

STATE OF MICHIGAN
COURT OF APPEALS

NORMAN L. WOOLLEY, RUTH D. WOOLLEY
and SILAS W. DENNY,

UNPUBLISHED
June 18, 1999

Plaintiff-Appellees,

v

No. 210262
Cheboygan Circuit Court
LC No. 94-004028 CH

JOHN E. BAIER and JANE P. BAIER,

Defendant-Appellants.

Before: Markey, P.J., and McDonald and Fitzgerald, JJ.

PER CURIAM.

Defendants appeal by right from the trial court's injunctive order, issued on remand, revising an earlier injunction that had been vacated by this Court in *Wooley v Baier*, unpublished memorandum opinion of the Court of Appeals, issued October 3, 1997 (Docket No. 194346). We affirm.

Plaintiffs, as owners of boating, bathing and recreational easements over waterfront property, the fee of which is owned by defendants, sought and were granted an injunction by the circuit court on March 12, 1996, which precluded defendants' use of the subject property for camping. In that order, the court found that "the grantor of the easements did not use the property in question for any purposes whatsoever for more than twenty years after the grants" and that the intent of the original parties was that plaintiffs, as owners of their easements, would be "entitled to the unobstructed use of the property in question in common with others, for recreational and/or swimming and boating purposes." The court enjoined defendants from erecting tents or other temporary or permanent structures on the property, parking campers or other vehicles on the property, and interfering in any other way with the uses granted to plaintiffs in their easements.

On appeal by defendants, this Court vacated the injunctive order issued by the trial court and remanded to the circuit court "for revision of the injunction to more equitably balance the conflicting rights of the parties, leaving each side reasonable scope for exercise of their respective rights without interference by the other." *Wooley, supra*.

In its February 20, 1998 opinion and order issued on remand, the circuit court specifically determined the scope of plaintiffs' easements as follows:

Over the years since the easement was granted, Plaintiffs, or their predecessors in interest, have used the subject parcel for the following purposes: ingress, egress, parking of a car, camping, launching or landing of a boat, swimming, sunbathing, fishing, picnics, to maintain a boat dock or anchorage, to play volleyball, to snowmobile or for ice skating. Thus, the parties have defined the scope of this "boating, bathing and recreational easement" by their past conduct. That definition is hereby adopted by the Court.

Defendants argue that the order entered on remand grants plaintiffs more rights to use the property than those to which plaintiffs are entitled under their easements. We disagree and hold that the court did not clearly err in its determination of the scope of plaintiffs' rights of use under their easements.

The rights of the easement holder "must be measured and defined by the purpose and character of the easement." *Unverzagt v Miller*, 306 Mich 260, 265; 210 NW2d 849 (1943); *Thies v Howland*, 424 Mich 282, 297; 380 NW2d 463 (1985). The easement cannot be modified unilaterally by either party, *Schadewald v Brulé*, 225 Mich App 26, 36; 570 NW2d 788 (1997), and the subject property, as the servient estate, is not to be burdened to a greater extent than was contemplated at the time of the creation of the easement. *Barbaresos v Casaszar*, 325 Mich 1, 8; 37 NW2d 689 (1949). As the easement holders, plaintiffs' activities must be within the scope of the easement and cannot unreasonably interfere with defendants' use and enjoyment of their property. *Thies, supra* at 289; *Dobie v Morrison*, 227 Mich App 536, 541; 575 NW2d 817 (1998). However, "the rights of the owner[s] of the easement are paramount, to the extent of the grant, to those of the owner[s] of the soil." *Harvey v Crane*, 85 Mich 316, 322; 48 NW 582 (1891); *Lakeside Associates v Toski Sands*, 131 Mich App 292, 300; 346 NW2d 92 (1983).

In this case, plaintiffs' easements were conveyed by deed. The scope of the terms "bathing and boating" and "recreational purposes" is somewhat ambiguous. When the wording of the grant "is uncertain or ambiguous, the circumstances surrounding the grant . . . and the situation of the parties must be inquired into with a view of arriving at the intention of the parties." *Harvey, supra* at 321. See also *Hasselbring v Koepke*, 263 Mich 466, 477-478; 248 NW 869; 93 ALR 1170 (1933), and 25 Am Jur 2d, Easements and Licenses, § 84, pp 654-655. The extent of the parties' respective rights under the easements was a question of fact to be determined by the court. *Harvey, supra* at 322-323; *Dobie, supra*. While the trial court's findings of fact are reviewed for clear error, *id.*, its dispositional ruling is subject to our de novo review. *Webb v Smith (After Remand)*, 204 Mich App 564, 568; 516 NW2d 124 (1994).

Here, by interpreting the terms of the easement with reference to the parties' past conduct, the trial court properly defined the scope of plaintiffs' easements. See *Cantienny v Friebe*, 341 Mich 143, 147; 67 NW2d 102 (1954) [wherein the Court looked to the parties' conduct and use of the easement for the past twenty years as evidence of the parties' intent and understanding regarding the easement holder's rights under the easement], and *Dobie, supra* at 541 [where the court looked to the

“traditional and historical” uses of the subject property by the easement holders to determine the scope of their easement]. See also Restatement Property, § 483(d), p 3019, and 25 Am Jur 2d, *supra*, § 83, p 653. There was ample testimony in this case regarding plaintiffs’ uses of the easement property over many years to support the trial court’s findings regarding the scope of plaintiffs’ rights of use under their easements.

Although defendants assert that plaintiffs should not be allowed to park or turn their cars around on the subject property and should not be allowed to permanently anchor boats or maintain docks, defendants raise this claim for the first time on appeal. This was never an issue at trial. Nor were there facts developed below which showed that there was a material increase in the burden upon the subject property beyond that contemplated. To the contrary, defendants maintained that they never attempted to prohibit plaintiffs from having docks or boats on the lakeside property during the warm weather months and never complained about plaintiffs’ vehicles on the property. To the extent that defendants did not take action at an early date to limit these or any of the other activities in which plaintiffs have engaged for over twenty years involving use of their easements, defendants’ claims in this regard are barred by laches. *Myer v Franklin Hotel*, 354 Mich 552, 560; 93 NW2d 224 (1958). We note, nonetheless, that where use of the property for “boating” purposes is within the express scope of the easement and where the subject property is a relatively large parcel of property, plaintiffs have a right to maintain docks and permanently anchor their boats. See *Dobie, supra*, 227 Mich App at 539-540; *Cabal v Kent Co Rd Comm*, 72 Mich App 532; 250 NW2d 121 (1976). Cf. *Thies, supra*, 424 Mich at 289, 296-297, and *Delaney v Pond*, 350 Mich 685; 86 NW2d 816 (1957) [easement holders enjoined from maintaining docks or anchoring boats in lake where their easement rights consisted of access to the lake over mere ten-foot-wide and twelve-foot-wide easements along the lake]. Moreover, the instant easements are not simply easements in a beach, as in *Fischer v Wing*, 293 Mich 61; 291 NW 222 (1940), wherein parking of vehicles was enjoined.

Defendants additionally claim that plaintiff Denny’s “bathing and boating” easement should encompass fewer permissible uses than the Wooley plaintiffs’ “recreational purposes” easement. The trial court, in its original order, referred to the easements as one, “for recreational and/or boating and swimming purposes,” implicitly declining to distinguish between the wording of the two easements. The trial court’s construction of the two easements as one was not clear error. The easements are found in deeds that may be traced to the same grantors, defendants’ grandparents. It is reasonable to interpret the grantors’ intent as being the same when they deeded the smaller parcels with easement rights to the same tract of land. Testimony revealed that all the easement holders used the easement property in approximately the same way.

Defendants’ final claims, that the court’s order does not sufficiently detail the restrained acts and unreasonably limits defendants’ use of their property, are without merit.

In its injunctive order, the circuit court was required to describe in reasonable detail the acts restrained. MCR 3.310(C)(3). The circuit court’s injunctive order dated February 20, 1998 specifically sets forth plaintiffs’ permitted activities pursuant to their easements. In holding that defendants “may make any use of the subject lakefront parcel in common with easement holders so long as it does not interfere with or preclude Plaintiffs’ described uses as specifically noted[.]” the circuit

court properly determined that defendants are entitled to make *any* reasonable use of the premises that does not preclude or interfere with plaintiffs' uses as specifically delineated in the injunctive order. See *Harvey, supra*, 85 Mich at 322. Thus, with reference to the provisions of the injunctive order, defendants are able to ascertain the acts restrained so that they may comply with the order.

We also conclude that the order does not unreasonably limit defendants' use of their property. The order reflects that defendants, as the "owner of the fee subject to an easement[,] may rightfully use the land for any purpose not inconsistent with the rights of the owner of the easement." *Id.*; Restatement Property, § 481, p 3007, § 486, p 3027. The court thus properly balanced the rights of the parties and left each side reasonable scope for exercise of their respective rights, subject only to noninterference with the other parties' rights of beneficial use and enjoyment of the property. The court's holding was in accord with the law and with this Court's instructions on remand to the court.

We affirm.

/s/ Jane E. Markey

/s/ Gary R. McDonald

/s/ E. Thomas Fitzgerald