STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH COYNE, JOYCE COYNE, JEANETTE J. DAY, WILLIAM H. DRANE, JUDY DRANE, DONALD A. ENYEDY, VICTORIA L. ENYEDY, MARK FRASER, DEBORAH FRASER, THOMAS HUBER, JANEL E. HUBER, JOSEPH E. MOONEY, CYNTHIA MOONEY, JON PUSKARICH, LAUREN PUSKARICH, RUTH W. ROANTREE, MAE VAN DEWIELE, RUSSELL MORFINO, MAMIE MORFINO, ANNA PAVLAC, ANNA STRELECK, and VERA WEST,

Plaintiffs/Counterdefendants-Appellees,

and

BRIAN DOOLEY and TAMARA DOOLEY,

Plaintiffs-Appellees,

v

RACHELLE M. DANELUK, GENEVIEVE BEGIN, LENORE LESNAU, DONALD PARTHUM, KAREN PARTHUM, DENNIS TEASDALE, and DEBBIE TEASDALE,

Defendants/Counterplaintiffs/Cross-Plaintiffs/Cross-Defendants-Appellants/Cross-Appellees,

and

KAY FEDERLEIN, JOHN SCHAMANTE, SALVATORE SCHAMANTE, VITA LONGO REVOCABLE TRUST, CARMELA LAROSA,

UNPUBLISHED
February 24, 2004

No. 242875
Sanilac Circuit Court
LC No. 00-027210-CH

MARY VAN RIJN, GERALD L. NEAULT, and MARY C. NEAULT,

Defendants/Cross-Defendants-Appellees/Cross-Appellees,

and

DONALD L. HOULAHAN and SYLVIA HOULAHAN,

Defendants/Cross-Defendants/Cross-Plaintiffs-Appellees/Cross-Appellants.

Before: Saad, P.J., and Markey and Meter, JJ.

PER CURIAM.

In this dispute over a strip of Lake Huron beach property, defendants-counterplaintiffs, owners of lots fronting the disputed strip, appeal as of right from a summary disposition order granting fee title ownership in the strip equally to all owners of lots or partial lots within the subdivision that contains the strip. Two other defendants, Donald and Sylvia Houlahan, cross appeal as of right from the trial court's order dismissing their cross-claim for damages. We affirm in part, modify in part, and remand this case for further proceedings.

The trial court provided a convenient statement of the case in its November 1, 2001, opinion:

> On January 26, 1950, John E. Bucsko caused to be filed a subdivision plat with the Sanilac County Register of Deeds establishing the John E. Bucsko Subdivision. The subdivision plat, by its terms, includes all property to the shore of Lake Huron. The plat contains 20 lots, 4 of which (Lots 1 through 4) front on Lake Huron. The other lots lie directly to the west of Lots 1 through 4.
>
> The subdivision plat has a number of designated private roads, and provides in its dedication that, "The streets and alleys as shown on said plat are hereby dedicated to the use of lot owners only."
>
> The Plaintiffs in this lawsuit and all of the back lot owners argue that historically the waterfront area has been used by all of the residents of the subdivision. They further allege that in the early 1990's restrictions were placed on the back lot owners' use of the beach and waterfront area. . . .

> This lawsuit was brought by the back lot owners against fellow property owners within the John E. Bucsko Subdivision whose property abuts the beach and waterfront . . . . The . . . issue presented is whether the riparian[1] rights to the waterfront belong only to the frontlotters (1 through 4) or whether these rights were conveyed to all of the lots within the subdivision by the dedication of the plat.

The court ultimately granted summary disposition to plaintiffs, ruling that "the interposition of [an] intervening parcel of land between parcels 1 through 4" and the lake "eliminates any claim that Lots 1 through 4 have for the riparian rights of the waterfront area lying to the east of this subdivision." The court granted "fee title ownership of that portion of the Subdivision Plat which is composed of all property lying between the shores of Lake Huron and the eastern boundary line of Lots 1 through 4" to each owner of a lot or partial lot within the subdivision. The court issued an accompanying injunction ordering that "no structures or impediments shall be erected" on the beachfront without the consent of all owners of lots or partial lots within the subdivision.[2]

On a later motion for summary disposition, the trial court dismissed a cross-claim brought by defendants[3] Donald and Sylvia Houlahan, who had alleged trespass and nuisance against certain front-lot owners, claiming that the front-lot owners "ha[d] sought to restrict or interfere with the rights, use, and enjoyment of the Waterfront by Houlahan and all other property owners." The trial court dismissed the cross-claim for damages in trespass on the ground that the Houlahans' right to the land in question was not exclusive of the possessory rights of cross-defendants. It dismissed the cross-claim for damages in nuisance on the ground that the Houlahans had no right to the private use and enjoyment of the disputed strip of property.

Defendants/counterplaintiffs argue that the court erred in granting summary disposition to plaintiffs. We find that the trial court did not err in concluding, as a matter of law, that the plattor intended the strip of land along the waterfront for the nonexclusive use of all owners of lots in the subdivision. We additionally find, however, that the court erred in declaring the waterfront to be owned by all lot owners in fee, instead of recognizing it as the back-lot owners' easement upon the front-lot owners' littoral land.

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[1] The appropriate term here is actually "littoral," which refers to the rights of owners of land abutting "an ocean, sea or lake rather than a river or stream . . . ." See Black's Law Dictionary (6th ed, 1990), p 934.

[2] By obvious implication, the court's ruling also dismissed a counterclaim brought by certain front-lot owners.

[3] It is not entirely clear why the Houlahans were designated as defendants in the original action, as they apparently are back-lot owners.

The trial court decided the case primarily on the basis of the plat map and accompanying pronouncements, the words of which are not in dispute.[4] The pertinent question, then, is whether the map and accompanying description could reasonably be interpreted in the manner advanced by defendants-counterplaintiffs. As noted in *Quinnin v Reimers*, 46 Mich 605, 608; 10 NW 35 (1881), "[t]o interpret the plat correctly we should place ourselves as nearly as possible in the position of the proprietor when he made it, and have its subdivisions before us as they were before him at that time." Moreover, "[t]he intent of the plattors should be determined with reference to the language used in connection with the facts and circumstances existing at the time of the grant." *Dobie v Morrison*, 227 Mich App 536, 540; 575 NW2d 817 (1998).

The trial court observed the following in reaching its decision:

> Lots 1 through 4 have a definite easterly boundary which is a solid line and is a definite distance from the westerly boundary of each of these respective lots. The private road which runs all the way to the eastern end of the subdivision has a non-solid line which runs between the easterly boundary of Lots 2 and 3. And there is definitely an intervening parcel of property lying to the east of Lots 1, 2, 3, and 4 in this subdivision. The subdivision indicates that it includes all property to the shore of Lake Huron. It is, therefore, the finding of this Court based upon a review of the plat of the John E. Bucsko Subdivision that no question of fact exists that there is an intervening parcel of land between the front lot owners (1 through 4) and the waterfront of Lake Huron.

The plat map does indeed state that "plat includes all land to water's edge." Moreover, there is a straight, solid[5] line running along the eastern edges of the four front lots, at a consistent uniform distance from the western edges of the lots. Defendants-counterplaintiffs contend that this line is akin to an "intermediate traverse line" or "meander line," i.e., a line formally measured and intended to represent the border of a body of water. See, e.g., Black's Law Dictionary (6th ed, 1990), p 980.[6] Accordingly, defendants-counterplaintiffs essentially argue that their lots extend to the water's edge. See, e.g., *Hilt v Weber*, 252 Mich 198; 233 NW 159 (1930) (discussing the fact that a lot extending to a formal "meander" line encompass all land to the water's edge, even if the meander line as formally portrayed does not, in actuality, reach the edge of the water).

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[4] We decline to consider certain untimely evidence presented below by defendants/counterplaintiffs. See, e.g., *Maiden v Rozwood*, 461 Mich 109, 126 n 9; 597 NW2d 817 (1999).

[5] This solid line is interrupted between Lots 2 and 3 with a short dotted portion that marks a road to the lake.

[6] Although meandering is more characteristic of watercourses than of lakes, meander lines may be used in platting land bordered by lakes as well. See, e.g., *Hilt v Weber*, 252 Mich 198, 201; 233 NW 159 (1930).

We cannot agree with the interpretation advanced by defendants-counterplaintiffs. Indeed, Lake Huron is depicted on the plat map using four slightly wavy lines, illustrating water and its natural irregularity. The westernmost of these wavy lines is emboldened, quite obviously marking the edge of the lake and the actual boundary of the whole plat, seeing as the plat "includes all land to [the] water's edge." The slightly wavy, emboldened line at the water's edge essentially serves the purpose of a meander line – that is, it represents the edge of Lake Huron. The straight line to the east of Lots 1 through 4 is clearly placed inland from the emboldened line and simply does not purport to represent the edge of the lake according to a plain and commonsense reading of the plat map. The only commonsense way to interpret this straight line is to view it as marking the eastern edges of Lots 1 through 4.

The otherwise uninterrupted line marking what appears to be the eastern borders of Lots 1 through 4 changes to dots between Lots 2 and 3, where the private road meets that line. Defendants-counterplaintiffs argue that this indicates that the whole line is a mere meander line, the dots signaling that an easement exists for continuation of a road and for a small water access area. However, given that the emboldened, wavy line clearly represents the water's edge, one would expect to see such dots, if they represented a small easement, to extend from the southeastern corner of Lot 3, and from the northeastern corner of Lot 2, to the water, the better to mark off the easement from the front-lot owners' respective areas of exclusive right.

Moreover, and significantly, there are solid lines extending from the northeast corner of Lot 4, and from the southeast corner of Lot 1, to the water. These lines thus comport with the dedication of the whole plat as running to the water's edge. The lack of any such lines extending the dividers between Lots 1 and 2, and 3 and 4, to the water suggests that those dividing lines end where they do for a reason. In other words, the whole plat is shown to run to the water, but Lots 1 through 4 are *not* shown to run to the water.

For these reasons, the trial court correctly held that the plat map indicates that the straight line running at the eastern end of Lots 1 through 4 marks a change in the character of the land. This leaves the question, then, whether the land between that line and the water is an intervening parcel over which the front-lot owners have no rights superior to those of the back-lot owners, as the trial court ruled, or whether the plat simply shows the existence of an easement, leaving the front-lot owners with certain littoral rights.

Where a plat indicates that lots are bounded by streets, those streets constitute the boundaries of the lots. *Thies v Howland*, 424 Mich 282, 291; 380 NW2d 463 (1985). "Unless a contrary intent appears, owners of land abutting a street are presumed to own the fee in the street to the center, subject to the easement." *Id.* When a street is contiguous to the lot and the water, the inquiry focuses on who owns the half of the way that touches the water. *Id.* As noted in *Thies*, *id.* at 293, "owners of land abutting any right of way which is contiguous to the water are presumed to own the fee in the entire way, subject to the easement." Here, the strip of land in dispute is analogous to a street or right-of-way,[7] given that the plat clearly did not expressly

[7] Viewing the strip of beach as analogous to the streets and alleys in the dedication is the only commonsense interpretation. Indeed, because the plat map clearly sets the strip off as a piece of
(continued…)

attach the strip of land to Lots 1 through 4.[8] Therefore, the owners of Lots 1 through 4 are presumed to own this strip, subject to an easement, unless a contrary intent appears.[9] We find no such contrary intent. Indeed, the dedication states that streets and alleys (and, by our analogy, the strip of land in dispute) are dedicated "to the use of the lot owners only." Dedication to "the use" of lot owners is insufficient, standing alone, to indicate that the fee in those rights-of-way

(…continued)

land different in character from the front lots, as discussed above, granting full exclusive ownership in the front-lot owners is inappropriate. That leaves as alternatives either that the plattor retained ownership, that the plattor dedicated the beach to the public, that the plattor conveyed joint fee ownership rights to all owners within the subdivision (as the trial court held), or that the plattor conveyed an easement interest to all lot owners, similar to the situation with rights-of-way. The first two possibilities are not viable because the plat nowhere hints at the plattor's retention of ownership rights or any public dedication of any part of the plat. Moreover, fee ownership by all lot owners in the waterfront is excessive, in that no words in the plat suggest such a thing. Extending the dedication of the streets and alleys – to "the use" of all lot owners – to cover the waterfront as well resolves the status of the waterfront in the only commonsense manner.

[8] Defendants-counterplaintiffs emphasize that the strip of beach in dispute bears no label on the plat map, arguing that this lack of a label weighs in favor of the land belonging exclusively to them. We disagree. Indeed, this lack seems to be a consequence of the labeling requirement of the then-applicable statutory scheme, the Plat Act of 1929, MCL 560.1 *et al.*, repealed by 1967 PA 288, § 292. The following provision existed in the 1948 statutory compilation: "If there be any street, park, or other places which are usually public, but are not so dedicated on the plat, the character and extent of the dedication of such street, park or other public place shall be plainly set forth in the dedication." MCL 560.12 (repealed). This provision concerned differentiating private dedications from public ones, not differentiating between kinds of private dedications, and it attempts to avoid ambiguity by requiring clear labeling whenever a part of the plat that may reasonably be presumed public in character is intended to be kept private. Streets, alleys, parks, and "other public place[s]" are more often public places than private ones. This is not true, however, with regard to waterfront property, over which owners normally exercise exclusive rights. Moreover, roads, alleys, and parks must be constructed, or at least preserved, in order to obtain or retain their character. This is not true with regard to beaches, which most typically exist wherever a lake has an edge (exceptions being where rocky natural formations or sturdy human ones take the place of traditional beaches). In this sense, a "beach" does not seem to require the clarification of labeling such as a road, alley, or park does. Thus, we conclude that the lack of any label on the disputed strip of beach, as opposed to the carefully labeled private roads, is not itself a matter of legal significance.

[9] We note that we do not find the strip of beach at issue here to be equivalent to the distinct "park" at issue in *Dobie, supra* at 537. Moreover, although the *Dobie* Court concluded that the *Thies* right-of-way analysis could not be applied to the park at issue in *Dobie*, the Court's analysis in this regard was not necessary to its conclusion and therefore constitutes non-binding obiter dicta. See *id.* at 538-540. Viewing the strip of beach at issue here as analogous to the streets and alleys in the dedication is the only commonsense interpretation under the facts of this case.

passed to all lot owners. See *id.* at 293-294. The presumption applies, then, that Lots 1 though 4 extend to the water, subject to an easement. The back-lot owners are not littoral owners, but they do have rights to the waterfront under an easement, while the front-lot owners presumably retain such exclusive littoral rights as the prerogative to construct docks in front of their lots. See *Thies*, *supra* at 293-295. Given the existence of an easement, as opposed to a grant of fee ownership, the scope of that easement must be resolved on remand.

The Houlahans argue that the trial court improperly dismissed their claims for trespass and nuisance. We disagree. Trespass involves intrusion upon the land of another. See, e.g., *DiFronzo v Port Sanilac*, 166 Mich App 148, 155; 419 NW2d 756 (1988). The people against whom the Houlahans focus their argument were not intruding upon the land of another, considering their ownership of the land in question. The Houlahans cite authority for the proposition that a landowner has a right of exclusion against "all others." However, the authorities cited should simply be understood to be referring collectively to all owners of a given parcel having exclusionary rights with regard to all non-owners. Additionally, the Houlahans protest that if the trial court's ruling is upheld, "then no individual co-tenant having an interest in a tenancy-in-common, could bring an action against a third party for trespass." The logic of this assertion is difficult to follow. At issue is whether one co-owner may sue another in trespass, where the parties each have rights to the property in question, not whether either may sue a third party for physically invading the premises. The trial court correctly held that the Houlahans had failed to state a claim in trespass.

With regard to nuisance, the trial court recited that nuisance is "a non-trespassory invasion of another's interest in the <u>private</u> use and enjoyment of land," supplying its own emphasis on the word "private," and then ruled that "since the Cross-Plaintiffs are not entitled to the private use and enjoyment of the land in question, dismissal of this claim is also required . . . . The term "private nuisance" is normally contrasted with "public nuisance." See, e.g., *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 190; 540 NW2d 297 (1995).[10] This distinction is not at issue in this case, where only private interests are in dispute. The trial court clearly used the word "private" not to distinguish a private from a public nuisance, but rather in the more general sense of "[s]ecluded from the sight, presence, or intrusion of others . . . ." See *American Heritage Dictionary* (2d college ed, 1985), p 986. In other words, the court dismissed the nuisance claim on the ground that the Houlahans' interest in the disputed strip was not private with respect to, or secluded from the intrusion of, their cross-defendants. Given (1) that the front-lot owners about whom the Houlahans complain had an even greater right to the property than the Houlahans and (2) that the Houlahans cite no authority in their appellate brief indicating that one may sue a cotenant in nuisance for invading shared land, we find no basis to disturb the trial court's ruling. See, generally, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984) (a party may not force this Court to search for authority to sustain his position).

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[10] "A public nuisance is an unreasonable interference with a common right enjoyed by the general public." *Cloverleaf, supra* at 190.

Given our resolution of the case, we need not address the additional issues raised on appeal.

Affirmed in part, modified in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Jane E. Markey
/s/ Patrick M. Meter