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IN THE
COURT OF APPEALS OF INDIANA

Kevin D. Albertson and Pamela L. Albertson,
Appellants-Plaintiffs,

v.

Richard Cadwell and Lisa Cadwell,
Appellees-Defendants.

December 14, 2022

Court of Appeals Case No. 22A-PL-782

Appeal from the Hendricks Circuit Court

The Honorable Daniel F. Zielinski, Judge

Trial Court Cause No. 32C01-2109-PL-126

Mathias, Judge.

[1] Kevin and Pamela Albertson appeal the Hendricks Circuit Court's entry of partial summary judgment for Richard and Lisa Cadwell on the Albertsons' complaint for declaratory judgment seeking an easement of necessity on real property owned by the Cadwells. The Albertsons raise a single issue for our

review, namely, whether the trial court erred when it concluded that they are not entitled to an easement of necessity. We affirm.

Facts and Procedural History

[2] In 2018, the Albertsons bought a lot at 8585 Hickory Hill Trail in a new subdivision in Mooresville ("Albertson lot"). During the planning phase of constructing a house on that lot, the Albertsons submitted their plans, including blueprints, to the Homeowner's Association ("HOA") for approval. The HOA's Architectural Control Committee ("ACC") initially denied the plans for several listed reasons, including the Albertsons' "[r]equest for a concrete driveway extension around the side of the home[.]" Appellants' App. Vol. 5, p. 15. The ACC noted that

> [n]o reason [for the extension] or information was provided by Pamela Albertson in her letter to support this unusual request. No current property owners in our HOA have such deviations and therefore no precedent exists to grant such an exception. **Recommendation:** ***Due to the issues of additional solid surfaces on the property, water run-off/drainage concerns, and potential increased negative water impacts on neighboring property owner(s), we should deny the request for a driveway extension beyond the garage entrance***.

Id. at 15-16 (emphasis original). The ACC encouraged the Albertsons "to address and resolve the issues stated in [the] review," and it stated that it "look[ed] forward to the next opportunity to review their revised plans." *Id.* at 16. The Albertsons submitted a series of revised plans and finally got approval

to build the house in December. The Albertsons did not install a driveway extension as originally planned.

[3] At some point, the Albertsons contacted the Cadwells, who owned approximately twenty-four acres east of and contiguous with the Albertson lot ("Cadwell property"). The Albertsons asked the Cadwells to sell them a portion of their property, and the Cadwells agreed. On June 23, 2019, the Albertsons and Cadwells executed a purchase agreement for approximately one-half of an acre of the Cadwell property ("new parcel"). The purchase agreement did not include a legal description of the new parcel but stated, "****legal description to follow, after engineering/surveying, but roughly 80'-85' x 212'-220' behind [the Albertson lot]." Appellants' App. Vol. 2, p. 20. The purchase agreement also provided in relevant part as follows:

> Additional Conditions:
>
> –[The Albertsons] agree to give a 10' utility easement to [the Cadwells]. It is to be located on the north end of [the Albertson lot].
>
> –[The Cadwells] agree to have a neighborly agreement that will allow the [Albertsons] to have an occasional access through their remaining ground to access their property for things such as drainage issues, building a barn/treehouse, back yard maintenance, back of home repairs etc. This <u>is not</u> a recorded easement or recorded agreement just a friendly agreement between neighbors. [The Albertsons] will always ask [the Cadwells] before coming onto their property!

Id. (emphasis original).

[4] The Albertsons hired Mike Sheppard, a surveyor, to prepare a legal description of the new parcel. On June 30, Sheppard advised Pamela by email that he had discovered a small gap, less than three feet wide, between the Albertson lot and the Cadwell property ("gap parcel"). Sheppard stated, "It's just a big mess created by poor quality surveying and I don't see anyway to fix it without a survey[,] and even that wouldn't fix the gap issue." Appellants' App. Vol. 5, p. 32. The Albertsons passed along that information to the Cadwells. Neither the Albertsons nor the Cadwells addressed the "gap issue" before they closed on the sale of the new parcel on August 2. *Id.* Soon thereafter, the Albertsons built a fence between the new parcel and the Cadwell property.

[5] In February 2020, the Albertsons submitted an application to the Hendricks County Building Department for a permit to build a pole barn on the new parcel. As part of that application, the Albertsons stated that the barn would be built "directly east of 8585 Hickory Hill Tr[ai]l" and that they would access the barn "from that property." Appellants' App. Vol. 4, p. 85. In addition, the Cadwells had constructed a driveway across the Cadwell property that connected the Albertsons' barn to County Road 825 East.

[6] In mid-2020, the Cadwells decided to sell the Cadwell property. The Albertsons expressed an interest in buying some of the property, but in April 2021, the Cadwells found a buyer for the entire property. In May, Pamela asked the Cadwells whether they were "able to get any feedback from the new owners about letting [the Albertsons] access [their] property when they take over[.]" Appellants' App. Vol 3, p. 207. The Cadwells responded, "Not yet," but she assured Pamela that the Albertsons would "have access all this summer and next [because the Cadwells were staying] until 10[/]1[/]2022." *Id.* at 208.

[7] Around that time, the Albertsons were trying to get a mortgage on the Albertson property. On July 30, Pamela texted the Cadwells the following message:

> Do you know anything about the 2' strip of ground that is between our lot & the property you sold us? The bank who did our perm[anent] financing had a mortgage survey done & it shows a 2' strip running the length of your west boundary?

Id. at 209. On August 26, the Albertsons asked the Cadwells to execute affidavits the Albertsons had prepared stating, in relevant part, that the Albertsons owned the gap parcel. The Cadwells did not execute the affidavits.

[8] On September 20, the Albertsons filed a complaint for declaratory judgment against the Cadwells seeking an easement of necessity toward County Road 825 East over the Cadwell property on the theory that the new parcel was landlocked by virtue of the gap parcel. The Cadwells filed an answer and asserted a counterclaim alleging slander of title. The Cadwells filed a motion for

judgment on the pleadings, which the trial court denied. The Cadwells executed a quitclaim deed to transfer title to the gap parcel to the Albertsons. The Cadwells then filed a motion for partial summary judgment on the easement of necessity issue.

[9] Following a hearing, the trial court entered partial summary judgment for the Cadwells.[1] The trial court found in part as follows:

> The parties agree that no gap was intended[,] therefore, by law, no Easement by Necessity exists. Further, in the purchase agreement, the parties agreed [that] no easement existed. Further, [the] Albertsons have access to the parcel via [a] county road. Finally, the Cadwells delivered to [the] Albertsons a quitclaim deed to the [gap parcel], which was not accepted by the Albertsons, but none-the-less conveyed to the Albertsons certain rights.

Appellants' App. Vol. 2, p. 10. This interlocutory appeal ensued.[2]

Discussion and Decision

[10] The Albertsons appeal the trial court's grant of the Cadwells' motion for partial summary judgment. Our standard of review is well settled:

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[1] The trial court also granted the Cadwells' motion to strike portions of affidavits submitted by the Albertsons in opposition to summary judgment. In their argument on appeal, the Albertsons assert, in passing, that the trial court's order striking portions of their affidavits submitted in opposition to summary judgment "is not yet ripe for appeal." Appellants' Br. at 21. The Albertsons are incorrect, and their failure to challenge the trial court's order on the motion to strike results in waiver of that issue.

[2] The trial court found that "no just reason exists for delay of final judgment," making the order final and appealable under Indiana Trial Rule 54(B).

> We review summary judgment de novo, applying the same standard as the trial court: "Drawing all reasonable inferences in favor of . . . the non-moving parties, summary judgment is appropriate 'if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" *Williams v. Tharp*, 914 N.E.2d 756, 761 (Ind. 2009) (quoting T.R. 56(C)). "A fact is 'material' if its resolution would affect the outcome of the case, and an issue is 'genuine' if a trier of fact is required to resolve the parties' differing accounts of the truth, or if the undisputed material facts support conflicting reasonable inferences." *Id.* (internal citations omitted).
>
> The initial burden is on the summary-judgment movant to "demonstrate [ ] the absence of any genuine issue of fact as to a determinative issue," at which point the burden shifts to the non-movant to "come forward with contrary evidence" showing an issue for the trier of fact. *Id.* at 761-62 (internal quotation marks and substitution omitted).

Hughley v. State, 15 N.E.3d 1000, 1003 (Ind. 2014) (alterations original to *Hughley*). Here, the trial court made findings and conclusions to support its summary judgment order, which are not binding on this Court. *See Global Caravan Techs., Inc. v. Cincinnati Ins. Co.*, 135 N.E.3d 584, 588 (Ind. Ct. App. 2019), *trans. denied*. Rather, "we may affirm a grant of summary judgment upon any theory supported by the evidence." *Miller v. Danz*, 36 N.E.3d 455, 456 (Ind. 2015).

[11] The Albertsons' argument on appeal is essentially in two parts. First, they contend that the trial court "erroneously ignored Indiana easement law," which, they maintain, precludes summary judgment for the Cadwells.

Appellants' Br. at 17. Second, they contend that the trial court "erroneously evaluated the Albertsons' claim under the Cadwells' unpled mutual mistake and reformation theories." *Id.* at 18. Because the Albertsons' first argument is dispositive of their appeal, we do not address their second argument.

[12] In *William C. Haak Trust v. Wilusz*, 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.

949 N.E.2d 833, 836 (Ind. Ct. App. 2011). Here, it is undisputed that the unity of title element is satisfied. The parties dispute only the necessity of the alleged easement.

[13] The Albertsons contend that "'[n]ecessity contemplates the need for *vehicular* access." Appellants' Br. at 15 (emphasis original). They acknowledge that, "[t]raveling on foot, the Albertsons can walk from Hickory Hill Trail, across the Albertson Parcel, across the Gap Parcel, to reach the [new] Parcel." *Id.* at 28. But they allege that "the focus of an easement-by-necessity is not just the ability to access a landlocked parcel on foot, but also the ability to access it by

vehicle." *Id.* In support, they argue that "[t]his is underscored by the inquiry [in the case law] focusing on access 'to a public road.'" *Id.* (citing *Haak Trust*, 949 N.E.2d at 836). And they maintain that there is a genuine issue of material fact whether they have vehicular access to the new parcel from Hickory Hill Trail across the Albertson property due to the gap parcel.

[14] The Albertsons also contend that, contrary to the trial court's findings, the issue of the parties' intent is not relevant to the question of necessity. In particular, they assert that "the analysis is akin to strict liability wherein intent is irrelevant." *Id.* at 18. In support, they cite to *Haak Trust*, which does not include intent among the elements required to establish an easement of necessity. 949 N.E.2d at 836. But the Albertsons' argument misses the mark.

[15] We agree with the Cadwells that, because the parties agreed at the time of the conveyance of the new parcel that the Albertsons would not have an easement across the Cadwell property, the Albertsons' claim to such an easement now fails as a matter of law. An easement of necessity is equitable in nature. *Ind. Reg'l Recycling, Inc. v. Belmont Indus. Inc.*, 957 N.E.2d 1279, 1284 (Ind. Ct. App. 2011), *trans. denied*. And when the rights of parties are controlled by an express contract, recovery cannot be based on a theory implied in law. *Coppolillo v. Cort*, 947 N.E.2d 994, 998 (Ind. Ct. App. 2011).

[16] In support of their argument, the Cadwells cite 28A Corpus Juris Secundum Easements § 98, which states in relevant part as follows:

> The common law easement by necessity doctrine does not exist to ensure a right of access to any and all landlocked property; rather, *the doctrine is properly applied only when the circumstances establish that an access easement was intended at the time of the common owner's conveyance*. An easement by necessity may be implied if the court can fairly conclude that the grantor and grantee, *had they considered the matter*, would have wanted to create one. *The implication of an easement by necessity is based upon the presumed intent of the parties*. Proof of necessity alone furnishes the probable inference of intention, on the presumption that the grantor and the grantee did not intend to render the land unfit for occupancy. The inference is a question of fact to be determined as of the time of the severance of the dominant and servient tenements. *In determining whether an easement by necessity has been created, the intent of the parties can be ascertained from the circumstances surrounding the conveyance, the information known to the parties of the conveyance, the language of the instrument, and the physical condition of the land.*

(Emphases added.) In short, an implied easement of necessity will only be established where the parties' intent regarding access to real property can *only* be presumed. *See, e.g.*, *Fischer v. Revett*, 438 N.E.2d 995, 1002 (Ind. Ct. App. 1982) (Staton, J., dissenting) (stating that "it must be remembered that an implied easement is based on the unexpressed intent of the parties as inferred from the circumstances existing at the time ownership is severed"); *see also Gacki v. Bartels*, 369 Ill. App.3d 284, 289, 859 N.E.2d 1178, 1184 (2006) (stating that an easement of necessity is implied "in that courts attempt to ascribe an intention to the parties who themselves did not put any such intention into words at the time of conveyance").

[17] Commentary to § 476 of the Restatement of Property further supports this conclusion. In particular, comment d provides in relevant part:

> The implication of an easement may always be prevented by language sufficiently explicit to negative it. No matter how clear the implication would otherwise be, it is always subject to being overcome by the language used. As the implication becomes less clear, the less explicit need be the language of negation to overcome it. . . .

And comment d includes the following illustration:

> A is the owner of two tracts of land, Blackacre and Whiteacre. Blackacre only is adjacent to a highway. A conveys Whiteacre to B. The conveyance contains the following stipulation: "it is understood that B will obtain access to the highway through other land to be purchased by him, and he will not, therefore, require, or be entitled to, a way across Blackacre." B is not entitled to an easement of way over Blackacre.

[18] Here, the undisputed designated evidence established the parties' intention that the Albertsons would not have an easement over the Cadwell property. The purchase agreement provides that the Albertsons would have only "occasional access" across the Cadwell property for the listed reasons and that that access was "*not* a recorded easement" but "just a friendly agreement between neighbors." Appellants' App. Vol. 2, p. 20 (emphasis original). The Albertsons did nothing to resolve the gap issue before they closed on the purchase of the

new parcel.[3] Thus, they knowingly bought a landlocked parcel without securing an access easement. In February 2020, when the Albertsons filed a permit application to build a pole barn on the new parcel, they stated that access to the barn would be via the Albertson lot. And in May 2021, Pamela asked the Cadwells whether the new owners of the Cadwell property would allow the Albertsons to use the driveway across the Cadwell property to access County Road 825 East.[4]

[19] Put simply, the law will not support an implied easement where the parties' explicit intent is otherwise. We hold that, given the parties' clearly-expressed intent that the Albertsons would not have an easement across the Cadwell property, the trial court did not err when it entered partial summary judgment for the Cadwells on the Albertsons' alleged easement of necessity. Because we may affirm the trial court on any theory supported by the designated evidence, we need not address the Albertsons' challenges to the court's specific findings. *Miller*, 36 N.E.3d at 456.

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[3] To the extent the Albertsons contend that an easement of necessity is implied, as a matter of law, because the new parcel is landlocked, their express intent and knowledge at the time of closing the sale undermines any such implication.

[4] For the first time in their reply brief, the Albertsons argue that "the Purchase Agreement is not dispositive" of the parties' intent and that the trial court erred when it "found that the negation of certain easement rights found in the Purchase Agreement controlled, without considering the subsequent actions of the parties." Reply Br. at 7-8. And they assert that, because the warranty deed for the new parcel states that it is located on County Road 825 East, that "at least creates a question whether the parties' original negation of easement rights survived and whether, in the wake of this, an easement by necessity was warranted." Reply Br. at 8. But it is well settled that "grounds for error may only be framed in an appellants' initial brief and if addressed for the first time in the reply brief, they are waived." *Monroe Guar. Ins. Co. v. Magwerks Corp.*, 829 N.E.2d 968, 977 (Ind. 2005).

[20] Affirmed.

Robb, J., and Vaidik, J., concur.