IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL
(Memorandum Web Opinion)

BARSELL V. RASMUSSEN

DANIEL R. BARSELL AND JILL E. BARSELL, HUSBAND AND WIFE, AND JOHN MANGIAMELI AND DEBORAH MANGIAMELI, HUSBAND AND WIFE, APPELLANTS,

V.

DANIEL D. RASMUSSEN AND CHARLOTTE M. RASMUSSEN, HUSBAND AND WIFE, APPELLEES.

Filed April 9, 2024. No. A-23-446.

Appeal from the District Court for Douglas County: W. RUSSELL BOWIE III, Judge. Affirmed.

Heather Voegele and Andreanna Smith, of Voegele Anson Law, L.L.C., for appellants.

Michael J. Decker and Michael J. O'Bradovich, for appellees.

PIRTLE, Chief Judge, and RIEDMANN and WELCH, Judges.

WELCH, Judge.

INTRODUCTION

This case involves a dispute over an easement. Daniel R. and Jill E. Barsell and John and Deborah Mangiameli (hereinafter referred to as the Appellants) brought this action against Daniel D. and Charlotte M. Rasmussen over a speed bump that the Rasmussens installed on a private road that is subject to the Appellants' easement. The district court denied the Appellants' claim and dismissed their complaint. The Appellants appeal arguing that the district court erred in determining that the speed bump did not materially interfere with their use of the easement. For the reasons set forth herein, we affirm.

STATEMENT OF FACTS

BACKGROUND

The Appellants and the Rasmussens are neighbors who share the use of a private road to access their respective properties located off of 72nd Street in Omaha, Nebraska. The Rasmussens own the property located closest to 72nd Street. The Barsells own the property located immediately east of the Rasmussens and the Mangiamelis own the property immediately east of the Barsells.

In July 1993, an easement agreement was entered into by the Mangiamelis and the predecessors in title to the Barsells and the Rasmussens. The easement was recorded in the office of the Register of Deeds of Douglas County, Nebraska. The easement granted the benefitted estates, now owned by the Appellants, a permanent easement for the purposes of ingress and egress over the northerly forty feet of the Rasmussens' property. The easement agreement provides the only ingress and egress to reach the Appellants' properties.

In November 2016, the Rasmussens installed a speed bump on the private road subject to the Appellants' easement. The speed bump was placed 30 to 40 feet east of the Rasmussens' driveway but prior to reaching the Barsells' driveway. Because of the location of the speed bump, the Rasmussens did not have to go over it to access their property, but the Appellants had to go over the speed bump in order to enter or exit their properties.

After the speed bump was installed, the Appellants had concerns about the speed bump's safety, their liability for accidents or damage that the speed bump might cause, and the speed bump's interference with emergency vehicles. In response to those concerns, the Appellants filed a complaint against the Rasmussens which sought a declaration as to the rights and liabilities of the parties under the easement agreement and whether the Rasmussens had the right to install the speed bump.

TRIAL

The trial was held over one day in March 2023. During the trial, both John Mangiameli and Daniel Barsell testified that they were not consulted prior to the installation of the speed bump and that they both wanted the speed bump removed. Mangiameli testified that his concerns with the speed bump included that

> little kids like to . . . go a little fast over the bump and jump. We've had issues with people's undercarriage on their cars scraping the top of it, and we're also very concerned about the security, but also fire or 911 calls because that's the only ingress and egress out of our . . . driveway. And there's no fire hydrants, so those trucks have to be trucked in with water.

However, he admitted that he has not had an ambulance or fire truck come to his property and that first responders operate on public streets that have varying sizes and conditions of speed bumps and traffic calming devices. Mangiameli testified that he cannot go over the speed bump faster than 5 miles per hour "otherwise it shakes you crazy," that the speed bump has scraped the undercarriage of guests' cars, and that "when you hit [the speed bump] with a snowplow . . . it starts to damage my equipment." However, he admitted that the most recent time he cleared snow with his snowplow the speed bump did not damage his equipment, that no claims have been made

regarding any injuries caused by the speed bump, and that people could be injured on the easement even without a speed bump.

Barsell testified that the location of the speed bump concerned him because "[a]s you're starting to make a turn and your front wheels hit that speed bump, it tends to push them off to the side a little bit. Sometimes you start to lose a little control. . . . it's very easy for somebody not aware of that speed bump to literally go off the road [and] into the grass." Barsell also testified that the location of the speed bump created a hazard when a snowplow hit it, which caused additional wear on the edges of the snowplow blade; that the speed bump scraped the undercarriage of lower profile vehicles; and that he had "witnessed young kids on quads and motorcycles hitting [the speed bump] at pretty high speeds and doing air and almost losing control." According to Barsell, the speed bump impaired the ingress and egress to his property.

Charlotte Rasmussen testified that she decided to install the speed bump for her and her husband's "safety of getting in and out of [their] driveway." Charlotte expressed that she was also concerned with slowing down traffic for safety reasons due to small children in the area. Charlotte admitted that she and her husband ordered the installation of the speed bump and spray painted the speed bump. She stated that she has not received any notification of the speed bump damaging cars, delaying first responders, or causing any injuries.

DISTRICT COURT ORDER

Following the bench trial, the court dismissed with prejudice the Appellants' complaint and the Rasmussens' counterclaims requesting contribution from the Appellants and attorney fees. With regard to the Appellants' complaint, the court specifically found that the Appellants "failed to make the necessary showing entitling them to a declaration that the speed bump is improper" and "failed to make the necessary showing for this Court to enter an injunction requiring [the Rasmussens] to remove the speed bump." Specifically, the court could not

> find that the speed bump presents an unreasonable interference with [the Appellants'] enjoyment of the easement. First, the easement agreement establishes that the easement's purpose is to provide [the Appellants] with ingress and egress to their properties. . . . The speed bump does not frustrate or otherwise hinder this purpose. The Court did not receive any evidence that [the Appellants] cannot access their properties or that the speed bump seriously hinders their access to their property. While the Court did hear testimony about issues as to ice accumulation on the easement, this testimony was minimal and lacked enough specificity to be considered more than speculation.

The court noted that there was testimony from the Appellants regarding possible damage to a snowplow blade, possible damage to the undercarriages of guests' vehicles, the Mangiamelis' vehicle rattling while going over the speed bump, and concerns that first responders could be "hampered or delayed." However, the court found that "[n]othing in the testimony showed any significant material interferences," that potential damage to vehicles and the snowplow was "too speculative," and that it could not find "that the testimony on these issues entitled [the Appellants] to a declaration that the speed bump is an unreasonable interference or an injunction requiring its destruction." The court also stated that, although it took concerns about emergency vehicles seriously, it was not presented with any evidence that emergency vehicles were significantly

hindered. The court noted that emergency vehicles traverse various traffic calming devices throughout the City of Omaha's corporate limits, and that even assuming that the speed bump failed to comply with the City's Traffic Calming Program and other regulations, the Appellants did not show how the speed bump's size was an unreasonable interference with their rights to ingress and egress.

ASSIGNMENT OF ERROR

The Appellants' sole assignment of error is that the district court erred in determining that the speed bump did not materially interfere with their use of the easement.

STANDARD OF REVIEW

An action to enforce restrictive covenants is equitable in nature. *Pine Tree Neighborhood Assn. v. Moses*, 314 Neb. 445, 990 N.W.2d 884 (2023). On appeal from an equity action, an appellate court decides factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the trial court's determination. *Id*. But when credible evidence is in conflict on material issues of fact, the court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. *Melia v. Hansen*, 31 Neb. App. 517, 985 N.W.2d 418 (2023).

ANALYSIS

The Appellants contend that the district court erred in determining that the speed bump did not materially interfere with their use of the easement.

This court recently set forth the analysis required to determine whether a servient estate owner's use of an easement is valid in *Melia v. Hansen*, 31 Neb. App. at 526-27, 985 N.W.2d at 426:

> There is a two-step analysis to determine whether a servient estate owner's use of an easement is valid: whether the easement expressly allows it, and if it is unclear, whether it is a reasonable exercise. Restatement (Third) of Property: Servitudes, § 4.9 (2000). . . .
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> The owner of the servient estate, which is the land that has the easement, and the owner of the dominant estate, which is the person who has rights to use the easement to access the land, share correlative rights to the easement property. See *Kovanda v. Vavra*, 10 Neb. App. 486, 633 N.W.2d 576 (2001). Both parties must have due regard for each other and exercise just consideration for the other's rights and demands. See *id.* Equity will not restrict the servient estate's use of the land, if the dominant estate receives all the uses it is entitled to under the easement agreement. See *id.* But the servient estate cannot interfere with the dominant estate's ability to use, maintain, or repair the easement or increase the risks to exercise the easement rights. Restatement, *supra*.

Here, the parties stipulated at trial that the language of the easement agreement does not expressly reference speed bumps. Thus, we turn to the issue of whether the speed bump materially interferes with or is an unreasonable use relative to the Appellants' rights. There are two Nebraska cases that are instructive on the issue of interference with a dominant estate owner's easement:

Melia v. Hansen, 31 Neb. App. 517, 985 N.W.2d 418 (2023), and *Kovanda v. Vavra*, 10 Neb. App. 486, 633 N.W.2d 576 (2001).

In *Melia*, the plaintiffs possessed an easement on a road located on the defendant's property in order to access their property. The defendant placed gates on the access road containing the easement and allowed his cattle to stay on the road between 1 and 3 weeks per year while moving the cattle between different fields. The plaintiffs claimed that the gate system and cattle made accessing their property more difficult, but not impossible. The district court held that the defendant's use of the easement materially interfered with the plaintiff's use of the easement. This court affirmed finding that the gate system constituted a "material interference" which frustrated the purpose of the easement which was to allow the plaintiffs to access their property. *Id*. at 528, 985 N.W.2d at 427

Similarly, in *Kovanda*, this court held that an irrigation system interfered with the dominant estate owner's easement rights by making the easement too muddy for a vehicle to cross. The easement's purpose was for ingress and egress to reach the dominant estate owner's property by means of any mode of transportation, including farm machinery and equipment, but the mud directly conflicted with that purpose. *Id.* This court concluded that while access to the dominant estate was not barred, the irrigation system unreasonably interfered with travel on the easement frustrating the easement's purpose. *Id*.

Numerous jurisdictions have specifically considered whether a servient landowners' installation of speed bumps interfered with the dominant estate's enjoyment of an easement. For example, see, *Burley v. Bradley*, 2021 Ark. App. 105, 619 S.W.3d 49 (2021) (speed bumps placed on private road subject to easement constituted reasonable safety measure that did not interfere with right of passage); *VanCleve v. Sparks*, 132 S.W.3d 902 (Mo. App. 2004) (speed bumps installed by servient owner did not unreasonably interfere with use of easement; *Wilson v. Palmer*, 229 A.D.2d 647, 644 N.Y.S.2d 872 (1996) (placement of speed bump in right of way did not substantially interfere with reasonable use and enjoyment of easement where bump was reasonable in height and width); *Phillips Industries, Inc. v. Firkins*, 121 Idaho 693, 827 P.2d 706 (Idaho App. 1992) (court order authorized servient owner to place speed bumps on easement for ingress and egress by trucks); *Marsh v. Pullen*, 50 Or. App. 405, 623 P.2d 1078 (1981) (7-inch speed bumps do not unreasonably interfere with use of easement). But, see, *Weatherholt v. Weatherholt*, 234 W. Va. 722, 769 S.E.2d 872 (2015) (lower court did not err in denying servient estate owners' request that permanent speed bumps be placed in dominant estate owner's right of way on basis of danger to children where there was no evidence that children were ever in danger by anyone traveling on right of way, servient estate owners' concerns were general in nature, and no accidents or injuries resulted from dominant estate owner's use of right of way); *Beiser v. Hensic*, 655 S.W.2d 660 (Mo. App. 1983) (substantial evidence supported trial court's determination that placement of speed bumps unnecessarily or unreasonably interfered with use of easement).

In analyzing the legitimacy of speed bumps placed in a right-of-way, courts addressing the issue appear to balance the safety features that speed bumps provide by slowing down traffic, while making sure the speed bumps themselves do not materially interfere with the dominant estate holders' use of their right-of-way. Although speed bumps do not normally restrict a right of passage, we recognize that in certain circumstances they could materially interfere with the

dominant estate holders' ability to use, maintain, or repair the easement or increase risks to exercise their easement rights depending on how they were constructed or how they have functioned.

After reviewing this record, we agree with the district court that the Appellants simply did not provide sufficient evidence to demonstrate that the speed bump installed by the Rasmussens constituted a material interference with their use of their right-of-way. Although the record demonstrates that parties using the right-of-way must slow down to avoid damage due to operating a motor vehicle too fast, they did not make a showing that this otherwise restricted their ability to access their properties or that the speed bump provided an unreasonable risk of damage while traversing it. And although the Appellants referenced concerns about emergency vehicles being able to access their properties, those concerns were general in nature without reference to specific incidents or reasons why this particular speed bump created a greater risk than other speed bumps traversed by emergency vehicles. Finally, although we recognize that snow maintenance can be impacted by speed bumps, we see no evidence demonstrating that the easement cannot be maintained or that the speed bump provided an unreasonable risk of damage during snow removal.

In short, unlike the facts in *Melia v. Hansen*, 31 Neb. App. 517, 985 N.W.2d 418 (2023), and *Kovanda v. Vavra*, 10 Neb. App. 486, 633 N.W.2d 576 (2001), where the parties provided sufficient evidence demonstrating the servient owners' material interference with the dominant owners' rights-of-use, we agree with the district court that the Appellants failed to prove, on this record, that the speed bump materially interfered with their right to use, maintain, or repair the easement, or increased the risks to exercising their easement rights.

CONCLUSION

In sum, having failed to establish that the speed bump substantially interfered with the Appellants' rights of ingress and egress to their properties, we affirm the decision of the district court.

AFFIRMED.