STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL R. BELTINCK, and DANNETTE BELTINCK, Plaintiffs-Appellants, v JEFFREY J. QUINN, and SHANNON L. QUINN, Defendants/Cross-Plaintiffs-Appellees, and YVONNE A. DEMLOW, Defendant/Cross-Defendant-Appellee.	UNPUBLISHED November 14, 2006 No. 270361 Isabella Circuit Court LC No. 04-003680-CH

Before: Murphy, P.J., and Meter and Davis, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the circuit court's order denying their motion for summary disposition under MCR 2.116(C)(9) against defendants/cross-plaintiffs Jeffrey and Shannon Quinn and granting in part defendant Yvonne Demlow's motion for summary disposition under MCR 2.116(C)(8) and (10). Plaintiffs also challenge the lower court's earlier decision to set aside a default entered against the Quinns and the subsequent award of costs based thereon. For the following reasons, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

This case involves two parcels of property: plaintiffs own lot 164, a lakefront lot on Lake Isabella, and the Quinns own lot 165, which directly abuts lot 164 at the rear. Demlow originally owned the Quinns' lot, and Demlow's grandparents originally owned plaintiffs' lot. In 2003, Demlow, who is not an attorney, drafted an easement that reads as follows:

> Robert Paul Moon, Sr. and Dorothy Opal Moon as co-trustees of The Moon Family Trust Agreement whose address is 1059 Crown Point Drive, Lake Isabella, Michigan 48893 grant to Yvonne A. Demlow whose address is 1057 Crown Point Drive, Lake Isabella, Michigan 48893 an easement across the West

> 25 feet of Lot 164 Lake Isabella Plat No. 2 recorded in Liber 8 Page 477 Isabella County Records.
>
> This easement, with right of ingress and egress for use of same, runs with the land and is binding on the heirs and assigns of both parties.
>
> This easement is granted for the full consideration of One and 00/100 Dollar ($1.00).

It is undisputed that the easement was properly executed and recorded. Four months later, plaintiffs purchased lot 164 from Demlow's grandparents, and the Quinns then purchased lot 165 from Demlow. At the closing, Demlow gave to the Quinns a written "assignment of easement" granting "any and all rights I have been given" under the easement described above. The assignment was also properly executed and recorded. Plaintiffs and the Quinns began to have disagreements about the use of the easement shortly after the Quinns took possession.

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, this Court considers all evidence submitted by the parties in the light most favorable to the non-moving party and grants summary disposition only where the evidence fails to establish a genuine issue regarding any material fact. *Id*., 120. A motion brought under MCR 2.116(C)(8) should be granted only where the complaint is so legally deficient that recovery would be impossible even if all well-pleaded facts were true and construed in the light most favorable to the non-moving party. *Id*., 119. Only the pleadings may be considered when deciding a motion under MCR 2.116(C)(8). *Id*., 119-120. Under MCR 2.116(C)(9), where a defendant has failed to state a valid defense, all of the defendant's well-pleaded allegations are accepted as true, and summary disposition is appropriate only "when the defendant's pleadings are so clearly untenable that as a matter of law no factual development could possibly deny the plaintiff's right to recovery." *Slater v Ann Arbor Pub Schools Bd of Ed*, 250 Mich App 419, 425-426; 648 NW2d 205 (2002).

Plaintiffs first argue that the trial court erred in finding the easement appurtenant to lot 165 rather than in gross to Demlow. We disagree.

"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). Michigan courts recognize two types of easements: easements appurtenant and easements in gross. *Collins v Stewart*, 302 Mich 1, 4; 4 NW2d 446 (1942). An easement in gross is personal in nature and, except in the case of easements for utility and railroad purposes, is not assignable. *Smith v Dennedy*, 224 Mich 378, 381; 194 NW 998 (1923). An appurtenant easement attaches to the land and is incapable of existence apart from the land to which it is annexed. *Schadewald*, *supra* at 795. The rules for determining the character of an easement are found in *Smith*, *supra* at 382 (quoting 9 RCL 738):

> Ordinarily the intention of the parties is primarily to be determined from the written instrument. Some courts adhere to the strict rule that the conveyance alone must show that the parties intended the right to be made appurtenant to certain land therein mentioned. The … reasonable and prevailing rule is that an

> easement is appurtenant if so in fact, although not declared to be so in deed, and that if the intention is not sufficiently expressed this question may be determined by the relation of the easement to the so-called dominant estate, or the absence of it, and in the light of all the circumstances under which the grant was made.
>
> As a rule of construction courts favor the appurtenant easements, and if the right in controversy is in its nature an appropriate and useful adjunct to the land conveyed, having in view the intention of the grantee as to its use, there being nothing to show that the parties intended it to be a mere personal right, it should be held to be appurtenant and not in gross, the presumption therefore being in favor of the former where there is a doubt as to the real nature of the grant. And so an easement is never to be construed to be in gross when it can fairly be construed to be appurtenant.

It is not necessary to use words of inheritance or successorship to create an easement running with the land, and "[t]he omission of words of inheritance from the [grant] of the easement does not establish an easement in gross." *Collins*, *supra* at 5. Finally, once an appurtenant easement is created, neither party can modify it unilaterally. *Schadewald*, *supra* at 795. The principal distinction between an easement appurtenant and an easement in gross is that where there is an appurtenant easement there must be a dominant tenement. *Smith*, *supra* at 381.

The trial court reached the correct conclusion. The trial court reasoned that it "may not consider extrinsic circumstances surrounding an unambiguous event," relying on case law controlling the interpretation of an easement's scope, e.g., *Little v Kin*, 468 Mich 699; 664 NW2d 749 (2003). In our view, the court should have considered the more relevant case law guiding the determination of the *type* of easement, e.g., *Smith*, *supra*. Despite the deviation from the correct precedent, the court properly decided this issue.

The trial court correctly observed that the language "runs with the land" in the easement is "a hallmark phrase of appurtenant easements" and is inconsistent with an in gross easement, relying on *Haab v Moorman*, 332 Mich 126, 141; 50 NW2d 856 (1952) and Michigan Land Title Standards 5th 14.1. The easement also specifies that it is granted to Ms. Demlow. Even if this rendered the easement ambiguous, in that case whether the easement is appurtenant or in gross "may be determined by the relation of the easement to the so-called dominant estate, or the absence of it, and in the light of all the circumstances under which the grant was made." *Smith*, *supra* at 382. Further, "[a]s a rule of construction courts favor the appurtenant easements, and if the right in controversy is in its nature an appropriate and useful adjunct to the land conveyed … it should be held to be appurtenant and not in gross." *Id*. "An easement will not be presumed to be a personal right where it can be construed as appurtenant to some estate." *Collins*, *supra* at 4. The easement here can indeed be construed as appurtenant to lot 165, as identified by its street address. Moreover the easement was drafted by the grantor's granddaughter, who testified that she and her children had "always walked across" lot 164. She is not an attorney and likely named herself because she was not familiar with the legal ramifications of doing so. The circumstances surrounding the grant and the legal presumption in favor of appurtenant easements mandate our conclusion that the trial court reached the correct conclusion.

Plaintiffs next assert that the trial court erred when it decided that the easement did not violate the statute of frauds. Plaintiffs argue that the easement fails to describe the dominant estate with sufficient specificity. We disagree.

An easement is subject to the statute of frauds. *Forge v Smith*, 458 Mich 198, 205; 580 NW2d 876 (1998). An instrument creating an express easement must show "a clear intent to create a servitude," and ambiguities are resolved against creation of an easement. *Id*. Sufficiency under the statute of frauds proceeds on a case-by-case approach rather than mechanically applied rules. *Id*., 206; see also *Opdyke Investment Co v Norris Grain Co*, 413 Mich 354, 367-368; 320 NW2d 836 (1982). Our Supreme Court has repeatedly held that a description of property in a contract for the sale of land that gives only the street number is sufficient if such property can be identified. *Tandy v Knox*, 313 Mich 147; 20 NW2d 844 (1945). If a street address is sufficient for a contract for the sale of land, we conclude that it must also be a sufficient descriptor in an easement, and we can perceive no reason why it should necessarily not be. The address listed in the easement in this case is therefore sufficient to satisfy the statute of frauds.

Plaintiffs next argue that the trial court erred in deciding that the Quinns have access to Lake Isabella under the easement. We disagree.

In this case, the easement expressly states that the grant is for the "ingress and egress for use of same." Therefore, the Quinns clearly have the right to enter and leave plaintiffs' property, by way of the western 25 feet. Although the easement does not explicitly state a purpose for that ingress and egress, the trial court correctly concluded that the "obvious inference" is to provide access to Lake Isabella. Indeed, "[i]t is an established principle that the conveyance of an easement gives to the grantee all such rights as are incident or necessary to the reasonable and proper enjoyment of the easement." *Unverzagt v Miller*, 306 Mich 260, 265; 10 NW2d 849 (1943) (quoting 9 RCL 784). Without access to the lake, the Quinns' easement is virtually useless to them. Therefore, it is necessary for the Quinns' reasonable and proper enjoyment of their easement to have access to Lake Isabella by way of plaintiffs' property. Although the trial court's conclusion goes beyond the plain language of the instrument, "if the text of the easement is ambiguous, extrinsic evidence may be considered by the trial court in order to determine the scope of the easement." *Little*, *supra* at 700. In this case, Demlow's deposition testimony and the circumstances surrounding the drafting of the easement clearly indicate that it was intended to provide access to Lake Isabella. The easement therefore grants the Quinns access to Lake Isabella, although we note that the holders of the easement must enjoy it "with as little burden as possible to the fee owner of the land." *Unverzagt*, *supra* at 265.

Plaintiffs next argue that the trial court abused its discretion by setting aside the default entered against defendants. We disagree.

We review a trial court's decision whether to set aside a default for abuse of discretion. *Alken-Ziegler Inc v Waterbury Headers Corp*, 461 Mich 219; 223-224; 600 NW2d 638 (1999). However, whether the trial court abused its discretion in setting aside a default depends on an interpretation of a court rule, MCR 2.603(D)(1). The interpretation and application of a court rule presents a question of law that we review de novo. *Grzesick v Cepela*, 237 Mich App 554, 559; 603 NW2d 809 (1999). According to MCR 2.603(D)(1), "[a] motion to set aside a default or a default judgment, except when grounded on lack of jurisdiction over the defendant, shall be

granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed." Good cause sufficient to merit setting aside a default or a default judgment may be shown by: (1) "a substantial irregularity or defect in the proceeding upon which the default is based," or (2) "a reasonable excuse for failure to comply with the requirements that created the default." *Alken-Ziegler*, *supra* at 233. Negligence of an attorney, short of complete abandonment, or of an insurer will be imputed to the party. *Amco Builders & Developers, Inc v Team Ace Joint Venture*, 469 Mich 90, 96; 666 NW2d 623 (2003); *Levitt v Kacy Manuf Co*, 142 Mich App 603, 609; 370 NW2d 4 (1985). However, imputed negligence does not necessarily preclude a finding of good cause for a default. *Levitt*, *supra*.

The trial court noted that although the Quinns failed to file a timely answer, the Quinns gave plaintiffs notice that they planned to contest their claims. The Quinns' attorney filed an appearance prior to the entry of the default and had been in contact with plaintiffs' counsel apprising him that the Quinns were attempting to obtain representation from their title insurer. After failing to hear from the title insurer, the Quinns filed their answer one day after the default was entered. Moreover, the trial court reasoned that plaintiffs were not entirely blameless for the Quinns' default. Plaintiffs had failed to serve the Quinns' counsel with a return of service, which the court reasoned would have "solidified that [sic] time frame for [the Quinns] to file an answer." Although that failure likely would not constitute "a substantial irregularity or defect in the proceeding" sufficient enough to justify good cause under the court rule, *see, e.g., Harvey Cadillac Co v Rahain*, 204 Mich App 355, 359; 514 NW2d 257 (1994), it certainly constitutes a "reasonable excuse" for default when taken together with the Quinns' other explanations, the short time period, and plaintiffs' actual notice that the Quinns would contest the case. The trial court also correctly found that the Quinns had shown a meritorious defense. As a matter of law, the fact that there was a recorded easement and assignment of that easement would be absolute defenses to plaintiffs' claims of trespass, disparagement of title, nuisance, and for plaintiffs' injunction to enjoin the Quinns from using the easement. Therefore, the Quinns' defense would be absolute if proven and is a sufficient showing of a meritorious defense to justify the setting aside of a default against them.

Plaintiffs finally argue that the lower court abused its discretion in failing to award certain attorney fees to plaintiffs related to the default. We agree in part.

We review the trial court's decision under MCR 2.603(D)(4) whether to impose discretionary costs and conditions such as a reasonable attorney fee for abuse of discretion. *Reppke v Macomb Circuit Judge*, 394 Mich 462, 462; 231 NW2d 644 (1975). The trial court granted the Quinns' motion to set aside the default subject to payment of taxable costs and actual attorney fees incurred by plaintiffs in preparing and filing the default. Plaintiffs filed a bill of costs in the amount of $3,720 and an itemization of claimed attorney costs incurred of 18.6 hours billed at $200 per hour, totaling $3,720. The lower court confirmed the clerk's award of $340 in such costs. The trial court denied the full amount of attorney fees, and we take no issue with that decision because it is plausible that the trial court reasonably concluded that plaintiffs' counsel spent an inordinate amount of time related to this matter.

However, we conclude that the trial court abused its discretion by striking two charges from plaintiffs' taxable costs. During the hearing on the Quinns' motion to set aside the default against them, the trial court ordered the parties' legal counsel to brief the applicability of MCR 2.603(B)(3)(b)(iii) and (iv) to the default in question. According to plaintiffs' itemized list of

attorney fees, plaintiffs' counsel spent 2.0 hours researching the issue as ordered by the trial court and 1.0 hours writing the final draft of the brief, filing it, and serving it on the other parties. We can discern no reason for refusing to permit charges that were not only directly related to the default, but also that the court explicitly ordered. We therefore remand for the limited purpose of amending the trial court's order to permit these charges.

Affirmed in part, reversed in part, and remanded for redetermination of taxable costs to plaintiffs consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Patrick M. Meter
/s/ Alton T. Davis