STATE OF MICHIGAN

COURT OF APPEALS

V&K, L.L.C.,

Plaintiff/Counter-Defendant-Appellee,

v

CHRIS HILTON,

Defendant/Counter-Plaintiff-Appellant.

UNPUBLISHED
January 13, 2011

Nos. 293726; 295655
Barry Circuit Court
LC No. 08-000310-CZ

Before: MARKEY, P.J., and ZAHRA and DONOFRIO, JJ.

PER CURIAM.

Plaintiff V&K, L.L.C., filed this declaratory action seeking a determination that its property has riparian or littoral rights to Mud Lake, which is situated almost entirely on property owned by defendant Chris Hilton. In Docket No. 293726, defendant appeals by right from the trial court's judgment, following a bench trial, declaring that plaintiff's property has riparian or littoral rights to Mud Lake under normal water conditions, permanently enjoining defendant from interfering with plaintiff's rights, allowing plaintiff to remove so-called berms from Mud Lake at defendant's expense, and granting plaintiff's request for attorney fees as a sanction for defendant's frivolous assertion that he was not involved in the construction of the berms. In Docket No. 295655, defendant appeals by right from the trial court's postjudgment order awarding plaintiff attorney fees of $42,368, taxable costs of $2,300.11, and remediation costs of $7,235.50 arising from plaintiff's removal of the berms. We affirm.

Defendant argues that the trial court abused its discretion by denying his motion for reconsideration pursuant to MCR 2.119(F) of the trial court's decision and judgment following the bench trial. On appeal, he argues that the trial court abused its discretion by failing to reconsider both its verdict for plaintiff and its decision to grant sanctions under MCR 2.114 in light of new evidence that defendant submitted in support of his motion. We disagree.

A trial court's decision on a motion for reconsideration under MCR 2.119(F) is generally reviewed for an abuse of discretion. *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 629; 750 NW2d 228 (2008). An abuse of discretion occurs when the trial court's decision results in an outcome outside the principled range of outcomes. *Id.* at 625. But issues involving the

interpretation and application of the court rules are reviewed de novo. *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009). A court must consider the plain language of a court rule in ascertaining its meaning, using the same principles applicable to issues of statutory construction. *Id*. The intent of a court rule is determined by examining both the language of the rule and its placement in the structure of the Michigan Court Rules as a whole. *Id.* If the language of the court rule is clear and unambiguous, further judicial interpretation is not permitted. *Vyletel-Rivard v Rivard*, 286 Mich App 13, 22; 777 NW2d 722 (2009).

As a preliminary matter, although the parties do not raise the issue, we question defendant's reliance on MCR 2.119(F) as authority for his posttrial motion for reconsideration following the bench trial. This Court does not ordinarily address issues not raised in the trial court or on appeal, but we have discretion to consider any issue that justice requires be considered and resolved. *Frericks v Highland Twp*, 228 Mich App 575, 586; 579 NW2d 441 (1998).

On its face, MCR 2.119(F)(1) states that it applies to a "motion for rehearing or reconsideration on the decision *on a motion*." The language of MCR 2.119(F)(3) similarly makes clear that it applies only to a request for rehearing or reconsideration of a motion. Subsection (3) provides:

> Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a *different disposition of the motion must result* from correction of the error. [Emphasis added.]

Accordingly, we conclude that defendant's motion for reconsideration was inappropriate to the extent that it attacked the trial court's findings of fact and conclusions of law at the bench trial and sought relief on the basis of new evidence not presented at trial. To properly offer new evidence or to argue that the trial court committed an error of law or a mistake of fact, defendant was required to move for a new trial under MCR 2.611(A) or sought relief from the judgment under MCR 2.612(C). At most, defendant's motion for reconsideration was proper to the extent it sought reconsideration of the trial court's award of sanctions under MCR 2.114. In fact, the trial court later clarified that sanctions were awarded because of defendant's assertion of a frivolous defense, because sanctions for a frivolous defense are initiated by motion. See MCR 2.114(F), MCR 2.625(A)(2), and MCL 600.2591(1).

Regardless, defendant has not shown any error based on the trial court's failure to explain its decision denying the motion for reconsideration. "Findings of fact and conclusions of law are unnecessary in decisions on motions unless findings are required by a particular rule." MCR 2.517(A)(4). Further, the trial court did not abuse its discretion in denying the motion, considering defendant's failure to show any legal theory or facts that could not have been pleaded, argued, or presented before the trial court's entry of the original judgment. *Woods*, 277

Mich App at 630. This is particularly so with respect to defendant's offer of new evidence to attack the trial court's findings of fact and conclusions of law at trial, without any attempt to satisfy the standards for obtaining a new trial on the basis of newly discovered evidence. See MCR 2.611(A)(1)(f). Further, it is clear from the trial court's remarks in the postjudgment proceedings that it found no basis for giving defendant a second opportunity to present evidence that with due diligence could have been presented at trial.

The 2005 attorney opinion letter that defendant submitted with his motion for reconsideration of the award of sanctions also did not justify relief. We note that with the exception of the information in the letter that summarized defendant's various representations to the attorney who provided the legal opinion, the letter's content was almost identical to the trial brief defendant submitted on the last day of trial. Considering defendant's failure to show that he could not have presented the letter itself before the trial court awarded sanctions and that the foundation for the opinion in the letter was based on factual representations that the trial court had found were not credible, the trial court did not abuse its discretion in denying the motion for reconsideration of its decision to award sanctions.

In sum, defendant has not shown that the trial court abused its discretion in denying his motion for reconsideration under MCR 2.119(F) of any issue decided in the original judgment.

With respect to defendant's challenge to the trial court's award of declaratory relief following the bench trial, our review is limited to the evidence presented at trial. *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990). MCR 2.605(A)(1) provides that a trial court "may declare the rights and other legal relations of an interested party" in a case of actual controversy. "The language of MCR 2.605 is permissive rather than mandatory; thus, it rests with the sound discretion of the court whether to grant declaratory relief." *PT Today, Inc v Comm'r of the Office of Fin & Ins Servs*, 270 Mich App 110, 126; 715 NW2d 398 (2006). A trial court's decision in a declaratory judgment action is reviewed de novo. *Toll Northville Ltd v Northville Twp*, 480 Mich 6, 10; 743 NW2d 902 (2008). We review a trial court's findings of fact at a bench trial for clear error and review its conclusions of law de novo. *City of Flint v Chrisdom Props, Ltd*, 283 Mich App 494, 498; 770 NW2d 888 (2009). "The clear error standard provides that factual findings are clearly erroneous where there is no evidentiary support for them or where there is supporting evidence but the reviewing court is nevertheless left with a definite and firm conviction that the trial court made a mistake." *Hill v City of Warren*, 276 Mich App 299, 308; 740 NW2d 706 (2007). A reviewing court gives deference to a trial court's special opportunity to judge the credibility of witnesses who appear before it. MCR 2.613(C). But "where the trial court's factual findings may have been influenced by an incorrect view of the law, an appellate court's review of those findings is not limited to clear error." *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

Initially, we note that defendant does not cite any pertinent authority in support of his argument that this case should be reviewed as an action to quiet title. An action to quiet title is an appropriate means to resolve a dispute concerning who has superior rights or title to property.

See *Beulah Hoagland Appleton Qualified Personal Residence Trust v Emmet Co Rd Comm*, 236 Mich App 546, 550; 600 NW2d 698 (1999); see also MCL 600.2932 and MCR 3.411. Here, however, defendant has not established that either plaintiff's first amended complaint or defendant's counter-complaint involved a claim to establish a superior right or title to property. Both complaints sought declaratory and injunctive relief with respect to whether plaintiff has riparian rights to Mud Lake. Although riparian rights are property rights,[1] *Peterman v Dep't of Natural Resources*, 446 Mich 177, 191; 521 NW2d 499 (1994), defendant has not established that the parties' dispute concerning whether plaintiff has riparian rights to Mud Lake could only be litigated in an action to quiet title. Thus, we deem that issue abandoned. *McIntosh v McIntosh*, 282 Mich App 471, 484-485; 768 NW2d 325 (2009). Therefore, we will consider the trial court's decision under the standards applicable to declaratory judgment actions.

We note that the trial court's declaratory ruling was limited because it did not attempt to fix the exact boundary line between plaintiff's and defendant's property. The trial evidence established that most of Mud Lake was situated on defendant's property, but that plaintiff was claiming riparian rights to Mud Lake because a narrow neck of the lake extended into its property.

In general, land must actually touch water to constitute riparian land. *Hilt v Weber*, 252 Mich 198, 218; 233 NW 159 (1930). A person who owns an estate or has a possessory interest in riparian land enjoys certain exclusive rights. *Thies v Howland*, 424 Mich 282, 288; 380 NW2d 463 (1985). Those rights include the right not to have a burden or hindrance imposed by artificial means. *Peterman*, 446 Mich at 192. The essence of the doctrine of riparian rights is that "no upper or lower proprietor may dispute passage by water of his riparial neighbor when the stream or lake commonly enjoyed by all has been made navigable in fact by nature." *Kerley v Wolfe*, 349 Mich 350, 357; 84 NW2d 748 (1957). "[W]hen one owns property on a small body of water which is connected to a larger body of water when the water level is at its legal or normal level, he has riparian rights in the larger body of water." *Pepper v Naimish*, 39 Mich App 597, 598; 197 NW2d 866 (1972).

Here, the trial court's declaratory relief was limited to holding that "under normal water conditions, such as those that have existed from 2003 to 2009, the Plaintiff's property has riparian or littoral rights to Mud Lake" and "Plaintiff has no riparian rights to Mud Lake when the water of the lake does not touch Plaintiff's property." Contrary to defendant's argument on appeal, the trial court did not rule that the "boundary" separating the parties' properties depends on fluctuating water levels. Under the trial court's declaratory ruling, the boundary line does not

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[1] "Strictly speaking, land which includes or abuts a river is defined as riparian, while land which includes or abuts a lake is defined as littoral." *Thies v Howland*, 424 Mich 282, 288 n 2; 380 NW2d 463 (1985). But the term "riparian" is often used to describe "littoral" land. *Id.*

change. The trial court's ruling leaves open the possibility that defendant's fee title to the adjacent property could cut off plaintiff's riparian rights if the normal water level changes.[2]

We find no error of law in the trial court's approach inasmuch as "[i]t is settled law both in this State and elsewhere, so settled that no contrary authority has been cited that the interposition of a fee title between upland and water destroys riparian rights, or rather transfers them to the interposing owner." *Hilt,* 252 Mich at 218. Further, water levels and boundaries defy any static definition. *Glass v Goeckel,* 473 Mich 667, 693 n 23; 703 NW2d 58 (2005).

We reject defendant's argument that the trial court could not declare that plaintiff had riparian rights without evidence of a survey. To establish an actual property line, our Supreme Court has required a survey based on proper monuments, *Glass,* 473 Mich at 692 n 20, although an agreement, adverse possession, and acquiescence also provide means for a plaintiff to establish ownership of a strip of land. *Boekeloo v Kuschinski,* 117 Mich App 619, 624; 324 NW2d 104 (1982).

Here, while each party sought declaratory relief, neither party presented a survey showing the actual boundary line that separates their properties. The trial court was aware of this deficiency and, accordingly, did not attempt to declare an exact location of the boundary line between the parties' properties. At most, the trial court found sufficient evidence to declare that the shoreline of Mud Lake touched plaintiff's property between 2003 and 2009. Considering all the evidence presented at trial, including the testimony of Michael VandeMaele that he was able to observe "survey stakes" going across the water before he purchased the property in 2003, defendant's own description of an old wood and wire fence that he assumed was the property line and photographic evidence showing wooden posts in the water in 2008, we find no clear err in the trial court's finding. Although the evidence might not be enough to establish acquiescence

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[2] Although there was little evidence concerning each party's chain of title, we note that defendant's deed contains no reference to Mud Lake. It describes the land conveyed by metes and bounds. It has been said that unless it otherwise appears, a grant of land bounded by water conveys riparian rights, and the title of the riparian owner extends to the middle line of an inland lake. *Grand Rapids Ice & Coal Co v South Grand Rapids Ice & Coal Co,* 102 Mich 227, 236; 60 NW 681 (1894). It has also been said that a deed of conveyance described by metes and bounds is one means for a grantor to limit the land conveyed, but if there is no express reservation of riparian rights by the grantor, the riparian rights pass with the land. See *Richardson v Prentiss,* 48 Mich 88, 92-93; 11 NW 819 (1882). Later, in *Thompson v Enz,* 379 Mich 667, 686; 154 NW2d 473 (1967) (opinion by KAVANAGH, J.), our Supreme Court stated that "riparian rights are not alienable, severable, divisible, or assignable apart from the land which includes therein, or is bounded, by a natural water course," although easement rights may provide access to the lake. Based on the evidence in this case, it could reasonably be inferred that defendant owned land under Mud Lake, without any limitation on his riparian rights, which abuts plaintiff's property.

in the wooden posts as the true line,[3] the evidence was sufficient to enable the trial court to at least infer that the water touched plaintiff's property during "normal conditions."

Although the trial court did not determine the "ordinary high water mark" of Mud Lake, as that term is defined in Part 301 of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.30101(m), we are not persuaded that the court was required to do so. The "ordinary high-water mark" is relevant under Part 301 to determine whether a person is required to obtain a permit for certain operations. See MCL 324.30102(f). This case is not a NREPA action, but rather a private dispute between landowners regarding riparian rights.

The existence of riparian rights must still be determined when lake waters are in their usual and normal condition, as opposed to temporary departures such as in a period of unusual drought or abnormally heavy precipitation. *Rice v Naimish*, 8 Mich App 698, 705; 155 NW2d 370 (1967). But this does mean that a lake's boundaries cannot shift. *Glass*, 473 Mich at 693 n 23. Here, having considered defendant's argument in light of the evidence presented at trial, we conclude that defendant has not shown that the trial court either committed clear error or operated under a misconception of the law when evaluating the condition of Mud Lake between 2003 and 2009. Indeed, defendant's own testimony indicates that it was his recollection that the water level in 2003 was normal, although he admittedly did not take any measurements.

Defendant's reliance on *Ruggles v Dandison*, 284 Mich 338; 279 NW 851 (1938) to support his claim of error is also misplaced. In *Ruggles*, our Supreme Court, after finding conflicting testimony, upheld the trial court's finding that the plaintiffs were not riparian owners. The Court observed:

> If the water of the lake touches plaintiffs' property, because of an artificial channel which was dug by plaintiffs from their property, through the bog land to the lake, they can acquire no riparian rights by virtue of this fact; and if water from the lake at times flows around boggy places on plaintiffs' marsh land, because of the fact that such soft marsh muck has been trampled down by cattle pastured there during many years, in the past, plaintiffs can claim no riparian rights, because of this situation, as this would not be the natural condition of the boggy land adjacent to the lake. There was evidence to present such questions to the lower court for determination. [*Id.* at 340-341.]

Although this issue also involves a question of fact, the trial court resolved it in favor of plaintiff by determining that defendant was responsible for blocking plaintiff's access to Mud Lake through artificial means, not that plaintiff dug a channel to reach Mud Lake. Because we find no clear error in the trial court's finding that the two berms were not natural structures and that defendant was responsible for their construction, we uphold its declaratory ruling. Although

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[3] Fifteen years of recognition and acquiescence has been found sufficient for this purpose. See *Gregory v Thorrez*, 277 Mich 197, 201; 296 NW 142 (1936); *Walters*, 239 Mich App at 456.

the declaratory relief is limited because it does not fix where the actual boundary line crosses the water, defendant has not shown any factual or legal basis for disturbing the trial court's decision.

We also reject defendant's challenge to the trial court's decision to award plaintiff attorney fees under MCR 2.114 at the time the original judgment was entered. Although the trial court did not identify the particular provision of MCR 2.114 on which it relied to award sanctions, it is apparent from the trial court's ruling and its subsequent remarks in postjudgment proceedings that sanctions were awarded pursuant to MCR 2.114(F), not MCR 2.114(E): The trial court determined that defendant's factual assertions that he was not involved in the construction of the berms constituted a frivolous defense. MCR 2.114(F) authorizes sanctions, as provided in MCR 2.625(A)(2), for asserting a frivolous defense. MCR 2.625(A)(2) provides for an award of costs as provided by MCL 600.2591. A claim is "frivolous" under MCL 600.2591(3)(a)(ii) where "[t]he party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true." Whether a claim or defense is frivolous must be determined on the basis of the circumstances at the time it was asserted. *Jerico Constr, Inc v Quadrants, Inc*, 257 Mich App 22, 36; 666 NW2d 310 (2003). We review for clear error a trial court's findings regarding whether attorney fees should be awarded for a frivolous defense. *Phinisee v Rogers*, 229 Mich App 547, 561; 582 NW2d 852 (1998).

Giving appropriate deference to the trial court's findings with respect to the defendant's lack of truthfulness in asserting his defense, defendant has failed to establish that the trial court clearly erred in granting plaintiff's motion for sanctions. We consider any challenge to the amount of attorney fees awarded by the trial court following the evidentiary hearing to be abandoned because defendant does not address that issue. *McIntosh*, 278 Mich App at 484-485. Therefore, we uphold the trial court's postjudgment order awarding attorney fees in the amount of $42,368 in favor of plaintiff.

Next, we decline to consider defendant's challenge to the trial court's award of taxable costs of $2,300.11 for failure to address the trial court's basis for awarding costs. *Roberts & Son Contracting, Inc v North Oakland Dev Corp*, 163 Mich App 109, 113; 413 NW2d 744 (1987).

Finally, while the trial court's postjudgment order awarding attorney fees and costs also awards remediation costs of $7,235.50 associated with plaintiff's removal of the man-made berms in Mud Lake, our jurisdiction in an appeal by right is from a "final judgment or final order" as defined in MCR 7.202(6). See MCR 7.203(a)(1); *McIntosh*, 282 Mich App at 483-484. A final order includes a postjudgment order awarding attorney fees and costs, MCR 7.202(6)(a)(iv), but an appeal from a postjudgment order awarding attorney fees and costs is limited to the portion of the order from which there is an appeal as of right. MCR 7.203(A)(1). Therefore, only the portion of the order awarding attorney fees and costs is appealable as of right, and this Court lacks jurisdiction to consider defendant's challenge to the award of remediation costs.

But even if we were to consider this issue on leave granted, see *Pierce v City of Lansing*, 265 Mich App 174, 182-183; 694 NW2d 65 (2005), we would reject defendant's claim that relief is warranted because plaintiff violated the automatic stay rule in MCR 2.614. The trial court did not err in treating the portion of the original judgment that allowed plaintiff to remove the berms at defendant's expense as part of its award of injunctive relief, which was immediately

enforceable under MCR 2.614. Injunctive relief is equitable in nature, and equity may shape relief to the circumstances presented. *Opal Lake Ass'n v Michaywe Ltd Partnership*, 47 Mich App 354, 366; 209 NW2d 478 (1973). Furthermore, even if plaintiff did violate the automatic stay rule by removing the berms immediately, defendant has not established that the violation would afford him any basis for avoiding the remediation costs. A party may not leave it to this Court to discover and rationalize the basis of a claim. *McIntosh*, 282 Mich App at 485. We note that this Court has found that a claim alleging a violation of the automatic stay rule may be moot where, as in this case, a substantial amount of time has passed beyond the 21-days of the potential stay. See *Bayati v Bayati*, 264 Mich App 595, 602; 691 NW2d 812 (2004).

We affirm. As the prevailing party, plaintiff may tax costs pursuant to MCR 7.219.

/s/ Jane E. Markey
/s/ Brian K. Zahra
/s/ Pat M. Donofrio