STATE OF MICHIGAN

COURT OF APPEALS

CRAIG C. SMITH, CONNIE SMITH, JAMES P. NIEMI, and LAURA A. NIEMI,

Plaintiffs/Counter Defendants-Appellants,

v

LIVINGSTON COUNTY ROAD COMMISSION, PUTNAM TOWNSHIP, LIVINGSTON COUNTY DRAIN COMMISSION, GENEVIEVE JAKUBUS, MAUREEN JAKUBUS, PERI GAGALIS, PATTY JO GAGALIS, HARRY COLLINS, VIRGENE DOHERTY, LORAINE HARWICK, LEO K. LUCKHARDT, LORENA K. LUCKHARDT, GERALD RICHARDS, KAREN RICHARDS, JACK I. COLEMAN, CREAGH MILFORD, KATHLEEN MILFORD, RICHARD HAAS, WILLIAM PEET, SHARON PEET, MICHAEL MCGUIRE, TRESSA MCGUIRE, HAROLD A. HARTMAN, SHARON K. HARTMAN, NELSON BAUDER, BERNARD C. SHEEHAN, and RONALD C. BELL,

Defendant,

and

STATE TREASURER,

Defendant-Appellee,

and

PAUL KING, SANDRA M. KING, JOAN F. PARKS, JAMES K. FETT, MARGARET A. FETT, JANET HAMLIN-O'BRIEN, and MARY SHEEHAN MAUVIZ,

UNPUBLISHED
September 9, 2008

No. 277606
Livingston Circuit Court
LC No. 00-18130-CH

Defendants-Counter Plaintiffs,

and

MICHAEL GRZESIK and CAROL GRZESIK,

Defendants/Counter Plaintiffs-Appellees.

Before: Donofrio, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Plaintiffs appeal as of right the grant of declaratory relief to defendants in this real property action regarding Alley No. 5 in Baughn Bluff platted subdivision on Portage Lake in Livingston County. Plaintiffs filed suit in September 2000 to modify the plat, to vacate the alley, which is adjacent to their property, and declare the offer of public dedication of the alley withdrawn. Because the trial court followed this Court's directive and properly applied the law to the facts on remand; and, because the encroachments at issue were minor there was no manifest injustice in declining to declare partial withdrawal of public dedication, we affirm.

This case involves a prior appeal by defendants Grzesik from an original trial court decision.[1] *Smith v Livingston Co Drain Comm'n*, unpublished per curiam opinion of the Court of Appeals, issued May 5, 2005 (Docket No. 251523) ("*Smith I*"). Defendants' main argument on prior appeal centered on MCL 560.255b, regarding the presumption of acceptance of land dedicated to public use and the rebuttal of that presumption. The statute states:

> (1) Ten years after the date the plat is first recorded, land dedicated to the use of the public in or upon the plat shall be presumed to have been accepted on behalf of the public by the municipality within whose boundaries the land lies.
>
> (2) The presumption described in subsection (1) shall be conclusive of an acceptance of dedication unless rebutted by competent evidence before the circuit court in which the land is located, establishing either of the following:
>
> (a) That the dedication, before the effective date of this act and before acceptance, was withdrawn by the plat proprietor.

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[1] Originally, defendants included, in addition to those listed above, property owners within the plat who used the alley for access to the lake. A stipulated order for summary disposition granted defendant property owners within the plat a permanent right to use the alley, and therefore their rights were not at issue at the bench trial and are not at issue here.

> (b) That notice of the withdrawal of the dedication is recorded by the plat proprietor with the office of the register of deeds for the county in which the land is located and a copy of the notice was forwarded to the state treasurer, within 10 years after the date the plate of the land was first recorded and before acceptance of the dedicated lands.

With respect to the application of the presumption, this Court stated the following in *Smith I*:

> In its order and judgment after the filing of the motion for reconsideration, the trial court does not address the presumption of acceptance occurring on the effective date in 1978 of MCL 560.225b. Rather, the trial court merely states that the offer of dedication was withdrawn before public acceptance. We presume that the trial court was relying on MCL 560.225b in its reference to acceptance and thus no error is present regarding whether the statute applied. Thus, the issue is whether the offer of the plattors was withdrawn before 1978 by the private acts of plaintiffs and their predecessor. From our review of the record, we conclude that whether the offer was withdrawn is a disputed fact question that requires resolution at trial rather than by summary disposition. As previously noted, while there is evidence that plaintiff's [sic] acquiesced in use of the alley by others, plaintiffs have presented evidence of a number of acts arguably "inconsistent with public ownership." Consequently, we reverse and remand for trial on the question of withdrawal only. [*Smith I, supra* at p 5 (citation omitted).]

Smith I also stated that evidence presented by the Grzesiks that there was informal public acceptance was insufficient to circumvent the statutory presumption and rebuttal:

> The Grzesiks also argue that public acceptance occurred informally, through township involvement with, or public use of, the alley. However, we find the township's supervisor's notation regarding use of the streets and alleys in the 1941 Supervisor's Plat of Beulah Beach, which redrew a portion of the Baughn Bluff plat and on which the Grzesiks rely, to be clearly insufficient to establish acceptance, and note that all other township involvement with the alley cited by the Grzesiks occurred after the presumed acceptance in 1978 pursuant to MCL 560.255b. Moreover, as found by the trial court, "the supermajority of persons that have used the alley were either lot owners inside the plat, lot owners outside the plat that believed they were located within the plat or invited individuals of lot owners." Such is similarly insufficient to establish informal acceptance by public use." [*Id.* at p 4 n 2 (citations omitted).]

Ultimately, on remand, the trial court found in favor of defendants and deemed the alley accepted by the public under the statutory presumption in MCL 560.255b. The trial court found that, given that plaintiffs did not exclude the public from using the alley, plaintiffs had not withdrawn the offer of dedication to the public.

Plaintiffs contend that the trial court violated the law of the case. "The law of the case doctrine holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue." *Higgins Lake Property Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 91; 662 NW2d 387 (2003). "[I]f an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same." *Grievance Administrator v Lopatin*, 462 Mich 235, 259; 612 NW2d 120 (2000) (internal citation omitted). Application of the law of the case doctrine is a question of law reviewed de novo on appeal. *Kasben v Hoffman*, 278 Mich App 466, 470; 751 NW2d 520 (2008).

Plaintiffs specifically assert that in its prior decision, this Court made a legal ruling binding the trial court to make a decision based on the sufficiency of plaintiffs' uses of the alley that were inconsistent with public ownership, and that precluded the trial court from making its decision based on plaintiffs' failure to exclude the public. Plaintiffs support this argument by directing us to Judge Neff's partial concurrence, partial dissent in the prior appeal. Judge Neff stated as follows: "In the instant case, plaintiffs have failed to show inconsistent use of Alley No. 5 to the extent necessary to demonstrate withdrawal of the offer to dedicate by either themselves or their predecessors." *Smith I, supra* at p 3 (Neff, J., concurring in part, dissenting in part). Plaintiffs interpret this passage to mean that the majority decided the legal question of what constitutes withdrawal. They argue that the majority concluded that plaintiffs could prevail if they show use of the alley inconsistent with public ownership to the extent necessary to demonstrate withdrawal, precluding a conclusion based solely on whether plaintiffs excluded the public.

Although plaintiffs argue that this Court implicitly ruled that failure to exclude the public from the alley cannot be the controlling factor in deciding whether there was a withdrawal of an offer of public dedication, the language of the prior decision does not indicate such a legal ruling. In fact, this Court explicitly stated that there was a "disputed fact question that requires resolution at trial" on the question of whether the offer of dedication was withdrawn. *Smith I, supra* at p 5. "When this Court reverses a case and remands it for a trial because a material issue of fact exists, the law of the case doctrine does not apply because the first appeal was not decided on the merits." *Brown v Drake-Willock International, Ltd*, 209 Mich App 136, 144; 530 NW2d 510 (1995).

Plaintiffs fail to recognize that *Smith I* did not preclude consideration of, or direct the trial court regarding how much weight it should afford the failure to exclude. The only directive given to the trial court was that it look to the facts of the case, including acts of acquiescence of public use as well as "acts arguably 'inconsistent with public ownership.'" *Smith I, supra* at p 5, quoting *Kraus v Dep't of Commerce*, 451 Mich 420, 431; 547 NW2d 870 (1996). This was not a legal ruling that bound the trial court or this Court on appeal and does not trigger application of the law of the case doctrine.

Next, plaintiffs argue that the trial court erred in denying their request for partial vacation of the alley with respect to encroachments. Plaintiffs did not preserve this issue for our review.[2] This Court may review an unpreserved issue "if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented." *Smith v Foerster-Bolster Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006). Accordingly, we review this issue for manifest injustice. *Id*.

Although plaintiffs offer no description of the encroachments at issue in their brief on appeal, we presume plaintiffs are referring to the cottage, porch, driveway, pump house, and the neighbors' sheds. The trial court stated on the record that the cottage and the pump house were "relatively minor . . . and frankly somewhat difficult to spot . . . in some areas." One of the sheds was built on cement blocks and one was sitting directly on the ground. The trial court also stated that the sheds "were not certainly major structures" and were "somewhat readily removed." The driveway is apparently used by people who want to gain access to the lake, and is thus not exclusive of public use, and there is no evidence that the pump house was maintained for private use. Despite its statements on the record, ultimately, the trial court declined to decide the encroachment issue because plaintiffs had not brought an adverse possession claim. After reviewing the record, we conclude that because the encroachments at issue were minor, there was no manifest injustice in the trial court declining to address the encroachment issue and declining to declare partial withdrawal of the public dedication.

This Court in *Smith I* directed that "if at trial the decision is that the dedication for public use was withdrawn before acceptance, the trial court must divide ownership between the adjoining property owners of Lots 52 and 53, subject to the easement of the subdivision lot owners." *Smith I, supra* at p 6. Because the trial court did not find that the dedication for public use was withdrawn before acceptance, or partially withdrawn, the trial court need not divide ownership.

Finally, although MCL 560.226 was referenced but not argued below, its dictates need not be applied and a new plat drawn up according to its provisions.

Affirmed.

/s/ Pat M. Donofrio
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald

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[2] Although this Court remanded the case on the issue of withdrawal, the trial court was under no obligation to make a determination on something that was not requested at trial. The trial court is permitted to grant relief to an entitled party even if that party did not plead such a request, but is not obligated to do so. MCR 2.601(A). Here, the trial court declined to address the encroachments because there was no claim by plaintiffs regarding adverse possession. Similarly, there was no claim by plaintiffs or partial acceptance/withdrawal of the alley dedication and thus it was properly within the discretion of the trial court not to make a determination.