STATE OF MICHIGAN

COURT OF APPEALS

PAUL PENTZ,

Plaintiff-Appellee,

V

RICHARD SCHLIMGEN and MARILYN SCHLIMGEN,

Defendants-Appellants.

UNPUBLISHED
December 19, 2006

No. 258130
St. Joseph Circuit Court
LC No. 03-000744-CZ

Before: O'Connell, P.J., and Murphy and Wilder, JJ.

PER CURIAM.

Defendants appeal as of right from the trial court's denial of their motion for summary disposition pursuant to MCR 2.116(C)(10), and its grant of summary disposition to plaintiff pursuant to MCR 2.116(I)(2). We affirm.

This case involves a property dispute over the scope of defendants' right to use the "lake access area" in the plat where they reside. The Sunset Shores plat was recorded on June 6, 1962, and included 30 lots. Lots 12, and 14-30 fronted Pleasant Lake ("frontlots"), and the plat language provided that those lots ran to the water's edge. Pleasant Shore Lane, a private road dedicated to "the lot owners within the plat," runs perpendicular to Pleasant Lake, and provides a means of ingress and egress to lots 14-17 on the north side, and lots 18-22 on the south side.

Plat dedications adopted on August 22, 1964 dedicated a lake access area for use by the owners of lots 1 to 11, the "backlots," including defendants, whose lots did not abut the lake. Paragraph 10 of the dedication provided as follows:

> 10. Lots 1 to 11 inclusive shall have access to [the] lake over Pleasant Shore Lane, a private road. Use of said lake access shall be restricted to said lot owners and their guests when accompanied by lot owners. Maintenance of this area shall be controlled by property owners committee as denoted in Paragraph #3 above and cost charged to owners of Lots 1 to 11. Parties using lake access area shall not leave autos unattended or parked in manner that would prohibit access to [the] lake for loading or unloading.

The lake access area is accessed by Pleasant Shore Lane and is the area between the terminus of that road and the lake.

Plaintiff, the owner of lot 17 on the north side of Pleasant Shore Lane, and lots 18 and 19 on the road's south side, filed a complaint for injunctive relief after defendants erected a dock and moored their boat at the lake access area. Plaintiff did not dispute defendants' right to use the lake access area, but challenged those specific uses. Defendants asserted that they had a fee interest, and therefore riparian rights in the lake access area, and were thereby permitted to place a dock and moor a boat there. Defendants moved for summary disposition, and argued that there was no material factual issue to decide based on their proffered evidence that the plat's proprietors intended that the permitted uses of the lake access area included dock placement and boat mooring. Plaintiff argued that defendants' interest was an unambiguous easement that must be enforced as written; therefore, the extrinsic evidence offered by defendants could not be considered in determining the scope of the plat dedication. Plaintiff further argued that the uses at issue were normally reserved for those with riparian rights, and could not be implied from simple access or travel easements.

The trial court ruled that the plat dedication language did not grant riparian rights to defendants. It ruled that although the defendants had the right to use the surface water in a reasonable manner and for activities such as boating, fishing, and swimming, they did not have the right to erect a dock and permanently moor their boat during the summer season.

A determination of the extent of a party's rights under a plat dedication is a question of fact that is reviewed for clear error. *Dyball v Lennox*, 260 Mich App 698, 703; 680 NW2d 522 (2004). The intent of the grantor controls the scope of the grantor's dedication. *Dyball, supra* at 704. Where the language of a legal instrument is plain and unambiguous, it is to be enforced as written and no further inquiry is permitted. *Little v Kin*, 468 Mich 699, 700; 664 NW2d 749 (2003); *Dyball, supra* at 704. We review de novo a trial court's decision on a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition brought under MCR 2.116(C)(10) may be granted where there is no genuine issue of material fact, except as to the amount of damages. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Summary disposition under MCR 2.116(I)(2) is appropriate if the opposing party, rather than the moving party, is entitled to judgment as a matter of law. *Local Area Watch v Grand Rapids*, 262 Mich App 136, 142; 683 NW2d 745 (2004).

Defendants raise several issues in support of their argument that they have a right to place a dock and moor a boat as the holders of riparian rights, or alternatively, under the plat dedication language.

Defendants first argue that the plat dedication language is ambiguous, in failing to clarify whether Pleasant Shore Lane runs all the way to the lake and whether it is part of the "lake access" area, and therefore, the trial court should have considered extrinsic evidence of the proprietors' intent in determining the scope of defendants' lake access rights. We disagree.

The plat dedication language provides that the backlot owners and their guests can access Pleasant Lake "over Pleasant Shore Lane." The term "over" indicates that Pleasant Shore Lane provides a means for travel to the lake access area, and is not part of the lake access area. Additionally, that the plat dedication contains a separate provision for the maintenance of Pleasant Shore Lane further supports a conclusion that the maintenance provision for the lake access area excludes Pleasant Shore Lane.

Defendants next argue that the plat dedication language granting them lake access over Pleasant Shore Lane is a grant of fee interest and full riparian rights. Again, we disagree. Generally, land that abuts a river is defined as riparian, while land that includes or abuts a lake is defined as littoral. *Thies v Howland*, 424 Mich 282, 288 n 2; 380 NW2d 463 (1985), citing *McCardel v Smolen*, 404 Mich 89, 93 n 3; 273 NW2d 3 (1978). However, the term "riparian" is often used to describe both types of land. *Id*.

Defendants are not riparian owners because they do not own land adjacent to Pleasant Lake. The land dedication presently at issue occurred before the enactment of the Land Division Act, MCL 560.101 *et seq*. Our Supreme Court has held that "dedications of land for private use in plats before 1967 PA 288 took effect convey at least an irrevocable easement in the dedicated land." *Little v Hirschman*, 469 Mich 553, 564; 677 NW2d 319 (2004). This date distinction is important because the Land Division Act [1967 PA 288], provides that a private dedication in a plat transfers a fee simple to the donees. *Martin v Beldean*, 469 Mich 541, 548; 677 NW2d 312 (2004).

Defendants rely on several cases, including *Thies,* to support their position. In *Thies*, *supra* at 510, a notation on the plat map designated driveways, walks, and alleys "to the joint use of all the owners in the plat," to provide lake access to the backlot owners. The frontlot, or riparian, owners filed suit to enjoin the defendant backlot owners from building and maintaining a dock at the end of one of the easements. *Id*. at 287. The trial court ruled that the defendants could only use the lake for boating, fishing, and sunbathing, and could anchor their boats, and granted the injunction. *Id*. This Court affirmed, but modified the injunction to prohibit the anchoring of boats. *Id*. In determining whether the backlot owners were riparian owners, our Supreme Court noted that the "ownership of the walk and alleys and the scope of the dedication of these lands are interrelated, but distinct inquiries." *Id*. at 289.

The Court stated that the plaintiffs were presumed to own a fee interest in the walkway located between the plaintiffs' lots and the lake, unless the plattors intended otherwise. *Id*. at 293. The Court ruled that the trial court's finding that the walk was an easement was not clearly erroneous, because "[t]he phrase 'joint use' standing alone does not ordinarily denote the passing of a fee interest in land," and the record did not support a different conclusion. *Id*. at 293-294. The Court also ruled that the plat dedication did not evidence an intent to permit the owners to construct docks along the walkway, because the phrase "joint use" did not "evidence an intent to grant a right to construct docks, a right which normally is reserved to riparian owners." *Id*. at 294.

The *Thies* Court noted the possibility of the defendants' right to construct a dock at the end of the alleys that terminated at the lake, and stated, "[c]ases involving a way which terminates at the edge of a navigable body of water are treated differently from those involving a way which runs parallel to the shore." *Id*. at 295. However, because the defendants in *Thies* did not build the dock at the end of an alley, the Court went no further in its analysis.

We find *Thies* instructive to the present case. The plattor's intent controls the scope of the dedication in terms of its ownership and use, *Thies, supra* at 289, 293, notwithstanding defendants' assertions why they have a fee interest and riparian rights in the lake access area (including its definition as an "area," that defendants are financially responsible for its maintenance, and that their property assessment includes their rights to the lake access area).

This remains true regardless of whether the dedication at issue runs parallel to the waterway and lies between the water and the frontlot owners' lots, or whether it lies where a roadway or walkway terminates at the water, or lies between such a terminus and the water's edge. *Id*. at 289, 293-294; *Little v Hirschman*, *supra*, 469 Mich at 554-556, 563-564. Regarding ownership, it is clear from *Thies* that the language used in the dedication affected was an important factor in the determination that the defendants had an easement rather than a fee interest in land. *Id*. at 293-294.

Here, there was a dedication rather than an outright grant, and that fact, together with the language used in the dedication, also supports the conclusion that defendants do not have a fee interest or riparian rights in the lake access area. The dedication language in paragraph 10 provides for "access" to the lake, and for use of the "lake access area," and does not indicate a grant of ownership. Further, our Supreme Court has stated that the "[r]eservation of a right-of-way for access does not give rise to riparian rights but only right-of-way." *Thompson v Enz*, 379 Mich 667, 685; 154 NW2d 473 (1967). We find that the plat dedication language provides defendants and the other backlot owners with rights analogous to an irrevocable easement or right-of-way, and does not grant a fee interest or riparian rights. The trial court's ruling that the owners' "joint use" of the lake access area did not create a fee interest in the land was not clearly erroneous.

We now address the scope of defendants' rights under the plat dedication. Defendants argue that the instant case is analogous to a public road ending at a lake rather than an easement situation. Defendants further argue that they are entitled to dockage rights because public dockage rights have been found in several cases determining the public's right of access, including *Backus v Detroit*, 49 Mich 110; 13 NW 380 (1882), *Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255 Mich App 83; 662 NW2d 387 (2003), and *Jacobs v Lyon Twp (After Remand)*, 199 Mich App 667; 502 NW2d 382 (1993).

Michigan Courts have held that publicly dedicated streets that end at the edge of navigable waters generally provide public access to the water. *Jacobs, supra* at 671, citing *Thies, supra* at 295; *McCardel, supra* at 96; *Backus, supra*. For example, the right of a municipality to build a wharf or dock at the end of a street that terminates at the edge of navigable waters is based on the presumption that the plattor intended to give access to the water and permit the building of structures to aid in that access. *Thies, supra* at 295-296. "Nonriparian owners and members of the public who gain access to a navigable waterbody have a right to use the surface of the water in a reasonable manner for such activities as boating, fishing and swimming. An incident of the public's right of navigation is the right to anchor boats temporarily." *Thies, supra* at 288, citing *Delaney v Pond*, 350 Mich 685, 688; 86 NW2d 816 (1957); *Hall v Wantz*, 336 Mich 112, 116-117; 57 NW2d 462 (1953). However, the extent to which the right of public access includes the right to erect a dock or boat hoists depends on the scope of the dedication. *McCardel, supra* at 97.

Riparian rights include the right to erect and maintain a dock, and the right to anchor boats permanently. *Thies, supra* at 288. Because defendants do not have riparian rights in the lake access area, the right to erect a dock and permanently moor a dock is not automatically vested in defendants. However, as noted in *Thies, supra* at 289,

> Even if we conclude that defendants merely have an easement interest in the walk and alleys, they may still prevail. Plaintiffs cannot prevent defendants from erecting a dock or permanently anchoring their boats if these activities are within the scope of the plat's dedication, *McCardel v Smolen*, 404 Mich 89, 97, 103; 273 NW2d 3 (1978), and do not unreasonably interfere with plaintiff's use and enjoyment of their property. [Footnote omitted.]

The scope of defendants' rights in the lake access area depends on the plat dedication language. *Id*. Whether the construction and maintenance of a dock is within the scope of this type of easement was addressed by this Court in *Dyball, supra*. In that case, the Court held that the plain and unambiguous language of an easement grant by a riparian owner to a nonriparian owner for ingress and egress to the water's edge of Lake Fenton did not grant riparian rights. *Id*. at 708. Therefore, it did not permit the maintenance of a dock or permanent mooring of a boat. *Id*. at 708-709. The Court reasoned that "nothing in the plain and unambiguous language of the easement permits or grants defendant the right to erect and maintain a dock or permanently moor a boat at the end of the easement." *Id*. at 709. It further stated that an easement created for access or ingress and egress to the lake cannot be expanded, and noted that access was defined as including "'a right to use the surface of the water in a reasonable manner for such activities as boating, fishing and swimming,' and a right to temporarily anchor boats." *Id*. at 709, 709 n 4, citing *Thies, supra* at 288.

Here, the dedication language grants defendants and the other backlot owners the right to access the lake and use the lake access area for loading or unloading. It does not specifically grant defendants the right to erect a dock and moor their boats. The language, which provides "access to [the] lake," "use of lake access," and specifies a condition for "[p]arties using lake access area," does not evidence an intent to allow dock construction or the mooring of boats; rather, it clearly provides a place for the backlot owners to access Pleasant Lake within the plat. The prohibition against leaving "autos unattended or parked in a manner that would prohibit access to [the] lake for loading or unloading," also evidences an intent that the lake access area was dedicated to allow the back lot owners ingress and egress to Pleasant Lake. We find that the trial court's ruling that the dedication provided defendants with access rights and surface water rights, but not the right to erect a dock and permanently moor boats, is not clearly erroneous.

Affirmed.

/s/ Peter D. O'Connell
/s/ William B. Murphy
/s/ Kurtis T. Wilder