MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Cherie M. Drew,
Appellant-Plaintiff,
v.
Southgate Development LLC and Charlestown Enterprises, Inc.,
Appellees-Defendants.

August 8, 2022

Court of Appeals Case No. 21A-PL-2642

Appeal from the Clark Circuit Court

The Honorable Daniel E. Moore, Judge

Trial Court Cause No. 10C01-2103-PL-27

Mathias, Judge.

[1] Approximately three years after she and her now-deceased husband purchased the undeveloped, Clark County real property at issue, Cherie M. Drew discovered that the property ("the Drew Property") did not have legal access to a public right of way. She filed a complaint against Southgate Development LLC ("Southgate"), the known owner of property adjacent to hers, and Charlestown Enterprises, Inc. ("Charlestown"), the company that sold her the property. The first count of the complaint was a request for a declaratory judgment that the Drew Property had an easement of necessity over Southgate's property. Following oral argument on Drew's subsequent motion for declaratory judgment, the trial court denied the motion.

[2] Drew appeals and presents three issues for our review, which we consolidate and restate as the following two issues:

1. Whether the trial court erred when it denied her motion for declaratory judgment.

2. Whether the trial court erred when it concluded that the Southgate property is not encumbered by an easement of necessity because Southgate was a bona fide purchaser.

[3] We affirm in part, reverse in part, and remand for further proceedings.[1]

Facts and Procedural History

[4] In 2016, Drew and her now-deceased husband, Nathan, purchased the Drew Property from Charlestown. At that time, Drew "believed . . . that [her] [p]roperty had legal access to a publicly-dedicated road across certain other real property owned by the Charlestown Christian Church" ("the Church"). Appellant's App. Vol. 2 p. 18. According to Drew, that belief "was founded upon the warranties of title contained in the Deed and oral statements made during the sales process by the President" of Charlestown, John Wood. *Id.* Near the time of closing, Wood allegedly told Drew that Ray Lee Drive, which runs "alongside the Church," was the "legal access point" for the Drew Property. *Id.* Charlestown owned a second tract of real property adjacent to the Drew Property on the side opposite the Church and, in April 2017, Charlestown sold that property to Charlestown Venture, LLC ("CV"). In June 2017, CV sold the second tract to Southgate ("the Southgate Property").

[5] In 2019, "while listing the Drew Property for sale," Drew learned that her property was, in fact, landlocked, with no access to a public road. Appellant's Br. p. 10. What Drew believed was "Ray Lee Drive" was actually "a private

[1] We held oral argument in this matter on July 13, 2022. We commend counsel for the quality of their advocacy.

easement for ingress and egress benefitting [the Church.]" *Id.* That easement, a small road, did not extend to the boundary of the Drew Property. After "the parties to that easement . . . refused to entertain [Drew's] offer to expand and extend the use of the easement to benefit the Drew Property as a means of legal access[,]" and after "multiple title searches did not disclose any means of legal access" to her property, Drew filed a complaint seeking a declaratory judgment against Southgate and alleging a breach of warranty and a breach of implied covenant of good faith and fair dealing against Charlestown. Appellant's App. Vol. 2 pp. 18-19. In her complaint, Drew alleged in relevant part that an implied

> easement by necessity over the Southgate Property, which was the last parcel of real property in unity of title and under common ownership with the Drew Property, arose by operation of law at the time that the Southgate Property conveyance resulted in the Drew Property becoming landlocked and now runs with the Southgate Property under Indiana law.

Id. at 20.

[6] In its answer, Southgate admitted to several of Drew's allegations, including that its property shared unity of title with the Drew Property, that the Drew Property "is landlocked," and that the severance of the unity of title "ultimately result[ed] in the Drew Property becoming landlocked[.]" *Id.* at 19. But Southgate denied that Drew has an implied easement of necessity over the Southgate Property, and Southgate denied that the easement of necessity "arose by operation of law at the time that the Southgate Property conveyance resulted

in the Drew Property becoming landlocked[.]" *Id.* at 20. Also in its answer, Southgate asserted affirmative defenses, including that Drew's claims are barred by the doctrines of laches, unclean hands, and waiver.

[7] Thereafter, Drew filed a "Motion for Declaratory Judgment," in which she alleged that she was entitled to declaratory judgment on the easement of necessity claim because there were "no material facts" in dispute. *Id.* at 50. In particular, Drew alleged that Southgate had "expressly admitted the facts which give rise to the easement implied by necessity under Indiana law[,]" namely, that the properties have unity of title and "an implied easement is absolutely necessary for the use and enjoyment of the Drew Property." *Id.* at 50, 52. In its response to Drew's motion, Southgate alleged in relevant part that "material fact issues remain which preclude the entry of declaratory judgment[,]" including questions of fact regarding whether Southgate is a bona fide purchaser. *Id.* at 62. Following a hearing, at which none of the parties presented evidence, the trial court issued findings and conclusions denying Drew's motion for declaratory judgment. This appeal ensued.[2]

Discussion and Decision

Issue One: Declaratory Judgment

[8] Drew contends that the trial court erred when it denied her motion for declaratory judgment. Initially, the parties assert that the trial court entered

[2] This is an appeal from an interlocutory order, as Drew's claims against Charlestown are still pending. In its order denying Drew's declaratory judgment motion, the trial court stated that there was no just reason for delay and directed entry of final judgment pursuant to Trial Rule 54(B).

findings and conclusions pursuant to Trial Rule 52(A), which, they allege, governs our standard of review. However, because the parties did not submit evidence at the hearing on Drew's motion for declaratory judgment, the trial court ruled on a paper record. "Where, as here, the trial court has entered factual findings based only on a paper record, this Court will conduct its own de novo review of that record." *House of Prayer Ministries, Inc. v. Rush Cnty. Bd. of Zoning Appeals*, 91 N.E.3d 1053, 1058 (Ind. Ct. App. 2018), *trans. denied*. And where the issue presented on appeal is a pure question of law, we review the matter de novo. *State v. Moss-Dwyer*, 686 N.E.2d 109, 110 (Ind. 1997).

[9] Indiana Trial Rule 57 provides in relevant part as follows:

> The procedure for obtaining a declaratory judgment shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. . . . Affirmative relief shall be allowed under such remedy *when the right thereto is established*.

(Emphasis added.) "'The use of a declaratory judgment is discretionary with the court and is usually unnecessary where a full and adequate remedy is already provided by another form of action.'" *Dible v. City of Lafayette*, 713 N.E.2d 269, 272 (Ind. 1999) (quoting *Volkswagenwerk, A.G. v. Watson*, 181 Ind. App. 155, 390 N.E.2d 1082, 1085 (1979) (citation omitted)).

[10] Drew maintains that the undisputed facts, as established both in her verified complaint and by Southgate's admissions in its answer, demonstrate that she is

entitled to an easement of necessity as a matter of law. In *William C. Haak Trust v. Wilusz*, 949 N.E.2d 833, 836 (Ind. Ct. App. 2011), this Court explained that

> [a]n easement of necessity will be implied when "there has been a severance of the unity of ownership of a tract of land in such a way as to leave one part without access to a public road." *Whitt v. Ferris*, 596 N.E.2d 230, 233 (Ind. Ct. App. 1992). *An easement of necessity may arise, if ever, only at the time that the parcel is divided and only because of inaccessibility then existing*. *Ind. v. Innkeepers of New Castle, Inc.*, 271 Ind. 286, 392 N.E.2d 459, 464 (1979). To demonstrate that an easement of necessity should be implied, a plaintiff must establish both unity of title at the time that tracts of land were severed from one another and the necessity of the easement.

(Emphasis added.)

[11] Drew relies on *Haak* in her brief on appeal, and she acknowledges the two elements set out therein that she is required to prove: (1) unity of title at the time of severance; and (2) necessity of the easement at the time of severance. *See id.* Drew alleges that the parties do not dispute the facts supporting both elements. Thus, she maintains that the trial court was required to grant her motion for declaratory judgment, as a matter of law. Because facts are still disputed, Drew is incorrect.

[12] As Drew contends, in its answer to paragraph 21 of Drew's complaint, Southgate admitted that its property shared unity of title with the Drew Property at the time of the 2017 severance and that the Drew Property ultimately became landlocked. Appellant's App. Vol. 2 pp. 19, 35. Southgate,

however, denied paragraphs 22 and 23 of Drew's complaint, which claimed that it was the 2017 severance of title which created the landlocked conditions forming the basis for an easement of necessity. As we stated in *Haak*, "an easement of necessity may arise, if ever, only at the time that the parcel is divided and only because of inaccessibility then existing." *Haak*, 949 N.E.2d at 836. Thus, it is not enough that Southgate admits that the Drew Property is *currently* landlocked or that the severance of the properties "ultimately result[ed]" in the Drew Property being landlocked. Appellant's App. Vol. 2 p. 19, 35. Rather, Drew must show that, while Southgate has admitted that the property is currently landlocked, it was landlocked, i.e., the Drew Property lacked access to a public right of way, *at the time of severance.* And this she has not done.

[13] In her brief on appeal, Drew states that it is "undisputed" that "when Charlestown severed the Drew Property from the Southgate Property, the Drew Property was left without legal access to a publicly-dedicated road or highway." Appellant's Br. p. 16. But for support in the record, Drew cites only excerpts from her complaint and Southgate's admission in its answer that "'the Drew Property *is* landlocked and lacks legal access to a publicly-dedicated road or highway.'" *Id.* (citing Southgate's answer; emphasis added). Because Southgate did not admit that the Drew Property was landlocked at the time of severance, the facts material to the issue of the alleged easement of necessity are disputed, and Drew has not shown that she is entitled to declaratory judgment on this issue. *See, e.g.*, *Town of Pittsboro Advisory Plan Comm'n v. Ark Park, LLC*, 26

N.E.3d 110, 120–21 (Ind. Ct. App. 2015) (reversing denial of motion to dismiss declaratory judgment claim where plaintiff presented no facts to show it was entitled to relief). For that reason, we hold that Drew has not satisfied her burden on appeal to show that the trial court erred when it denied her motion for declaratory judgment on her easement of necessity claim.[3]

[14] That being said, we agree with Drew that, when the trial court denied her motion, it relied on case law that mischaracterizes the required elements to prove an easement of necessity. In particular, the trial court included an element that "the common owner's use of part of his land to benefit another part was apparent and continuous[.]" Appellant's App. Vol. 2 p. 11 (citing *Flick v. Reuter*, 5 N.E.3d 372, 382 (Ind. Ct. App. 2014), *trans. denied*; *Reed v. Luzny*, 627 N.E.2d 1362, 1364 (Ind. Ct. App. 1994), *trans. denied*).[4] That finding is not an element of an easement of necessity. Rather, the two elements set out in *Haak*, as discussed above, are all that is required. Thus, on remand, Drew is entitled to present evidence, either at a trial or by way of motion practice, to prove her easement of necessity claim under the two elements set out in *Haak*.

[3] In addition, we note that "a court may refuse to entertain an action for a declaratory judgment where the relief sought would not terminate the controversy between the parties. The determinative factor is whether the declaratory action will result in a just and more expeditious and economical determination of the entire controversy." *Volkswagenwerk, A.G.*, 390 N.E.2d at 1085. Here, because the parties have additional issues to resolve, including those pending summary judgment below, the trial court could have denied Drew's motion for declaratory judgment on this basis.

[4] *Flick* was a prescriptive easement case. 5 N.E.3d at 381-82. And *Reed* sets forth the elements of an easement based on prior use. 627 N.E.2d at 1367. Neither of those types of easements are applicable here.

Issue Two: Bona Fide Purchaser

[15] Drew next contends that the trial court erred when it concluded that Southgate "took title as a bona fide purchaser for value and its property is therefore protected against the establishment of an implied easement of necessity across the Southgate Property for the benefit of the Drew Property." Appellant's App. Vol. 2 p. 14. On appeal, Drew asserts that there is no bona fide purchaser defense to an easement of necessity, and, in the alternative, she points out that Southgate did not present any evidence to support its bare assertion that it was a bona fide purchaser.

[16] We agree with Drew that the record is not developed enough for us to resolve this factual issue, given that the trial court relied solely on arguments and not evidence. Southgate also asserted in the trial court – in its memorandum in opposition to Drew's motion for declaratory judgment – that this issue is not ripe for decision because questions of fact first must be resolved. Because the factual record has not been fully developed, we do not address whether Indiana law allows a bona fide purchaser for value to defeat an easement of necessity.[5]

[5] Though Southgate relies on our analysis in *Indiana Regional Recycling, Inc. v. Belmont Industrial, Inc.*, 957 N.E.2d 1279, 1285 (Ind. Ct. App. 2011), which discusses the bona fide purchaser doctrine in relation to an easement, the facts of that case demonstrate an easement by use, not of necessity. Whether a bona fide purchaser for value can defeat an easement of necessity is a more complex concept that has never been directly decided in Indiana and has split many of our sister states. See, *e.g.*, *McCormick v. Schubring*, 267 Wis. 2d 141, 672 N.W.2d 63, 68 (2003) (ruling that "a bona fide purchaser in the chain of title of a grantor who created a landlocked parcel may have a defense to an easement of necessity if he can show he had no knowledge or notice, actual or constructive, of either the way of access maintained across his property or the landlocked condition of the severed parcel"); *Tiller v. Hinton*, 19 Ohio St.3d 66, 482 N.E.2d 946, 949-951 (Ohio 1985) (finding, based in part on a relevant statute, that a bona fide purchaser for value who has no actual or constructive notice of an easement by necessity is not bound by the easement); *Drye v. Eagle Rock Ranch, Inc.*, 364 S.W.2d 196, 212 (Tex. 1962) (noting that easements created by implication pass with the

Conclusion

[17] In sum, Drew has not satisfied her burden on appeal to show that the undisputed facts prove that she is entitled to an easement of necessity over the Southgate Property as a matter of law. In addition, the trial court must determine whether Southgate is a bona fide purchaser and if so, whether that status defeats an easement of necessity in this case. On remand, the parties are entitled to pursue these claims further, either at trial or by way of motion practice.

[18] Affirmed in part, reversed in part, and remanded for further proceedings.

Bailey, J., and Weissmann, J., concur.

land and are not "subject to being cut off by a bona fide purchaser of legal title"). We decline to rule on such a complex legal issue before the facts have been developed at the trial court level.