

STATE OF MICHIGAN
COURT OF APPEALS

JEANNIE L. BARNES,

Plaintiff-Appellee,

v

DOUGLAS KEISTER,

Defendant-Appellant.

UNPUBLISHED

May 26, 1998

No. 198932

Hillsdale Circuit Court

LC No. 95-025300 CZ

Before: Fitzgerald, P.J., and Holbrook, Jr. and Cavanagh, JJ.

PER CURIAM.

Defendant appeals as of right from the order granting summary disposition and injunctive relief to plaintiff in this property dispute. We affirm in part, reverse in part, and remand for further proceedings.

The parties are owners of real property in the Fountain Park Beach subdivision that lies on the north shore of Bird Lake in Hillsdale County. Plaintiff owns three lake view lots that are separated from the lake shore by a park that was dedicated by the plattors to the use of all the property owners of the subdivision. Defendant's parcel is a "back lot" that is separated from the lake by three rows of lots. When defendant erected a seasonal boat dock along the shoreline in the park across from plaintiff's lots, plaintiff brought suit seeking a declaratory judgment holding that defendant had no riparian rights in the shoreline of Bird Lake and an injunction requiring defendant to remove the dock. The parties filed cross motions for summary disposition. Following a hearing on the matter, the trial court granted plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10), finding that the Supreme Court's decision in *Thies v Howland*, 424 Mich 282; 380 NW2d 463 (1985), entitled plaintiff to judgment as a matter of law. The order also permanently enjoined defendant from constructing or maintaining a boat dock and from permanently mooring or anchoring his boat across the park from plaintiff's lots.

The result in this case is dictated by this Court's recent decision in *Dobie v Morrison*, 227 Mich App 536; 575 NW2d 817 (1998). *Dobie* resolved the identical issue presented in this case and is therefore controlling authority pursuant to MCR 7.215(H)(1). Applied to the facts of the instant case, the holding in *Dobie* compels the conclusion that the language used in the dedication of the park

evidenced an intent to convey only an easement interest. See *Dobie, supra* at 540. The intent of the plattors must be determined from the language they used and the surrounding circumstances. *Id.*; *Thies, supra* at 293. The trial court erred in finding *Thies* to be controlling because a park is distinguishable from a mere right of way; a presumption of fee ownership does not arise in lands abutting a parcel dedicated to use as a park. See *Dobie, supra*. However, we affirm to the extent the court found that the language of the plat dedication does not support the conclusion that a fee interest was transferred. As in *Thies* and *Dobie*, the dedication on the plat in this case is a grant of use and not a conveyance of a fee interest. *Thies, supra* at 293; *Dobie, supra*.

Defendant argues that a different result is required because the lots in this case have defined boundaries, in contrast to the lots at issue in *Thies*, which lacked exact boundaries. However, the determination of whether a grant is of a fee interest or an easement is governed by the language of the grant and the surrounding circumstances, not the precision, or lack of the same, with which the plat was drafted. *Thies, supra* at 293.

Defendant also asserts that plaintiff could not be the owner of the riparian rights associated with the shoreline across the park from her lots because no lot owner has ever been assessed for taxes on the park property. We find this evidence to be of limited value because it does not say to whom the park *is* assessed; in order to be consistent with the grant of a fee interest to all lot owners in common, as defendant contends, *all* lot owners would have to pay a proportionate share of the taxes. Thus, the fact that *no* lot owner pays property taxes on the park is of no probative value with regard to a dispute between two lot owners.

Thus, we find that the trial court did not err in finding that the language used in the dedication of the park at issue evidenced the plattor's intent to convey only an easement. However, the extent of a party's right under an easement is a question of fact. *Dobie, supra* at 541; *Soergel v Preston*, 141 Mich App 585, 588; 367 NW2d 366 (1985). Where a dispute exists with regard to a material question of fact, summary disposition is inappropriate. *Mahaffey v Attorney General*, 222 Mich App 325, 343; 564 NW2d 104 (1997). In this case, summary disposition was improper because defendant presented sufficient evidence to create a genuine issue of material fact for trial with regard to whether the scope of the easement included the right to erect and maintain seasonal boat docks. As our Supreme Court has noted, although "riparian rights may not be conveyed or reserved[,] . . . easements, licenses and the like for a right-of-way for access to a water course do exist and oftentimes are granted to nonriparian owners." *Thompson, supra* at 686. Accordingly, the trial court abused its discretion in granting a permanent injunction prohibiting defendant from maintaining a boat dock in the park because the court decided a factual issue that was inappropriately resolved by summary disposition. *Mahaffey, supra*. Consequently, we reverse the trial court's decision to the extent that it permanently enjoined defendant from erecting or maintaining a seasonal boat dock and remand for trial on the factual issues remaining regarding the scope of the easement.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Mark J. Cavanagh