STATE OF MICHIGAN

COURT OF APPEALS

MARY CHRISTINA RASHID, KEITH R. STRICKER, DAVID M. DOSS, JANET L. DOSS, REBECCA C. BURK, CHRISTOPHER J. POCILOYKO, JULIANA SEMMA, BERNADETTE SARRICO, CHARLES A. PHILLIPSON, SANFORD MOSER, ROBERT J. ROGEAU, RON WERNER, VANCE MCCORMICK, BOB KAY, and NANETTE FLAG,

Plaintiffs/Counterdefendants-Appellants,

V

CITY OF WIXOM,

Defendant/Counterplaintiff-Appellee,

and

STATE TREASURER, OAKLAND COUNTY DRAIN COMMISSIONER, OAKLAND COUNTY ROAD COMMISSION CHAIRMAN, SBC/AMERITECH, CONSUMERS ENERGY, DETROIT EDISON, COMCAST, JOHN C. CHRISTIE, MARGUERITE MCCLELLAN, RODERICK J. KALLGREN, DENNIS L. CRAIGIE, REGINALD CRAIGIE, JENNETT REID, and JOAN MURPHY,

Defendants-Appellees,

and

BIRCH PARK IMPROVEMENT ASSOCIATION, TERRY TUCK, and JAMIE TUCK,

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UNPUBLISHED
January 31, 2006

No. 257664
Oakland Circuit Court
LC No. 2003-053720-CH

Intervening Defendants-Appellees.

Before: White, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

Plaintiffs brought this action under the Land Division Act, MCL 560.101 *et seq*., to vacate a privately dedicated tract of land. Plaintiffs appeal as of right from an order granting summary disposition to defendant city of Wixom ("the city") and the intervening defendants under MCR 2.116(C)(10).[1] We affirm in part, and reverse in part and remand for further proceedings.

Plaintiffs argue that the circuit court erred in granting defendants' motions for summary disposition. We disagree.

A trial court's grant of summary disposition is reviewed de novo to determine whether the prevailing party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion brought under MCR 2.116(C)(10), the court must examine the documentary evidence presented below and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 361-362; 547 NW2d 314 (1996).

Our Supreme Court held in *Little v Hirschman*, 469 Mich 553, 563; 677 NW2d 319 (2004), that "private dedications are valid in plats registered both before and after 1967." In *Little*, the Court addressed a subdivision plat containing a dedication of various parks "to the owners of the several lots" of the subdivision. *Id.* at 555, 563. The Court found that, "in both the era of statutory silence on private dedications (1835-1924) and the era of implicit statutory recognition of private dedications (1925-1966), a dedication of land for private use in a recorded plat gave owners of the lots an irrevocable right to use such privately dedicated land." *Id*. at 561-562. Thus, the subdivision homeowners had "an irrevocable right to use the parks." *Id*. at 563. "[D]edications of land for private use in plats before 1967 PA 288[2] took effect *convey at least an irrevocable easement* in the dedicated land." *Id*. at 564 (emphasis added). All private dedications are "enforceable by those in the chain of title from the original purchasers of the lots." *Id.* at 554.

Although the Court in *Little* did not address the proper procedure for vacating a pre-1967 private dedication, in *Martin v Beldean*, 469 Mich 541; 677 NW2d 312 (2004), the Court held "that the *exclusive means available* when seeking to vacate, correct, or revise a dedication in a

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[1] Other defendants were named, but did not participate in the proceedings below. As used in this opinion, the term "defendants" shall refer only to the intervening defendants and the city of Wixom.

[2] 1967 PA 288 is the predecessor to the Land Division Act.

recorded plat is a lawsuit filed pursuant to [the Land Division Act] MCL 560.221 through 560.229." *Id.* at 542-543 (emphasis added). The action cannot proceed as an action to quiet title. *Id*. at 550-551.

In the present case, plaintiffs' complaint sought entry of an order "abandoning, discontinuing or vacating a portion of an area known as 'Loon Drive' that lies between Loon Lake and certain lots in the Birch Park Subdivision." The complaint asserted that "[a]lthough the area is referred to as 'Loon Drive,' it has never been improved as a street, or used by the general public as a street or other thoroughfare," and it "has never been accepted by any appropriate governmental entity." The complaint does not recognize the possibility that the disputed tract was part of the subdivision's community beach rather than Loon Drive, and did not seek to vacate a portion of the community beach.

Defendants argue that, because the evidence demonstrates that Loon Drive clearly does not exist north of plaintiffs' lots, plaintiffs' complaint fails to state a claim upon which relief can be granted, thus warranting summary disposition under MCR 2.116(C)(8). In reviewing a motion under MCR 2.116(C)(8), however, the allegations of the complaint are taken as true and construed in the light most favorable to plaintiffs. *Maiden*, *supra* at 119. Viewed in that light, plaintiffs' complaint states a claim upon which relief can be granted. The factual issue whether Loon Drive actually exists at the location alleged cannot be considered in the context of a motion under MCR 2.116(C)(8).

Under MCR 2.116(C)(10), however, the circuit court properly considered whether there was a genuine issue of material fact with regard to the existence of Loon Drive at the disputed location. The recorded plat clearly demonstrates that the disputed property is located in the area that is designated a "community beach." The plat indicates that Loon Drive is located to the east and, arguably, to the west of the disputed tract. Whether the plat is ambiguous with regard to the precise boundaries of Loon Drive to the east and to the west is immaterial, because, as the trial court observed, the plat unambiguously designates the property at issue as part of the "community beach." Because the complaint seeks to vacate only a portion of Loon Drive that does not exist, at least not at the location identified in plaintiffs' complaint, the circuit court properly found that defendants were entitled to judgment as a matter of law.

Plaintiffs' reliance on various representations of city officials to argue that there is a question of fact concerning whether the disputed property is part of Loon Drive is misplaced. Where a recorded plat is clear and unambiguous, the document must be enforced as written. *Blackhawk Dev Corp v Dexter*, 473 Mich 33, 42; 700 NW2d 364 (2005) (public road easement); *Little v Kin*, 468 Mich 699, 700; 664 NW2d 749 (2003) (dock easement). "Only where the language in the granting instrument is ambiguous may this Court examine evidence extrinsic to the document to determine the meaning within it." *Blackhawk Dev Corp*, *supra* at 42. Thus, the documents on which plaintiffs rely, which were prepared by others decades after the plat was recorded, cannot modify the clear and unambiguous designation of the disputed tract of land as a "community beach."

The circuit court correctly found that there was no genuine issue of material fact concerning whether the disputed tract was part of Loon Drive. Because a court cannot vacate a

road that does not exist, defendants were entitled to judgment as a matter of law and their motion for summary disposition was properly granted.

Next, plaintiffs argue that the circuit court erred in granting the motion to intervene brought by the Birch Park Improvement Association, Terry Tuck, and Jamie Tuck. We disagree. A trial court's decision on a motion to intervene is reviewed for an abuse of discretion. *Vestevich v West Bloomfield Twp*, 245 Mich App 759, 761; 630 NW2d 646 (2001).

Under MCR 2.209(A)(3), a person has a *right* to intervene "when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Plaintiffs' sole argument is that the intervenors failed to show that the city would not adequately represent their interests.

Contrary to plaintiffs' argument, intervention as of right "is properly allowed where the intervenor's interests '*may be*' inadequately represented by one of the existing parties." *Id*. at 761, quoting *D'Agostini v Roseville*, 396 Mich 185, 188-189; 240 NW2d 252 (1976) (emphasis in the original). This "burden . . . is treated as minimal." *Karrip v Cannon Twp*, 115 Mich App 726, 731; 321 NW2d 690 (1982). All that is required is a showing of "*concern* of inadequate representation of interests[,] . . . *inadequacy of representation need not be definitely established*." *Vestevich*, *supra* at 762 (emphasis added). "Where this concern exists, the rules of intervention should be construed liberally in favor of intervention." *Id*.

At the hearing of the motion to intervene, plaintiffs' counsel noted that there was "a history of litigation" between the city and the Tucks. Plaintiffs' counsel added:

> [T]he Tucks are concerned that if we are allowed to vacate the property . . . somehow the City will have carte blanche to vacate property it owns to the west and turn it into a public access for city-wide benefit for the City of Wixom. But that's a dispute between the City of Wixom and the Tucks. It's not a dispute that belongs with part of this lawsuit.

There was also evidence that the city's assessor sent a letter to plaintiffs' counsel expressing his belief that the disputed lots "probably should be vacated," and asking plaintiffs' counsel to keep him informed because the city "might possibly be interested in joining in with your clients in the circuit court action relative to the portion of Loon Lake Drive which is on the city owned property to the west of lots 178-184."

The record amply demonstrates that the intervenors had a reasonable concern that the city might not adequately represent their interests in the case. Thus, the circuit court did not abuse its discretion in allowing intervention as of right under MCR 2.209(A)(3).

Lastly, plaintiffs argue that the circuit court erred in denying their motion to amend their complaint. We agree.

Under MCR 2.118(A)(2), "a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires." An

amendment is generally a matter of right rather than grace. *Ben P Fyke & Sons, Inc v Gunter Co*, 390 Mich 649, 659; 213 NW2d 134 (1973). Leave to amend should ordinarily be denied only for particularized reasons such as undue delay, bad faith or dilatory motive, repeated failures to cure by amendments previously allowed, or futility. *Id*. at 656, 659. A circuit court's decision on a motion for leave to amend will not be reversed absent an abuse of discretion resulting in injustice. *Phillips v Deihm*, 213 Mich App 389, 393; 541 NW2d 566 (1995).

Plaintiffs should have been permitted to amend their complaint to pursue a Land Division Act action against the necessary defendants with regard to the community beach area at issue. At the argument on the motion for summary disposition, counsel for plaintiffs stated:

> The - - the Land Division Act, and specifically MCL 560.22, which we've brought our Complaint pursuant to, permits any owner of any lot in a subdivision to seek to vacate, correct, or revise a recorded plat, or any part of it, by filing a complaint in the circuit court. That's exactly what the Plaintiffs have done here. We have filed a complaint in this court seeking to vacate the area that lies north of lots 178 through 184, and south of Loon Lake. This is a grassy area, which my clients have always used as part of their backyards, it's never been utilized as a community beach, there is a sandy beach to the east of the property, but this has been used and maintained by my clients as part of their backyards for as long as anyone can remember.
>
> At the time we filed the Complaint, we had been advised by the City of Wixom, specifically the City of Wixom's assessor, that this area in question was actually part of an undeveloped roadway, known as Loon Drive, and we've attached the letter from the city assessor as Exhibit C to our response.
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> In reliance on what the assessor told us when we filed the Complaint, we specifically referred to the area that we were seeking to vacate as part of the undeveloped area of Loon Drive.
>
> In defending against this action, Defendants have taken the position it's not Loon Drive, it's community beach, and they, therefore, are arguing that because it's not Loon Drive there's no road to be vacated, and therefore we are somehow not entitled to continue to pursue our claim under the Land Division Act.
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> This is a matter of semantics, your Honor. Whether it's Loon Drive or community beach, or some other name, "No Man's Land," it doesn't prevent us from pursuing a claim under the Land Division Act to vacate it.
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> Even if this Court agrees that the plat specifies this area as part of the community beach, we are still allowed to pursue a claim to vacate this area. There have been no cases cited by either of the Defendants which would support the notion that if you have a private and dedicated area, such as a community beach, that you can't proceed as a plaintiff under the Land Division Act to vacate that area. In fact, a recent decision of the Michigan Supreme Court, that was first

> brought to your attention by the Plaintiffs, the Martin v Beldein [sic Beldean] case, specifically provides that it is okay for a plaintiff to proceed under the Land Division Act to seek to vacate privately dedicated area [sic]. In that case, the court specifically held that where a plaintiff sought to vacate a privately dedicated part of a plat, what they [sic] needed to do was not file an action to quiet title, but to file an action under the Land Division Act, which is exactly what was done here.
>
> So, for the argument to be made that, just because there's a dispute as to whether this is Loon Drive or community beach, that we're somehow not entitled to vacate that area, it's not supported by the Land Division Act and it's not supported by the Supreme Court case that was just issued back in March of this year.

On appeal, plaintiffs argue that they should have been permitted to pursue the Land Division Act action with respect to the beach area. We agree, and remand for proceedings under the Land Division Act.[3]

Affirmed in part, and reversed and remanded in part. We do not retain jurisdiction.

/s/ Helene N. White
/s/ Kathleen Jansen
/s/ Kurtis T. Wilder

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[3] Plaintiffs also sought to pursue claims for adverse possession or to quiet title (count II), and for acquiescence (count III). However, our Supreme Court has clearly and unequivocally held that an action to quiet title will not lie to vacate a portion of a recorded plat. *Martin*, *supra* at 550-551. Instead, "the *exclusive means available* when seeking to vacate, correct, or revise a dedication in a recorded plat" is a lawsuit filed pursuant to the Land Division Act. *Id*. at 542-543 (emphasis added). An action under the Land Division Act is "an action *at law* of special character." *Id*. at 551 (emphasis added). Equity has no jurisdiction over actions to vacate or modify a recorded plat. *Binkley v Asire*, 335 Mich 89, 96-97; 55 NW2d 742 (1952). Thus, the circuit court correctly concluded that the proposed amendment to add counts II and III would be futile.