STATE OF MICHIGAN

COURT OF APPEALS

MARIANNE DROSTE, PAMELA S. POLINSKI, RICHARD POLINSKI, SHERRY SERRANO, E. ANTONIO SERRANO, JOYCE F. MOORE, CHARLES S. MOORE, THERESA FILLION, MICHAEL D. FILLION, LORALYN KELLER, RAYMOND M. KELLER, JUDITH L. VAILLIENCOURT and MARK VAILLIENCOURT,

Plaintiffs-Appellants,

v

BERNARD LITTLE, JILL ANN HEINCELMAN and SHIRLEY HALPRIN,

Defendants-Appellees.

UNPUBLISHED
May 23, 1997

No. 190557

Oakland Circuit Court
LC No. 94-485120

Before: Doctoroff, P.J., and M.J. Kelly and Young, JJ.

PER CURIAM.

> It appears that as the Water Wonderland acquires more population it also acquires more litigation over water rights. [*In re Vacation of Cara Avenue*, 350 Mich 283, 285; 86 NW2d 319 (1957).]

This riparian rights property action fully illustrates the wisdom of the Supreme Court's observation in *In re Vacation of Cara Avenue*. Plaintiffs appeal by right the bench trial judgment for defendants. We affirm in part, reverse in part and remand for further proceedings.

I. Underlying Facts and Procedure

A. The Platted Property

Unable to arrange their affairs without judicial supervision, the owners of the property at issue now make their fourth appearance in this Court. The parties own real property in Log Cabin Beach Subdivision on Commerce Lake. Defendants own riparian property abutting Commerce Lake at Longspur Lane and plaintiffs own non-riparian property along Longspur Lane. In this action, plaintiffs sought to enjoin defendants from maintaining a fence across Longspur Lane. Plaintiffs claimed that they were entitled to use the road for lake access.

The original 1925 plat of Log Cabin Beach Subdivision granted access to Commerce Lake to all lot owners via two lakefront lots north of Longspur Lane. The section of Longspur Lane that runs to the lake did not exist on the original plat. In 1935, a replat of a portion of the subdivision, called "Supervisor's Plat No. 11,"[1] officially created the pertinent section of Longspur Lane. The relevant dedication in Supervisor's Plat No. 11 provides that "the streets and alleys as shown on said plat are now being used for such purposes." The replat also created an easement, that the replat did not identify as a street or an alley, along the shore of Commerce Lake between Longspur Lane and Whip-Poor-Will Way. For years, at least as early as 1942, residents of the subdivision used the easement as a beach and for recreational purposes such as swimming, picnicking, fishing, wading and boating.

In the area that includes Longspur Lane there are several differences between the original 1925 plat and the 1935 replat, Supervisor's Plat No. 11. In the original plat, only Blue Bird Drive provided access to all the waterfront property. The riparian property ran in an east/west direction in long ribbon lots from the water to Blue Bird Drive, which ringed the riparian property in concentric fashion to the east of the lake. The 1935 replat divided the riparian ribbon lots into smaller lots. To provide access to the now-landlocked lakefront property, the plattor extended Longspur and a parallel street to the south, Whip-Poor-Will Way, westward to the lakeshore from their original termini at Blue Bird Drive. At the lakeshore, Whip-Poor-Will and Longspur joined a shoreline easement running north and south between them, providing access to the lakefront property between those two streets.

B. Previous Litigation[2]

In 1978, the previous owners of two lakeshore lots, Peter and Nancy Tybinka, expressed their intent to erect a fence to block lake access from Longspur Lane. The homeowners' association sued to enjoin the proposed fence construction. The circuit court granted summary disposition to plaintiffs, ruling that the land had been dedicated for public use. Nonetheless, in 1984, the Tybinkas erected a fence, which neighbors removed within days. The Tybinkas then appealed to this Court.

In 1985, this Court stated that it was unable to determine whether a private dedication had occurred.[3] This Court determined that the circuit court had granted summary disposition improperly to plaintiffs because material issues of fact existed. This Court reversed and remanded, ruling that, if the circuit court found a private dedication, it then must determine the dedication's scope to decide on the property's appropriate use.

In 1987, the circuit court reexamined the case on remand and concluded that the Tybinkas' property extended to the shore. The court reasoned that, because the 1935 replat did not identify the strip of land as a street or an alley, the land did not fall within the plat's dedication. The circuit court concluded that a private dedication did not exist and plaintiffs had no right to use the property. Plaintiffs appealed the circuit court's grant of summary disposition to the Tybinkas.

Defendants Little and Heincelman then bought the Tybinkas' property and were substituted as defendants. In 1989, this Court again reversed and ruled that defendants' property did not include the disputed area; rather, the area was an extension of two streets.[4] This Court remanded the case, ruling that the circuit court must determine whether the disputed area had been dedicated. This Court instructed that, if the circuit court found a completed statutory dedication, then it must determine the scope of the dedication; alternately, the circuit court could dismiss the case if it found no dedication.

In 1990, the circuit court ruled that the dedication had been accepted informally through public use and the use of public money for maintenance or repair. The court determined that the scope of the dedication was as a beach for the exclusive use of the Log Cabin Beach Association. The circuit court granted plaintiffs' motion for summary disposition. Defendants appealed again to this Court.

In its 1993 opinion,[5] this Court reversed the circuit court. This Court first ruled that the circuit court erred in determining that the scope of the dedication included the use of the strip of land as a beach. This Court then noted that, although homeowner association funds had been expended for the maintenance of the disputed property, the record did not indicate that any funds had come from the public at large. Also, the evidence did not show that the general public accessed and used the property; indeed, under the circuit court's order, only the subdivision homeowners could use the property. Accordingly, this Court held that the circuit court erred in finding a public acceptance of the dedication. This Court reversed the circuit court's order granting plaintiffs' motion for summary disposition.

In October 1993, the circuit court issued a final judgment in the matter. The judgment provided that the disputed property was intended by the proposed dedication for use only as a right of way between Longspur and Whip-Poor-Will Way. The court explained that the proposed dedication, however, never had been completed because no evidence existed regarding the acceptance of the proposed dedication. The judgment indicated that property rights therefore vested in defendants because the dedication failed. The circuit court also lifted the injunction that enjoined defendants from erecting a fence.

C. The Case at Bar and the Circuit court's Findings

As a result of that judgment, defendants Little, Heincelman and Halprin erected a fence in 1994 between their lots across Longspur Lane, blocking plaintiffs' access to Commerce Lake. Plaintiffs sued, seeking removal of the fence and an order enjoining defendants from interfering with plaintiffs' use of the property for recreation. The matter proceeded to a bench trial in 1995. In their stipulated statement of facts for trial, the parties stated, in part: "There is no indication in Supervisor's Plat No. II

that the portion of Longspur Lane abutting the parties' properties was dedicated to the use of the general public."

The circuit court first determined that the doctrines of res judicata and collateral estoppel did not bar plaintiffs' suit because: (1) defendants' fence was in a different location than that of the previous fence erected by the Tybinkas and (2) the disputed area was north of the area at issue in the previous Tybinka litigation. The court then decided that the dedication did not provide plaintiffs with an express right of access to Commerce Lake by way of Longspur Lane. The court discounted plaintiffs' argument that it should rule that access existed because Longspur runs perpendicularly to the lake. The circuit court resolved that it could not reach a contrary conclusion that Longspur terminated at the lake's edge because this Court previously had determined that the shoreline easement was an extension of Longspur Lane.

The evidence in this case showed that plaintiffs and their predecessors in interest consistently had used Longspur Lane as an access to Commerce Lake for boating, swimming, wading and fishing and picnicking. Although the circuit court accepted that evidence, it also found no indication in the dedication of Longspur Lane that the plattor had intended public lake access. Moreover, the circuit court concluded that that Longspur Lane was not intended for such access because the original plat expressly granted lake access via other lots north of Longspur Lane and the 1935 dedication did not change this original lake access or expressly identify Longspur Lane as an additional lake access point. The court dismissed plaintiffs' complaint and plaintiffs appeal that judgment.

II. Points of Law

A. Interpretation of the Dedication

> The question of dedication is largely one of intention. [*Hawkins v Dillman*, 268 Mich 483, 490; 256 NW2d 492 (1934.]

Plaintiffs first argue that the circuit court misinterpreted the dedication, which provides that "the streets and alleys as shown on said plat are now being used for such purposes." The parties do not dispute that the 1935 plat shows Longspur as a "street" falling within the ambit of the dedication. On its face, however, the 1935 dedication is wholly devoid of any indication that Longspur also was dedicated as an access to Commerce Lake. Notwithstanding, plaintiffs contend that the scope of this dedication is unclear on the face of the plat. Plaintiffs urge this Court to examine the history of the dedicated way's use to help determine the intent of the plattor.

This Court reviews equitable decisions de novo and the findings of fact in support of the decision for clear error. *Mitchell v Dahlberg*, 215 Mich App 718, 727; 547 NW2d 74 (1996). A trial court's findings are clearly erroneous if this Court is left with a definite and firm conviction that a mistake has been made. *Webb v Smith (After Remand)*, 204 Mich App 564, 568; 516 NW2d 124 (1994).

The scope of a dedication, as established by its language and the surrounding circumstances, determines the use to which dedicated property may be put. *Thies v Howland*, 424 Mich 282, 293; 380 NW2d 463 (1985). A dedication for a public purpose requires two elements – a recorded plat designating the area for public use, which evidences a clear intent by the plattor to dedicate the area for public use, and acceptance by the proper public authority. *Kraus v Dep't of Commerce*, 451 Mich 420, 424; 547 NW2d 870 (1996).

As reflected in the circuit court's opinion, evidence of the plattor's intent was, at best, mixed. On the one hand, the language of the dedication and the structure of the original and replatted areas in question suggest no obvious intent that Longspur Lane was to become an additional lake access point. On the other hand, shortly after the 1935 dedication, and for over 50 years, members of the Log Cabin Beach Subdivision used Longspur Lane as an access point to the lake. Consequently, given the factual record and the ambiguity of the dedication, we cannot conclude that the circuit court's findings were clearly erroneous. Neither can we rule that the trial court inequitably concluded that the plattor failed to show a clear intent to make Longspur Lane a lake access point.[6] The dedication does not reflect a clear intent to provide lake access.

B. Presumption of Access

Plaintiffs also assign error to the circuit court's conclusion that it could not rule on the presumption of access. Plaintiffs contend that the circuit court failed to consider one critical circumstance -- the presumption of access that arises when a publicly-dedicated road, which runs perpendicular to water, terminates at the waterfront.[7]

The presumption upon which plaintiffs rely appears in case law from our Supreme Court: where a public highway ends at a navigable body of water, public access to the water is provided. *In re Vacation of Cara Avenue, supra*, 350 Mich at 291. Likewise, public ways that terminate at the edge of navigable waters generally are deemed to provide public access to the water. *Thies, supra*, 424 Mich at 295. See also *Jacobs v Lyon Twp (After Remand)*, 199 Mich App 667, 671; 502 NW2d 382 (1993); *Thom v Rasmussen*, 136 Mich App 608, 612; 358 NW2d 569 (1984).

In addressing plaintiffs' argument, the circuit court ruled as follows:

> Plaintiffs argue that Longspur is presumed to be for the purpose of providing lake access because it runs perpendicular to the lake. In *Thies v Howland*, 424 Mich 282, 295; 380 NW2d 463 (1985), the Court noted that cases involving a way which terminates at the edge of a navigable body of water are treated differently from those involving a way which runs parallel to the shore and that public ways which terminate at the edge of navigable waters are deemed to provide access to the water. Plaintiffs predicate their entire claim upon this observation. However, as noted above, the Court of Appeals determined in the prior litigation that the shoreline easement was an extension of Longspur Lane (and Whip-Poor-Will Way) *and thus this Court cannot*

find that Longspur runs solely perpendicular to and terminates at the edge of the lake. [Emphasis added.]

Although the circuit court's conclusion, based as it was on language found in our prior opinion, was entirely understandable, we conclude that the circuit court nevertheless erred in its belief that it was unable to consider whether Longspur terminated at the lake because of a purported "finding" from this Court. First, the language of the decision relied upon by the circuit court was, at best, dicta not essential to this Court's holding in the earlier case that the dedication of the easement running between Longspur and Whip-Poor-Will failed for lack of public acceptance. Second, principles of collateral estoppel and res judicata do not preclude this action because, as the circuit court correctly found, the previous litigation involved rights to an entirely separate part of the Log Cabin Beach Subdivision (the easement running between Longspur and Whip-Poor-Will, rather than the extension of Longspur Lane to the water at issue here). Consequently, the circuit court was not bound in this case by a "determination" in the prior litigation that the easement was an extension of Longspur. Finally, as plaintiffs argue, the prior litigation effectively removed the easement from the dedication, such that the public was barred from access to it, thereby theoretically causing Longspur, a dedicated public way, to terminate at the lakeshore.

Because the circuit court erroneously concluded that it could not consider independently plaintiffs' argument that lake access should be presumed under the *Thies* doctrine, we remand with instruction for it to address this argument. In remanding, we note that, although *Thies*, *supra,* 424 Mich at 295-296, recognizes a presumption that access to the water arises when a public road terminates at water, the presumption nevertheless is predicated upon the *intent* of the plattor. Consequently, we instruct the circuit court to consider all the circumstances, including that Longspur runs perpendicularly to the lake, in determining whether the plattor intended to dedicate Longspur as a lake access point when replatting the Log Cabin Beach Subdivision in 1935.

Affirmed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. There being no prevailing party, no costs shall be taxed pursuant MCR 7.219.

/s/ Martin M. Doctoroff
/s/ Michael J. Kelly
/s/ Robert P. Young, Jr.

[1] This replat has also been referred to as Plat II in the litigation between the parties.

[2] Although the previous litigation involved a separate section of land, albeit an adjacent section, we include the facts and rulings in the prior cases because they involve defendants' right to access the lake via Longspur Lane.

[3] See *Log Cabin Beach & Supervisor's Plat II Improvement Ass'n, Inc v Tybinka*, unpublished opinion per curiam of the Court of Appeals issued October 30, 1985 (Docket No. 73432).

[4] See *Log Cabin Beach & Supervisor's Plat II Improvement Ass'n, Inc v Heincelman & Little*, unpublished opinion per curiam of the Court of Appeals issued August 11, 1989 (Docket No. 104509).

[5] *Log Cabin Beach & Supervisor's Plat No. II Improvement Ass'n, Inc v Heincelman & Little. (After Remand)*, unpublished opinion per curiam of the Court of Appeals issued May 25, 1993 (Docket No. 131389).

[6] Because we hold that the dedication does not reflect a clear intent by the plat proprietor, we need not address the issue of acceptance.

[7] Plaintiffs' argument depends in large part on the prior litigation's determination that the easement that runs between Whip-Poor-Will and Longspur was not a public right of way. Once it was legally established that the easement was not a part of the publicly-dedicated ways, plaintiffs were free to argue that Longspur terminated at Commerce Lake.