S T A T E   O F   M I C H I G A N

C O U R T   O F   A P P E A L S

J.J.L. PROPERTIES, L.L.C., JOHN LINARDOS, and MOTOR CITY BREWING WORKS, INC.,	UNPUBLISHED August 12, 2010
Plaintiffs-Appellees,	
v	No. 291203 Wayne Circuit Court LC No. 06-630442-CK
TRAFFIC JAM AND SNUG OF MICHIGAN, INC.,	
Defendant-Appellant.	

Before: WILDER, P.J., and CAVANAGH and SAAD, JJ.

PER CURIAM.

Defendant appeals from a judgment that defined the scope of plaintiffs' easement over defendant's property and awarded plaintiffs damages of $15,000. For the reasons set forth below, we affirm.

This case involves a dispute concerning the scope of an easement across defendant's parking lot to provide access to plaintiffs' microbrewery business, which is located at the back of defendant's parking lot. Following a bench trial, the trial court ruled that the easement entitled plaintiffs to unlimited access to their property through gate one of defendant's parking lot, that gate one was to remain open at all times and be under plaintiffs' control, and that defendant could not place any obstructions in its parking lot, or allow its customers to park in the parking lot, in a manner that would impede access to plaintiffs' property through gate one.

I. STANDARD OF REVIEW

We review for clear error a trial court's findings of fact at a bench trial, including its determination of damages. *Sands Appliance Servs, Inc v Wilson*, 463 Mich 231, 238; 615 NW2d 241 (2000); *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 513; 667 NW2d 379 (2003). Similarly, we review for clear error as a question of fact the extent of a party's rights under an easement. *Dyball v Lennox*, 260 Mich App 698, 703; 680 NW2d 522 (2004). A finding is clearly erroneous when, although there is evidence to support it, the appellate court is left with a definite and firm conviction that a mistake has been made. *Arco Indus Corp v American Motorists Ins Co*, 448 Mich 395, 410-411; 531 NW2d 168 (1995), overruled in part on other grounds in *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 116-117 n 8; 595 NW2d 832 (1999). We give due regard to the trial court's special opportunity to evaluate the credibility of

witnesses who appeared before it. *Morris v Clawson Tank Co*, 459 Mich 256, 271; 587 NW2d 253 (1998). Questions of law are reviewed de novo. *Sands Appliance Servs*, 463 Mich at 238.

II. SCOPE OF PLAINTIFFS' EASEMENT

Defendant argues that the trial court erred when it ruled that the access easement granted plaintiffs (and their customers and invitees, including delivery trucks and emergency vehicles) a right of unlimited access to the brewery by the most direct route, which requires that gate one be kept open at all times.

"The existence of an easement necessitates a thoughtful balancing of the grantor's property rights and the grantee's privilege to burden the grantor's estate." *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 41; 700 NW2d 364 (2005). "[W]hile the easement holder's rights are ultimately paramount to those of the owner of the soil, the latter's rights are subordinate only to the extent stated in the easement grant." *Id*. (internal quotations and citation omitted). "Consequently, the use of an easement must be confined strictly to the purposes for which it was granted or reserved." *Id*. (internal quotations and citation omitted).

"[A]n easement gives to the grantee all such rights as are incident or necessary to the reasonable and proper enjoyment of the easement." *Id*. at 41-42. Therefore, use of the easement "must be reasonably necessary and convenient to the proper enjoyment of the easement, with as little burden as possible to the fee owner of the land." *Id*. at 42.

If the language of an easement is plain and unambiguous, it is to be enforced as written, without considering extrinsic evidence. *Dyball*, 260 Mich App at 703-704; see also *Little v Kin*, 468 Mich 699, 700-701; 664 NW2d 749 (2003). However, if the language is ambiguous, extrinsic evidence may be considered to determine the scope of the easement. *Id.*; *Dyball*, 260 Mich App at 704. In resolving an ambiguity, the court may consider evidence of the circumstances existing at the time the easement was granted. *Id.* at 703-704.

Here, the easement grants "access for vehicular and pedestrian traffic" for the benefit of plaintiffs "and their tenants, customers, *licensees*, employees, guests, *invitees*, visitors and mortgagees." (Emphasis added.) The purpose of the easement "is to provide ingress and egress to [the brewery] . . . by vehicular and pedestrian traffic." The easement is perpetual and is binding on defendant, as successor of the grantor. The easement agreement provides that defendant "shall not interfere with the grantee's use and enjoyment of the Easement or the Easement Property."

Delivery trucks require access to plaintiffs' property for a business purpose and, therefore, are invitees. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597; 614 NW2d 88 (2000). Under the clear language of the easement, plaintiffs are entitled to use the easement to allow delivery trucks to access the brewery.

Plaintiff John Linardos testified that large delivery trucks are unable to negotiate the turns required to access the brewery from gate two. Thus, the use of gate one for access by large delivery trucks is reasonably necessary and convenient for the proper enjoyment of plaintiffs' right of access. Accordingly, the trial court did not err when it ruled that defendant could not

prevent or interfere with plaintiffs' use of gate one to allow large delivery trucks to access the brewery.

Our Supreme Court held in *McKim v Forward Lodging, Inc*, 474 Mich 947; 706 NW2d 202 (2005), that a paramedic who entered a defendant's premises to render assistance to a guest and to the defendant's employee was not an invitee because the "defendant did not derive a business or commercial benefit from plaintiff's provision of medical services on its property." By their very nature, however, an emergency vehicle is "privileged to enter the land of another by virtue of the possessor's consent" and, therefore, is a licensee. *Stitt*, 462 Mich App at 596. Because the easement here expressly grants a right of access to both invitees and licensees, plaintiffs are entitled to make reasonable use of the easement to allow access to emergency vehicles, including fire trucks. It is immaterial who has the legal responsibility under the fire code to provide a fire lane. Rather, under the clear language of the easement agreement, plaintiffs have a right to use the easement to provide access to licensees and invitees, including emergency vehicles.

Lieutenant Gregory Turner of the City of Detroit Fire Department testified that fire trucks could not gain reasonable access to plaintiffs' premises by entering the parking lot through gate two. Rather, to access plaintiffs' premises, fire trucks need to enter through gate one. Thus, the use of gate one to provide such access is reasonably necessary and convenient for the proper enjoyment of plaintiffs' right of access. The trial court did not err when it ruled that plaintiffs' right to reasonably use the easement entitled them to use gate one to provide access to fire trucks.

Lieutenant Turner also testified that the concrete parking barriers that defendant had placed along plaintiffs' property line interfered with the fire trucks' ability to turn around. Thus, the cement barriers interfered with the fire truck's reasonable use of the easement. Again, regardless of who has the legal responsibility to provide a fire lane, the trial court correctly ruled that defendant could not interfere with plaintiffs' reasonable use of the easement (to provide access to fire trucks) by placing concrete parking blocks along the property line.

Defendant argues that the trial court went beyond the language of the easement by requiring that gate one be kept open at all times. We disagree. An "emergency" is defined as "1. a sudden, urgent, usu. unexpected occurrence requiring immediate action. 2. a situation requiring help or relief." *Random House Webster's College Dictionary* (2d ed), p 427. Thus, by definition, an emergency is usually an unforeseen event. To provide *reasonable* access for an emergency vehicle responding to an unforeseen, sudden, urgent event requiring immediate action, gate one must be kept open, at a minimum, anytime plaintiffs' business is open and whenever else plaintiffs choose. Response delays caused by gate one being locked or under defendant's control would unreasonably interfere with plaintiffs' right of access. Therefore, the trial court did not err when it ruled that gate one must be kept open at all times and shall be under the control of plaintiffs.

Defendant complains that keeping gate one open will increase the burden on the servient estate because it will limit the number of available parking spaces. The easement states that, "[t]o the extent that there exists parking spaces on portions of the Access Easement located on [the parking lot], [the grantor] shall be entitled to use of said parking spaces *so as not to impede the flow of vehicular or pedestrian traffic*, consistent with the purpose for which this Access Easement is given." (Emphasis added.) Thus, the easement contemplates that plaintiffs'

reasonable use of the easement may limit the number of parking spaces to the extent that vehicle parking would impede the flow of vehicular traffic. The trial court's judgment did not unreasonably increase the burden on the servient estate.

Defendant complains that keeping gate one open will make it more difficult to control traffic and to police the parking lot, thereby increasing the burden on the servient estate. The trial court did not require that both gates be kept open. Defendant is free to close gate two to regain some parking spaces and decrease any difficulties in controlling and policing the parking area. Again, the trial court's order did not did unreasonably burden the servient estate.

Defendant claims there is no evidentiary support for plaintiffs' claim that defendant closed gate one to create a financial hardship on plaintiffs, so defendant could acquire plaintiffs' business cheaply. Defendant's motivation was relevant to plaintiffs' tort claims. See *Badiee v Brighton Area Sch*, 265 Mich App 343, 365-366; 695 NW2d 521 (2005). Further, the evidence showed that it was not until after defendant learned that it did not have a right of first refusal to purchase plaintiffs' business that defendant engaged in a course of conduct that intentionally interfered with plaintiffs' business, in whole or in part for the purpose of putting plaintiffs out of business. The trial court's findings are not clearly erroneous.

In sum, we find no clear err in the trial court's decision regarding the scope of plaintiffs' easement.

III. AWARD OF MONEY DAMAGES

Defendant also argues that the trial court's award of $15,000 in money damages is unsupported by the evidence and must be reversed.

Damages must be proven with reasonable certainty. *Ensink v Mecosta Co Gen Hosp*, 262 Mich App 518, 525; 687 NW2d 143 (2004). Damages that are speculative or based on conjecture are not recoverable. *Id*. However, damages are not speculative merely because they cannot be ascertained with mathematical precision. *Id*. It is sufficient that a reasonable basis exists for computation, even if the result is only an approximation. *Id*. Further, the certainty requirement is relaxed when the fact of damages has been established and the only question to be decided is the amount. *Id*. In such a case, recovery will not be denied for lack of proof, particularly when defendant has caused the imprecision. *Id*.

Here, Daniel Scarsella testified that defendant's actions in interfering with customer access to plaintiffs' business led to diminishing retail sales. He stated that retail sales in October and November 2006 were approximately half of the previous year's sales. Scarsella later submitted an affidavit stating that, during the approximately two years that plaintiffs were unable to open gate one (January 2004 to October 2006),[1] plaintiffs lost approximately 9,530 customers. Scarsella calculated that, from 2004 through 2006, plaintiffs' customers spent an average of $9.50 a person at the brewery. Plaintiffs' profit margin was 21 percent, or $2.00 out of every

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[1] The court ordered that gate one be opened on November 9, 2006.

$9.50 spent. Thus, by losing approximately 9,530 customers, plaintiffs lost $19,060 in net profits. Defendant did not present any evidence to dispute or contradict Scarsella's calculations.

We hold that plaintiffs' evidence sufficiently established their damages with reasonable certainty and was not speculative. There was a reasonable basis for Scarsella's computations, even if the result was only an approximation. Accordingly, sufficient evidence supported the trial court's award of $15,000 in damages.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Henry William Saad