

STATE OF MICHIGAN
COURT OF APPEALS

WILLIAM H. BEDFORD, SR., CAROL H. BEDFORD, B. HARDY BEDFORD, SHARON BEDFORD, MARY M. HOBAN, Trustee, MARY M. HOBAN REVOCABLE LIVING TRUST, MARY FRANCES FALENDER, Trustee, FRAN FALENDER TRUST, MARY S. VALLANCE FRANCO, HARVARD W. VALLANCE, and ELIZABETH J. VALANCE, Co-Trustees, THEODORE R. VALLANCE TRUST, JAMES T. BAKER, MARY L. BAKER, ROBERT J. GARRISON, SUSAN A. GARRISON and EB ALLEN COTTAGE LLC,

Plaintiffs-Appellants,

v

JOAN YVONNE ROGERS, Trustee, JOAN YVONNE ROGERS TRUST,

Defendant-Appellee.

UNPUBLISHED
April 17, 2012

No. 299783
Benzie Circuit Court
LC No. 09-008746-CH

Before: WILDER, P.J., and HOEKSTRA and BORRELLO, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order denying their motion for summary disposition and granting defendant's cross-motion for summary disposition. For the reasons set forth in this opinion, we affirm.

I. FACTS AND PROCEDURAL HISTORY

The parties are owners of real property in the platted subdivision of Glen Eyrie, located on Crystal Lake in Benzie County. According to both the plat, recorded in 1920, and the parties' deeds, the individual lots do not extend to the shore of Crystal Lake. Rather, the plat depicts a 100-foot wide strip of land, running the entire length of the subdivision and designated as the "lakeway," between the south line of the platted lots and Crystal Lake. The plat provides that, along with "the drive, court, [and] spring road" depicted in the plat, this lakeway is "hereby

dedicated to the common use of property owners in Glen Eyrie plat.” At some point in time subsequent to the recording of the plat, Crystal Lake Drive came to be located parallel to, and partially within, the lakeway. Surveys conducted in May 2001 and January 2010 indicate that the parties’ lots terminate, and the lakeway begins, at the approximate center of Crystal Drive, such that one half of the paved surface, together with the statutorily imposed roadway easement extend into the lakeway, reducing the width of the lakeway as platted to approximately 67 feet along the entire length of the subdivision. Over time, the forces of nature eroded portions of the lakeway such that, at certain points, there is little land remaining between the lakeside edge of Crystal Lake Drive and the Crystal Lake shoreline.

Historically, a number of owners in the plat constructed small boathouses or storage sheds in the lakeway in front of their respective lots. When defendant purchased her lot in 1987, there was a boathouse, approximately 20 by 28 foot in size, in the lakeway in front of her property. In September 2009, defendant submitted an application for a land use permit to the township to construct a new 28 by 34 foot “Boat House” in the lakeway, to replace the existing, smaller boathouse. The township issued the permit on September 16, 2009. In October 2009, defendant demolished the old boathouse and began constructing her replacement structure. Defendant’s new structure had heat, running water, toilet facilities, a kitchenette, an extensive workshop, and a second floor cupola to allow for a view of Crystal Lake.

On November 20, 2009, plaintiffs, through an attorney, wrote a letter asking defendant to cease construction of the structure based on the language in the plat dedicating the “lakeway . . . to the common use of property owners” in the plat. The record establishes that, at the time plaintiffs sent this letter to defendant, construction of the new structure was in its very early stages, consisting only of a cement slab and some initial studding. Defendant declined to halt construction. On December 11, 2009, the Lake Township Zoning Administrator wrote defendant a letter advising her that the building violated the township’s zoning ordinance, because it “includes substantial space designated by the [] Building Department as living quarters,” and that, accordingly, a stop work order was being issued. Defendant appealed the zoning administrator’s decision to the Zoning Board of Appeals, and on April 14, 2010, the Zoning Board of Appeals passed a resolution “that the structure known as a Boat House/Beach House be allowed as a compatible non-commercial recreational facility” under certain conditions, which included removal of certain residential features but did not include removal of the cupola.¹

After construction of the new structure was completed, plaintiffs filed a complaint against defendant for trespass and nuisance. Thereafter, the parties filed cross-motions for summary disposition. Plaintiffs moved for summary disposition pursuant to MCR 2.116(C)(9) and (10), arguing, in relevant part, that the plat dedication granted the property owners within the plat an

¹ The conditions imposed by the Board of Appeals included that defendant remove a certain wall to create a larger workshop area, eliminate the tub and shower from the proposed bathroom, and limit the kitchen “to a sink with running water,” a microwave, coffee pot and small refrigerator, “but no fixed kitchen appliances, such as a garbage disposal, built-in or single appliance, stove or oven.”

irrevocable easement over the lakeway property and prevented defendant from exclusively using the portion of the lakeway in front of her lot by constructing a new structure that expanded the footprint of the old boathouse. Defendant moved for summary disposition under MCR 2.116(C)(10), arguing, in relevant part, that under *Thies v Howland*, 424 Mich 282; 380 NW2d 463 (1985), she owned the portion of the lakeway between her lot and the lakeshore in fee simple subject to an easement in favor of plaintiffs, that, accordingly, she had the right to make reasonable exclusive use of that portion of the lakeway, and that the new structure did not unreasonably interfere with plaintiffs' limited easement rights in the portion of the lakeway owned by defendant.

The trial court granted defendant's motion and denied plaintiffs' motion, stating on the record:

[T]he court's ruling would be different without the historical placement of these boathouses. [Plaintiffs' counsel] is entirely correct in his citation to . . . a strong line of cases, that where there's a plat that makes a dedication, the dedication becomes irrevocable upon sale of lots by reference to the plat.

[Defense counsel] and co[-]counsel are correct in this strong line of cases about easements and fee, and the reasonable use of the fee holder so as not to interfere with the exercise of the rights of the holder of the easement.

It seems to me this court has really only two choices in this case. The court can say summary disposition for plaintiff[s] that this defendant, when [s]he – after waiting for the summer season essentially to pass, [s]he, in a hurry, went out and enlarged this boathouse beyond – I think it's 11 feet in width beyond what it had been. And so defendant has to scale this back and can put a boathouse there as long as it doesn't exceed what was essentially a prescriptive footprint. Other than I'm not sure it was there solely by prescription. That is, it seems to me – it seems to the court in the factual context of this case there is an acceptance among the owners in this plat of these boathouses, they've been there a long time, approximately 50% of the owners of the plat have them now, they're of long-standing, and nobody's complained. And what's complained of in this case is that this one has increased in size.

The dedication is that the – Lakeway, as shown on said plat, is dedicated – hereby dedicated to the common use of property owners in Glen Eyrie plat. The problem is by tacit agreement of the plat owners, 100% of Lakeway is not dedicated to the common use of property owners. The exception is by tacit agreement of the plat owners of long-standing – you know, I think we're talking 40 years or more on many of these structures - is an exception for boathouses used for storage.

We have an enlargement of a boathouse, and the use – I think the record establishes, counsel can interrupt if they think I'm wrong, but it's to become some kind of not only storage, but sitting area for at least one elderly [gentleman, the husband of] defendant who can't - put it this way - isn't as spry as he used to be in

terms of getting across the road and such. So he just, rather than use the boathouse exclusively to store things, he wants to be able to sit in it as well. And he wants to use it exclusively for himself, or himself and his invited guests, or those with his permission.

Externally, everyone else in the plat is free to walk around the new enlarged boathouse, and use the – use Lakeway for the things its [sic] historically used for to get to and from the beach. I suppose some of them may picnic, lie in the sun, go to the water. In the circumstances of this case, this court – I can't find that this increases the exclusion of other owners in the plat beyond merely a few feet, the area that they're excluded from, and which was historically acceptable and of long-standing. It simply does not in any significant way burden the rights of the other owners in the plat in exercising the common use of their easement rights on Lakeway beyond that which has historically been acceptable.

Now, I don't want to – I don't want to be taken the wrong way in this case. This case is heavily factually dependent upon the long-standing historical use of these other exclusive boathouses. And because of that – because of that, the court looks to whether this is any kind of unreasonable expansion of that historically accepted exclusion. And the expansion of that exclusion is de minimus in terms of the rights of other owners in the plat to exercise their easement rights in Lakeway.

* * *

So the decision is summary disposition for defendant.

II. STANDARD OF REVIEW

This Court's review of a trial court's grant of summary disposition pursuant to MCR 2.116(C)(10)² is as follows:

This Court reviews de novo a trial court's grant or denial of summary disposition under MCR 2.116(C)(10). *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Downey v Charlevoix Co Rd Comm'rs*, 227 Mich App 621, 625; 576 NW2d 712 (1998). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered by the court when ruling on a motion brought under MCR 2.116(C)(10). *Downey, supra* at 626; MCR 2.116(G)(5). When reviewing

² The trial court did not specify under which sub rule of MCR 2.116(C) summary disposition was appropriate. However, because it is clear that the trial court considered documentary evidence beyond the pleadings in deciding the motion, we will review it as having been granted under MCR 2.116(C)(10). *Driver v Hanley*, 226 Mich App 558, 562; 575 NW2d 31 (1997).

a decision on a motion for summary disposition under MCR 2.116(C)(10), this Court “must consider the documentary evidence presented to the trial court ‘in the light most favorable to the nonmoving party.’” *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539; 620 NW2d 836 (2001), quoting *Harts v Farmers Ins Exchange*, 461 Mich 1, 5; 597 NW2d 47 (1999). A trial court has properly granted a motion for summary disposition under MCR 2.116(C)(10) “if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law.” *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). [*Clerc v Chippewa Co War Mem Hosp*, 267 Mich App 597, 601; 705 NW2d 703 (2005), remanded in part 477 Mich 1067 (2007).]

Both the extent of a party’s rights under a plat dedication, and the extent of a party’s rights under an easement, present questions of fact for the trial court, which this Court reviews for clear error. *Dyball v Lennox*, 260 Mich App 698, 703; 680 NW2d 522 (2004); *Little v Kin*, 249 Mich App 502, 507; 644 NW2d 375 (2002); *Dobie v Morrison*, 227 Mich App 536, 541; 575 NW2d 817 (1998).

III. ANALYSIS

At issue in this case is whether the trial court properly denied plaintiffs’ motion for summary disposition that requested the trial court to enforce a private dedication for common use of the “lakeway” by ordering defendant to remove the structure built in the “lakeway” that plaintiffs maintain is not permitted by the dedication.

The courts of this state will enforce plat owners’ rights arising from private dedications; however, those rights are constrained in two different ways. *Dobie v Morrison*, 227 Mich App 536, 540-541; 575 NW2d 817 (1998). First, the uses must be within the scope of the plat’s dedication, and second, the uses must not unreasonably interfere with the owners’ use and enjoyment of their property. *Id.* at 541. Determinations of a party’s rights under an easement are questions of fact. *Id.* We review questions of fact regarding the parties’ rights under an easement for clear error. *Id.*

In this case, both of the parties and the trial court assumed that the dedication in the Glen Eyrie plat created a park for common use by the lot owners. Because we conclude that the lakeway was not dedicated as a park, we find the parties and the trial court’s interpretation of the scope of the dedication is clearly erroneous.

The dedication provides that “the drive, court, spring road and lakeway” are dedicated for common use. When interpreting a contract, this Court will read contractual language as a whole, and interpret individual words within the context that they are used. *Henderson v State Farm Fire and Cas Co*, 460 Mich 348, 356-357; 596 NW2d 190 (1999). This approach is consistent with the parallel rule for statutory construction. See *Manuel v Gill*, 481 Mich 637, 650; 753 NW2d 48 (2008) (“It is a familiar principle of statutory construction that word groups in a list should be given related meaning.”) (quotation and citation omitted). Applying this rule of construction to a determination of the scope of the dedication requires that the dedication be

interpreted to harmonize the term “lakeway” with that of the other terms with which it is grouped in the dedication.

In this case, the plat map clearly shows that the drive, the court and the spring road are right-of-ways, and that each runs basically perpendicular from the lakeway and ends on the opposite side of the plat. From that point, in some manner not shown on the plat map, the drive, court, and spring road presumably connect to public roads. The plat map also shows that the only way to access lots 2, 3, 4, 5, 8, 9 and 10, which front on Crystal Lake, is by using the lakeway. Under these circumstances, the only logical conclusion is that the “common use” that the lakeway was intended for is to be a right-of-way just as the drive, court and spring road was intended to be a right-of-way for lot owners to travel to, from, and within the plat.

This interpretation is consistent with the circumstances that existed at the time the Glen Eyrie Plat was dedicated in 1920. The plat map also shows that the lakeway consists of a 100 foot wide unimproved strip of land that separates the plat lots from the water’s edge. Subsequent to the dedication, 66 feet of the lakeway became a county road known as Crystal Drive, which extends along the shores of Crystal Lake in both directions from the lakeway. This suggests that the lakeway may have been used as some kind of a roadway at the time of the platting.³ Indeed, the “drive,” “court” and “spring road” all provide access to the “lakeway.” Thus, today the lots owned by plaintiffs and defendant are separated from Crystal Lake by a public road, and that road, not the remaining 33 feet of lakeway land that is the subject of this dispute, provides the access formerly provided by the lakeway to lots not abutting the other right-of-ways within the plat.

In addition, the lakeway is a “way,” and as such is a right-of-way and not park. Had it been the intent of the platator to create a park, there is little reason to think it would be called a “way,” because that term has historically been used to indicate a right-of-way, as opposed to a “park” or other similar designation. See, e.g. *Thies v Howland*, 424 Mich 282, 290; 380 NW2d 463 (1985) (using term “way” to mean right-of-way); *Oneida Twp v Allen*, 137 Mich 224, 226-227; 100 NW 441 (1904) (using term “way” to mean a path or road). Further, if it were intended to be park it would logically be listed separately from the drive, court, and spring road.

³ There are only three ways that privately owned land can become a public road; by either a statutory dedication, a common-law dedication, or by “highway by public user.” *2000 Baum Family Trust v Babel*, 488 Mich 136, 147; 793 NW2d 633 (2010). A statutory dedication requires “a recorded plat designating the areas for public use, evidencing a clear intent by the plat proprietor to dedicate those areas to public use, and acceptance by the proper public authority.” *Id.* at 149. Here, the only dedication of the lakeway was a private dedication, not a public one for public use; accordingly, the road that now exists within the lakeway must have been created by a common-law dedication or by “highway by public user.” *Id.* at 147. Either of these means requires that the lakeway had to have been used for some considerable time by the public before becoming a public road and also suggests that at the time of the dedication, the lakeway property was being used as a road.

Under these circumstances, we conclude that the scope of the dedication created an easement within the lakeway for common use of lot owners of the land as a right-of-way that allows lot owners to use the lakeway in the same manner as the “drive,” “court,” and “spring road.” Additionally, we note that despite the fact that the parties have considered the lakeway to be a park does not transform the dedication because dedications cannot be extinguished or altered by inconsistent use. See *2000 Baum Family Trust v Babel*, 488 Mich 136, 153; 793 NW2d 633 (2010) (the central principle of dedication is that “the use of land dedicated to the public depends on the dedicator’s intention and may not be appropriated to an entirely different use.”) Consequently, because the lakeway was dedicated to be a right-of-way and not a park and because Crystal Drive fully satisfies the dedication for common use of a right-of-way within the lakeway, plaintiffs claim for relief is without merit.

Nevertheless, even assuming, as the parties and the trial court do, that the dedication of the lakeway for common use constituted a dedication of the area to be used as park, we would still conclude that plaintiffs’ claim is without merit. The parties in this case are in agreement that all the front-lot owners, including defendant, are fee simple owners of the property that constituted the lakeway, subjected to the dedication. See also *Babel*, 488 Mich at 171 (“front-lot owners whose property is separated by a public road running parallel to the water are deemed to have riparian rights”); *Thies*, 424 Mich at 290 (fee holders of lots separated from the water by a right-of-way created by private dedication maintain ownership of fee to the lakeshore). Consistent with *Dobie*, defendant’s fee ownership entitles her to make use of her property in any manner that does not infringe on the dedication. See *Dobie*, 227 Mich at 541-542. Thus, the question becomes whether the structure that plaintiffs challenge constitutes an infringement on the dedicated use that they are entitled to make of the lakeway.

Plaintiffs argue that the trial court made an improper finding of fact that defendant’s new construction constituted a mere “de minimus” additional burden on their easement over the lakeway. As previously stated, a motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Downey*, 227 Mich App at 625. When reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), we view the evidence in the light most favorable to the nonmoving party. *DeBrow*, 463 Mich at 539. A trial court has properly granted a motion for summary disposition under MCR 2.116(C)(10) “if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law.” *Clerc*, 267 Mich App at 601, quoting *Quinto*, 451 Mich at 362. The trial court’s finding that defendant’s construction was a “de minimus” burden on plaintiffs’ easement touches on the reasonableness of defendant’s use of the servient estate, which is a material fact in this matter. Here, plaintiffs are still able to use the lakeway in the same manner and for the purposes that it was used before defendant tore down her old boathouse and constructed a larger, more elaborate structure. Accordingly, the boathouse constitutes a reasonable use of the property by defendant, and does not interfere with the exercise of plaintiffs’ rights pursuant to the dedication. See, e.g., *Hasselbring v Koepke*, 263 Mich 466, 476; 248 NW 869 (1933) (“It is settled that the owner of a fee, subject to an easement, may rightfully use the land for any purpose not inconsistent with the rights of the owner of the easement.”). And to the extent that plaintiffs maintain that the scope of the dedication provides for the lakeway to remain “open space,” we would conclude that neither the language of the dedication nor the evidence of the historical use by lot owners supports that claim. Thus, even viewing the evidence in the light most favorable to plaintiffs, there is no genuine issue of material fact regarding the

reasonableness of defendant's use of the servient estate. Therefore, it was not improper for the trial court to find that defendant's new structure constituted a "de minimus" burden on plaintiffs' easement over the lakeway.

Affirmed.

/s/ Kurtis T. Wilder

/s/ Joel P. Hoekstra

/s/ Stephen L. Borrello