STATE OF MICHIGAN

COURT OF APPEALS

JUDD H. HART, ALICIA HART, MARA FILO, and DOUGLAS FILO,

Plaintiffs/Counter-Defendants-Appellants,

v

STEVEN C. WARD and REBECCA L. MILLER-WARD,

Defendants/Counter-Plaintiffs-Appellees.

UNPUBLISHED
October 26, 2004

No. 248725
Cheboygan Circuit Court
LC No. 00-006790-CH

Before: Murphy, P.J., and Sawyer and Markey, JJ.

PER CURIAM.

Plaintiffs appeal as of right an order granting defendants a right to use a private road easement next to plaintiffs' property to access a lake. Plaintiffs sought to enjoin defendants from all use of the roadway. The trial court enjoined plaintiffs from interfering with defendants' use of the roadway as a road to access Mullet Lake, but also enjoined all parties from using the roadway for non-road purposes. We affirm.

We review the trial court's findings of fact in a bench trial for clear error and conduct a review de novo of the court's conclusions of law. *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001). A finding is clearly erroneous if, after a review of the entire record, the reviewing court is left with the definite and firm conviction that a mistake has been made. *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). This Court gives special deference to a trial court's findings when they are based on the credibility of the witnesses. *Id*.

Although this Court reviews a trial court's decision whether to grant injunctive relief for an abuse of discretion, the trial court's decision may not be arbitrary and must be based on the particular facts of each case. *Higgins Lake Property Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 105-106; 662 NW2d 387 (2003). Equitable actions, such as an action to quiet title, are reviewed de novo. *Burkhardt v Bailey*, 260 Mich App 636, 646-647; 680 NW2d 453 (2004). An action to partition land is equitable in nature. MCL 600.3301; *Anderson v Richter*, 54 Mich App 532, 534; 221 NW2d 251 (1974). Interpretation of statutes or contracts is also reviewed de novo. *Burkhardt, supra* at 646-647. Construction of court rules is a question of law reviewed de novo,

and principles of statutory construction apply when interpreting court rules. *CAM Constr v Lake Edgewood Condo Ass'n*, 465 Mich 549, 553-554; 640 NW2d 256 (2002).

Plaintiffs first argue that defendants' use of the private road violates Cheboygan County zoning ordinances and is not a prior nonconforming use. Plaintiffs failed to submit sufficient evidence of the zoning ordinances or a violation of the zoning ordinances. We note that at summary disposition, defendants submitted an affidavit of the Cheboygan County zoning administrator who averred that there were no zoning ordinance violations as alleged.

Moreover, a prior nonconforming use was established. "A prior nonconforming use is a vested right in the use of particular property that does not conform to zoning restrictions, but is protected because it lawfully existed before the zoning regulation's effective date." *Heath Twp v Sall*, 442 Mich 434, 439; 502 NW2d 627 (1993). "The zoning restriction's enactment date is the critical point in determining when a nonconforming use vests." *Id*. at 441. The parties agreed that the earliest alleged ordinance was adopted in 1969. There was testimony at trial that individuals had observed the easement in use since 1938 or earlier and every year since 1965. The private road was regularly used to access Mullet Lake for well over sixty years. Betty Rodgers testified that, to the best of her memory, the roadway had been in existence and in use as early as 1930. She observed people using the roadway for purposes of boating, walking, swimming, sitting, or taking dogs to the lake on a regular basis every year. Consistent testimony came from Gale Rodgers. No evidence was presented to the contrary. The evidence did not reflect that regular easement users were persons other than those entitled to use the roadway access. Further, defendants' use is generally consistent with the prior use of the roadway easement. Therefore, the trial court did not clearly commit error by finding that the use of the easement predated the ordinance and that a nonconforming use was established, assuming the use was indeed nonconforming.

Plaintiffs argue that defendants were required to show that defendants or their predecessors in interest had personally engaged in the nonconforming use. Plaintiffs cite *Square Lake Hills Condo Ass'n v Bloomfield Twp*, 437 Mich 310; 471 NW2d 321 (1991), in support of this proposition. However, plaintiffs do not provide a pinpoint citation, and the case does not appear to support plaintiffs' assertion. We will not search for authority either to sustain or reject a party's position. *Mudge v Macomb Co*, 458 Mich 87, 104-105; 580 NW2d 845 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Plaintiffs' assertion that the doctrine of nonconforming use should not apply under *Adams Outdoor Advertising v City of East Lansing (After Remand)*, 463 Mich 17; 614 NW2d 634 (2000), fails because the ordinances, as merely recited to us in plaintiffs' brief, do constitute zoning regulations. See *id.* at 22 n 2. Plaintiffs also argue that defendants abandoned the nonconforming use based on an alleged definition of "abandonment" in the ordinance. However, abandonment requires more than nonuse even if there is an applicable zoning ordinance stating that nonuse alone constitutes abandonment. *Livonia Hotel, LLC v City of Livonia*, 259 Mich App 116, 127-128; 673 NW2d 763 (2003). Plaintiffs had the burden of showing not only an omission by easement users but an intent to relinquish or abandon a vested right to use the property in the manner in which it was being used. *Id*. at 128. However, plaintiffs only argue that defendants failed to prove continuous use of the private road every year since 1969.

Plaintiffs argue a number of reasons, under the terms of the document the parties agreed created the private road easement, why defendants allegedly have no rights to use the private

road to access the lake. As an initial matter, plaintiffs argue that defendants may not rely on the document at all because "a party may not rely on written evidence not sufficiently referred to in their pleadings." Plaintiffs rely on MCR 3.411(C)(1) for this proposition, but they misstate the court rule. MCR 3.411(C)(1) actually provides:

> Written evidence of title may not be introduced at trial unless it has been sufficiently referred to in *the* pleadings in accordance with this rule. [Emphasis added.]

If language in a statute or court rule is unambiguous, it must be enforced as written. *CAM Constr*, *supra* at 554. The plain language of the court rule does not require a document to be referred to in any particular party's pleadings, only "the pleadings." Plaintiffs attached a copy of the document to their complaint and, in fact, introduced it into evidence as one of their trial exhibits. Error requiring reversal may not be "error to which the aggrieved appellant has contributed by planned or neglectful omission of action on his part." *Smith v Musgrove*, 372 Mich 329, 337; 125 NW2d 869 (1964). Plaintiffs introduced the document and cannot have been harmed to learn that it was actually used at trial. The issue has been effectively waived.

Plaintiffs argue that the easement gives defendants no rights to use the roadway, yet plaintiffs admitted at trial that defendants had a right to launch boats from the easement. Plaintiffs argue that defendants do not live in the required subdivision, but uncontradicted expert testimony from a surveyor showed that defendants do have the required property interest. Both parties' expert surveyors agreed that, although the language of the document was not entirely clear, the easement extended to the edge of the water, if not into it. The trial court did not commit clear error by making findings of fact consistent with the evidence.

Plaintiffs argue that the plain language of the indenture limits any rights it conveys to property owners with lots directly on Mullett Lake. The relevant portion of the indenture reads:

> And as a further consideration for this deed, the parties of the second part have this day deeded to parties of the first part land in the southwest quarter of the northwest quarter of said section five to be used for private road purposes.
>
> This deed together with another deed of even date herewith between the same parties being made as a compromise settlement of the boundary line, which said private road above described is hereby agreed to by said parties to be the boundary line between the adjoining premises of said parties.
>
> And besides establishing the boundary line, this deed is given for the purpose of vesting in said second parties the right to use said premises as a private road, also all parties who have purchased or obtained any interest and all persons who may purchase or obtain any interest in lots in Grand View and Wildwood Subdivisiond [sic] in said Township on Mullet Lake.

The language plaintiffs rely on is "on Mullet Lake," which, plaintiffs argue, must modify "lots." Therefore, because there is no dispute that defendants' property has no frontage on the lake itself, defendants have no right to use the private road. Plaintiffs' argument is directly contrary to principles of construction. Our Supreme Court held almost a century ago that it was a general

legal and grammatical maxim of construction that, absent clear intent to the contrary, a relative word must refer to the last antecedent. *Traverse City v Twp of Blair*, 190 Mich 313, 323-324; 157 NW 81 (1916). The same rule applies today. *Dessart v Burak*, 470 Mich 37, 41; 678 NW2d 615 (2004). The phrase "on Mullet Lake" would, therefore, refer to the *township*, not to the *lots*. Plaintiffs argue that the purpose of the indenture was to settle a boundary line dispute, but the indenture also clearly states that, "*and besides establishing the boundary line*, this deed is given for the purpose of vesting in said second parties the right to use said premises as a private road, also all parties who have purchased or obtained any interest and all persons who may purchase or obtain any interest in lots . . . ." (Emphasis added). Therefore, plaintiffs' interpretation of the language of the indenture is incorrect.

Plaintiffs argue that the roadway may not be used as anything other than a roadway, but the trial court ruled in plaintiffs' favor on this argument and defendants have not cross-appealed it. Plaintiffs' argument appears to be an assertion that defendants should be precluded from doing anything once they have accessed the lake by using the roadway. A roadway terminating at the edge of navigable waters is presumed to provide access to the water. *Higgins Lake, supra* at 102. "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." *Id*. at 103-104. The trial court's decision to enjoin defendants from using the roadway as anything other than a roadway, but to refuse to enjoin defendants from making use of the water once they access it, was neither arbitrary nor an abuse of discretion. *Id*. at 105-106.

Plaintiffs argue that as a matter of law, defendants are precluded from using the lakeshore at the end of the private road and in front of plaintiffs' cottage. Plaintiffs' argument is based on an allegation that defendants' rights to use the water were based on the public trust doctrine. Alternatively, plaintiffs argue that the indenture merely establishes a road, not access to the lake. As discussed, a road to a lake provides access to the water, *Higgins Lake*, *supra* at 102, and such use was reflected in the evidence. Plaintiffs admit that defendants did not rely on the public trust doctrine in their pleadings, and it does not appear that the trial court relied on the public trust doctrine to reach its decision. In any event, plaintiffs conceded at trial that the lake is navigable water.

Plaintiffs argue that defendants may not use the easement because the easement is not explicitly referenced in defendants' chain of title, that the easement was extinguished by the union of dominant and servient estates, and that the court erred in finding that the indenture permitted the splitting of lots thereby increasing the number of easement users and the burden on the roadway. These arguments are not supported by the law or the facts presented at trial, and the court did not err. The evidence did not support a finding that there had been an increased burden on the easement that was material and substantial and contrary to the easement language found in the indenture. See *Schadewald v Brulé*, 225 Mich App 26, 36; 570 NW2d 788 (1997). Although a valid easement appurtenant requires two distinct estates, *Rusk v Grande*, 332 Mich 665, 669; 52 NW2d 548 (1952), the evidence indicates that it was not defendants' predecessors in interest who owned the land underlying the present location of the roadway easement. Therefore, defendants' predecessors never owned the servient and dominant estates simultaneously. Moreover, plaintiffs' arguments ignore the plain language of the indenture that provided the roadway easement to all persons who have or may obtain any interest in the referenced subdivisions.

Plaintiffs argue that the indenture constitutes a private dedication, which plaintiffs allege is invalid. However, our Supreme Court has recently rejected this argument. *Little v Hirschman*, 469 Mich 553, 557-563; 677 NW2d 319 (2004). Assuming for the sake of argument that the indenture was, as plaintiffs maintain, a private dedication, it would "convey at least an irrevocable easement in the dedicated land." *Id*. at 564. Plaintiffs' dedication arguments otherwise lack merit.

Plaintiffs finally argue that they are entitled to a partition sale of a portion of the private road pursuant to MCL 600.3304. That section states that "[a]ll persons holding lands as joint tenants or as tenants in common may have those lands partitioned." Plaintiff argues that an easement is an "estate in land" and therefore subject to partition. However, plaintiff relies in part on a case that holds an easement to be a *privilege*, not an estate. *Burling v Leiter*, 272 Mich 448, 454; 262 NW 388 (1935). More recently, this Court reaffirmed that holding:

> An easement is the right to use the land of another for a specified purpose. *Bowen v Buck & Fur Hunting Club*, 217 Mich App 191, 192; 550 NW2d 850 (1996). An easement does not displace the general possession of the land by its owner, but merely grants the holder of the easement qualified possession only to the extent necessary for enjoyment of the rights conferred by the easement. *Morrill v Mackman*, 24 Mich 279, 284 (1872). [*Schadewald, supra* at 35.]

Because an easement is not an estate in land, but merely a right to use land, it cannot be partitioned. See *Outhwaite v Rodgers*, 214 Mich 346, 349; 183 NW 74 (1921)("[D]efendants may not be deprived of this easement under color of partition proceedings."). To the extent that plaintiffs are arguing for partition of the roadway property itself and not the easement, we agree with the trial court's ruling:

> [The complaint] language does not constitute a sufficiently pled request for partition or a partition sale. All proper title holders are not parties to this case, there are no factual pleadings contained in the complaint to support partition nor has MCR 3.401 been satisfied.

Further, a partition of the roadway property would not impact the trial court's ruling regarding the use of the roadway easement as established by the indenture. We reject in total all arguments submitted by plaintiffs.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Jane E. Markey