STATE OF MICHIGAN

COURT OF APPEALS

MARTIN CATES, JULIA CATES, KENNETH L. CLAYTON, THOMAS ALBON, MALLORY HARRISON, DAWNICE DAY, GREGORY P. SLOAN, ALICE J. WRIGHT, SHELLEY LANCE, ROBERTA CATES, BONNIE L. ABBOTT, DAVID A. HETHERINGTON, ROBIN R. JUNE, E. W. VANHOUSE, DENISE ADAMSKI, ANN M. SWEET, JACOB CIESIELSKI, WADE GOBLE, JOHN M. MILLER, TRACIE SPICER, ANDY VADERBOSS, KATHLEEN CYPHER, MARY ELLIS, JOSEPH J. WILSON, CHRISTOPHER UDELL, KAREN WATSON, JASON CHARLES, RUDY KOVACKS, LINDA HAMMON, WILLIAM L. ALEXANDER, TERESA KAY ABBEY, BARBARA J. SUCHOVSKY, CARL NELSON and ROSEMARY MILLER,

Plaintiffs-Appellees,

v

ARGENTINE TOWNSHIP,

Defendant-Appellant,

and

THOMAS SLEVA, ROBERT DIAZ and GENESEE COUNTY ROAD COMMISSION,

Defendants.

UNPUBLISHED
June 30, 2011

No. 296861
Genesee Circuit Court
LC No. 08-088004-CH

Before: METER, P.J., and CAVANAGH and SERVITTO, JJ.

PER CURIAM.

In this case concerning rights to an alleged easement and interference with the same, defendant, Argentine Township (the township), appeals as of right from an order granting

summary disposition to plaintiffs. We affirm in part, reverse in part, and remand to the trial court.

The township first argues that the trial court erred in granting summary disposition to plaintiffs, because it relied on nonrecord evidence. We agree. To preserve an issue for appeal, a party must have raised the issue below, and received a ruling on it. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). The township did not object to the consideration of documents by the trial court that had not been formally filed in the record. Therefore, this issue is unpreserved.

In civil cases, we are not required to consider unpreserved issues. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 509-510; 741 NW2d 539 (2007). We may overlook preservation requirements if, however, among other reasons, the issue involves a question of law, and the facts necessary for its resolution have been presented. *Johnson Family Ltd Partnership v White Pines Wireless, LLC*, 281 Mich App 364, 377; 761 NW2d 353 (2008). Because this issue presents a question of law and the necessary facts have been presented, we elect to review it. Unpreserved issues are reviewed for plain error affecting substantial rights.

Plaintiffs never filed the alleged 1941 easement upon which they rely, and on which the trial court relied in rendering its ruling. No easement from 1941 is contained in the record. Therefore, it was plain error for the trial court to consider it, and summary disposition granted to plaintiffs on the basis of the document is reversed.

The township also argues that the trial court erred in concluding that an easement exists over the parcels of land at issue in this case (which shall be referred to as parcels A and B), located along the northern edge of Switzer Road, touching Lobdell Lake. We agree.

Summary disposition rulings are reviewed de novo. *Ligon v City of Detroit*, 276 Mich App 120, 124; 739 NW2d 900 (2007). In deciding a motion under subrule MCR 2.116(C)(10), a court considers all the admissible evidence submitted by the parties in conjunction with the motion, and the pleadings, in a light most favorable to the nonmoving party. *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 30-31; 651 NW2d 188 (2002).

The only documentary record evidence of an easement is the record of a 1954 warranty deed. The record of the 1954 warranty deed is not the deed itself. In addition, the alleged 1954 warranty deed at most granted, to the grantees only, an easement to use the land in question (the land between lots 24 and 29 of Pleasant View Park subdivision). The alleged 1954 warranty deed only conveyed land known as "parcel 171 of the unrecorded survey of Pleasant View Park No. 2," so it could not have granted an easement to a later or an earlier purchaser of a different lot or lots.

Also, an easement may not be reserved or granted in favor of a stranger to the deed or grant. *Choals v Plummer*, 353 Mich 64, 71; 90 NW2d 851 (1958). The only relevant documentary evidence is the alleged 1954 warranty deed, which contained restrictions that purported to convey to the grantees an easement:

> Said property conveyed by this instrument is subject to the following restrictions which shall run with the title to the land and bind all future owners. . . .
>
> * * *
>
> 7. *An easement is hereby granted to the parties of the second part* [i.e., the grantees] to use the beach for bathing in front of Lot 11, *and* at the discretion of the seller a place is reserved for boat dockage either in front of Lot 11 or *along the North side of Island Drive [i.e., Switzer Drive], between lots 24 and 29* Pleasant View Park, so as to not interfere with the general enjoyment there[of] by the either property owner. [Emphases added.]

At the time a parcel of property is conveyed by its owner, the owner may only reserve an easement for the benefit of other property he owns. See *Chapdelaine v Sochocki*, 247 Mich App 167, 170-171; 635 NW2d 339 (2001). There is no evidence that, at the time of the alleged 1954 deed, Ralph Peters and Rhonda Peters, the grantors, owned any other land in any of the three subdivisions, for the benefit of which an easement could have been reserved.

Viewing the evidence in a light most favorable to the township, the evidence does not indicate that an easement was reserved in favor of a lot owned by a grantor, or that an easement was reserved to any plaintiff, or to any lot owned by any plaintiff. Therefore, the trial court erred in granting summary disposition to plaintiffs.

The township also argues that the trial court erred in granting summary disposition to plaintiffs on the issue of whether the alleged easement benefits all plaintiffs. We agree.

As noted above, the only documentary record evidence of an easement is the record of the 1954 warranty deed. And, the alleged 1954 warranty deed at most only granted *to the grantees* an easement to use the land in question (parcels A and B, land between lots 24 and 29 of Pleasant View Park subdivision). As just discussed, the alleged 1954 warranty deed only conveyed land known as "parcel 171 of the unrecorded survey of Pleasant View Park No. 2," so it could not have granted an easement to a later or to an earlier purchaser of a different lot or lots.

Also, there is no evidence that the grantees of the alleged 1954 warranty deed, Ira Smith and Quilla Smith, are in the chain of title of any plaintiff. Viewing the evidence in a light most favorable to the township, the evidence does not sufficiently indicate that an easement was reserved in favor of any plaintiff, or in favor of any lot now owned by any plaintiff.

The township also argues that the trial court erred in concluding that the scope of the alleged easement includes construction of a dock and permanent mooring of boats. We agree.

There is insufficient evidence of an easement granting, to plaintiffs, the right to install a dock, and the right to moor boats permanently. As just noted, the only record evidence of an easement is the record of the 1954 warranty deed. That instrument does not contain language indicating a right to permanently moor boats on a dock. Therefore, the trial court erred in granting summary disposition to plaintiffs on this issue.

The township additionally argues that the alleged easement is invalid under *2000 Baum Family Trust v Babel*, 284 Mich App 544; 773 NW2d 44 (2009), rev'd 488 Mich 136 (2010). We disagree. This issue was first raised by the township in its motion for reconsideration. An issue first raised in a motion for reconsideration is not preserved. See *Pro-Staffers, Inc v Premier Mfg Support Servs, Inc*, 252 Mich App 318, 328-329; 651 NW2d 811 (2002). We nevertheless elect to review this issue because it is a question of law, and the necessary facts have been presented. We review for plain error affecting substantial rights.

In *2000 Baum Family Trust*, the Supreme Court held that the property interest conveyed by a statutory dedication of a public road in a plat, where the road runs parallel to a body of water, does not divest the owners of the properties in the first row of lots on the landward side of the road of their riparian rights to use the body of water. *2000 Baum Family Trust*, 288 Mich at 137-140. The case at bar does not concern riparian rights to use land on the other side of a road from a lot owned by a claimant. Rather, it concerns alleged easement rights, allegedly running in favor of lots that are distant from the alleged easement area. Therefore, *2000 Baum Family Trust* is inapplicable, and there is no plain error under this issue.

The township also argues that the trial court erred in holding that two township ordinances (ordinance 46, governing docks on water, and section 17.15 of the zoning ordinance, governing riparian rights) do not apply to plaintiffs' proposed uses of the alleged easement. We agree.

Ordinance 46 provides, in section IV, that "[a]ll docked boats and watercraft shall be registered to the owners, riparians and/or occupants of the property to which they are attached." The trial court held that the language of ordinance 46 only applies to nonriparian users. The trial court concluded that plaintiffs have riparian rights (because of the alleged easement), therefore they are riparians, and therefore ordinance 46 does not apply to them. This reasoning lacks merit.

First, the conclusion that plaintiffs (to paraphrase) "are riparians" is misleading. *Lots* can be riparian or nonriparian. See *2000 Baum Family Trust*, 488 Mich at 139 (discussing whether owners of particular *lots* have riparian rights); see also *2000 Baum Family Trust*, 284 Mich App at 552-553 ("In some instances, *a platted lot may be riparian*" (emphasis added)). In other words, a person can be "a riparian" only by virtue of owning a lot to which riparian rights are attached. See *2000 Baum Family Trust*, 488 Mich at 138-140 (this premise is suffused throughout the Supreme Court's reasoning).

It follows that where an easement was, as here, allegedly *reserved* in favor of a lot or lots still owned by the grantor, an owner of land can have riparian rights *only by virtue of owning a lot* so benefitted. Therefore, the issue is, first, whether plaintiffs' *lots* are riparian in a relevant respect (i.e., with respect to the area allegedly covered by an easement). *With respect to this particular (alleged) easement area*, plaintiffs' lots are not riparian. This is clear when one looks at the survey of the alleged easement parcels (parcels A and B), and then views the locations of plaintiffs' lots, which lie throughout the three subdivisions and at distances from the alleged easement area.

Second, the trial court also erred in concluding that ordinance 46's provisions only apply to "riparians." By its unambiguous terms, ordinance 46 contains no such restriction. Ordinance 46 provides, in relevant part, that "[*a]ll* docked boats and watercraft shall be registered to the owners, riparians and/or occupants of the property to which they are attached."

The word "all" is the broadest of classifications. *Calladine v Hyster Co*, 155 Mich App 175, 182; 399 NW2d 404 (1986). It leaves no room for exceptions. *Id*.

Accordingly, ordinance 46 applies to all docked boats or watercraft. Although the *effect* of section IV of ordinance 46 may be to prohibit persons who do not own riparian lots from docking boats on the lake, the effect of the ordinance does not destroy the fact that, under the plain terms of the ordinance, it applies to "[*a]ll* docked boats."

The next issue is whether section 17.15 of the zoning ordinance applies to plaintiffs' proposed uses of the alleged easement area. It does.

This section, entitled Riparian Use, states:

> Where a parcel of land is *contiguous to a body of water*, it shall not be used for riparian purposes for more than one dwelling unit. Where a parcel of land is *not* contiguous to a body of water, it shall not be used in conjunction with a continuous [sic; contiguous?] parcel to allow the owners or occupiers to engage in riparian uses. *The intent of this section is to prevent non-riparian owners or occupiers from engaging in riparian uses on parcels owned by others or in common with others*. This section shall not be construed to prevent riparian use from being engaged in by riparian owners. . . . [Emphases added.]

The first sentence of this section applies to the parcels covered by the alleged easement, i.e., parcels A and B, because parcels A and B are contiguous to a body of water, namely, Lobdell Lake. This applicability is reinforced by the third sentence, because parcels A and B are not owned by plaintiffs, rather plaintiffs only claim easements over parcels A and B, and plaintiffs are seeking to engage in riparian uses (building a dock, docking boats, etc.). Thus, under the first and third sentences of section 17.15, that section does apply to plaintiffs' proposed uses. Accordingly, the trial court erred in concluding that ordinance 46, and section 17.15 of the zoning ordinance, does not apply to plaintiffs and their desired uses.

The township also argues that the trial court erred in granting summary disposition to plaintiffs on their claims that the township's ordinances cause a taking of plaintiffs' property without just compensation. We agree. Issues of constitutional law are reviewed de novo. *Nat'l Pride at Work, Inc v Governor of Mich*, 274 Mich App 147, 156; 732 NW2d 139 (2007), aff'd 481 Mich 56, 63 (2007).

In addition to its takings ruling, the trial court also held that section 17.15 of the zoning ordinance deprives plaintiffs of property without due process of law. The township does not challenge this ruling on appeal. Therefore, with respect to section 17.15, the taking claim is moot. This Court is not obliged to decide moot questions, even when they are preserved. *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 221; 761 NW2d 293 (2008).

The question remains whether ordinance 46 causes a taking of plaintiffs' property rights. Since plaintiffs would have the burden of proof on this issue at trial, and they failed to support their motion for summary disposition with any evidence to support the taking claim, we reverse the grant of summary disposition for plaintiffs.

The township also argues that plaintiffs failed to exhaust their administrative remedies before asserting takings claims. We agree.

The trial court did not rule on this issue. Therefore, it is technically unpreserved. However, a party need not be punished for a court's failure to address an argument that was made. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994). We review unpreserved issues for plain error affecting substantial rights.

A taking claim, based on enforcement of a land-use ordinance, is subject to the rule of finality. *Paragon Props Co v City of Novi*, 452 Mich 568, 571; 550 NW2d 772 (1996). The rule of finality provides that judicial review of a land-use-planning decision is premature until the municipality has rendered a final decision regarding permissible uses of the property. *Id*. If the claimant can still apply for an administrative remedy, judicial review is premature and the taking claim is not ripe. *Id*.

Plaintiffs did not apply to the township's ZBA for nonconforming use status. Plaintiffs themselves claimed in their motion for summary disposition that their prior uses gave them nonconforming use status. Therefore plaintiffs' takings claims, based on the riparian use provision in the zoning ordinance, are not ripe. *Paragon Props Co*, 452 Mich at 571. The trial court thus erred in granting summary disposition to plaintiffs on the takings claims.

Finally, the township argues that plaintiffs lack standing. We disagree. Whether a party has standing is generally a question of law. *Coldsprings Tp v Kalkaska County Zoning Bd of Appeals*, 279 Mich App 25, 28; 755 NW2d 553 (2008).

Standing concerns the right of persons who are parties to pursue a claim, based on a cognizable interest at stake. See generally *Taylor v Blue Cross & Blue Shield of Mich*, 205 Mich App 644, 655-656; 517 NW2d 864 (1994) (emphasis added). The general principle of standing is that a party "must demonstrate *a legally protected interest that is in jeopardy of being adversely affected* and must allege a sufficient personal stake in the outcome of the dispute to ensure that the controversy to be adjudicated will be presented in an adversarial setting that is capable of judicial resolution." *Taylor*, 205 Mich App at 655-656 (emphasis added).

Here, plaintiffs allege that they have easements over parcels A and B. Although their proofs failed below (see the discussion of the first, second, and third issues above), plaintiffs did present *some* evidence suggesting that they may be entitled to easement rights. Therefore, plaintiffs made a sufficient showing that they have standing to pursue their claims.

Affirmed in part, reversed in part, and remanded to the trial court for further proceedings. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Mark J. Cavanagh
/s/ Deborah A. Servitto