STATE OF MICHIGAN

COURT OF APPEALS

ALLEN MODROO and BONNIE S. MODROO, Plaintiffs-Appellants, v MARIE COPPA and AMELIA JAYNE, Defendants-Appellees.	UNPUBLISHED January 19, 2006 No. 264307 Leelanau Circuit Court LC No. 04-006733-CH

Before: Zahra, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(10) in this action involving a dispute over the existence and validity of an easement claimed by defendants, who own the dominant estate, that traverses two parcels owned by plaintiffs, the servient estates, and which alleged easement provides access to defendants' property from a roadway abutting plaintiffs' property. We affirm.

Plaintiffs own two adjoining parcels of land on Grand Traverse Bay in Leelanau County. The northernmost parcel abuts a roadway known as Cherry Tree Lane, and this roadway dead ends at the northern boundary of said parcel. Cherry Tree Lane is located within the Old Mission View Subdivision. The parties' parcels at issue in this case are not located within the Old Mission View Subdivision. Defendants' property lies directly to the south of plaintiffs' parcels. Defendants maintain that a valid easement exists, running from Cherry Tree Lane over both of plaintiffs' parcels and connecting at defendants' property line,[1] thereby giving them access to their property via Cherry Tree Lane and the easement. Lee Point Road lies directly to the west and abuts plaintiffs' and defendants' property. Plaintiffs maintained that defendants have no legal right to utilize the claimed easement for reasons forthcoming in this opinion.

[1] Defendants own several adjoining parcels of property that lie to the south of plaintiffs' parcels. When we speak of defendants' "property," the reference will pertain to the parcel that directly adjoins plaintiffs' southernmost parcel unless otherwise indicated.

There is no dispute that two 1960 warranty deeds regarding conveyances by predecessors in title to the parties here contained reservations of an easement over both of plaintiffs' parcels by the past owners of defendants' property who at one time owned all of the three parcels at issue. These easement reservations provided respectively:

> RESERVING, HOWEVER, unto the Grantors herein and their assigns, an Easement, 20 ft. wide, for ingress to and egress from premises on the south, the centerline of said Easement beginning at the southerly centerline extremity of Cherry Tree Lane as platted in Old Mission View Subdivision recorded in Leelanau County Records; thence S.7 [degrees] 33' W., 129.19 ft. to the south line of the parcel described above.
>
> RESERVING unto the said . . . equal and mutual rights of ingress and egress in and through said Easement; and also RESERVING unto the said . . ., an Easement 20 ft. wide, for ingress to and egress from premises on the south, the centerline of said Easement being an extension of the centerline of the Easement first described above to the south line of the premises first described above.[2]

The focus of this appeal and the central claim by plaintiffs below entails and entailed the argument that the above-referenced easement reservations were void *ab initio* (from the beginning). The basis for this claim was set forth in plaintiffs' complaint:

> [U]nbeknownst to the grantors, Cherry Tree Lane was no longer a public roadway at the time the easements were created, as it was previously abandoned on or about May 26, 1958, by Order of the 13th Circuit Court for the County of Leelanau. In addition to the abandonment of Cherry Tree Lane, Orchard Drive and Mission View Drive were likewise [abandoned] and reverted to the owners of the property through which said roadways traversed. . . .
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> As of the date of the abandonment, Cherry Tree Lane became a private road for the benefit of the residences of Old Mission View Subdivision.
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> Plaintiffs assert that neither party has the right to use Cherry Tree Lane to access their property and attached hereto . . . is a copy of a statement signed by the residents of Old Mission View Subdivision indicating that Cherry Tree Lane is a private road for the use and benefit of the residents of Old Mission View Subdivision only.[3]

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[2] Numerous deeds were submitted by the parties to the trial court regarding conveyances over the years relative to the parties' parcels, all of which expressly reflect recognition of and reference to the easement, thus subjecting and binding the parties and their predecessors to the easement, assuming the validity of the easement at the time of its creation.

[3] The document is signed, apparently, by some of the lot owners in the Old Mission View (continued…)

It is plaintiffs' theory that, because Cherry Tree Lane was not a public road at the time of the inception of the easement, and because the roadway was in fact private with no right of access by those living outside the Old Mission View Subdivision, the easement's intended purpose was impossible from the beginning, rendering it void *ab initio.*

The lower court record contains a 1958 order entered by the Leelanau Circuit Court vacating Cherry Tree Lane, as well as other roads, pursuant to a petition brought by the Porter-Mulder Land Company and the Muskegon Bank & Trust Company. The order recites numerous procedural actions that were taken in the process of vacating the road, ostensibly in compliance with the governing law of the day. The order provides that the "highways so vacated shall be private drives for the use and enjoyment of the purchasers and owners of lots in said plat." The order additionally provides that the property shall be free and clear from any rights, title, and interests held by the county, the county road commission, the township, the state, and the public in general as previously created by the plat and dedication.

Defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(10), arguing that the easement was legally created via the deeds and not void at its inception, and that the easement was used by defendants and their predecessors in title and never abandoned. Defendants attached three affidavits in support of the motion. One was the affidavit of Jane Autenrieth, who averred that she and her now-deceased husband were defendants' immediate predecessors in title.[4] Mrs. Autenrieth asserted that she and her husband "would walk the easement occasionally, generally at least weekly, except in the winter when it was walked less frequently[.]" She further averred that her husband "traveled the easement occasionally with his four-wheel all terrain vehicle[,]" and that there had never been any interference with the use of the easement during their residency.

Defendants also submitted the affidavit of Frederick Kilbourn, Sr., who lived in the area, was familiar with the easement and the properties, and who was a close friend of the Autenrieths. Kilbourn averred that he had frequently observed Mr. Autenrieth traveling over the easement, "both by motor vehicle, on foot, and by a four-wheel all terrain vehicle." Mr. Autenrieth had given Kilbourn permission to traverse the easement, which Kilbourn did often, either by foot, snowmobile, or by four-wheel, all-terrain vehicle. According to Kilbourn, there was never any interference with the easement, nor had Mr. Autenrieth ever indicated an intent to abandon or discontinue use of the easement. Kilbourn's and Mrs. Autenrieth's affidavits indicated that Kilbourn and Mr. Autenrieth used the easement to visit friends in the Old Mission View Subdivision.

(…continued)

Subdivision, and it indicates only that the undersigned maintain Cherry Tree Lane for their private use.

[4] The affidavit indicates that Mrs. Autenrieth and her husband bought property adjacent to the benefited parcel in 1985, on which their home was built. They lived there until she sold the property in 1999 to defendants; her husband died in 1998. Mrs. Autenrieth and her husband bought the benefited or dominant parcel, i.e., defendants' property, in 1990. This parcel was also sold to defendants in 1999.

Finally, the trial court received the affidavit of defendant Marie Coppa, who averred that plaintiffs, on the day defendants took possession, came to defendants and asked to purchase the easement. She further indicated that plaintiffs had plowed snow onto the easement and leveled, raked, and cultivated the grass on the easement, despite defendants' protests. Coppa additionally averred that the easement was important "because it is the only feasible access to our property because the contour of [the parcel] and Lee Point Road makes access directly to Lee Point Road dangerous[.]" She asserted that ever since buying the property in 1999, she always accessed the property by motor vehicle and by way of the easement, except when snow blocked her access, or when plaintiffs' vehicles blocked the easement. Coppa claimed that plaintiffs had intentionally blocked the easement at times through placement of chains, vehicles, boats, and snowmobiles on the easement, which prevented access to defendants' property by workers hired by defendants to mow, farm, and build a pole barn. Finally, Coppa contended that defendants never abandoned the easement and never failed to use it unless prevented to do so by plaintiffs.

Plaintiffs filed their own motion for summary disposition, plus a response to defendants' motion for summary disposition. Plaintiffs attached the affidavit of David Dietrich to their motion and response. This affidavit was not signed, and the transcript of the hearing on the motions for summary disposition indicates that counsel was still awaiting and anticipating Mr. Dietrich's execution of the document. A week after the hearing, a signed and notarized version of Dietrich's affidavit was filed with the court. We note that Dietrich's affidavit avers that his parents previously owned plaintiffs' property from 1987 to 1999, and that during this time there was a cable or chain attached to two posts blocking access to the easement from Cherry Tree Lane. Dietrich indicated that his father had placed a boat in front of the posts and chain, and that his father had told him that he never saw anyone using the easement. Plaintiffs also attached the affidavit of Mark Richter,[5] who averred that his grandparents had previously owned plaintiffs' property from the 1960s to 1987. He further averred that there was always a cable or chain attached to two posts blocking access to the easement from Cherry Tree Lane. According to Richter, the purpose of the chain "was to keep people from driving across my grandparents' property as a shortcut to Lee Point Road." Plaintiffs also relied on the document signed by residents in the Old Mission View Subdivision indicating that they maintained Cherry Tree Lane for their private use. Additionally, plaintiffs submitted a diagram showing that some trees were located within the easement, and they attached a photograph showing these trees and showing a grassy area in the vicinity of the easement.

At the hearing on defendants' motion for summary disposition, counsel for plaintiffs informed the court that they were not making any claim for abandonment. Plaintiffs relied on their theory that the easement was void *ab initio* in light of the fact that Cherry Tree Lane was a private road when the easement was created in 1960. The trial court granted the motion for summary disposition, finding that the easement was in the public record and known to everyone, and short of clear impossibility to use the easement, which had not been the case, the easement could not be deemed to never have existed. The trial court noted that the easement and Cherry

[5] The record copy of this affidavit is signed and notarized.

Tree Lane were at times used to visit friends in the Old Mission View Subdivision; therefore, use of Cherry Tree Lane was permitted regardless of its private nature. The trial court also found that the lot owners in the Old Mission View Subdivision had not attempted to actually prevent defendants from using Cherry Tree Lane. The trial court continued:

> [I] think even if there were a legal barrier and they actually prevented strangers from using Cherry Tree Lane, it still is an easement that has been of some value to the participants, and [it should not be eliminated] just because in one person's opinion it isn't worth as much, or isn't as useable as it might have been. It's an easement that was in the public record; everyone knew about it.

Regarding any chains that may have been placed at the end of Cherry Tree Lane, the court found that the purpose appears to have been to prevent people in general from using the road and easement as a shortcut to Lee Point Road, but not to prevent the easement holders from using the easement. The trial court noted that there was no evidence that any chain effectively and actually blocked the easement; indeed, there was evidence to the contrary. Regardless, even if blocked, the easement did not terminate.

An order granting defendants' motion for summary disposition was subsequently entered. The order legally described the easement, indicated that it burdened plaintiffs' parcels for the benefit of defendants' property, ruled that the easement was not void or impossible at its inception, and permanently enjoined plaintiffs from blocking the easement or otherwise interfering with it.

Plaintiffs filed a motion for reconsideration, asserting that subsequent to the court's ruling, lot owners in the Old Mission View Subdivision had unilaterally constructed a barrier next to the easement consisting of posts and chains, posted a "no trespassing" sign, sent letters to plaintiffs and defendants informing them that they could not use Cherry Tree Lane to access their respective properties, and are in the process of adopting a resolution, to be recorded, barring third parties from using Cherry Tree Lane. Pictures of the barrier and a copy of the letter sent to the parties were attached to the motion. The letter from the Old Mission View Subdivision lot owners[6] threatens both plaintiffs and defendants with criminal and civil trespass charges and actions should they choose to access their properties via Cherry Tree Lane. The trial court, first noting that plaintiffs had not timely filed the motion for reconsideration, found that the motion presented the same issues previously ruled on by the court, and the court did not find that palpable error had been demonstrated. Plaintiffs appeal as of right.

This Court reviews de novo a trial court's ruling to either grant or deny a motion for summary disposition. *Kreiner v Fischer,* 471 Mich 109, 129; 683 NW2d 611 (2004). Further, questions of law in general are reviewed de novo. *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 612; 684 NW2d 800 (2004).

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[6] The letter was from Richard and Amy Freundl who own lot 28 in the Old Mission View Subdivision. It is not signed by any other lot owners in the subdivision.

MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue regarding any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. *Quinto v Cross & Peters Co,* 451 Mich 358, 362; 547 NW2d 314 (1996), citing MCR 2.116(G)(5). Initially, the moving party has the burden of supporting its position with documentary evidence, and, if so supported, the burden then shifts to the opposing party to establish the existence of a genuine issue of disputed fact. *Quinto, supra* at 362; see also MCR 2.116(G)(3) and (4). "Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in [the] pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Quinto, supra* at 362. Where the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id.* at 363. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp,* 469 Mich 177, 183; 665 NW2d 468 (2003).

On appeal, plaintiffs argue that the trial court clearly erred when it ruled that the easement was not void *ab initio*, when it ruled that defendants had a right to use Cherry Tree Lane, and when it determined the rights of owners living on Cherry Tree Lane when they were not parties to the suit.[7] Plaintiffs also argue that the court abused its discretion in denying the motion for reconsideration.

"An easement is the right to use the land of another for a specified purpose." *Schadewald v Brule*, 225 Mich App 26, 35; 570 NW2d 788 (1997). An easement may be created by either an express grant, reservation or exception, or by covenant or agreement. *Rossow v Brentwood Farms Development, Inc,* 251 Mich App 652, 661; 651 NW2d 458 (2002).[8] An appurtenant easement attaches to the land and is incapable of existence separate and apart from the land to which it is annexed. *Schadewald, supra* at 35. The land benefited or served by an appurtenant easement is referred to as the dominant tenement, and the land burdened by the appurtenant easement is called the servient tenement. *Id.* at 36. Once an easement is granted, it cannot be modified by either party unilaterally. *Id.* Where possible, courts construe an easement as

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[7] We note that plaintiffs briefly assert that the easement had not been used, as there was no evidence of a roadway and the easement is covered with healthy grass and has several large trees growing in its path. However, defendants presented documentary evidence of actual use and the trees and grass do not establish that the easement was not or could not be used as claimed. Furthermore, plaintiffs waived any abandonment theory by counsel's remarks to the court at the hearing on the motions for summary disposition.

[8] "An easement may be created by an express reservation in another document of conveyance. For example, at the time a parcel of property is conveyed by its owner, the owner may reserve an easement over it for himself or herself or for the benefit of other property he or she owns." 1 Cameron, *Michigan Real Property Law* (2d ed), Easements, § 6.6, p 194.

appurtenant and perpetual because easements appurtenant run with the land. 1 Cameron, *Michigan Real Property Law* (2d ed), Easements, § 6.22, p 210.

An easement may be terminated based on end of purpose.

> When an easement is granted for a particular purpose and that purpose comes to an end, the easement terminates. *MacLeod v Hamilton*, 254 Mich 653; 236 NW 912 (1931). In that case the court quoted an Iowa decision with approval, "'A grant of an easement for particular purposes having been made, the right thereto terminates as soon as the purposes for which granted cease to exist or are abandoned or are impossible.'" . . . If the subject of the easement itself is destroyed, the easement terminates. [*Michigan Real Property Law, supra* at § 6.28, pp 216-217.]

Plaintiffs rely on *Waubun Beach Ass'n v Wilson*, 274 Mich 598; 265 NW 474 (1936); *MacLeod, supra*; *City of Boyne City v Crain*, 179 Mich App 738; 446 NW2d 348 (1989); *Cheslek v Gillette*, 66 Mich App 710; 239 NW2d 721 (1976); and *Andersen v Schmidt*, 16 Mich App 633; 168 NW2d 437 (1969), for the proposition that an easement granted for a particular purpose terminates when the purpose for which it was granted ceases to exist or is frustrated, when the purpose or use is abandoned, or when it is impossible to carry out the purpose or use. Indeed, these cases do support that general proposition. *Waubun, supra* at 615 (if easement by necessity had previously arisen, it terminated when other avenues of access to resort lot became available); *MacLeod, supra* at 656-657 (easement granted for drainage purposes only terminated when contemplated purpose was abandoned by establishment of drain at another location and easement lay dormant for 54 years); *Boyne, supra* at 744-746 (railroad easement or right of way granted by deed extinguished by impossibility when property previously reverted to state due to delinquent taxes); *Cheslek, supra* at 715-716 (easement for purposes of operating funeral business can continue only so long as successors use easement for funeral business); *Andersen, supra* at 635-636 (easement granted to allow access to boathouse terminated after boathouse went unused, then deteriorated to point where it could not be used, and then collapsed completely). Plaintiffs rely on these cases, arguing that the purpose of reserving the easement was to utilize it in accessing the property via Cherry Tree Lane, but this purpose could not be fulfilled and was impossible to carry out because Cherry Tree Lane constituted private property or a private road, which the parties and their predecessors in title had no right to use. We disagree with plaintiffs' argument.

Assuming that the 1958 court order vacating Cherry Tree lane was valid,[9] the purpose of the easement was not frustrated or made impossible simply because Cherry Tree Lane was a

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[9] Defendants argue that the 1958 court order, standing alone, was ineffective to vacate Cherry Tree Lane because there was no evidence of a concurrent legislative enactment vacating the roadway adopted by the governing municipality body, and because the court order did not direct the preparation and filing of a revised or corrected plat. Defendants also contend that at most the court order relieved the municipality of having responsibility for the road, but it could not
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private road. Without yet taking into consideration the recent events in which a couple of Cherry Tree Lane residents apparently declared that plaintiffs and defendants cannot use the roadway, which matter will be addressed when discussing alleged error relative to the motion for reconsideration, the undisputed evidence reflected that the easement had been used by defendants and their predecessors in title for purposes of ingress and egress via Cherry Tree Lane and that the lot owners in the Old Mission View Subdivision had not actually prevented or interfered with such use. In fact, the affidavits submitted by defendants suggested permissive use of Cherry Tree Lane. The residents of the Old Mission View Subdivision were not the only individuals that could use Cherry Tree Lane simply because the roadway was vacated and made private. Clearly, family, friends, acquaintances, social guests, licensees, and invitees of any particular resident of the Old Mission View Subdivision could use Cherry Tree Lane in visiting the resident. Plaintiffs cite no law to the contrary, nor do plaintiffs even attempt to broach the issue regarding the parameters of what a "private road" encompasses with respect to access rights by third parties. Merely because Cherry Tree Lane was private, it did not automatically mean defendants and their predecessors in title could not utilize the easement. Again, there was evidence of years of use consistent with the purpose of the easement, with no evidence that the subdivision tried to prevent defendants or their predecessors from using the easement. The document signed by subdivision lot owners indicating that they maintain Cherry Tree Lane for their private use does not reflect that defendants are prohibited from accessing their easement by way of Cherry Tree Lane, and the document is a recent development. Further, there is no accompanying documentation indicating whether the signatures constitute all of the lot owners in the subdivision. Moreover, we question whether this is admissible evidence without affidavits from the signatories attesting to their execution of the document. Accordingly, we cannot conclude that the easement was void *ab initio* as the purpose of the easement was not frustrated, nor impossible to carry out, despite the private nature of Cherry Tree Lane.

Plaintiffs next argue that the trial court erred in finding that defendants had a right to use Cherry Tree Lane. This argument needs little response. The order granting the motion for summary disposition, through which the court speaks, did not indicate that defendants had such a right. In the court's ruling from the bench, the court stayed clear from making a definitive ruling regarding plaintiffs' rights and the subdivision lot owners' rights with respect to Cherry Tree Lane. At one point in the hearing, the court indicated that the parties could not assert the rights of the lot owners. The trial court did suggest that the subdivision's lot owners could not prevent defendants from using the easement and Cherry Tree Lane to visit the lot owners, and we believe this to be legally correct because the court's reasoning implicitly, but clearly, operates under the

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preclude the public from using it, where the road was dedicated to public use in the original plat. In a reply brief, plaintiffs vigorously defend the validity of the court order and their position that Cherry Tree Lane was vacated, vesting rights solely in the subdivision's lot owners and creating a private road. Plaintiffs point out that defendants never raised this argument below and conceded that it was a private road. Plaintiffs also maintain that defendants rely on today's law concerning vacation or abandonment of public roads instead of the law applicable in 1958, which would control, and which was satisfied. We find it unnecessary to address and resolve these issues as we find that the court did not err, even assuming that the 1958 court order effectively vacated Cherry Tree Lane and vested private ownership with the subdivision's lot owners.

assumption that the lot owner being visited consents to and desires the visit. The trial court did not state that defendants had a general, absolute, and unrestricted right to traverse Cherry Tree Lane.

Next, plaintiffs argue that the trial court erred in determining the rights of the lot owners living in Old Mission View Subdivision when they were not parties to the lawsuit. Again, this argument finds no support in the record and fails for the reasons stated in our analysis of the preceding issue.

Finally, plaintiffs argue that the trial court erred in denying the motion for reconsideration. A trial court's decision with respect to a motion for reconsideration is reviewed for an abuse of discretion by this Court. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000). "An abuse of discretion exists when the result is so palpably and grossly violative of fact and logic that it evidences perversity of will or the exercise of passion or bias rather than the exercise of discretion." *Id.* MCR 2.119(F)(3) provides:

> Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

MCR 2.119(F)(3) merely provides guidance to the trial court in deciding a motion for reconsideration and does not operate to restrict the court from exercising its discretion to grant such a motion where appropriate in a particular case. *Michigan Bank-Midwest v DJ Reynaert, Inc,* 165 Mich App 630, 646; 419 NW2d 439 (1988). The court may grant a motion for reconsideration where it determines that a serious error was made based on an intervening change in law or otherwise. *Id.* (citation omitted). We note that in ruling on a motion for summary disposition, a court considers the evidence then available to it. *Quinto, supra* at 366 n 5.

We first acknowledge defendants' contention that plaintiffs have cited no authority that directly states that a court may consider newly arisen facts when deciding a motion for reconsideration. The language of MCR 2.119(F)(3), however, does not appear so restrictive as to absolutely preclude newly arisen facts from forming the basis for granting a motion for reconsideration. Here, the evidence or facts relied on by plaintiffs supposedly arose or came into existence after the motion for summary disposition was heard. Nonetheless, we conclude that the trial court did not abuse its discretion in denying the motion for reconsideration.

First, we question whether the evidence constituted admissible evidence, where the photographs and letter were not accompanied by any authenticating documentation or affidavits. Additionally, the letter is from the owners of only one lot in the Old Mission View Subdivision, and all of the subdivision's lot owners have rights in the roadway, although we acknowledge that it is the owner of the last lot at the southern end of Cherry Tree Lane who is attempting to block usage. The right of this lot owner to block the end of Cherry Tree Lane would necessarily have to be determined if reconsideration or the relief requested is granted, yet the lot owner is not a

party to the suit. Finally, and importantly, plaintiffs' action sought a ruling that the easement was void *ab initio* or void at its inception, yet the new evidence does not bear on the validity of the easement when first created. In sum, we find no abuse of discretion.

Affirmed.

/s/ Brian K. Zahra
/s/ William B. Murphy
/s/ Janet T. Neff