

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT DOUGLAS and ROBERTA
DOUGLAS, Trustees of the DOUGLAS FAMILY
TRUST, and DENIS STEVENS, Trustee of the
ETHEL STEVENS REVOCABLE TRUST,

Plaintiffs-Appellees,

v

JANET HARTING, MICHAEL HILL, JOHN
DILWORTH, THOMAS SCHUMM, and DIDI
SCHUMM,

Defendants-Appellants.

UNPUBLISHED
December 18, 2008

No. 277892
Livingston Circuit Court
LC No. 06-022350-CH

Before: Hoekstra, P.J., and Cavanagh and Zahra, JJ.

PER CURIAM.

Defendants appeal as of right from the trial court's order granting plaintiffs' motion for summary disposition pursuant to MCR 2.116(C)(10). We conclude that the trial court properly determined that plaintiffs had standing to challenge defendants' use of the terminus of a public alley ("Alley No. 3"). We also conclude the trial court did not err in finding plaintiffs established that defendants' use of the terminus of Alley No. 3 exceeded the public dedication. However, we agree with defendants that plaintiffs failed to prove that defendants' use of the terminus of Alley No. 3 significantly harmed plaintiffs' enjoyment of their property rights as to establish a private nuisance. Thus, except as to the finding of private nuisance, we affirm the trial court's final order.

I. Basic Facts and Proceedings

This case arises from defendants' use of a dock and boat hoist at the terminus of public alley, Alley No. 3, that ends at the edge of Portage Lake in the Baughn Bluff subdivision in Pinckney. Plaintiffs, the Douglas Family Trust and the Ethel Stevens Revocable Trust, own lakefront lots adjacent to Alley No. 3. Defendants are owners of back lots in the subdivision; their properties do not border Portage Lake. The subdivision plat states that "the streets and alleys as shown on said plat are hereby dedicated to the use of the public."

The dock at the terminus of Alley No. 3 has existed for many years, before many or all of the parties involved in this action acquired their properties. Although none of the parties asserted

who originally installed the dock, and none of the defendants claimed ownership of the dock, defendants generally understood that the dock was available for area residents who wished to use it, and that four families in the neighborhood, i.e., defendants, were the principal users. Defendant John Dilworth installed and removed the boat hoist every year. Defendants generally moored their boats to poles mounted along the edge of the lake at the terminus of Alley No. 3 at the beginning of the season and left them there until the season's end, and they would use the boat hoist and dock throughout the boating season.

Plaintiffs never attempted to stop defendants from using the dock and boat hoist before April 2006. Defendant Dilworth stated that plaintiff Denis Stevens gave him permission to enter his property when he installed and removed the boat hoist.

In May 2005, this Court issued a decision in another case involving a different dock in the same Baughn Bluff subdivision. In that case, *Smith v Livingston Co Rd Comm*, unpublished opinion per curiam of the Court of Appeals, issued May 5, 2005 (Docket No. 251523), this Court considered whether a dock at the end of Alley No. 5 in the Baughn Bluff subdivision was within the scope of the plat's dedication. The Court held that it was not, explaining:

In the instant case, the parties have presented no evidence regarding the uses of Alley No. 5 at the time of its dedication. Thus, the trial court was left with the presumption from *Thies* [*v Howland*, 424 Mich 295, 296; 380 NW2d 463 (1985)], that “the platter intended to give access to the water and permit the building of structures to aid in that access.”

We note, however, that where such access is given to the public generally, it is the governmental entity that has been deemed to have accepted the dedication which, “on behalf of its citizens, is entitled to build [a dock] at the end of [the alley] to aid the public's access.” *Id.* at 295-296. Private docks are not permissible. *Higgins Lake* [*Prop Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 104; 662 NW2d 387 (2003)]. Thus, although in such situations the public may use the access point made available by the dedication to make use of the surface of the water in such reasonable manners as boating, fishing, swimming, and the temporary mooring of boats, . . . members of the public, including lot owners of this subdivision, are not themselves entitled to erect docks for private use. *Thies*, *supra* at 288; *Higgins Lake*, *supra* at 103-104. That right is reserved to the governmental entity found to have accepted the dedication No individual or group of individuals, whether members of the general public or subdivision lot owners, may install a dock. That right and its attendant obligations falls to either the governmental entity that has accepted the dedication of Alley No. 5, or the subdivision lot owners as a whole. [*Smith*, *supra*, slip op at 7.]

After *Smith* was decided, plaintiffs' attorney sent defendants a letter dated April 26, 2006, that included a copy of this Court's decision in *Smith*, informed defendants that they had no legal right to maintain the dock and boat hoist at the terminus of Alley No. 3, and demanded that defendants remove the dock and boat hoist, or legal action to compel removal would be taken.

After defendants failed to remove the dock and boat hoist, plaintiffs filed this action alleging that the subdivision plat did not permit defendants to construct or use a private dock or

boat hoist off any of the public alleys in the subdivision. Plaintiffs requested declaratory and injunctive relief enjoining defendants from keeping the dock and boat hoist at the terminus of Alley No. 3. Plaintiffs also asserted a claim for trespass, alleging that the boat hoist encroached “approximately 3 feet onto submerged riparian land owned by the Douglas trust,” and interfered “with the ability to pilot boats moored along the dock located off of the Douglas Trust Parcel.” Additionally, plaintiffs alleged a claim for private nuisance, alleging that defendants disrupted plaintiffs’ quiet use and enjoyment of their property by holding picnics, parties, and bonfires on Alley No. 3 and the dock, by failing to remove dog droppings in the alley, and by interfering with plaintiffs’ ability to pilot boats moored off their property. Plaintiffs also alleged that defendants would remove the dock and boat hoist from the water and leave it on Alley No 3 and the Douglas property during the winter, causing damage to the grass.

Defendants moved to dismiss plaintiffs’ complaint for lack of standing, alleging that only the township had standing to bring an action for the allegedly improper use of a dock and boat hoist adjacent to a public alley, and that plaintiffs lacked any personal or special interest related to these activities. Plaintiffs responded that their property interests were impaired by defendants’ dock and boat hoist, and that the dock’s combined width was greater than the boundaries of Alley No. 3, thus encroaching on the submerged land of the Douglas property. Plaintiffs additionally asserted that defendants and their guests crossed the Stevens property without permission when they used the dock and boat hoist. Further, plaintiffs argued that they had a personal stake in this action because defendants’ use of the dock and boat hoist constituted a private nuisance that interfered with plaintiffs’ enjoyment of their properties and diminished their property values. The trial court denied defendants’ motion to dismiss.

The parties thereafter filed cross-motions for summary disposition under MCR 2.116(C)(10). Relying on defendants’ deposition testimony, plaintiffs asserted that there was no genuine issue of material fact that defendants used a private dock and boat hoist at the end of Alley No. 3 to permanently moor their boats throughout the boating season. Plaintiffs also alleged that defendant Dilworth damaged the Douglas property when he drove over the lawn to remove the boat hoist in 2006, and submitted a photograph depicting tire tracks across the lawn in support of this claim.

Plaintiffs argued that they were entitled to equitable relief to prevent disruption of plaintiffs’ use and enjoyment of their property and riparian rights. They also argued that defendants’ entries onto the Stevens property’s lawn and the Douglas property’s submerged land established a trespass, and that defendants’ use of the dock and boat hoist constituted a private nuisance that diminished the use and enjoyment of their property. Plaintiffs did not present any documentary evidence in support of their allegations that defendants held picnics or parties, or built bonfires, in Alley No. 3.

Defendants argued in response that plaintiffs failed to establish an actual injury resulting from defendants’ activities, and that their claims for declaratory and injunctive relief were based solely on their position that defendants’ activity was illegal. They argued that plaintiffs were not entitled to a private remedy for conduct that might be illegal, but which did not constitute a trespass or private nuisance.

In their own motion for summary disposition, defendants argued that plaintiffs failed to establish that defendants’ activities substantially interfered with plaintiffs’ property rights, and

emphasized that there was no factual support for plaintiffs' allegations that defendants or their guests held picnics, bonfires, or parties on Alley No. 3 or the dock, other than defendant Dilworth's annual use of the dock to watch fireworks. Defendants also emphasized that it was undisputed that the dock and boat hoist had been used for many years, without objection by plaintiffs, and that Robert Douglas previously consented to Dilworth's placement of the boat hoist.

The trial court expressed its agreement with this Court's decision in *Smith, supra*, noting that it involved the same subdivision, and granted plaintiffs' motion for summary disposition. The court enjoined defendants from using, maintaining, or installing a dock or boat hoist in Portage Lake at the terminus of Alley No. 3, and awarded plaintiffs damages of \$1.00 each for their claims of trespass and private nuisance.

II. Legal Analysis

Defendants argue that the trial court erred in granting summary disposition for plaintiffs and in denying their own motion for summary disposition. Defendants primarily contend that plaintiffs lacked standing to seek an injunction against their use of the dock and boat hoist on the ground that such use is not authorized by the plat.

Plaintiff sought, in part, declaratory relief to determine the propriety of defendants' use of Alley No. 3. In regard to the issue of standing, it must be noted that "[t]he power to enter declaratory judgments neither limits nor expands the subject matter jurisdiction of a court; the court must have jurisdiction over the claims on which the plaintiff seeks relief." *Associated Builders and Contractors, supra*. Further, "[d]eclaratory judgments have the force and effect of, and are reviewable as, final judgments." MCR 2.605(E)." Thus, the question whether a party has standing is a question of law that this Court reviews de novo. *Higgins Lake, supra* at 89.

To establish standing, "[t]here must be an actual case in controversy, and the party seeking relief must be an interested party." *Id.* In other words, a party "must show that it has a substantial interest that will be detrimentally affected in a manner distinct from that of the citizenry at large." *Id.* at 89-90, quoting *Franklin Historic Dist Study Committee v Village of Franklin*, 241 Mich App 184, 187-188; 614 NW2d 703 (2000). The plaintiff "must demonstrate an actual injury or likely chance of immediate injury that is different from that of the general public." *Higgins Lake, supra* at 90, quoting *Franklin Historic Dist, supra*.

The plaintiff in *Higgins Lake, supra*, was a nonprofit corporation comprised of lakefront property owners seeking to restrict public use of "road ends," i.e., the terminus of roads that ended at the lake. *Id.* at 91. The plaintiff asserted "that the alleged overuse of, and concentration of persons and watercraft, at the road ends is affecting its members' enjoyment of the lake as well as their property values." *Id.* This Court noted that the plaintiff's purpose was "to protect the lake, the watershed, and the interests of its members," and held that the plaintiff had "standing to sue as a non-profit membership organization litigating to vindicate the interest of its members." This Court held that the plaintiff had standing to litigate the scope of the public dedication in question and the permissibility of the defendants' activities concerning riparian and navigable rights. Plaintiffs' situation here is analogous to the owners association in *Higgins Lake, supra*. Instead of an association of lakefront property owners collectively litigating the general use of road ends within a subdivision, plaintiffs are individual subdivision lot owners

litigating the use of a particular alley that directly affects their property. Accordingly, we conclude that plaintiffs have standing to challenge defendants' use of the end of Alley No. 3.¹

Given our conclusion that plaintiffs have standing to challenge defendants' use of Alley No. 3, we now consider whether plaintiffs successfully established that defendants' activities are outside the scope of the public dedication of Alley No. 3. Public roads, streets, and alleys that end at the edge of navigable waters "are presumed to provide public access to the water." *Higgins Lake, supra* at 102. Persons claiming that a dedication provides more than "mere access" bear the burden of proving the broader scope of the dedication. *Id.* Consequently, as this Court explained in *Higgins Lake, supra* at 103-104, the use of the end of Alley No. 3 is limited:

Members of the public who gain access to a navigable waterbody have a right to use the surface of the water in a reasonable manner for such activities as boating, fishing, and swimming. . . . Lounging, sunbathing, picnicking, and the erection of boat hoists at the road ends are prohibited as beyond the scope of the dedications. . . . [O]ne, nonexclusive dock may be erected at each road end to facilitate public access to the water. Members of the public are entitled to moor boats temporarily as an incident of the public's right of navigation. . . . Because the plat language and the applicable law dictate that the road ends are intended to afford access to the public, private docks are not permitted at the road ends. [Citations omitted.]

Defendants admitted in their depositions that they kept their boats moored to the dock throughout the entire boating season. They also admitted that defendant Dilworth installed and removed the boat hoist every year. These activities are beyond the scope of the public dedication of Alley No. 3.

Defendants argue that the dock is permissible because it is a public dock, or that there is at least a question of fact on this issue that precludes summary disposition for plaintiffs. The Court in *Higgins Lake* held that one "nonexclusive" dock is permissible to facilitate general lake access, but that "private" docks are not permitted. Defendants did not present any evidence that

¹ Defendants also argue that plaintiffs' claims are barred by the doctrine of laches. Laches is a "tool of equity that may remedy 'the general inconvenience resulting from delay in the assertion of a legal right which it is practicable to assert.'" *Wayne Co v Wayne Co Retirement Comm*, 267 Mich App 230, 252; 704 NW2d 117 (2005), quoting *Dep't of Pub Health v Rivergate Manor*, 452 Mich 495, 507; 550 NW2d 515 (1996). The doctrine of laches is generally not recognized where the claimant's delay has not prejudiced the opposing party. *Wayne Co, supra*. Laches does not apply here because plaintiffs did not unreasonably delay by waiting until this Court clarified the public access issue in *Higgins Lake, supra*, and by waiting for this Court to address a similar issue involving the same subdivision in *Smith, supra*. Additionally, defendants have not shown that they were prejudiced by any delay in the initiation of plaintiffs' action. Although defendants generally allege that they bought their property in the subdivision with the expectation that they could use Alley No. 3 for seasonal boat storage, the change in this situation resulted from developments in the law, not plaintiffs' actions.

the dock was installed or maintained by a public authority. The holding in *Higgins Lake* is based on the premise that individual members of the public may not monopolize the road ends, e.g., by permanently mooring boats there, because such use would impair the general public's ability to use the road ends for lake access. The Court observed that "if a few individuals build their own docks or keep boat hoists at the road ends, they are effectively appropriating the public road ends for their own private use, which would impede the public's access to the lake." *Id.* at 112 n 11. Here, defendants' use of the dock constituted use of the alley end by a small group of individuals. There is no evidence supporting defendants' assertion that the dock is a public dock. Consequently, the trial court did not err in granting plaintiffs summary disposition and entering an order declaring in essence that defendants may not install or maintain a private dock or boat hoist or moor their watercraft at the terminus of Alley No. 3.²

Defendants also argue that plaintiffs failed to establish a private nuisance. Plaintiffs' nuisance claim is based on allegations that congestion caused by defendants' boat use interfered with plaintiffs' riparian rights and impaired plaintiffs' own use and enjoyment of the lake. Plaintiffs specifically claim defendants' use of the terminus of Alley No. 3 results in crowding; however, plaintiffs submit no evidence to establish crowding occurs. Plaintiffs also aver that their enjoyment of their properties has been diminished by the emotional distress caused by this litigation, and that the value of their properties has diminished because of defendants' use of Alley No. 3. Although there is no dispute that defendants used the terminus of Alley No. 3, we cannot conclude that plaintiffs presented sufficient evidence to conclude that defendants' illegal use of the terminus of Alley No. 3 resulted in *significant* harm to plaintiffs' enjoyment of their property rights. We therefore conclude that plaintiffs failed to show that defendants' use of Alley No. 3 for season-long moorings constituted a private nuisance.

Defendants last argue that plaintiffs failed to prove trespass because defendants were given permission to moor boats on plaintiff's land. We disagree.

Recovery for trespass to land is available only upon proof of an unauthorized direct or immediate intrusion of a physical, tangible object onto land over which the plaintiff has a right of exclusive possession. *Terlecki v Stewart*, 278 Mich App 644, 654-655; 754 NW2d 899 (2008). Plaintiffs' trespass claim was based in part on photographic evidence that defendant Dilworth drove across the lawn of the Stevens property. There is no evidence that defendants had permission to drive across plaintiffs' property. We cannot conclude that the trial court's damage award of \$1.00 for this trespass is not erroneously.

² At oral argument, the parties did not seriously dispute that the trial court's declaratory order, if valid, can be enforced through injunctive relief. We also note that under MCR 2.605(F) that, "[f]urther necessary or proper relief based on a declaratory judgment may be granted, after reasonable notice and hearing, against a party whose rights have been determined by the declaratory judgment."

We affirm the trial court's April 19, 2007 final order except to vacate paragraph L, which relates to plaintiffs' claim of nuisance. Plaintiffs may tax costs.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Brian K. Zahra