

STATE OF MICHIGAN
COURT OF APPEALS

EBERHARD LAKE ASSOCIATION, RANDY
FANDREI, ALICE FANDREI, JANET LARSEN,
KATHLEEN DAVIS, J.D. YODER, TERRY
BENNETT, ROBERT MCKINLEY, MAE
MCKINLEY, LEROY LEISTER, MADELYN
LEISTER, ROBERT LANE, JEAN LANE,
LINDA LANE, KENNETH PURLEE, JOANEE
PURLEE, KATIE EICHER, JOAN EASH,
THOMAS DARRINGTON, ANN
DARRINGTON, ELVA ROOT, DAVID PRATT,
JOHN BOOCHER, BERNICE BOOCHER,
HARVEY SCHLABACH, KATIE SCHLABACH,
ESTER WOLF, and JAMES WOLF,

Plaintiffs-Appellants,

v

H. DAVID WALTERS, SR., H. DAVID
WALTERS, JR., and WENDY S. WALTERS,

Defendants-Appellees.

UNPUBLISHED
December 20, 2002

No. 234586
St. Joseph Circuit Court
LC No. 98-000554-CZ

Before: Whitbeck, C.J., and Zahra and Murray, JJ.

PER CURIAM.

Plaintiffs appeal as of right a trial court order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

I. Basic Facts and Procedural History

Plaintiffs own riparian property abutting Eberhard Lake. Defendants also own riparian property abutting Eberhard Lake (hereinafter the lake) and have been withdrawing water from the lake to irrigate crops on both their riparian and non-riparian farmlands. In a separate proceeding in 1997, the St. Joseph Circuit Court established "minimum" and "normal" lake levels. Plaintiffs claim defendants use of the lake water for irrigation causes the lake's water level to drop to such an extent that it not only was below the court designated "normal" level, but

it also impairs plaintiffs' use of the lake for recreational purposes, such as boating, swimming, and fishing. As a result, they filed this action seeking injunctive relief.

Plaintiffs maintained that defendants' riparian rights to the use of the lake water for irrigation was unreasonable and that the water could only be utilized on defendant's riparian lands. In response, defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(10), arguing that because they had established prescriptive rights to use the lake water for irrigation purposes, no genuine issue of material fact existed, and therefore, summary disposition was appropriate as a matter of law.

The trial court agreed, finding that defendants had established prescriptive rights to use of the lake water for irrigation purposes. The trial court further found that plaintiffs had failed to support their claim with documentary evidence showing the amount of lake water used by defendants for irrigation or the amount of rainfall measured over the period. Thus, the trial court granted defendants' motion for summary disposition.¹

II. Standard of Review

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. *Id.* In *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999) the Supreme Court, quoting from *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996), set forth the following standards to apply in reviewing a motion brought pursuant to MCR 2.116(C)(10):

“In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).

“In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Neubacher v Glove Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v J Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary

¹ The trial court also noted that the injunctive relief sought by plaintiffs was inappropriate when a legal remedy was available from the drain commissioner.

evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins Ass’n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).”

III. Analysis

Plaintiffs argue on appeal that the trial court erred in granting defendants’ motion for summary disposition because defendants’ use of the water is unreasonable and defendants have failed to establish a prescriptive right to the unlimited withdrawal of the lake water. We disagree. “Use of the water by riparian owners is governed by the principles of reasonableness.” *West Michigan Dock & Market Corp v Lakeland Investments*, 210 Mich App 505, 512; 534 NW2d 212 (1995). Thus, where there are several riparian owners on an inland lake, they must use the waters in a way that does not interfere with the reasonable use of the waters by other riparian owners. *Id.* at 512-513. “The definition of reasonable use depends on the facts of the case.” *Id.* at 513.

In this case, plaintiffs have failed to establish a genuine issue of material fact as to whether defendants’ use of the lake water was unreasonable. As the trial court recognized, plaintiffs failed to present evidence in opposition to defendants’ motion for summary disposition to establish the amount of lake water defendants used for irrigation or whether defendants’ use of the lake water for irrigation caused lower water levels during the period in question. Plaintiffs may not rely on mere allegations to establish a genuine issue of material fact, but are instead required to set forth specific admissible facts at the time the motion for summary disposition is heard. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999); MCR 2.116(G)(4). Nor do the virtually identical affidavits submitted by four of the plaintiff’s cause us to decide otherwise, as those affidavits contain only conclusionary statements that are devoid of any detail.² *Rose v National Auctions Group*, 466 Mich 453, 470; 646 NW2d 455 (2002). Plaintiff’s needed to provide admissible evidence addressing the material factual dispute between the parties, ie., whether defendant’s irrigation caused the lake level to go below the “normal” level set by the court. Plaintiffs, however, failed to create a genuine issue of material fact with regard to this issue.

Further, we note that the trial court correctly found that the evidence before the court established that defendants had prescriptive rights to use the lake water for irrigation purposes. It is well established that an easement by prescription may be established where the use is open, notorious, adverse, and continuous for the statutory period of fifteen years. *Goodall v Whitefish Hunting Club*, 208 Mich App 642, 645; 528 NW2d 221 (1995); *West Michigan Dock & Market Corp, supra* at 511; *Toth v Waterford Twp*, 87 Mich App 173, 176; 274 NW2d 7 (1978). In this case, the undisputed evidence showed that defendants have been pumping water out of the lake to irrigate their farm property for more than twenty years. Still, as plaintiffs correctly point out, “[a] principle which underlies the use of all easements is that the owner of an easement cannot materially increase the burden of it” or impose a new and additional burden. *Delaney v Pond*,

² Moreover, the Feasibility Study indication that the lake level has dropped does not address why the level has dropped and, more importantly, whether defendant’s irrigation is the cause of the lower levels.

350 Mich 685, 687; 86 NW2d 816 (1957). However, plaintiffs failed to present any competent evidence to establish that defendants' use of the lake water for irrigation increased from previous years. Plaintiffs' mere assertion that defendants' use has increased due to their seed corn contracts is insufficient as a matter of law to create a genuine issue of material fact. *Maiden, supra*. Accordingly, summary disposition was properly granted to defendants.

Affirmed.

/s/ William C. Whitbeck

/s/ Brian K. Zahra

/s/ Christopher M. Murray