STATE OF MICHIGAN

COURT OF APPEALS

WILLARD P. WILCOX, GORDON W. WILCOX, THEODORE W. WILCOX, DAVID W. PALMER, and CAROLYN P. SHAH,

Plaintiffs-Appellees,

v

ELK RAPIDS TOWNSHIP and ELK RAPIDS TOWNSHIP BOARD,

Defendants-Appellants,

and

ELK RAPIDS SPORTSMAN'S CLUB, INC.,

Intervening Defendant.

UNPUBLISHED
November 22, 2005

No. 261139
Antrim Circuit Court
LC No. 04-008041-CZ

WILLARD P. WILCOX, GORDON W. WILCOX, THEODORE W. WILCOX, DAVID W. PALMER, and CAROLYN P. SHAH,

Plaintiffs-Appellees,

v

ELK RAPIDS TOWNSHIP,

Defendant-Appellee,

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ELK RAPIDS TOWNSHIP BOARD,

Defendant,

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No. 261142
Antrim Circuit Court
LC No. 04-008041-CZ

ELK RAPIDS SPORTSMAN'S CLUB, INC.,

Intervening Defendant-Appellant.

Before: Sawyer, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

In these consolidated appeals, defendants Elk Rapids Township and its township board (collectively referred to as "defendants"), and intervening defendant, Elk Rapids Sportsman's Club, Inc. (ERSC), appeal as of right from the trial court's grant of summary disposition in favor of plaintiffs, quieting title to certain property in favor of plaintiffs, but granting Elk Rapids Township an opportunity to submit a plan to the trial court for development of the property as a public recreation park. For the reasons set forth in this opinion, we affirm the ruling of the trial court.

FACTS

This case arises from a dispute over ownership of approximately eleven acres of real property located in Antrim County. In January 1948, Mina Wilcox executed a codicil to her will which gave the disputed parcel of land to Elk Rapids Township for development as a recreation park. She further stated that it:

> is my wish that the township of Elk Rapids shall not relinquish ownership of this parcel to any person or group. [sic] but I do wish [sic] the Township of [sic] shall be permitted to lease to the Elk Rapids Sportsmans [sic] Club, the site of it present [sic] shooting range, at the discretion [sic] of the Township Board for reasonable [sic] periods of time . . . for some appropriate annual rental sums be put aside as a park improvement fund.

Following her death in 1948, the executor of Mina Wilcox's estate executed a deed conveying the property to Elk Rapids Township, providing for the property to be named the "Mina G. Wilcox Recreation Park." Also in 1948, a lease covering approximately three acres of the property between Mina Wilcox and the ERSC expired. That lease provided that it was for a ten-year period commencing May 1, 1938, and was to remain in effect as long as the property was used as a shooting range. The ERSC was required to fence off the shooting range area and was authorized to make improvements suitable for the land's purpose. None of the parties' dispute that the ERSC continued to use the property after the lease expired, however no lease can be found prior to 1986.

Following the state taking some of the property for highway use, in 1986 Elk Rapids Township and the ERSC entered into a fifty-year lease, with total payable rent of $50 and an option to renew for another fifty years. In 1987 the ERSC became an incorporated nonprofit corporation and assigned the lease to the corporation. In June 2004, plaintiffs brought this action as heirs of Mina Wilcox asserting that defendants Elk Rapids Township and Elk Rapids Board had abandoned the dedication of the property as a public park and asserted a claim for superior title based on a failed dedication.

Plaintiffs also claimed an unlawful diversion of donated land and an unconstitutional appropriation of property or lending of credit. Defendants filed an answer and in August 2004, the trial court permitted ERCS to intervene as a defendant.

Following plaintiffs and defendants filing counter motions for summary disposition, the trial court granted summary disposition in favor of plaintiffs, stating, in part:

> In the instant case, the dedicated public use was never established. The property was never developed and used by the public for recreational purposes. It was not even left in its natural state and opened for use by the public. [citations omitted]. Instead, the Sportsman's Club, that originally leased only three acres of land, now occupies all eleven acres of the land. The Sportsman's Club did not have a lease for a number of years and the park improvement fund was never established. The Sportsman's Club is a private membership organization that controls access to the property. Thus, the Court must conclude that, even though the Defendant Township initially accepted the dedication, it ultimately abandoned the purpose of the dedication by effectively giving the property to a private club and making it impossible for the public to access and use the land for park purposes. By operation of law, title should revert to the heirs of Mina G. Wilcox.

The trial court then fashioned a remedy which allowed the Township to submit a plan within 180 days for the creation of the park, and ordered the ERSC to abandon the property thirty days following submission of the Township plan. On April 11, 2005, the trial court ordered a stay, pending appeal which was conditioned on the ERSC paying monthly rent of $1,500 for its use of the property as a shooting range.

LAW

We review de novo the trial court's decision denying defendants' motion for summary disposition and granting plaintiffs' cross-motion for summary disposition with respect to count I (abandoned dedication) and count II (quiet title) of plaintiffs' complaint. *Burkhardt v Bailey*, 260 Mich App 636, 646; 680 NW2d 453 (2004). We also review de novo an equitable action to quiet title. *Id.* Although the trial court did not specify under which subrule of MCR 2.116(C) summary disposition was granted, because the court considered evidence beyond the pleadings and stated that there was no genuine issue of material fact, MCR 2.116(C)(10) is the appropriate subrule to apply. *Velmer v Baraga Area Schools*, 430 Mich 385, 389; 424 NW2d 770 (1988); *Craig v Detroit Public Schools Chief Executive Officer*, 265 Mich App 572, 573-574; 697 NW2d 529 (2005).

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the plaintiff's complaint. *Payne v Farm Bureau Ins*, 263 Mich App 521, 525; 688 NW2d 327 (2004). "Evidence offered in support of or in opposition to the motion can be considered only to the extent that it is substantively admissible." *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163-164; 645 NW2d 643 (2002); see also MCR 2.116(G)(6). The evidence is viewed in a light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law. *Payne*, *supra* at 525.

"A dedication is merely an appropriation of land to some public use, accepted for such use by or in behalf of the public." *Clark v Grand Rapids*, 334 Mich 646, 656-657; 55 NW2d 137 (1952). The law recognizes both statutory and common-law dedications. *Little v Hirschman*, 469 Mich 553, 557 n 4; 677 NW2d 319 (2004). A statutory dedication, such as that arising under laws governing plats, can be sufficient to vest fee simple title in the grantee. *Little*, *supra*; see also MCL 560.253(1), as enacted by 1967 PA 288, effective January 1, 1968 (dedication, gift, or grant to public or any person, society, or corporation sufficient to vest fee simple title). Pursuant to MCL 560.253(2), "land intended for . . . parks . . . or other public uses as designated on the plat shall be held by the municipality in which the plat is situated in trust to and for such uses and purposes." A fee simple constitutes an estate in land, which reverts to the grantor only if the deed contains reversionary language. *Dep't of Natural Resources v Carmody-Lahti Real Estate, Inc*, 472 Mich 359, 381; 699 NW2d 272 (2005); see also *Briggs v Grand Rapids*, 261 Mich 11; 245 NW 455 (1932) (deed executed in exchange for consideration, which stated that "purchase of land is for park purposes," but had no reversionary clause, did not limit the city/grantee).

But the common law treats the act of dedication as creating only an easement in the public. *Little*, *supra* at 557. Under the common law, a grant or conveyance to the general public cannot take effect because the common law requires a definite and certain grantee. *Payne v Godwin*, 147 Va 1019, 1024; 133 SE 481 (1926); see also *Badeaux v Ryerson*, 213 Mich 642, 647; 182 NW 22 (1921). Although it has been said that a municipality in which dedicated property is situated may take the property as trustee for the public, *Baldwin Manor, Inc v Birmingham*, 341 Mich 423, 430; 67 NW2d 812 (1954), an easement gives no title to land, *Thies v Howland*, 424 Mich 282, 289 n 5; 380 NW2d 463 (1985). Rather, it is an inherently limited estate in land. *Dep't of Natural Resources*, *supra* at 381.

No particular form or ceremony is necessary to validate a common-law dedication so long as the dedicator's intent is established. *Badeaux*, *supra* at 647. But when a dedication is effectuated by a deed, a court must look to the deed itself to determine the grantor's intent. See *Patrick v YMCA*, 120 Mich 185, 192-193; 79 NW 208 (1899), and *Van Ness v Washington*, 29 US (4 Pet) 232; 7 L Ed 842 (1830). As with other instruments, if there is no ambiguity, the grantor's intent is determined from the instrument itself. *Thomas v Jewell*, 300 Mich 556; 2 NW2d 501 (1942). A dedication is always construed with reference to the object with which it was made. *Baldwin Manor, Inc*, *supra* at 430.

ANALYSIS

In this case, the 1948 executor's deed contains some language indicating that it was the result of a bargained for transaction, supported by valuable consideration, and that it purports to convey all of the decedent's title to the land. But the deed also recites that there is no consideration, and the conveyance was expressly subjected to the suggestions and directions in the codicil to the decedent's will. A deed must be read as a whole to determine the grantor's intent. *Dep't of Natural Resources*, *supra* at 370. A deed that refers to and is subject to another instrument is construed in light of that other instrument. *Chicago Lumbering Co v Powell*, 120 Mich 51, 57; 78 NW 1022 (1899). As set forth in the executor's deed, the codicil of the decedent's will provided:

> At the present time the Elk Rapids Sportsman's Club has a nearly expired lease for the site of its shooting range. It uses an unimproved drive extending [sic] from the Bay Shore road across the field to its shooting range. This drive should be considered as a temporary access and the Sportsman's Club should be allowed to do sufficient grading to make the drive passable at its off-shoot from the Bay Shore road, pending the provision for a more permanent [sic] access which should [sic] be designated by the Township Board, when the field is needed for some recreational project. It is my suggestion, but not my dictation, that the permanent access be along the East-West quarter line, which is the Southern boundary of said parcel. It is my understanding that the use of Michigan public parks is not denied to any person because of race, color or creed.

We therefore begin our analysis by ascertaining whether the conveyance by Mina Wilcox vested Defendant Elk Rapids Township with fee simple or an easement.[1]

Precatory words in a will, such as "I request," may be treated as mandatory if such an intent is manifest. *In re McKay Estate*, 357 Mich 447, 451; 98 NW2d 604 (1959). Here, notwithstanding some reference to a bargained for transaction in the executor's deed, we find it plain that it is subject to the codicil of the decedent's will, and that the decedent had a donative intent for a specific public park purpose. The decedent's use of the word "wish" in conjunction with the phrase, "shall not relinquish ownership," is evidence that she specifically and singularly intended that Elk Rapids Township hold and develop the property for this public purpose. The word "shall" is commonly understood as mandatory. See *Browder v Int'l Fidelity Ins Co*, 413 Mich 603, 612; 321 NW2d 668 (1982) (discussing an issue of statutory construction). The decedent also provided a means of funding at least some of the park development by allowing Elk Rapids Township to rent part of the property to the ERSC. Had the decedent intended a conveyance with no restrictions, she could have used the same discretionary language used with respect to Elk Rapids Township's permission to lease the property, or the "suggestion, but not my dictation" language used with respect to the placement of the access road for the ERSC.

Examined as a whole, the deed is unambiguous with respect to the decedent's intent to effectuate a common-law dedication of property for the stated purpose of development as a public recreation field, subject to Elk Rapids Township's limited authority to lease part of the property to the ERSC. Therefore, as a matter of law, the property interest created by the executor's deed was an easement.

Because Elk Rapids Township did not acquire fee simple title, the absence of a reversionary clause is immaterial in determining plaintiffs' property rights. Rather, the material question is whether Elk Rapids Township abandoned the easement. The record discloses that the trial court examined the issue of abandonment, and correctly applied the law, notwithstanding its omission of specifically finding that an easement interest was created.

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[1] We note that the trial court referred to the "common law" application of the rule of law in this case, however, we agree with defendant township that the trial court never specifically ruled that the township was vested with title in fee simple of an easement.

After de novo review, neither defendants nor the ERSC have established any basis for disturbing the trial court's determination that no genuine issue of material fact was shown with respect to the issue of abandonment. *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002). We agree with plaintiffs that defendants' and the ERSC's arguments on appeal were not fully presented to the trial court, but do not find that this deficiency precludes appellate review. *Id.*

Nonetheless, it was incumbent on defendants or the ERSC to present substantively admissible evidence in support of their respective positions regarding whether plaintiffs could prove abandonment. *Veenstra*, *supra* at 163-164; MCR 2.116(G)(6). To prove abandonment of an easement, plaintiffs were required to establish both an intent to relinquish the easement and external acts putting the intention into effect. *Dep't of Natural Resources*, *supra* at 385. Nonuse alone is inadequate. *Id.* at 385; see also *Roebeck v Mecosta Co Rd Comm*, 59 Mich App 128, 132-133; 229 NW2d 343 (1975).

Here, the evidence established that the extent of the property actually subject to the easement was reduced after the 1948 executor's deed because of the state's acquisition of part of the property for a highway, and a related transaction in 1959 between Elk Rapids Township and the decedent's heirs in order to provide a new access to the approximate eleven acres remaining on the east side of the highway. Viewed in a light most favorable to defendants and the ERSC, the evidence established that Elk Rapids Township abandoned the easement when it executed a formal lease with the ERSC in 1986 for fifty years, with an option to renew for another fifty years. The lease specified that the property was to be used and occupied by the ERSC "exclusively as a semi-private club and shooting range."

Although a shooting range might constitute a recreational activity, it is plain that the decedent did not intend a lease with the ERSC to be part of the intended public recreation park or field, inasmuch as she made a separate provision for the lease, restricting it to the site of the ERSC's then-existing lease area, which was approximately three acres. Further, while we recognize that a governmental entity may perform a public function through a private lessee by maintaining control over the use, *Huron-Clinton Metropolitan Authority v Attorney General*, 146 Mich App 79, 86; 379 NW2d 474 (1985), the lease in this case was definitely for a private purpose. Neither defendants nor the ERSC submitted any admissible evidence establishing a genuine issue of material fact with respect to the issue of abandonment. Hence, we uphold the trial court's grant of summary disposition in favor of plaintiffs with respect to this issue.

We reject defendants' and the ERSC's estoppel and waiver arguments as a threshold matter, it is necessary to identify the particular fact that defendants and the ERSC are claiming plaintiffs are estopped from denying or asserting. As the trial court correctly determined, estoppel would not aid Elk Rapids Township in acquiring title by estoppel because there was no evidence of fraud. *Kitchen v Kitchen*, 465 Mich 654, 660; 641 NW2d 245 (2002).

In general, equitable estoppel is not a cause of an action, but is a defense or may be used defensively. *Westfield Cos v Grand Valley Health Plan*, 224 Mich App 385, 395; 568 NW2d 854 (1997). It may assist a party by precluding the opposing party from asserting or denying a particular fact. *Lakeside Oakland Development, LC v H & J Beef Co*, 249 Mich App 517, 527; 644 NW2d 765 (2002); *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 140-141; 602 NW2d 390 (1999). "Equitable estoppel may arise where (1) a party, by representations,

admissions, or silence intentionally or negligently induces another party to believe facts, (2) the other party justifiably relies and acts on that belief, and (3) the other party is prejudiced if the first party is allowed to deny the existence of those facts." *Id.* at 141.

To the extent defendants' and the ERSC's claims pertain to the use of the property, the relevant question is whether plaintiffs are precluded from asserting that the lease arrangement between Elk Rapids Township and the ERSC constituted an abandonment of the easement. Neither defendants nor the ERSC have identified any admissible evidence of conduct or silence by any of the decedent's heirs factually supporting an estoppel argument. "An essential element of estoppel is that a party knowingly permitted the opposite party to act to its own disadvantage." *Commercial Union Ins Co v Medical Protective Co*, 136 Mich App 412, 422; 356 NW2d 648 (1984), rev'd in part on other grounds 426 Mich 109; 393 NW2d 479 (1986); see also *Bentley v Cam*, 362 Mich 78, 82; 106 NW2d 528 (1960).

Additionally, neither defendants nor the ERSC have identified any admissible evidence submitted to the trial court that supports a claim of wavier, i.e., an intentional and knowing relinquishment of a right. *Commercial Union Ins Co, supra* at 29; see also *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 379; 666 NW2d 251 (2003). Finally, the ERSC has failed to show that it properly preserved its alternative theory of consent by presenting this issue to the trial court. *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 532-533; 672 NW2d 181 (2003). In any event, as with the ERSC's claim of waiver, the ERSC has failed to demonstrate factual support for its claim.

In sum, we conclude that the trial court properly granted summary disposition in favor of plaintiffs with respect to counts I and II of their complaint. We decline to address the parties' arguments concerning other counts in plaintiffs' complaint because these claims were neither properly presented to, nor decided by, the trial court. *ISB Sales Co, supra* at 532, nor are they necessary for a proper determination of this appeal. *Steward, supra* at 554.

Affirmed.

/s/ David H. Sawyer
/s/ Michael J. Talbot
/s/ Stephen L. Borrello