OPINION SUMMARY

MISSOURI COURT OF APPEALS EASTERN DISTRICT

DIVISION ONE

DAVID MAUE,	)	No. ED108696
	)	
Appellant,	)	Appeal from the Circuit Court
	)	of Jefferson County
vs.	)	17JE-CC00665
	)	
FIEDLER ACRES SUBDIVISION, et al.,	)	Honorable Dianna L. Bartels
	)	
Respondents.	)	Filed: December 8, 2020

David Maue ("Plaintiff") appeals the trial court's judgment dismissing Count V of his first amended petition, a road maintenance action filed under section 228.369 RSMo 2016[1] ("section 228.369" or "the statute") against individually named defendants, for failure to state a claim upon which relief can be granted.[2] The roadway maintenance action in Count V of Plaintiff's first amended petition seeks a court order establishing a plan of road maintenance for a roadway adjacent to Fiedler Acres Subdivision ("Subdivision") that is known as Fiedler Lane/Morgan Woods Drive ("Roadway").

The individually named defendants who are parties to Count V can be grouped into three categories: (1) individuals who own property located on the Roadway, whose property is in the Subdivision, and who are subject to Subdivision covenants ("Subdivision Owners"); (2) individuals who own property located on the Roadway, but whose property is not in the Subdivision, and who are not subject to Subdivision covenants ("Benefitted Owners"); and (3) Georgia Rosemann in her capacity as Trustee ("Trustee") of the Subdivision (collectively "all individually named Defendants").

The trial court dismissed Count V of Plaintiff's first amended petition as to all individually named Defendants. Additionally, the trial court, in accordance with Missouri Supreme Court Rule 74.01(b) (2020),[3] entered judgment as to Count V, found no just reason for delay, and certified the matter for appeal.

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[1] All further statutory references are to RSMo 2016. Section 228.369 is a statutory cause of action allowing a party to petition the circuit court for an order establishing a plan of maintenance for a private road under certain circumstances. *See* section 228.369.1-.6.

[2] Fiedler Acres Subdivision ("Subdivision") is not a party to Count V of Plaintiff's first amended petition but remains a party to the remaining counts in the underlying case including: keeping the Subdivision from repairing the roadway at issue in this case beyond what is necessary or in a more-expensive-than-reasonable manner (Count I); directing the Subdivision to abide by provisions of 1988 Restrictions including with respect to the collection of assessments (Count II); enforcing provisions in the 1988 Restrictions including prohibiting recreational vehicles from being parked in front of residences, prohibiting livestock, and prohibiting overnight parking on the streets of the Subdivision (Count III); seeking specific performance to carry out the 1988 Restrictions (Count IV); having an equitable accounting on any assessments collected by the Subdivision (Count VI); and imposing a constructive trust on assessments that are alleged to have been improperly collected by the Subdivision (Count VII).

[3] All further references to Rules are to Missouri Supreme Court Rule (2020).

After Plaintiff filed a notice of appeal with this Court, some of the individual Defendants filed two motions to dismiss Plaintiff's appeal for improper certification under Rule 74.01(b), alleging there was no final appealable judgment. Our Court then ordered both motions to dismiss Plaintiff's appeal be taken with the case. Submission of this appeal followed.

On appeal, Plaintiff only argues the trial court erred in dismissing Count V as to Subdivision Owners and Benefitted Owners.[4,5]

AFFIRMED IN PART AND REVERSED AND REMANDED IN PART.

Division One holds:

(1) There is a "final judgment," and certification is proper under Rule 74.01(b). Therefore, we review the merits of Plaintiff's appeal. The motions to dismiss Plaintiff's appeal filed by some of the individually named Defendants are denied.

(2) Because Plaintiff does not argue on appeal that the trial court erred in dismissing Count V as to defendant Trustee, we affirm the portion of the judgment dismissing Trustee from Count V.

(3) A homeowner-plaintiff states a claim under section 228.369 to "petition the circuit court for an order establishing a plan of maintenance" for a private road when, (1) there is a subject "private road" used by "more than one homeowner"; and (2) there is not a recorded prior written agreement or recorded prior covenant for the maintenance of the private road collectively affecting all landowners benefitting from the use of the private road. *See* section 228.369.1-.6. Accepting as true the allegations in Plaintiff's petition and liberally granting him all reasonable inferences therefrom, we find Plaintiff has sufficiently alleged both of the preceding elements of a road maintenance action under section 228.369. Because Plaintiff's first amended petition states a claim under section 228.369 to "petition the circuit court for an order establishing a plan of maintenance" for the Roadway against Subdivision Owners and Benefitted Owners, we reverse the portion of the trial court's judgment dismissing

[4] The Subdivision Owners and Benefitted Owners are: John S. and Diana M. Wood; Matthew and Kara Ruth Guckes; Diane K. Williams; David T. and Emma Wallen; William K. and Denise Y. Morgan; Omar and Tiffany Garcia; Richard J. and Kathleen A. Hoelzer; Joseph Holycross; Kelly Thies; Andrew F. and Donna M. Fischer; Steven L. Schneider; Cuttler Properties, LLC; Alexander J. Maldonado; John E. and Irma V. Greever; Owen D. Neill; Angela M. Foppe; James Galen Leroy a/k/a Galen L. James; Nancy James; Chris E. and Janet D. Davis; Munir and Alphea Halilovic; Ward D. and Robynne M. Cook; Neal Family Trust; Daniel and Kristin Hudson; Vernon and Rita J. Miller; Gruttke Living Trust; Benjamin F. and Terri J. Ashmore; Lyshing and Thipphavanh Saeou; Marty and Mary C. Sweeney; George and Georgia Rosemann Trust a/k/a the Rosemann Family Trust, George and Georgia Rosemann, Trustees; Cameron D. and Brittney S. Jungewaelter; James R. Baxter, Jr.; and Richard M. and Donna L. Rands.

[5] Plaintiff raises three points on appeal (points one, two, and four), arguing the trial court erred in dismissing Count V as to Subdivision Owners and Benefitted Owners. Quizzically, Plaintiff also raises another point on appeal (point three), contending the trial court erred in dismissing Count V as to the Subdivision. We deny Plaintiff's third point on appeal outright because the record on appeal shows the Subdivision is not a party to Count V of Plaintiff's first amended petition, and therefore, the trial court could not have erred in dismissing it. *See* footnote 2 of this opinion summary; *see also* footnote 2 and Section I.B. of this Court's opinion.

Count V as to Subdivision Owners and Benefitted Owners, and we remand for further proceedings consistent with this Court's opinion.

Opinion by: Robert M. Clayton III, J.
Colleen Dolan, P.J., and Mary K. Hoff, J., concur.

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