at road ends because they are intended to afford access to the public." *Higgins Lake Prop. Owners Ass'n v. Gerrish Twp.*, 255 Mich. App. 83, 104, 662 N.W.2d 387, 404 (2003). Nor is the "great expense to the defendants compared with the injury to complainants" of consequence when enforcing deed restrictions. *Longton v. Stedman*, 182 Mich. 405, 414, 148 N.W. 738, 741 (1914). See also *Webb v. Smith*, 224 Mich. App. 203, 211, 568 N.W.2d 378, 382 (1997) ("The order requiring defendants to demolish their home seems harsh; nonetheless, we point out that the applicable deed restrictions were readily ascertainable.").

Therefore, the Court hereby orders Defendants to remove the deck/dock, seawall, and any other improvements made to Paige Street. While the Court understands that this is will be of great expense to Defendant, it nonetheless finds that it is the appropriate remedy.

E. Conclusion

The Court hereby finds that Plaintiffs possess a right-of-way easement over Paige Street. Plaintiffs are awarded the sum of \$1 in nominal damages for Defendants' trespass to the easement. Defendants are ordered to remove the deck/dock, seawall, and any other improvements made to Paige Street.

It is so ordered.

Dated:

10/08/2019

Thomas R. Evans

THOMAS R. EVANS (P38525)

Circuit Judge