STATE OF MICHIGAN

COURT OF APPEALS

CHARTER TOWNSHIP OF WATERFORD,

Plaintiff-Appellee,

v

DENNIS R. HYNES and CONSTANCE HYNES,

Defendants-Appellants,

and

J & J SLAVIC, INC.,

Defendant-Appellee.

UNPUBLISHED
March 8, 2002

No. 224462
Oakland Circuit Court
LC No. 95-500005-CZ

PORT COVE CONDOMINIUM ASSOCIATION, INC.,

Plaintiff-Appellee, Cross-Appellant,

v

DENNIS R. HYNES and CONSTANCE HYNES,

Defendants-Appellants, Cross-Appellees.

No. 224463
Oakland Circuit Court
LC No. 95-501409-CH

DENNIS R. HYNES and CONSTANCE HYNES,

Plaintiffs-Appellants,

v

PORT COVE CONDOMINIUM ASSOCIATION, INC.,

Defendant-Appellee.

No. 224464
Oakland Circuit Court
LC No. 96-523123-CZ

Before: Owens, P.J., and Holbrook, Jr., and Gage, JJ.

PER CURIAM.

These three suits, involving a single piece of property, were consolidated at trial and now on appeal. Two of the suits involved actions against the property owners, Constance and Dennis Hynes, and the final suit was initiated by the Hyneses against a neighbor condominium association. The Hyneses appeal as of right from the final order disposing of all three suits. Port Cove cross-appeals, also by right. We affirm.

For a motion brought under MCR 2.116(C)(10), this Court reviews the record to determine whether there is a genuine issue of material fact and whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998). That review is de novo.[1]

The Hyneses first assert that the trial court erred when it granted an injunction against them, based on a motion for summary disposition brought by the township. We disagree. In this case, the township and Port Cove sought to enjoin the Hyneses from cutting any vegetation on the part of the property identified as "the island parcel." The township and Port Cove asserted that the language of the site plan is binding on the Hyneses and that because the Hyneses' actions violated the site plan, an injunction was warranted. The Hyneses also contend on appeal that Port Cove lacked standing to seek an injunction. However, because they do not contend that the township lacked such standing and because Port Cove's request for the injunction was brought on the same grounds as was the township's, we need not address the issue.

MCL 125.286e(3) provides:

> If a zoning ordinance requires site plan approval, the site plan, as approved, shall become part of the record of approval, and subsequent actions relating to the activity authorized shall be consistent with the approved site plan, unless a change conforming to the zoning ordinance receives the mutual agreement of the landowner and the individual or body which initially approved the site plan.

There is no indication in the record, nor do the Hyneses allege that the township approved a change to the site plan or that it sought such an alteration. Therefore, the language of the original plan, concerning the natural state of part of the development, limits subsequent actions that may be taken on the land.

The notation on the site plan indicates that the natural area would extend from the canal east towards an indeterminate location near Cass Lake Road, the property boundary. There were no limiting markings included on the plan showing that the designation was intended to cover

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[1] The township cited MCR 2.116(C)(9) as its basis for summary disposition. Although the trial court concluded that MCR 2.116(C)(9) was the incorrect rule it ultimately granted summary disposition under MCR 2.116(C)(10).

only part of the island parcel. The wording is actually displayed on both sides of the north-south quarter section line, which splits the island parcel.

Because the site plan is unambiguous, the only way there could be a genuine issue of material fact is if the affidavit of an architect involved in development of the site plan provided one. The architect expressed in his affidavit that he intended only the lowland, inner portion of the island, to remain in a natural state. The trial court did not specifically comment on the affidavit at trial. The site plan, as submitted to the township, provided clear evidence that the entire island parcel was intended to be left in a natural state. Given the unambiguous nature of the site plan, the affidavit (created more than ten years after the site plan was submitted), by itself, is insufficient to create a genuine issue of material fact.

The trial court properly concluded that there was no genuine issue of material fact concerning the "natural area" designation on the site plan. The trial court properly granted an injunction against the Hyneses for any action inconsistent with the plan.

The Hyneses finally assert that the trial court erred in not issuing an injunction against Port Cove for trespass on the submerged lands of the lake they claim to own. On cross-appeal Port Cove argues that the Hyneses do not own the submerged lands. We agree with Port Cove that it owns the submerged lands.

The Hyneses concede that Port Cove received the riparian rights associated with the condominium property when Slavic transferred title of the development to Port Cove. Therefore, as long as riparian rights include the right to utilize submerged lands, all of the Hyneses' arguments must fail.

It has long been established in Michigan that the riparian rights of owners living on the Great Lakes vary from the riparian rights of owners on inland lakes. *Hall v Wantz*, 336 Mich 112, 115; 57 NW2d 462 (1953). Even though title to submerged lands of the Great Lakes is owned by the state, owners of inland lake property possess title to the submerged land to the center point of the lake. *Id.* at 116; see also *Thies v Howland*, 424 Mich 282, 288, n 2; 380 NW2d 463 (1985); *Bott v Natural Resources Comm*, 415 Mich 45, 60; 327 NW2d 838 (1980); *West Michigan Dock & Market Corp v Lakeland Investments*, 210 Mich App 505, 509; 534 NW2d 212 (1995).

In relation to inland lakes, the types of activities associated with riparian rights have been expanded, beyond those related to the Great Lakes, to include such things as the right to build and maintain docks, and the right to permanently anchor boats offshore from the landowner's property. *Thies, supra* at 288; *Burt v Munger*, 314 Mich 659, 665; 23 NW2d 117 (1946); *Thom v Rasmussen*, 136 Mich App 608, 612; 358 NW2d 569 (1984).

When the (uncontested) riparian rights were conveyed to Port Cove the rights to the submerged lands extending from the condominium property to the center of Cass Lake were also conveyed. *Bott, supra* at 60; *Hall, supra* at 116. Therefore, Port Cove possesses the right to create docks or install pilings into the submerged lands, on its property, in order to enjoy its riparian rights. *Thies, supra* at 288.

The Hyneses rely on *People ex rel Dir of the Dep't of Natural Resources v Murray*, 54 Mich App 685, 687-688; 221 NW2d 604 (1974), for the argument that because title to the land can be traced back to a land patent, state law does not apply to it. *Murray* specifically concerns state interest in the beds of the Great Lakes, and therefore, does not pertain to Cass Lake. In addition, nothing in *Murray* addresses whether state law would still apply to those lands patented before Michigan became a state. Although the land may have initially been conveyed by federal patent, once title is vested the role of federal law pertaining to the property ceases, and the land is then governed by state law, as any other land within state boundaries. *Oregon ex rel State Land Bd v Corvallis Sand & Gravel Co*, 429 US 363, 377; 97 S Ct 582; 50 L Ed 2d 550 (1977).

Therefore, Michigan statutory and case law, concerning riparian rights, apply to the condominium property. As the previously cited case law explains, the possession of riparian rights includes the rights to the submerged lands, which extends to the center point of streams and inland lakes. *Hall, supra* at 116.

Port Cove asserts that sanctions are warranted because the Hyneses have presented this issue even though it is not "well grounded in fact," or "warranted by existing law." Port Cove raised this issue below, but the trial court never addressed it. Appellate consideration of an issue raised before the trial court but not specifically decided by the trial court is not precluded. *Peterman v DNR*, 446 Mich 177, 183; 521 NW2d 499 (1994). However, Port Cove's argument on this issue is not well-developed. Its argument consists largely of a condemnation of Dennis Hynes, contentions that he is pursuing a personal vendetta, that he "enjoys harassment for harassment's sake", and then a bald statement that Hynes' position was taken "without a scintilla of legal support." Although the Hyneses' argument is ultimately wrong in light of existing case law, we are not convinced that it is so wrong as to warrant sanctions. Further, review of this issue is to determine whether the trial court's findings on the question were clearly erroneous. *Schadewald v Brule*, 225 Mich App 26, 41; 570 NW2d 788 (1997). Because the court did not rule on this issue, we have no findings to review. In light of the above, we conclude that sanctions should not be awarded under the rule Port Cove invokes, MCR 2.114(E).[2]

On cross-appeal, Port Cove asserts that there is a genuine issue of material fact concerning title to the island property, and therefore, the trial court erred in denying its motion for summary disposition. We disagree.

As Port Cove argues, although there may be statute of frauds issues in relation to promises created by Slavic, courts have recognized that some situations involving equitable claims may be allowed to "circumvent" the statue of frauds. *Shanty Creek Lodge Ass'n v Deskin Land Trust*, 86 BR 491, 497-498 (Bankr WD Mich, 1988). It further relies on *Shanty Creek* for the assertion that the fraud requirement of real estate claims has been expanded to include negligent misrepresentation. *Id.* at 497. However, in a subsequent case, this Court stated that in order to assert promissory fraud a party must demonstrate that the party making the representations had no intention of honoring those intentions at the time they were made or

[2] This Court may award sanctions under MCR 7.216(C). However, Port Cove does not invoke that rule.

shortly thereafter. *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 90; 443 NW2d 451 (1989).

Summary disposition is rarely appropriate in cases involving questions of credibility, intent or state of mind. *Michigan National Bank-Oakland v Wheeling*, 165 Mich App 738, 744-745; 419 NW2d 746 (1988). However, in *Old Kent Bank v Sobczak*, 243 Mich App 57; 620 NW2d 663 (2000), where intent was clearly a material factor, we found summary disposition appropriate where there was "no factual dispute involving their intent." *Id.* at 71.

Several owners of the condominium units provided affidavits asserting that they relied on Slavic's representations when making their decision to buy. However, there was no evidence to show Slavic did not intend to keep his promises concerning the island, when they were made. Port Cove has thus demonstrated no genuine issue of material fact as to Slavic's intent when he made the promises pertaining to the island parcel. Therefore, the trial court properly granted summary disposition in favor of the Hyneses.

Port Cove's final assertion on cross-appeal is that the Hyneses' title to the island is invalid because Slavic removed the island from the final master deed, in violation of the master deed itself. We disagree.

Although the island parcel was included on the site plans, it apparently was done so because it was part of the entire parcel of land acquired by Slavic. Because the island parcel was never actually designated as part of the condominium development, it was never withdrawn from the development. Therefore, since the island was not included in the final consolidated master deed it did not violate any covenants in the deed itself.

The island was included in the deed's description of "additional land." The deed reserved the right for Slavic to add the additional land (the island), but established no obligation to do so. Because the island was classified as additional land in the initial deed, and was never subsequently added to the development itself, it could not have been later withdrawn, as Port Cove argues. The trial court properly concluded that "[t]he consolidating master deed did not withdraw the island property from the development since that property had never been submitted to the development."

Because the island was never part of the development, the exclusion of the island from the final consolidated deed could not be a material alteration of the co-owners' rights. Therefore, a two-thirds vote of the co-owners was not warranted.

Port Cove's final assertion under this issue is that Slavic violated the Condominium Act (MCL 559.181a) by not labeling the island as a "need not be built" area. This final argument is without merit.

MCL 559.181a provides:

> If any structure or improvement proposed in a condominium project is labeled pursuant to section 66 "need not be built," or is to be located within a portion of the condominium project with respect to which the developer has reserved a development right, promotional material may not be displayed or delivered to prospective purchasers which describes or portrays that structure or improvement

> unless the description or portrayal of the structure or improvement in the promotional materials conspicuously labeled "need not be built."

The island simply was not a structure or improvement. It was land that may or may not have been added to the development, based on the discretion of Slavic. As the trial court stated, "[t]he defendant's advertisements regarding the land may have been misleading but they were not violative of this section regulating advertising of structures and improvements." Therefore, the non-inclusion of the island in the final consolidated master deed did not violate any covenants within the deed, and summary disposition concerning title to the island was properly granted in favor of the Hyneses.

Affirmed.

/s/ Donald S. Owens
/s/ Donald E. Holbrook, Jr.
/s/ Hilda R. Gage