

STATE OF MICHIGAN
COURT OF APPEALS

ATTORNEY GENERAL OF THE STATE OF
MICHIGAN, ex rel MICHIGAN DEPARTMENT
OF NATURAL RESOURCES,

UNPUBLISHED
August 3, 1999

Plaintiff- Appellee/Cross- Appellant,

v

CHALET du PAW PAW CONDOMINIUM
ASSOCIATION and BEACHFRONT
DEVELOPMENT, INC.,

No. 205384
Berrien Circuit Court
LC No. 94-004017 CE

Defendants- Appellants/Cross-
Appellees.

Before: Griffin, P.J., and Wilder and R. J. Danhof,* JJ.

PER CURIAM.

Defendants appeal the trial court's determination, made after a bench trial, that they are required to apply for a permit to operate a marina pursuant to MCL 324.30102(c); MSA 13A.30102(c). Plaintiff cross-appeals the court's denial of its request for a civil penalty against defendants pursuant to MCL 324.30112(2); MSA 13A.30112(2). Because we reverse the court's ruling regarding the permit, we need not address the penalty issue.

I

Beachfront Development, Inc. (Beachfront) is the developer of the Chalet du Paw Paw Condominiums (Chalet) on Paw Paw Lake, and the Chalet du Paw Paw Condominium Association (the Association) is composed of owners of condominium units at the site. This case involves a dispute between the Michigan Department of Environmental Quality (MDEQ) and defendants over whether defendants operate a marina at Paw Paw Lake consisting of a network of docks placed into the lake in front of Chalet each year from spring until fall for use by condominium owners.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

In August 1994, the Paw Paw Lake Association, Inc. and Ronald L. Hendrix sued defendants, alleging that the docks violated the Michigan Environmental Protection Act, MCL 691.1201 *et seq.*; MSA 14.528(201) *et seq.*, now part of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.1701 *et seq.*; MSA 13A.1701 *et seq.*, and that operation of the docks constituted a nuisance, warranting injunctive relief. In November 1994, the Michigan Department of Natural Resources (MDNR), now the MDEQ, filed a complaint alleging that the Association comprises owners of individual condominium units and that Beachfront is the developer of Chalet and owner of some unsold condominium units there, and seeking removal of an alleged marina at Chalet pursuant to what is now the NREPA, as well as a civil penalty for defendants' alleged failure to comply with the statute. The trial court granted the Association's motion to consolidate these cases, ruling that "the two actions involve substantial and controlling common questions of law and fact." Following a bench trial, the court held that defendants are operating a marina without a permit, but denied plaintiff's request for a civil penalty.

II

Defendants first argue that the trial court erred by consolidating the action brought by the Paw Paw Lake Association and Hendrix with that brought by the MDNR. Defendants claim that these cases possess no controlling common questions of law or fact and that consolidation created sufficient confusion of issues and evidence to necessitate reversal. We disagree. MCR 2.505(A)(2) provides that actions pending before the trial court may be consolidated if they involve a substantial and controlling common question of law or fact. "Decisions regarding consolidation rest in the sound discretion of the trial court." *Bordeaux v Celotex Corp*, 203 Mich App 158, 163; 511 NW2d 899 (1993).

Defendants' assertion that these cases lack commonality is unconvincing. Paw Paw Lake Association's case included a count under what is now part 17 of the NREPA, and a count for nuisance. The MDNR's complaint raised an issue under what is now part 301 of the NREPA. The proofs necessary for establishing the parties' claims and defenses include common and overlapping questions of fact. Thus, defendants' claim that their dock facility is exempt from the permit requirement because it is a "seasonal structure" as defined by statute requires proof that the facility did not "unreasonably interfere with the use of the water by others entitled to use the water or interfere with water flow." MCL 324.30103(b); MSA 13A.30103(b). It follows from this that portions of the MDNR's case, Paw Paw Lake Association's case and defendants' defense required evidence of the use of Paw Paw Lake, the lake's carrying capacity and congestion, and the role played by defendants' docks in the lake's condition. Consolidation therefore does not manifest an abuse of the trial court's discretion necessitating reversal.

Defendants' contention that fatal error occurred because the trial court became confused as the result of consolidation is not borne out by the evidence. The court's questioning of Hal Harrington, when considered in context, does not disclose significant confusion prejudicing defendants' case. Defendants judge too harshly a comment by the trial court during which the court stated that it was "thinking out loud." Defense counsel agreed with the court's explication

of this remark, and no error resulted from it, especially in view of the fact that this case involves a bench trial with no possibility of jury confusion.

Finally, evidence such as the MDNR's shoreline study, the Paw Paw Lake Association's carrying capacity analysis, and the rebuttal testimony of Deputy Thomas Yops was proper given the nature of the proofs and defenses, and did not unduly confuse the court or prejudice defendants. Reversal is therefore unwarranted on this ground.

III

Defendants next contend that the trial court erred by applying the marina operating permit provisions of the NREPA to them because the court's interpretation of the statute is inconsistent with its plain meaning. We agree. MCL 324.30101(f); MSA 13A.30101(f) provides:

(f) "Marina" means a facility that is owned or operated by a person, extends into or over an inland lake or stream, and offers service to the public or members of the marina for docking, loading or other servicing of recreational watercraft.

MCL 324.30102(c); MSA 13A.30102(c) states:

Except as provided in this part, a person without a permit from the department shall not do any of the following:

* * *

(c) Erect, maintain, or operate a marina.

Proper interpretation of these provisions is a question of law that this Court reviews de novo. *Oakland Co Bd of Rd Comm'rs v Michigan Property & Casualty Guaranty Ass'n*, 456 Mich 590, 610; 575 NW2d 751 (1998). Statutory language should be construed reasonably, keeping in mind the purpose of the act. *People v Seeburger*, 225 Mich App 385, 391; 571 NW2d 724 (1997). If the plain and ordinary meaning of statutory language is clear, judicial construction is normally neither necessary nor permitted. *Lorencz v Ford Motor Co*, 439 Mich 370, 376; 483 NW2d 844 (1992).

Examination of the NREPA in the light of these principles compels the conclusion that the marina operating permit requirements are clearly directed toward entities such as commercial marinas and yacht clubs. The term "marina" as defined in MCL 324.30101(f); MSA 13A.30101(f) does not include docks like those located in front of Chalet that belong to individual condominium owners with riparian rights to the property and that exist for the owners' private, noncommercial, recreational use. Defendants possess no ownership in the common elements of the condominiums or in the unit-owners' personal property placed on the common elements. The trial court therefore erred as a matter of law by ruling that the NREPA requires defendants to obtain a marina operating permit.

IV

Defendants' final argument is that the trial court clearly erred in its factual finding that defendants operate a statutorily defined marina on Paw Paw Lake. This Court reviews a trial court's findings of fact in a bench trial under the clearly erroneous standard. MCR 2.613(C); *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 98; 535 NW2d 529 (1995). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Hofmann, supra* at 99.

Plaintiff avers that Beachfront once contracted with a company for installation of some boat docks. However, it appears from the evidence that these docks were associated with unsold condominium units, and when each unit was sold Beachfront provided the materials for the dock with the unit. Furthermore, the fact that in 1984 Beachfront attempted to lease docking privileges apart from the sale or leasing of a condominium unit is not controlling of Beachfront's present status under the NREPA. Finally, the facts that Beachfront leased two condominium units and did not prohibit the tenants from using the docks and that it recently arranged with a contractor to change the configuration of a docking structure are too attenuated to support the trial court's conclusion that Beachfront is operating a marina.

The evidence is also deficient regarding the Association. Trial testimony supports the conclusion that the Association does not assess its members for the installation and removal of the docks, that the billing for such work is separate from the billing for general assessments, and that the Association's role in this process is simply to act as an intermediary between the members and the contractor who does the work, thus obviating the need for members to write individual checks to the contractor. Viewed in its entirety, the evidence does not support plaintiff's claim that the Association conducts routine maintenance of the docks. Furthermore, the Association's establishment of a "beach and dock committee," its issuance of a "good neighbor reminder" forbidding glass in the beach and dock area, its purchase of liability insurance covering the docks, and its authority to approve dock configuration do not support the conclusion that the Association is operating a marina. Finally, the fact that condominium owners may occasionally switch their docking spots without taking their physical dock structures with them is inconsequential. The trial court therefore clearly erred by finding that defendants operate a marina under MCL 324.30102(c); MSA 13A.30102(c).

Reversed.

/s/ Richard Allen Griffin

/s/ Kurtis T. Wilder

/s/ Robert J. Danhof