

STATE OF MICHIGAN
COURT OF APPEALS

GARY WARD and CLAUDIA WARD,

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

UNPUBLISHED

May 26, 2009

v

BARRON PRECISION INSTRUMENTS, LLC
and HASSAN PROPERTY MANAGEMENT,
LCC,

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

No. 280461

Genesee Circuit Court

LC No. 03-077358-CH

GLENN M. HOWARTH and ANNE M.
HOWARTH,

Plaintiffs-Appellees-Cross-
Appellants,

v

BARRON PRECISION INSTRUMENTS, LLC
and HASSAN PROPERTY MANAGEMENT,
LCC,

Defendants-Appellants-Cross-
Appellees.

No. 280462

Genesee Circuit Court

LC No. 03-077850-CH

Before: Whitbeck, P.J., and O’Connell and Owens, JJ.

PER CURIAM.

In this property dispute, defendants Barron Precision Instruments, LLC and Hassan Property Management, LLC appeal as of right from the trial court’s ruling on remand. Plaintiffs Gary and Claudia Ward and Glenn and Anne Howarth cross-appeal from the same ruling. We affirm in part and reverse in part and remand.

I. Facts

This case involves rights of ownership and access to the land bordering on Warwick Lake, a man-made lake in Grand Blanc Township, Genesee County. The lake is shown on the Warwick Farms subdivision plat, although defendants contend that the lake and the surrounding land was not included in the plat. The plat map contains a handwritten note that states that the land lying between Lots 6-11 and Warwick Lake is “reserved for the private use of the proprietors.” Plaintiffs are owners of lots that abut the reserved strip. Defendants are owners of all land that was part of the original parcel, but which was not platted as part of the subdivision. The parties have an ongoing dispute regarding their respective rights and interests in the reserved strip.

In *Ward v Barron Precision Instruments*, unpublished decision per curiam of the Court of Appeals, issued January 19, 2006 (Docket No. 263616) this Court held that the trial court erred by finding that defendants’ lot lines extended to the water’s edge and were riparian lots, because the plat unambiguously showed otherwise. Then, this Court found that summary disposition was inappropriate where the language on the reserved strip was ambiguous regarding plaintiffs’ independent interests in the reserved strip.

After remand, the trial court held that where the plat map stated, “reserved for the private use of the proprietors,” the term “proprietors” was an “improper use of a term” and that it actually referred to the individual lot owners and not to William and Edna Hovey, who were the original owners of the property. It concluded that the Hoveys intended to dedicate an irrevocable easement in the reserved strip to all the lot owners in the plat.

The trial court went on to find that defendants had been the ones responsible for paying taxes on the land and the lake; therefore, the trial court granted defendants the right to make reasonable rules for their use. Then, the trial court held that the lot owners did not have any riparian rights in the lake and that the lot owners could use the lake for swimming, fishing, and boating. It held that the easement was not solely an ingress/egress easement, but that the reserved strip could be used for gaining access to the lake, for walking dogs, or for strolling. The trial court concluded that all of the lot owners had access to the entire reserved strip, not just the portions extending to the lake from their property lines.

II. Interpretation of Language on the Plat

Defendants argue that the trial court erred in concluding that the meaning of the note on the Warwick Farms Plat, which reserves the strip of land adjoining Warwick Lake to the “private use of the proprietors,” intended “proprietors” to mean the lot owners as opposed to defendants. We disagree.

This Court reviews the trial court’s findings of fact in a bench trial for clear error, but applies a de novo standard when reviewing the court’s conclusions of law. *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001). Under the “clearly erroneous” standard of reviewing the trial court’s factual findings, this Court will find that the trial court

erred, even when a finding is supported by some evidence if, based upon a review of the entire record, this Court has the firm conviction that the trial court made a mistake. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). The scope of a dedication presents a question of law that is reviewed de novo on appeal. *Christiansen v Gerrish Twp*, 239 Mich App 380, 384; 608 NW2d 83 (2000).

At the outset, we note that in its prior opinion, this Court stated, “[i]n this case, however, the plat is ambiguous with regard to whether the language ‘‘reserved for the private use of the proprietors’’ was intended as a dedication of a private easement.” *Ward I, supra* at 3. “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.” *Ashker ex rel Estate of Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001). Under this doctrine, the “previous decision of an appellate court should be followed, even if the decision was erroneous, in order to ‘‘maintain consistency and avoid reconsideration of matters once decided.’’” *The Meyer and Anna Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 52; 698 NW2d 900 (2005), quoting *Bennett v Bennett*, 197 Mich App 497, 499-500; 496 NW2d 353 (1992). Therefore, we will analyze all of the issues based on the underlying assumption that the language on the plat was indeed ambiguous.

Our Supreme Court provided that “[w]here the language of a legal instrument is plain and unambiguous, it is to be enforced as written and no further inquiry is permitted.” *Little v Kin*, 468 Mich 699, 700; 64 NW2d 749 (2003). However, “[i]f the text of the easement is ambiguous, extrinsic evidence may be considered by the trial court in order to determine the scope of the easement.” *Id.* The intent of the plattors must be determined from the language they used and the surrounding circumstances. *Bang v Forman*, 244 Mich 571, 576; 222 NW 96 (1928).

In *Little v Hirschman*, 469 Mich 553, 559-562; 677 NW2d 319 (2004), our Supreme Court recognized that a dedication of land for private use in a recorded plat grants lot owners an irrevocable easement or right to use the dedicated land. In *Dobie v Morrison*, 227 Mich App 536, 540; 575 NW2d 817 (1998), this Court stated that “[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.” (emphasis added).

Edna Hovey testified that she and William Hovey intended for all lot owners to have access to the lake. Owners of lots 1-5 could use Outlot A to get to the lake, and owners of lots 6-11 could get there through their frontage. She stated that lake access was a selling point for lots 6-11. Hovey’s testimony lends support to plaintiffs’ claim that the reserved strip was not reserved exclusively for the Hoveys as proprietors, but was intended for use by subsequent owners of lots in the plat. Jack Sweet also testified, as one of the original lot owners and as a plattor, that it was his intent that all lot owners have an irrevocable right to use Warwick Lake.

Additionally, Bruce Pollock, the licensed real estate broker, subdivision developer, and friend of William Hovey testified that William Hovey intended that Warwick Lake remain a private lake for private use of the lot owners. He also stated that the reservation note was included to avoid the current understanding in Michigan law that a plat dedication adjoining navigable water gave the public access to the water. Richard Kraft, the surveyor and engineer of Warwick Farms Subdivision, and the author of the note on the plat, testified that William Hovey intended that Lot Owners 6-11 would have direct access to Warwick Lake. He also stated that

the term “proprietors” as used in the note he drafted meant all present and future owners of lots 6-11. He noted that the term “proprietors” was used because, at the time the language was drafted, the proprietors and the lot owners were one and the same. We conclude that contrary to defendants’ argument, the trial court’s decision was supported by the evidence.

In addition, as detailed in this Court’s first opinion in this case, a review of the plat supports the trial court’s interpretation of the language in the plat. First, if the reserved strip were not intended as an easement, then Outlot A, which the parties stipulated was a private easement for the use of all lot owners within Warwick Farms, would not extend to Warwick Lake and would dead-end at the reserved strip. Second, the fact that the reserved strip is depicted on the plat suggests that it was platted as subdivision property; otherwise there would have been no need to include it on the map. Third, the note on the reserved strip states that it is reserved for the proprietors’ “private use,” which suggests that the “proprietors” would hold less than full ownership rights in the reserved strip. And fourth, the Hoveys did not need to reserve the strip to themselves because they already owned the property.

Defendants next assert that the original plattors did not intend to include the strip as part of the platted land because they argue that the reserved strip is not included in the legal description and therefore, cannot be a statutory dedication and violates the statute of frauds. However, the 1929 Plat Act, which was in effect at the time the plat was drawn up, requires the use of a traverse line, rather than the waterline, in the legal description. Specifically, it states, “This intermediate traverse should be given in the written description and notation made that the plat includes all land to the water’s edge or otherwise.” MCL 560.5. Thus, the written legal description did include the reserved strip by including the traverse line. Further, the note on the plat addresses whether the “plat includes all land to the water’s edge or otherwise.” Because the reserved strip was included in writing in the legal description of the property and was a part of the platted property, the statute of frauds was satisfied.

III. Admission of Evidence

Next, defendants argue that the trial court erred in refusing to admit a letter written by Jack Sweet in 1978. We disagree.

This Court reviews a trial court’s decision to admit or exclude evidence for an abuse of discretion. However, any error in the admission or exclusion of evidence will not warrant appellate relief unless refusal to take this action appears inconsistent with substantial justice or affects a substantial right of the opposing party. *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004).

The letter defendants sought to admit was from Sweet to Milford Barron and was apparently an attempt to resolve an issue that one of the lot owners was having regarding lake access. The letter contained several suggestions for the resolution of the issue that included various arrangements for the sharing of costs and establishment of rules of use for the lake and the easement. The trial court ruled that the letter was inadmissible because it pertained to Sweet’s ideas on how to resolve a “situation” and did not pertain to the relevant inquiry: the original intent of the grantors. MRE 402 provides:

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court. Evidence which is not relevant is not admissible.

As a matter of law, testimony or other evidence too far removed in time from the event at issue is irrelevant. *McDonald v Stroh Brewery Co*, 191 Mich App 601, 606-607; 478 NW2d 669 (1991). Here, the trial court's inquiry was confined to the intent of the original plat in 1963. As plaintiffs argue, the 1978 letter relates to circumstances that did not exist in 1963. Defendants assert that the letter is relevant to Sweet's intent in 1963 because it was written a mere 13 years after the note was written, as opposed to his deposition testimony which was taken 40 years later. Our review of the letter indicates that it is merely a compilation of ideas about how to potentially resolve a problem with lake access. It does not definitively state any information about Sweet's intent in 1963, nor does it clarify the legal rights of the lot owners at the time the letter was drafted. The letter is merely another indication that the rights of the lot owners were legally ambiguous. Therefore, the trial court did not abuse its discretion in refusing to admit the letter into evidence.

IV. Statutory Dedication

Next, defendants argue that the trial court erred in finding an easement because there was never a legal statutory dedication of the property. We disagree.

Defendants argue that without a writing granting an express easement, or an effective statutory dedication, plaintiffs cannot establish anything more than a license. Defendants cite *Hirschman, supra* and *Martin v Beldean*, 469 Mich 541, 549; 677 NW2d 312 (2004) in support of their argument. Both *Hirschman* and *Martin* dealt with the issue of whether a dedication to lot owners alone, without making the public a party to the dedication, constituted an enforceable statutory dedication. The *Hirschman* Court extensively analyzed a long line of private dedication cases before arriving at its conclusion:

For all these reasons, we hold that dedications of land for private use in plats before 1967 PA 288 took effect convey at least an irrevocable easement in the dedicated land. [*Id.* at 560-564].

The present case differs factually from *Hirschman* and *Martin* in that both of those cases involved unambiguous dedication language and therefore, extrinsic evidence about the intent of the dedicators in those cases was inadmissible as a matter of law. However, after resolving the initial ambiguity of the note on the plat, the holding of *Hirschman* supports the trial court's conclusion that plaintiffs hold an irrevocable easement in the reserved strip. Having found the private dedication of an irrevocable easement, the trial court properly disregarded defendants' argument that plaintiffs have only a revocable license interest in use of the reserved strip and Warwick Lake.

Regarding defendants' claim that plaintiffs failed to establish the elements necessary to prove statutory dedication, the cases relied upon by defendants are not on point. The elements cited by defendants¹ apply to dedications to public use, not private use. As the *Martin* Court noted, there is no provision in the Land Division Act for acceptance by donees of a private dedication which mirrors the provision for acceptance of a public dedication. *Martin, supra* at 549 n 19. Furthermore, defendants again confuse public and private dedications when they assert that the 1929 Plat Act requires that the plat contain a "dedication clause which must mention the Reserved Strip for the dedication to be legal." Defendants quote sections 12 and 13 of the 1929 Plat Act in their brief on appeal and they contend that the plat is deficient in that it fails to reference the following: "(4) the character and extent of the dedication of any street, park or other public place which although usually public, is not." Here, the reserved strip is a private lake access, it is not a "public place which although usually public is not."

V. Plaintiffs' Prior Knowledge

Next defendants argue that plaintiffs never had reasonable belief that they had more than a license to access the lake. We find this argument to be irrelevant.

Whether or not plaintiffs relied on the note on the plat has absolutely no bearing on this matter. This Court instructed the trial court to determine whether plaintiffs possess an independent interest in the reserved strip and, if so, the nature of that interest. As previously discussed, in light of the ambiguous language of the note, the inquiry relevant to that issue is the intent of the original plat owners.

Defendants also argue that plaintiffs' remedy is not against defendants, but rather against the individuals who sold plaintiffs their houses. These remedies are not mutually exclusive. Plaintiffs could pursue both causes of action; however, logically, plaintiffs would seek to clarify the nature of their interest in the property before embarking on a lawsuit against the sellers.

VI. Reasonable Use and Maintenance of the Reserved Strip

On cross-appeal, plaintiffs argue that the trial court's ruling that makes defendants solely responsible for the upkeep and maintenance of the reserved strip is contrary to Michigan law. We agree.

Where equity is involved, this Court's standard of review is *de novo*, and we will not reverse unless the trial court's findings were clearly erroneous or this Court concludes that it would have reached a different result had it occupied the trial court's position. *Schmude Oil v Omar Operating Co*, 184 Mich App 574, 582; 458 NW2d 659 (1990).

¹ 1) A recorded plat that designates the area for public use and which evidences a clear intent to dedicate the land; and 2) acceptance by the public authorities. *Beulah Hoagland Trust v Emmet County Road Comm'n*, 236 Mich App 546, 554; 600 NW2d 698 (1999).

The trial court ruled that defendants alone were responsible for the upkeep and maintenance of the reserved strip and that “in fairness, [defendants] ought to be able to set the rules for the use of the lake and the land, as long as their rules are reasonable . . .” A court acting in equity “looks at the whole situation and grants or withholds relief as good conscience dictates.” *Michigan Nat’l Bank & Trust Co v Morren*, 194 Mich App 407, 410; 487 NW2d 784 (1992). A trial court has jurisdiction to ensure that both parties can use an easement without impediment. *WPW Acquisition Co v City of Troy (On Remand)*, 254 Mich App 6, 9; 656 NW2d 881 (2002). “The owner of the fee subject to an easement may rightfully use the land for any purpose not inconsistent with the easement owner’s rights.” *Morrow v Boldt*, 203 Mich App 324, 329; 512 NW2d 83 (1994). “However, it is the owner of the easement, rather than the owner of the servient estate, who has the duty to maintain the easement in a safe condition so as to prevent injuries to third parties.” *Id.* at 329-330 (emphasis added).

We conclude that the trial court erred when it gave defendants exclusive rights to maintain the easement. It appears that plaintiffs and the other subdivision lot owners have a duty to maintain the easement under Michigan law. Furthermore, the grant of an easement includes “such rights as are incident or necessary to the enjoyment of such right or passage.” *Lakeside Associates v Toski Sands*, 131 Mich App 292, 299-300; 346 NW2d 92 (1983). The reasonableness of the means used to maintain or use an easement is a question of fact to be determined by the trial court or jury. *Id.* at 300. Therefore, the reasonableness of use and maintenance of the reserved strip is a question of fact to be determined by the trial court.

Where an easement does not specifically denote its acceptable uses, then the surrounding circumstances may be considered to ascertain the intent of the parties. In determining the scope of permissible use by non-riparian owners *Dobie, supra*, provides this Court with guidance. In *Dobie, supra*, this Court stated that the intent of the plattors should be determined by referencing the language used in the instrument in conjunction with the facts and circumstances existing at the time of the grant. The Court went on to endorse the idea that the extent of the non-riparian owners’ dedicated use also may be determined according to the traditional and historical use of the easement area. *Dobie, supra* at 540-541.

Here, the parties provided the trial court with evidence about the historical and traditional uses and maintenance of the easement. This Court’s language in *Dobie* indicates that the trial court may use this information to determine the scope of the subdivision lot owners’ use and maintenance of the easement.

It is not the role of this Court to create rules in this situation. Therefore, we remand this issue to the trial court with the specific instruction that the subdivision lot owners must be allowed to reasonably use and maintain the reserved strip. We leave the scope of that use and maintenance to the trial court. We remind the trial court that the reasonableness of the rules should be determined in light of the testimony about the intent of the original plattors as to how the reserved strip was to be used and maintained as well as testimony about the historical and traditional uses and maintenance of the property. Finally, we note that he who seeks equity must do equity as a reminder to the parties that although the trial court has some legal guidance in this matter, where the law is silent, the trial court is proceeding in equity. All parties should be mindful that their behavior regarding the reasonable use and maintenance of the reserved strip is relevant to the trial court’s ultimate resolution of this matter.

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

/s/ William C. Whitbeck

/s/ Peter D. O'Connell

/s/ Donald S. Owens