ATTORNEY FOR APPELLANT

Zechariah D. Yoder
Adler Attorneys
Noblesville, Indiana

ATTORNEYS FOR APPELLEE

Thaddeus J. Schurter
Alexander C. Trueblood
Drewry Simmons Vornehm, LLP
Carmel, Indiana

IN THE COURT OF APPEALS OF INDIANA

Jason Morehouse and Sarah Morehouse,
Appellant-Defendants,

v.

Dux North LLC,
Appellee-Plaintiff.

September 27, 2022

Court of Appeals Case No. 22A-PL-664

Appeal from the Hamilton Superior Court

The Honorable Gail Z. Bardach, Judge

Trial Court Cause No. 29D06-2010-PL-7042

Mathias, Judge.

[1] Dux North LLC ("Dux North") filed a complaint for a declaratory judgment seeking an implied easement over real property owned by Jason Morehouse and Sarah Morehouse (collectively, "the Morehouses"). The Hamilton Superior Court entered summary judgment for Dux North on its complaint and denied

the Morehouses' motion for partial summary judgment. The Morehouses appeal and present two issues for our review:

1. Whether the trial court erred when it denied their motion for partial summary judgment on the issue of whether Dux North has an easement of necessity over their property.

2. Whether the trial court erred when it found that Dux North has an easement by prior use and entered summary judgment for Dux North.

[2] We reverse and remand for further proceedings.

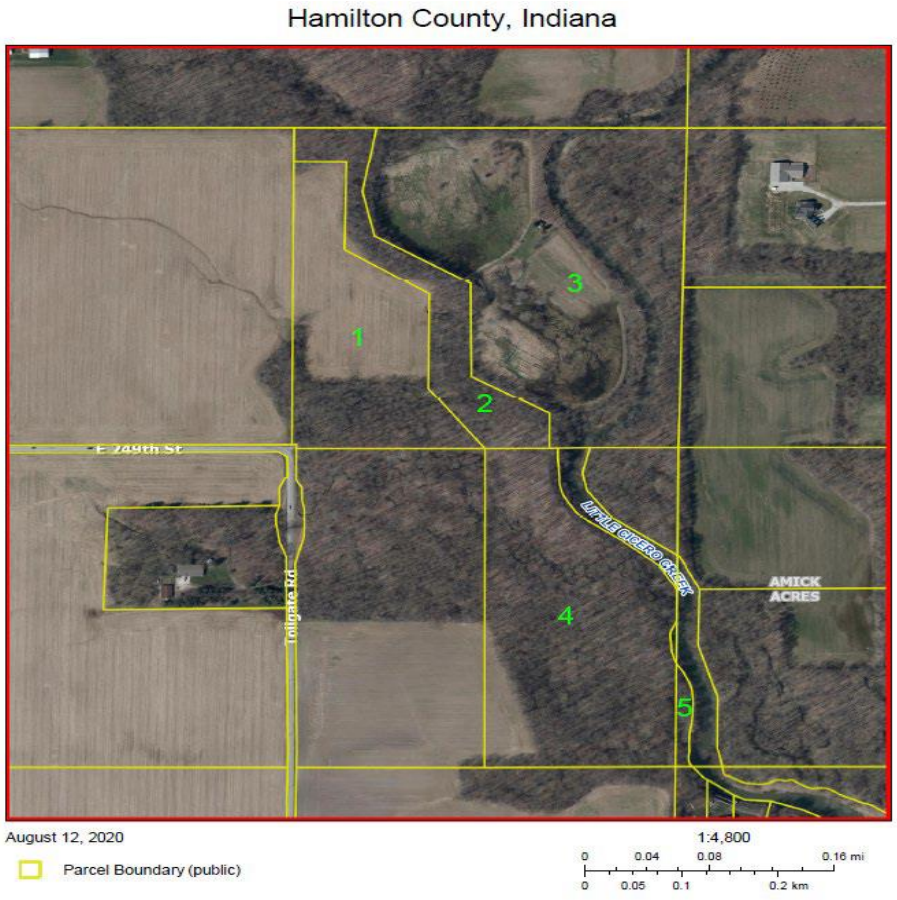
Facts and Procedural History

[3] In December 2018, the Morehouses bought two contiguous parcels of land in Hamilton County near Morse Reservoir (collectively, "the Morehouse property") The previous owners of the parcels were Maurice and Gwendolyn Marshall.[1] The Marshalls had also previously owned a third contiguous parcel ("Parcel 3") that they had separately sold to Shorewood Corporation ("Shorewood") in April 1991. At that time, Shorewood owned three contiguous parcels (respectively, "Parcel 4," "Parcel 5," and "the Southern Tract") adjacent to Parcel 3. The Southern Tract had access to a public road. In November 1995, Dux North, Inc. bought Parcels 3, 4, and 5, and, in February 2020, Dux North

[1] The Estate of Gwendolyn Marshall sold the Morehouse parcels to Bergman Land, LLC on December 14, 2018, and Bergman Land, LLC sold the parcels to the Morehouses on December 31.

bought those parcels from Dux North, Inc. (collectively, "the Dux North property"). The following figure depicts all but the Southern Tract:

Parcel Label on Figure 1	Hamilton County Parcel Number	Owner
1	03-02-26-00-00-009.000	Jason and Sarah Morehouse
2	03-02-26-00-00-010.000	Jason and Sarah Morehouse
3	03-02-26-00-00-010.001	Dux North, LLC
4	03-02-26-00-00-012.000	Dux North, LLC
5	03-02-26-00-00-016.000	Dux North, LLC



[4] Since at least 1985, a gravel lane ("the access road") across the Morehouse property has connected Parcel 3, which is landlocked, to a public road. From 1991 until Gwendolyn Marshall's death in 2018, the owners of Parcel 3, including Dux North and its predecessors in interest, were permitted to use the access road. The Marshalls even allowed Dux North, Inc. to place a padlock on a gate located at the entrance to its property on the access road. However, in June 2020, Jerry Watson III, a member of Dux North, found that the lock had been changed, and he could not open the gate. Watson contacted Jason by email and asked about the new padlock. In response, Raymond Adler, an attorney representing the Morehouses, emailed Watson and stated: "The purple paint, no trespassing signs[,] and padlock confirm the private property nature of the real estate. Why would you wish access?" Appellants' App. Vol. 2, p. 74.

[5] One week later, Adler emailed Ted Butz, another member of Dux North, and stated:

> The family is concerned by the increased usage and the apparent misunderstanding by Mr. Watson of his lack of legal rights to cross the property and a large number of strangers/trespassers, the calls from DNR etc. Please see if the attached license agreement doesn't set forth our understanding.

Id. at 91. The proposed license agreement acknowledged that the Marshalls had permitted Dux North to use the access road but stated that, going forward, Dux North members and a limited number of other people could use the access road only during duck hunting season.

[6] On October 5, 2020, Dux North filed a complaint for declaratory judgment against the Morehouses. Dux North alleged that it had an easement of necessity over the Morehouse property. The Morehouses filed an answer and counterclaim to quiet title. On August 11, 2021, Dux North filed a motion for summary judgment alleging that it is entitled to an easement of necessity over the Morehouses' property as a matter of law. The Morehouses filed a cross-motion for partial summary judgment alleging that Dux North is not entitled to an easement of necessity as a matter of law. During a hearing on the parties' motions, Dux North argued that it was entitled to either an easement of necessity or an easement by prior use. The Morehouses did not object to that argument.

[7] The trial court found that Dux North has an easement by prior use over the Morehouse property and entered summary judgment for Dux North. And the trial court denied the Morehouses' motion for partial summary judgment on the issue of whether Dux North had an easement of necessity. This appeal ensued.[2]

[2] The trial court expressly stated that there was no just reason for delay and declared that the order was final and appealable. *See* Ind. Trial Rule 54(B).

Discussion and Decision

Standard of Review

[8] The Morehouses appeal following the trial court's denial of their motion for partial summary judgment and the court's grant of Dux North's motion for summary judgment. Our standard of review is well settled.

> 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*). Cross motions for summary judgment do not affect our standard of review. *Monroe Cnty. v. Boathouse Apartments, LLC*, 177 N.E.3d 1201, 1205 (Ind.

Ct. App. 2021), *trans. denied*. We simply review each motion independently and construe the facts in favor of the nonmoving party in each instance. *Id.*

Overview of Implied Easements

[9] As the parties observe, Indiana case law regarding easements of necessity and easements by prior use has sometimes conflated the elements required to prove these two distinct types of easements. Both types of easements are created by implication, rather than by grant or by prescription. *See William C. Haak Trust v. Wilusz*, 949 N.E.2d 833, 835 (Ind. Ct. App. 2011). In *Haak Trust*, we explained the difference between the two types of implied easements:

> "An easement of necessity will be implied only 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 any access to a public road. *See Wolfe v. Gregory*, 800 N.E.2d 237, 241 (Ind. Ct. App. 2003). On the other hand, an easement of prior use will be implied 'where, during the unity of title, an owner imposes an apparently permanent and obvious servitude on one part of the land in favor of another part and the servitude is in use when the parts are severed . . . if the servitude is reasonably necessary for the fair enjoyment of the part benefited.' *Hysell v. Kimmel*, 834 N.E.2d 1111, 1114 (Ind. Ct. App. 2005), *trans. denied*. Unlike a landowner requesting an easement by necessity, a landowner requesting an easement by prior use does not need to show absolute necessity. *See id.* at 1115. The focus of a claim for an easement by prior use is the intention for continuous use, while the focus of a claim for an easement by necessity is the fact of absolute necessity."

Id. at 839 (quoting *Pardue v. Smith*, 875 N.E.2d 285, 291 (Ind. Ct. App. 2007)).

[10] Initially, we note that here, in its complaint, Dux North alleged that it was entitled to an easement of necessity over the Morehouse property. But at the hearing on the parties' cross-motions for summary judgment, Dux North argued that it had "established the elements of either an easement by prior use or easement [of] necessity." Tr. p. 19. On appeal, the Morehouses assert that "implied easement by prior use was not properly before the Trial Court in Dux North's Motion for Summary Judgment." Appellants' Br. at 27. However, as the Morehouses acknowledge, Dux North relied on case law regarding easement by prior use in its memorandum in support of summary judgment. And when Dux North argued at the summary judgment hearing that it was entitled to an easement by prior use, the Morehouses did not object. To the extent the Morehouses allege that Dux North cannot pursue an easement by prior use in addition to an easement of necessity in this matter, we conclude that the Morehouses failed to preserve that issue for appellate review, and we do not consider it.

Issue One: Easement of Necessity

[11] The Morehouses first contend that the trial court erred when it denied their motion for partial summary judgment. They maintain that "the undisputed facts establish that an easement [of] necessity did not exist against the Morehouses." Appellants' Br. at 29. We agree.

[12] In *Haak Trust*, 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 at 836.

[13] The Morehouses argue that "an easement of necessity requires absolute necessity." Appellants' Br. at 30 (citing *Pardue v. Smith*, 875 N.E.2d 285, 291 (Ind. Ct. App. 2007). And they contend that, at the time Parcel 3 was severed from Parcels 1 and 2 in April 1991, "it became part of a large, unified tract of land owned by Shorewood Corp." which had access to a public road via the Southern Tract. *Id.* Thus, they conclude that the undisputed evidence shows that there was no absolute necessity for an easement over the Morehouse property at the time of the severance in April 1991, and Dux North is not entitled to an easement of necessity as a matter of law. *See Haak Trust*, 949 N.E.2d at 836.

[14] Dux North, on the other hand, argues that it need not show absolute necessity but only "reasonable necessity." Appellee's Br. at 19. Dux North argues that our Supreme Court "expressly rejected a rule that would require strict or

absolute necessity to establish an easement [of] necessity, instead holding that reasonable necessity was sufficient for that purpose." *Id.* at 20 (citing *Shandy v. Bell*, 207 Ind. 215, 189 N.E. 627, 630-31 (Ind. 1934)). Specifically, in *Shandy*, the Court stated:

> It is the law, by the weight of authority, that, where one grants real estate by metes and bounds, by a deed containing full covenants of wa[r]ranty, and without an express reservation, there can be no reservation by implication, unless the easement claimed is at least one of reasonable necessity. The fact that it may be convenient and beneficial does not make it an easement. *In many jurisdictions the courts adhere to the rule of strict necessity. In this state we think this court has adopted the rule of reasonable necessity*.

189 N.E. at 630 (emphasis added).

[15] However, as the Morehouses point out, it was only within the last two decades that this Court "began identifying easement of necessity and easement by prior use as separate legal theories." Appellants' Br. at 13. Indeed, our review of relevant case law shows that Indiana courts did not distinguish between the two types of implied easements until 2005, when, in *Hysell*, this Court used the term "easement by prior use" for the first time. 834 N.E.2d at 1114. And the Indiana Supreme Court's holding in *Shandy* was made in the context of what would now be labeled an easement by prior use. 189 N.E. at 631 (holding that the "driveway in question was convenient and beneficial for the fair enjoyment of the dwelling house of appellant" but it was not reasonably necessary).

Accordingly, we agree with the Morehouses that *Shandy* is inapposite with respect to the question of Dux North's alleged easement of necessity.

[16] In *Pardue*, we observed that "[a]n easement of necessity will be implied only 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 *any* access to a public road." 875 N.E.2d at 291 (citing *Wolfe v. Gregory*, 800 N.E.2d 237, 241 (Ind. Ct. App. 2003)) (emphasis original). Indeed, as we stated in *Haak Trust*, "the focus of a claim for an easement by necessity is the fact of absolute necessity" at the time of severance and that the severance occurs "in such a way as to leave one part without access to a public road." 949 N.E.2d at 836.

[17] Here, the undisputed evidence shows that Dux North's predecessor in interest had access to a public road via the Southern Tract at the time Parcel 3 was severed from the Morehouse property. Dux North does not dispute that contention, but states only that, "due to its difficult terrain, the Southern Tract did not provide any reasonable or practicable means of accessing Parcel 3, and the Access Road was therefore *reasonably necessary* to access Parcel 3 at all relevant times." Appellee's Br. at 12 (emphasis added). Given the undisputed evidence that the access road was not absolutely necessary to access Parcel 3 at the time of severance in April 1991, the trial court erred when it denied the

Morehouses' motion for partial summary judgment on Dux North's alleged easement of necessity over the Morehouse property.[3]

Issue Two: Easement by Prior Use

[18] The Morehouses next contend that the trial court erred when it found that Dux North is entitled to an easement by prior use as a matter of law. Again, an easement by prior use will be implied

> where, during the unity of title, an owner imposes an apparently permanent and obvious servitude on one part of the land in favor of another part *and the servitude is in use when the parts are severed* . . . if the servitude is reasonably necessary for the fair enjoyment of the part benefited.

Hysell, 834 N.E.2d at 1114 (emphasis added). Here, Dux North designated evidence showing that the access road, an obvious servitude, *existed* when Parcel 3 was severed from the Morehouse property. But the Morehouses maintain that the evidence does not show that the access road was "in use" at that time. *See id.* We must agree.

[19] In its answer to Dux North's complaint, the Morehouses admitted that the Marshalls had "freely allowed the owners" of Parcel 3 to use the access road "in

---

[3] We note that Dux North limits its argument on appeal to the issue of whether absolute or reasonable necessity is required to prove an easement of necessity. Dux North does not make cogent argument with citation to the record to show that it is entitled to an easement of necessity as a matter of law given the requirement of an absolute necessity.

order to access the Dux North Preserve . . . at all times *from 1991* until Gwendolyn Marshall's death in 2018[.]" Appellants' App. Vol. 3, p. 93 (emphasis added). And in its order granting summary judgment for Dux North, the trial court found that

> [t]he undisputed material facts established by the designated evidence show that at the time Parcel 3 was severed from Parcels 1 and 2, there was no reasonable means of accessing Parcel 3 from a public road except by crossing Parcels 1 and 2 via the Access Road, *which was apparently permanent and obvious and had been in use since at least 1985*. As such, there is no genuine issue of material fact and Dux North is entitled to an implied easement by prior use to use the Access Road to cross Parcels 1 and 2 to provide access to Parcel 3 from a public road.

Appellants' App. Vol. 2, p. 20 (emphasis added).

[20] The Morehouses point out that, contrary to the trial court's finding, the designated evidence does not show that the access road was "in use" at the time Parcel 3 was severed from the Marshalls' property in April 1991. In response, Dux North argues that the Morehouses, in their answer, admitted to facts sufficient to prove this element of its claim when they admitted that the access road had been in use "at all times from 1991" until 2018. Appellants' App. Vol. 3, p. 93.

[21] We believe Dux North's interpretation of that admission is too broad. The Morehouses' admission that the access road had been in use "from 1991" could mean any date between January 1, 1991, and December 31, 1991. But the

critical date is the date of severance in April 1991, and there is no designated evidence that shows that the access road was definitively "in use" at that time. *See Collins v. Metro Real Estate Servs. LLC*, 72 N.E.3d 1007, 1016 (Ind. Ct. App. 2017) (holding evidence insufficient to prove easement by prior use "[w]ithout more specific evidence regarding the use or non-use of the easement and the timing of such use"). Indeed, Dux North did not designate any evidence to show that the access road was even passable in April 1991. Accordingly, we hold that the evidence does not support the trial court's entry of summary judgment for Dux North on its alleged easement by prior use.[4]

Conclusion

[22] We hold that Dux North was required to designate evidence to show that the access road is absolutely necessary to access Parcel 3, which it did not do. Thus, the trial court erred when it denied the Morehouses' motion for partial summary judgment on the alleged easement of necessity. We also hold that the designated evidence does not show, as a matter of law, whether the access road either was or was not in use at the time that Parcel 3 was severed from the Morehouse property in April 1991. Accordingly, the trial court erred when it

[4] The Morehouses also contend that the trial court erred when it declared that the easement shall be twenty feet wide without evidence to support that determination. Because we reverse the trial court's grant of summary judgment for Dux North, we need not address that issue.

entered summary judgment on the alleged easement by prior use, and on that issue, we remand for further proceedings.

[23] Reversed and remanded for further proceedings.

Bradford, C.J., and Robb, J., concur.