

STATE OF MICHIGAN
COURT OF APPEALS

GARY E. MACZIK,

Plaintiff/Counter Defendant-
Appellee,

v

TROY A. DAVIS and MICHELLE DAVIS,

Defendants/Counter Plaintiffs-
Appellants.

UNPUBLISHED

January 24, 2008

No. 273220

Roscommon Circuit Court

LC No. 99-720867-CK

Before: Kelly, P.J., and Cavanagh and O’Connell, JJ.

PER CURIAM.

Defendants appeal as of right from an order granting riparian rights to plaintiff. We reverse.

Plaintiff is the owner of back-lot properties known as Lots 1, 2, and 3 in Block 9 of the Shoppenagon Lodge Subdivision. Defendants own Block F, a front-lot property that is situated in front of plaintiff’s lots and is contiguous with Sam-O-Set Boulevard in the Shoppenagon Lodge Subdivision. This subdivision is adjacent to the south shore of Higgins Lake. Sam-O-Set Boulevard generally runs parallel to the shoreline of Higgins Lake. The issue of riparian rights has been extensively contested for several years with regard to properties around Higgins Lake. See, e.g., *McCardel v Smolen*, 404 Mich 89, 97 n 14; 273 NW2d 3 (1978). Plaintiff’s predecessor in interest was involved in such litigation which culminated in a judgment being entered in 1974 that plaintiff alleges declared these lots to be riparian lots. The judgment was recorded and plaintiff purportedly improved these lots in reliance upon that judgment.

According to plaintiff’s complaint filed in 1999, however, the “judgment did not define the boundary lines of the riparian interest enjoyed by Lots 1-3, Block 9, of Shoppenagon’s Lodge Subdivision.” After defendants “intentionally interfered with Plaintiff’s lawful exercise of his riparian rights by removing his dock and precluding him from using any of the adjacent shoreline to access his riparian frontage,” plaintiff filed this action. Plaintiff requested, in part, that the trial court “enter a judgment partitioning the riparian interests of the respective parties.” Subsequently, the court ordered the matter to be adjudicated “based upon a stipulated set of facts, briefs, responsive briefs, and oral argument.”

In his “trial brief,” plaintiff argued that the 1974 judgment he relied on was appealed and subsequently affirmed in part, and remanded in part for further findings of fact in *Kempf v Ellixson*, 69 Mich App 339; 244 NW2d 476 (1976). On remand, the trial court made certain findings of fact that were then affirmed by this Court. After the appeals were concluded in 1977, the original 1974 judgment was recorded. Plaintiff argued that “[t]his Judgment declaring that the owners of Plaintiff’s lots have riparian rights has been recorded as public record for over twenty years. . . . [and] has gone unchallenged by anyone for all of those years.” And, because defendants purchased their property over twenty years after the judgment was recorded, they “had constructive notice that Block 9, Lots 1 through 3 were declared to have riparian rights in Higgins Lake.” Defendants cannot now, plaintiff argued, challenge the validity of the recorded 1974 judgment in *Kempf*. The judgment cannot be collaterally attacked.

In their “trial brief,” defendants argued that plaintiff was misinterpreting the prior court judgment. The judgment clearly held that for a lot to have riparian rights, it had to be located on Sam-O-Set Boulevard. The reason that the prior judgment has not been challenged is because “nobody ever advanced any claim that Lot 1 through 3 had riparian rights.” Plaintiff did not claim that he purchased the property believing that riparian rights would attach and such rights obviously would not attach because the property is not contiguous to the water. And, the Court of Appeals confirmed that only those properties located on Sam-O-Set Boulevard enjoyed riparian rights. The Court of Appeals remanded the matter only as to the issue of whether any back-lot owners proved that they were entitled to a prescriptive easement to access Higgins Lake. The trial court determined that none of the back-lot owners were entitled to a prescriptive easement, including specifically plaintiff’s predecessor in interest, and the Court of Appeals affirmed that conclusion. In summary, defendants argued, a plain reading of the prior judgment and rulings of the trial court, as well as the Court of Appeals, clearly debunk plaintiff’s claim of riparian rights.

Oral arguments were conducted on March 4, 2002, following which the trial court held that the 1974 judgment from the *Kempf* case indicated that the lots at issue have riparian rights. The court refused to relitigate the issue, concluding that the judgment settled the matter. However, the court retained jurisdiction and directed the parties to attempt to come to a partition agreement. On May 10, 2002, the court entered an order to that effect, giving the parties until June 15, 2002, to come to an agreement. Defendants’ motion for relief from judgment, premised primarily on the argument that the trial court misinterpreted the 1974 judgment in the *Kempf* case, was denied. After the parties failed to come to a partition agreement, a partition commissioner was appointed to “partition the riparian bottomlands of the parties.” On July 14, 2006, the partition commissioner submitted his findings and conclusions to the trial court. On September 1, 2006, the trial court entered an “order confirming commissioner’s report and closing file.” This appeal followed.

We initially note and reject plaintiff’s challenge to this Court’s jurisdiction. The May 10, 2002, order entered by the trial court clearly retained jurisdiction of the matter until the partitioning issue was resolved. On September 1, 2006, the trial court rendered its final order, MCR 7.202(6)(a)(i), which disposed of the claims and adjudicated the rights and liabilities of the parties by determining their respective riparian rights. Until that September order, there was no final judgment to appeal, and so defendants’ claim of appeal filed on September 22, 2006, was timely, being filed within 21 days of the September 1, 2006, final order. MCR 7.204(A)(1)(a).

Defendants argue on appeal that the September 10, 1974, judgment did not grant riparian rights to back-lot owners, including plaintiff's predecessor in title, and this Court "already determined, in its opinion in *Kempf v Ellixson*, 69 Mich App 339; 244 NW2d 476 (1976)[,] that the September 10, 1974 judgment denied riparian rights to the plaintiff's property." We agree. Interpreting the meaning of a court order and holdings of this Court are questions of law that are reviewed de novo. See *Brown v Loveman*, 260 Mich App 576, 591; 680 NW2d 432 (2004).

The September 10, 1974, judgment at issue in this matter was entered in a dispute between front-lot owners and back-lot owners regarding riparian rights in Higgins Lake. Although it is not clear, this case likely involved a similar issue as was involved in the *McCardel* case: whether riparian rights in Higgins Lake frontage were vested in the public—which would include back-lot owners—by the dedication of the boulevard (in this case, Sam-O-Set Boulevard) to public use. See *id.* at 93; *Kempf, supra* at 342. The judgment declared that

those persons owning lots bordering on Sam-O-Set Boulevard, in Lyon Township, located in Shoppenagon and Lyon Manor Subdivisions, and particularly, those Defendants who were made parties by the class action whose properties are describe[d] herein and whose names are listed herein, hold title to the riparian rights in Higgins Lake by virtue of their ownership of the lots bordering on Sam-O-Set Boulevard.

* * *

It is further ORDERED that the parties named in the appended list who were named parties Defendant in Cause #1022 owning properties bordering on Sam-O-Set Boulevard in Shoppenagon and Lyon Manor Subdivision of Lyon Township, and/or their successors in title, own, by virtue of their ownership of said land, the riparian rights in Higgins Lake opposite their properties and they shall have the exclusive use of the same against all other persons, including members of the public generally.

The judgment was appealed and this Court, in 1976, described the case as follows:

Three actions involving riparian rights in a portion of the shore of Higgins Lake were consolidated below. In each case, owners of lots along Sam-O-Set Boulevard, which runs along the shore, contested the use of the lakeshore by owners of lots behind theirs and by the public. 'Back lot' owners and other individuals had constructed a number of docks out from the shore. The trial court's judgment ruled that the front lot owners held riparian rights in the shore, and rejected the various claims advanced by the back lot owners. The back lot owners have appealed. We affirm in part and remand for further findings of fact. [*Kempf, supra* at 340-341 (footnotes omitted).]

The *Kempf* Court specifically indicated that the named front-lot owners sought and received injunctions against the named back-lot owners, restraining the back-lot owners "from trespassing upon their riparian rights." *Id.* at 340 n 1. The *Kempf* Court then reviewed and rejected the arguments asserted by the back-lot owners in support of their claim that the front-lot owners did not possess exclusive riparian rights in the shore. *Id.* at 341-343.

Thereafter the Court noted, “[a]lso tried below were claims that the public and individual back lot owners had established rights to use the waterfront area by prescription.” *Id.* at 342-343. After rejecting the claim that the public had established by prescription a recreation easement, *id.* at 343-344, the Court noted that the trial court “dismissed the individual claims of prescriptive easements offered by [back-lot owners] without giving specific findings as to each claim.” *Id.* at 344. Thus, the matter was remanded to the trial court for “findings of fact about each claim of a prescriptive easement presented at trial.” *Id.*

On remand, the trial court considered each back-lot owner’s claim to a prescriptive easement and rejected all such claims “against any private owners of lots along Sam-O-Set Boulevard.” The claim of prescriptive easement by plaintiff’s predecessor in interest, Charles H. Snell,¹ was also specifically denied.² This Court affirmed the judgment on remand. At some point, the September 10, 1974, judgment was recorded with the county register of deeds.

Plaintiff’s claim of riparian rights is grounded solely on the fact that a predecessor in interest to Lots 1, 2, and 3 in Block 9, Dorothy S. Snell, was allegedly one of

the parties named in the appended list who were named parties Defendant in Cause #1022 owning properties bordering on Sam-O-Set Boulevard in Shoppenagon and Lyon Manor Subdivision of Lyon Township, and/or their successors in title, own, by virtue of their ownership of said land, the riparian rights in Higgins Lake opposite their properties and they shall have the exclusive use of the same against all other persons, including members of the public generally.

Dorothy S. Snell was named in the list appended to the judgment as owning “Lots 1 through 3, 13 and 14” in Block 9. Of those properties, though, by the unambiguous language of the judgment, only the ones “bordering on Sam-O-Set Boulevard” were entitled to “the riparian rights in Higgins Lake opposite their properties” Lots 1, 2, and 3 of Block 9 do not border on Sam-O-Set Boulevard and are not opposite Higgins Lake. The lots border on Akron Street and Block F is opposite these properties. Therefore, Lots 1, 2, and 3 could not possibly “have the exclusive use of the [riparian rights in Higgins Lake] against all other persons, including members of the public generally.” Block F is situated in front of Lots 1, 2, and 3 and is the property that borders on Sam-O-Set Boulevard and has Higgins Lake opposite the property.

Riparian land is generally land that includes or is bounded by a natural watercourse. *Hess v West Bloomfield Twp*, 439 Mich 550, 561; 486 NW2d 628 (1992). But, land that is separated from the water by a highway that is contiguous to the water is also considered riparian land and enjoys riparian rights. *Croucher v Wooster*, 271 Mich 337, 344; 260 NW 739 (1935);

¹ Charles H. Snell was the successor of Dorothy S. Snell, apparently through probate, in ownership of Lots 1, 2, and 3.

² We note that plaintiff has blatantly misrepresented the lower court record by stating that “[t]he factual findings included a determination that Lots 1-3 of Block 9 were entitled to riparian privileges.” The remand proceedings only pertained to the prescriptive easement claims and those claims with regard to these lots were rejected. We caution plaintiff against future attempts to deceive this Court.

Dobie v Morrison, 227 Mich App 536, 538; 575 NW2d 817 (1998). “‘Riparian rights’ are special rights to make use of water in a waterway adjoining the [riparian] owner’s property.” *Dyball v Lennox*, 260 Mich App 698, 705; 680 NW2d 522 (2003) (citation omitted); see, also, *Thies v Howland*, 424 Mich 282, 288; 380 NW2d 463 (1985). In *Kempf*, the trial court recognized and followed these legal principles when it declared in its 1974 judgment that the owners of properties bordering on Sam-O-Set Boulevard owned “the riparian rights in Higgins Lake opposite their properties and they shall have the exclusive use of the same against all other persons, including members of the public generally.”

Plaintiff’s Lots 1, 2, and 3 are not separated from the water only by a highway that runs contiguous to the water, the lots do not border on Sam-O-Set Boulevard, and Higgins Lake is not opposite these properties. This is not riparian land as a matter of law. Because it is not riparian land, only by easement would plaintiff enjoy any special riparian rights. Plaintiff has not claimed any such easement. And, in fact, plaintiff’s predecessor in interest’s claim of prescriptive easement was specifically rejected by the *Kempf* Court and affirmed by this Court.

Therefore, it appears that the 1974 judgment’s reference to all of Dorothy S. Snell’s properties, including Lots 1, 2, and 3, was merely for the purpose of identification of the proper parties and their respective properties, whether or not they were considered to have riparian rights. Clearly when the entire judgment is read, particularly in light of the applicable law, it would be unreasonable to conclude that any land other than land bordering on Sam-O-Set Boulevard was riparian land. It is especially true in this case where such a conclusion would lead to the anomalous result of depriving the owners of Block F—property that actually borders on Sam-O-Set Boulevard and is opposite Higgins Lake—of their riparian rights. Under plaintiff’s and the trial court’s interpretation, the application of the 1974 judgment language would provide that the owners of Lots 1, 2, and 3 would “have the exclusive use of the [riparian rights in Higgins Lake] against all other persons, including members of the public generally,” as well as the owners of Block F. This is untenable. Accordingly, we reverse the trial court’s order granting riparian rights to plaintiff and remand for entry of judgment in favor of defendants. In light of our disposition of this matter, we need not consider the other issues defendants raised on appeal.

Reversed and remanded for entry of judgment in favor of defendants. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Mark J. Cavanagh
/s/ Peter D. O’Connell