STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM J. PARSONS and KATHLEEN S. PARSONS,

Plaintiffs-Appellants,

v

CHARLES D. WHITTAKER,

Defendant-Appellee.

UNPUBLISHED

No. 170274,171456
LC No. 92-73130-CH

Before: White, P.J., and Fitzgerald and E. M. Thomas,* JJ.

WHITE, P.J. (concurring in part, dissenting in part).

I concur in the majority's disposition of the sanctions issue. I dissent, however, from its affirmance of the trial court's grant of summary disposition to defendant and denial of plaintiffs' motion for reconsideration.

The majority, in effect, concludes that the question whether defendant has riparian rights in the surface waters of the artificial lake is governed and decided by the Inland Lakes and Streams Act of 1972, MCL 281.951 *et seq*.; MSA 11.475 (1) *et seq*. I do not agree. While the lake is clearly subject to the act, and plaintiffs cannot take certain action without a permit, nothing in the act reveals a legislative intent to grant or enlarge riparian rights. The definitions of "riparian owner" and "riparian rights" do no more than explain the general meanings of the terms. The phrase "those rights which are associated with the ownership of the bank or shore of an inland lake or stream" cannot be understood to grant rights where none already exist.

The lake in question was formed when water filled the depression created by an old gravel mining operation. It is seven acres. Before plaintiffs and defendant purchased their parcels, the land surrounding the lake and the lake itself was entirely owned by one owner. The owner subdivided the larger parcel into a number of lots which dissect the lake. Several of the lots, including plaintiffs' and defendant's consist of a large front parcel, a section of the lake, and then a rear parcel which is not accessible from the front parcel, except by crossing the lake. See Appendix. The deeds include in the

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* Circuit judge, sitting on the Court of Appeals by assignment.

legal description title to the submerged lands in the gravel pit that fall within the side boundaries of the parcels.

Plaintiffs moved for summary disposition on defendant's counter claim, asserting that no riparian rights arose in the surface waters of the gravel pit due to the artificial nature of the lake. Plaintiffs also argued that when the land was subdivided and transferred there was no intent to grant riparian rights as demonstrated by the legal descriptions of the property. Plaintiffs further asserted that without the bridge the rear of their property was landlocked. The briefs of both parties focused largely on the legal issue whether plaintiffs owned the bottomland and surface waters or whether all property owners adjacent to the lake shared common riparian rights in the surface waters. After the court ruled in defendant's favor and ordered the bridge removed, plaintiffs moved for reconsideration relying in part on information that they claimed became available to then after the court's ruling. Plaintiffs submitted the affidavit of the vice president and manager of the land surveying and planning company retained by the grantor in creating the legal descriptions of the property. The affidavit stated that the deeds were prepared in a manner believed to convey the land under the water, and the surface water, and not to include riparian rights. The intent of the grantor and the deeds was to "allow for individual ownership by each property owner of that part of the gravel pit that was contained within the land description…". Plaintiffs also submitted the affidavit of David Whittaker, the president of Whittaker Real Estate, the company that owned and subdivided the large parcel and sold plaintiffs and defendant their property. Whittaker's affidavit stated that both plaintiffs and defendant knew the lake was manmade and was an old gravel pit, that no one who was sold property on the gravel pit was promised or told they had riparian or littoral rights, that plaintiffs' deed had a real property description that defined their property as having boundaries passing through the pit, and that it was the grantor's intent to transfer the entire property described in the deed. The court denied the motion for reconsideration.

I conclude that the Inland Lakes and Streams Act does not decide the question whether defendant has riparian rights in the surface waters of the entire lake – as distinguished from ownership rights in the surface waters that fall between the front and rear parcels of his property within the side boundaries of his property line - and that there were genuine issues of material fact that precluded the grant of summary disposition. Further, I do not agree with the majority that the affidavits submitted with plaintiffs' motion for reconsideration are irrelevant to the legal determination whether riparian rights exist.

While normally questions regarding the existence and scope of riparian rights should and can be resolved by reference to the general body of law regarding riparian rights, here, where no public rights are involved, where the lake is non-navigable and artificial, and was entirely within the boundaries of a single parcel when created, and where there is evidence that the intent of the grantor was to convey the bottom- land and surface waters within the boundaries of the legal description, which conveyance would permit the owner to join the front and back parcels, the scope of the conveyance is indeed relevant. The contrary view, that ownership of land adjacent to any body of water five acres or more in and of itself carries with it riparian rights to the entirety of the surface waters, regardless of the developer's or grantor's intent in creating and conveying the individual parcels, is not compelled by the Inland Lakes and Streams Act and unduly restricts the ability of property owners to create lakes on their property and to convey property rights as they wish. For example, if the owner of Parcel A creates a lake that

extends to one of the side boundaries of Parcel A, abutting Parcel B, no riparian rights should be created in the owner of Parcel B, notwithstanding that the water abuts Parcel B. Similarly, if a property owner creates a lake within a large parcel and chooses to subdivide the parcel down the center of the lake, with a view toward selling one-half of the property, including one-half of the lake, without giving up the right to the exclusive use and enjoyment of the retained half of the lake, the law should not prevent the property owner from doing so. Where artificial, non-navigable lakes are involved, the grantor's intent is relevant.

I would reverse as to count II of the counterclaim and remand for further proceedings.

/s/ Helene N. White