# STATE OF MICHIGAN

# COURT OF APPEALS

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MICHAEL J. JANDERNOA,

Plaintiff/Counterdefendant-Appellee,

v

T. L. LEISURE COMPANY and FOREST BEACH JOINT VENTURE,

Defendants/Counterplaintiffs/Third-Party Plaintiffs-Appellees,

and

HOTEL MACATAWA INCORPORATED and RICHARD DEN UYL,

Third-Party Defendants,

and

DEPARTMENT OF ENVIRONMENTAL QUALITY,

Third-Party Defendant-Appellee.

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UNPUBLISHED
November 23, 2004

No. 246469
Allegan Circuit Court
LC No. 00-028063-CH

Before: Donofrio, P.J., and Markey and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order quieting title to a parcel of property abutting Lake Michigan in favor of defendants, T. L. Leisure Company and its successor in interest, Forest Beach Joint Venture (hereafter referred to individually as "Leisure Company" and "Forest Beach," or collectively as "defendants"). We affirm in part, reverse in part, and remand for further proceedings.

Plaintiff commenced a trespass action in November 2000, against Leisure Company and its alleged agent, Timothy McAuliffe, but later amended his complaint to add a claim to quiet

title to the disputed property. Plaintiff alleged that he had superior title to the property based on a January 20, 2000, deed he received from Point West I, L.L.C. The disputed property consists of (1) three lots along the shore of Lake Michigan that were designated in an 1896 plat for the Chicago Addition to Macatawa Park subdivision,[1] and (2) a separate parcel, comprised of a vacated portion of the plat for the Chicago Addition, which was described by metes and bounds.[2] Defendants disputed plaintiff's claim of superior legal title, but also filed a counterclaim alleging an interest in the property by adverse possession.

On March 28, 2002, plaintiff acquired another deed to the orange parcel that was executed by Richard Den Uyl, on behalf of Hotel Macatawa, Inc. ("Hotel Macatawa"). Defendants then sought leave to pursue a motion for summary disposition on the ground that the January 20, 2000, deed did not convey title to the orange parcel. Plaintiff responded by moving to amend his complaint. The trial court heard arguments regarding the motions at the time scheduled for trial. Treating plaintiff's motion as one to supplement, rather than amend, the complaint, the trial court granted plaintiff's motion, conditioned on his payment of defendants' attorney fees and costs incurred to defend the lawsuit based on the defective January 20, 2000, deed. The trial court also afforded defendants additional time for discovery and to determine if additional parties should be added.

Plaintiff thereafter filed a supplemental complaint that challenged the title of Leisure Company's successor in interest, Forest Beach, to the disputed property. Defendants filed a third-party complaint against Den Uyl, who was later voluntarily dismissed from the case.

Defendants also filed a third-party complaint against the Hotel Macatawa, a corporation that dissolved in 1975, seeking to invoke the trial court's equitable powers to have a receiver appointed and the corporate records examined, but the trial court disposed of this case without resolving the parties' dispute concerning whether Den Uyl had authority to execute the March 28, 2002, deed to plaintiff on behalf of the Hotel Macatawa. Rather, the trial court granted defendants summary disposition under MCR 2.116(C)(10) on the ground that their chain of title provided superior title.[3] Specifically, the trial court determined that an earlier, October 19, 1973, deed in defendants' chain of title from the Hotel Macatawa to Carousel Recreational Equities Company ("Carousel") was ambiguous concerning the extent of the property conveyed. But the trial court also determined that no genuine issue of fact existed with respect to the grantor's

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[1] Consistent with the parties' designations below, these three lots are referred to collectively as the "blue parcel."

[2] Consistent with its designation below, this later parcel shall be referred to as the "orange parcel."

[3] Defendants also filed a third-party complaint against the Michigan Department of Environment (MDEQ) on the ground that the MDEQ was the rightful owner of all or part of the disputed property and a necessary party to the proceeding. Because the trial court did not rule on MDEQ's interests, but only held that defendants were entitled to the disputed property subject to any paramount state rights, we agree with MDEQ's claim that this appeal does not implicate its interests.

intent, which was to convey all property up to the water's edge. Accordingly, the trial court found the October 19, 1973, deed conveyed all property to the water's edge to Carousel, giving defendants superior title to the property in question as riparian owner.

On appeal, plaintiff challenges the trial court's determination that the October 19, 1973, deed was ambiguous.

We review the trial court's decision granting summary disposition de novo to determine if defendants were entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Because defendants' motion was based on MCR 2.116(C)(10), summary disposition was appropriate if the proffered admissible evidence failed to establish a genuine issue of material fact. *Id.* at 120-121.

We conclude that the trial court correctly determined that the description of the land in the October 19, 1973, deed was ambiguous. Although we agree with plaintiff's position that the parties' intent must, if possible, be drawn from the four corners of the deed, a court's paramount duty is to ascertain the parties' intent. *Flajole v Gallaher*, 354 Mich 606, 609; 93 NW2d 249 (1958); *Nye v Van Husan*, 6 Mich 329, 342 (1859).

A written instrument is ambiguous when it its words may be reasonably understood in different ways. *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998); *Meagher v Wayne State Univ*, 222 Mich App 700, 722; 565 NW2d 401 (1997). A court may consider extrinsic evidence in determining the existence of an ambiguity. *Id.* at 722.

Here, the question before us concerns the metes and bounds description in the October 19, 1973, deed, which largely refers to platted designations, but also describes a border of the property as "along the shore line of Lake Michigan." The trial court took judicial notice of the fact that the shoreline changes in finding that the October 19, 1973, deed was ambiguous.

A description in a deed provides a means for identifying property, but it does not in and of itself provide the identification. *Farabaugh v Rhode*, 305 Mich 234, 240; 9 NW2d 562 (1943). A description provides certain marks or characteristics that aid in singling out the thing intended, but even lands "'are not identified by description until we place ourselves in the position of the parties by whom the description has been prepared, and read it with the knowledge of the subject matter which they had at the time.'" *Id.*, quoting *Willey v Snyder*, 34 Mich 60 (1876). The rule that when a general description in a deed is followed by a particular description the latter expresses the intent and is controlling is an aid in determining the parties' intent. But it remains subordinate to the paramount rule that the parties' intent is the controlling factor. *Curran v Maple Island Resort Ass'n*, 308 Mich 672, 678-681; 14 NW2d 655 (1944).

The trial court appropriately took judicial notice of the fact that the shoreline was ever changing in determining that the October 19, 1973, deed was ambiguous. Judicial notice of an adjudicative fact is appropriate if the fact is not subject to reasonable dispute. MRE 201. But one could also reasonably infer that the grantor, Hotel Macatawa, had notice of this fact, yet chose to include both a natural reference point (shoreline) and a specific metes and bounds description in the legal description of the property. The grantor did not clearly express an intent

to grant Carousel an ever-changing boundary at the water's edge. At the same time, ignoring the "along the shore line" language in the description would contravene the general rule that all descriptions in a deed should be reconciled and given effect, if possible. *Curran, supra* at 680. Because the October 19, 1973, deed is susceptible to two reasonable interpretations, it is ambiguous. We therefore reject plaintiff's claim that the October 19, 1973, deed should have been construed solely from its four corners. Extrinsic evidence may be considered when construing an ambiguous written instrument. *Bice v Holmes,* 309 Mich 110; 115-116; 14 NW2d 800 (1944); *Meagher, supra* at 722.

Plaintiff further argues, however, that even if the October 19, 1973, deed is ambiguous, the trial court erred by concluding that no genuine issue of material fact existed with respect to the intent of the parties to the October 19, 1973, deed. We agree.

In an action to quiet title, the plaintiff has the burden of proof and must make a prima facie case of title. *Beulah Hoagland Appleton Qualified Personal Residence Trust v Emmet Co Rd Comm,* 236 Mich App 546, 550; 600 NW2d 698 (1999). But if the plaintiff makes out a prima facie case, the defendant then has the burden of proving superior right or title in themselves. *Id.* Here, the trial court did not decide if plaintiff presented a prima facie case of title and we express no opinion concerning the validity of the March 28, 2002, deed on which plaintiff relies. Because the October 19, 1973, deed comes within defendants' chain of title, we must decide whether a genuine issue of material fact exists whether the 1973 deed was intended to convey title to property running to the ever-changing Lake Michigan shoreline.

Although defendants submitted testimonial evidence from individuals involved in the 1973 transaction in support of their position that the deed was intended to convey property to the water's edge, the trial court erred by relying on plaintiff's failure to submit additional rebuttal evidence to contradict defendants' proofs as a basis for finding no genuine issue of material fact.

The parties' conduct is also a consideration in determining their intent. *Negaunee Iron Co v Iron Cliffs Co,* 134 Mich 264, 280; 96 NW 468 (1903). Hence, plaintiff's proffered evidence that the Hotel Macatawa executed a deed conveying lots in the blue parcel to a liquidating trustee in 1975, which was inconsistent with an intent to convey the disputed property in the 1973 deed, was sufficient to establish a genuine issue of material fact concerning the scope of the 1973 conveyance. Further, summary disposition is especially suspect if credibility or intent is at issue. *Michigan National Bank-Oakland v Wheeling*, 165 Mich App 738, 744-745; 419 NW2d 746 (1988). Indeed, it is well settled that the meaning of an ambiguous written instrument is a question of fact. *Klapp v United Ins Group Agency, Inc,* 468 Mich 459, 469; 663 NW2d 447 (2003). Summary disposition ordinarily is not appropriate if the terms of a written instrument are ambiguous. *SSC Associates Ltd Partnership v General Retirement System,* 192 Mich App 360, 363; 480 NW2d 275 (1991). Because defendants were not entitled to judgment as a matter of law with respect to the intent of the October 19, 1973, deed, we vacate the trial court's order of summary disposition and remand for further proceedings.

Plaintiff also argues that the trial court erroneously conditioned his filing of the supplemental complaint on his payment of defendants' attorney fees and costs preceding the filing of the supplemental complaint. But plaintiff relies on the wrong court rule for purposes of

challenging the trial court's decision. Although the trial court's decision indicates that it considered plaintiff's delay in discovering the defect in his January 20, 2000, deed from Pointe West I, L.L.C, with respect to the orange parcel, the trial court did not rely on MCR 2.118(A) as the basis for ordering attorney fees and costs. The trial relied on MCR 2.118(E).

Because plaintiff has not briefed the basis for the trial court's decision, an issue that must necessarily be reached, we conclude that he has not established any basis for relief with respect to this issue. "It is axiomatic that where a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court." *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). See, also, *Roberts & Son Contracting, Inc v North Oakland Development Corp*, 163 Mich App 109, 113; 413 NW2d 744 (1987) (an appellant's failure to brief an issue that necessarily must be reached precludes appellate relief).

We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Jane E. Markey
/s/ Karen M. Fort Hood