

Court of Appeals, State of Michigan

ORDER

Nicholas Mushovic v Bloomfield Hills School District
Christopher Mark Fellin v Bloomfield Hills School District

Kirsten F. Kelly
Presiding Judge

Docket Nos. 303372; 303374

Kurtis T. Wilder

LC Nos. 2009-098669 AW; 2009-100784 AW

Mark T. Boonstra
Judges

The Court orders that the May 15, 2012, unpublished per curiam opinion in this matter is hereby AMENDED to correct a clerical error as follows: Alan H. Peterson is added as a plaintiff-appellant to the caption in Docket No. 303372.

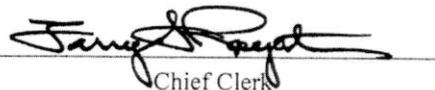
In all other respects, the May 15, 2012, opinion remains unchanged.



A true copy entered and certified by Larry S. Royster, Chief Clerk, on

JUN 29 2012

Date


Chief Clerk

STATE OF MICHIGAN
COURT OF APPEALS

NICHOLAS MUSHOVIC, MIA MUSHOVIC,
SOFIA MUSHOVIC, SUE ABRAMS, RICHARD
R. COLT, and MICHAEL A. COX ATTORNEY
GENERAL NECESSARY STATUTORY
PARTY,

Plaintiffs,

and

CHAYA STRINGER, Next Friend of CHARON
STRINGER and CHANON STRINGER,

Plaintiff-Appellant,

v

BLOOMFIELD HILLS SCHOOL DISTRICT, and
BLOOMFIELD HILLS BOARD OF
EDUCATION,

Defendants-Appellees.

CHRISTOPHER MARK FELLIN,

Plaintiff-Appellant,

and

JAMES HAROLD STRINGER and MICHAEL A.
COX ATTORNEY GENERAL NECESSARY
STATUTORY PARTY,

Plaintiffs,

v

BLOOMFIELD HILLS SCHOOL DISTRICT and
BLOOMFIELD HILLS BOARD OF
EDUCATION,

UNPUBLISHED
May 15, 2012

No. 303372
Oakland Circuit Court
LC No. 2009-098669-AW

No. 303374
Oakland Circuit Court
LC No. 2009-100784-AW

Defendants-Appellees.

Before: K. F. KELLY, P.J., and WILDER and BOONSTRA, JJ.

PER CURIAM.

In this consolidated appeal, plaintiffs appeal as of right from an order granting defendants' motion for summary disposition. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

In 1955, Mae Callow executed a deed that gave defendants' predecessor in interest approximately 11.72 acres of land in West Bloomfield Township ("the property"). *Mushovic v Bloomfield Hills Sch Dist*, unpublished opinion per curiam of the Court of Appeals, issued March 18, 2010 (Docket No. 293841), p 2 n 1. The Callow deed stated consideration of \$1.00 and conveyed the property "subject to the restriction that these premises shall be used for School purposes only." *Id.*

Defendants acquired other surrounding parcels and built Pine Lake Elementary School, which sits partially on the parcel conveyed in the Callow deed. *Id.* at 2. Defendants closed the school in late 2008/early 2009, allegedly due to decreases in financing and a declining student enrollment. It then leased the property to the Waterford School District. *Id.*

A. INITIAL LITIGATION

Property owners residing next to the school, the successors-in-interest to the parcel once owned by Callow, and parents as the next friends of children who would have been eligible to attend Pine Lake Elementary School had it remained open, brought suit, seeking declaratory and injunctive relief, arguing that defendants did not have the right to lease the property to another school district, as it was a violation of the deed restriction. *Id.* at 3. Following a bench trial, the trial court found that the conveyance established a charitable trust requiring defendants to use the property as a Bloomfield Hills school for the benefit of Bloomfield Hills' students. *Id.* It further found that defendants breached the trust by leasing the property to the Waterford School District. *Id.*

B. APPEAL TO THIS COURT

On appeal, this Court rejected the trial court's finding that the deed conveyed a charitable trust. *Id.* at slip op p 5. Instead, it found that the deed conveyed a determinable fee, where the real property was conveyed subject to a specific limitation of use and was subject to termination and reversion on cessation of that use, despite the fact that the deed did not contain a reversionary clause:

Mae Callow conveyed the real property to defendants subject to a specific limitation of use. "A conveyance of land to be held as long as it is used for a school creates a determinable or qualified fee, subject to termination and

reversion on cessation of that use, or, it has been said, the words fix a conditional limitation on the title to the land conveyed.” The deed language supports this determination. First, the devise is only to the School District and does not include any provisions for the grantee’s assigns, demonstrating ownership is contingent on the limitations contained in the deed, implying that the property is not to be conveyed to another entity. Second, the phrase “subject to the restriction that these premises shall be used for School purposes only” is a clear limitation on the use of the property. Specifically, the words “shall” and “only” indicate a mandate regarding the required use of the property. Further, the phrase “subject to the restriction” is akin to words long recognized in property law as designating a special limitation such as “until,” “during,” and “so long as.” Based on the existence of the deed’s wording expressing a condition of use a determinable fee was granted. As a result, despite the absence of a reversionary clause within the Callow deed, the grantor retains a right of re-entry upon the failure of the condition imposed on the conveyance of the fee. In other words:

A conveyance of land to be held as long as it is used for a school creates a reversionary interest in the grantor or his or her heirs or assigns even though there is no express provision to that effect. Such interest, it has been held, is not a full or true reversion, but only a possibility of reverter.

Consequently, there exists no useful purpose in the labors undertaken by the trial court to justify this conveyance as establishing a charitable trust. As previously recognized by our Supreme Court, the imputed or supposed intent of the restrictors is insufficient to overcome the express language used in the documents creating the restrictions. Callow’s intent was sufficiently effectuated based on the language of the deed. We need not resort to speculation regarding the donor’s motivation in granting the conveyance because it would result in the improper expansion of both the type of conveyance actually granted and the limitations to be imposed on use of the property. [*Id.* at pp 5-6 (citations omitted).]

As to the scope of the limitation, and whether leasing the property to Waterford was within that scope, this Court found that “defendants’ lease to the Waterford School District of the premises for the operation of a school resulting in a monetary gain to defendants comprises a proper and acceptable “use” within the strictures of the document conveying the property” *Id.* at 7. This Court then remanded for further action consistent with its opinion. *Id.* at 9.

C. POST APPEAL LITIGATION

Following this Court’s decision, the heirs to the Callow reversionary interest and defendants entered into a settlement agreement. Pursuant to the agreement, the heirs sold and conveyed by deed any and all reversionary interest they had in the property to the Bloomfield Hills School District. In consideration, among other things, the heirs received \$40,000 and the possibility of an additional future payment if certain criteria were met.

Shortly thereafter, plaintiffs filed a third amended complaint, alleging:

14. Mae Callow, by her gift of the subject property to the defendants, conveyed certain rights to defendants subject to a common-law dedication for a public purpose as to all plaintiffs and for the educational purposes and benefit of future students, including plaintiffs herein. Said gift's acceptance and use by defendants created a common-law dedication for a public purpose.

15. Mae Callow conveyed the property to defendants subject to the common-law dedication that it "shall be used for School purposes only" and defendants accepted the gift for that specific purpose and continued to honor that dedication by operating that site for use as the Pine Lake School for some 50 years after that acceptance.

16. That defendants' non-use of the land for active instructional purposes, and their stated intentions to consider selling or developing the land for residential purposes, are contrary to the purposes of the above common-law dedication, and are both an immediate and an anticipatory breach of defendants' obligations under the common-law dedication and terms of the restricted deed.

17. Persons residing within sight of the subject property, or who abut same, such as present-day homeowners and residents, given and Defendant BOE's recent vote to end the use of Pine Lake School as a functioning community school in violation of that deed restriction, would have a direct negative impact on the enjoyment, beneficial use, and economic value of the neighboring community properties.

18. Minor children who, as students, have been attending and/or who have been expected to attend the Pine Lake community school, if no longer able to do so because of its closure by defendants, would be wrongfully deprived of their expected beneficial use of that community asset, contrary to the terms of the common-law dedication and deed restriction which was placed upon the Pine Lake School property by Grantor Mae Mitchell Callow.

19. Defendant BOE's vote to close Pine Lake School, and to spend large sums of district money to remodel other facilities in order to accept Pine Lake students, if permitted to continue, would negatively affect the children of the Pine Lake community, who would be deprived of their high quality neighborhood school, as well as disrupt the lives of their families.

20. Plaintiffs have standing to bring this equitable matter for the enforcement of the Mae Callow common-law dedication.

In response, defendants moved for summary disposition on three grounds. First, they asserted that the complaint should be dismissed because when they acquired the reversionary interest pursuant to the settlement agreement, it merged with their interest, and they now owned the property in fee simple absolute. Second, they asserted that the common-law dedication theory was barred by the law of the case doctrine pursuant to this Court's decision that the deed created a fee simple determinable. And third, that the plaintiffs no longer had standing to

enforce the limitation contained in the Callow deed because the Callow heirs sold their rights to defendants.

The trial court granted the motion on the second basis and did not address whether plaintiffs had standing or whether defendants held a fee simple absolute pursuant to the merger doctrine. It is from this decision that plaintiffs now appeal.

II. STANDARD OF REVIEW

Although defendants did not specify under which subsection they sought summary disposition, the trial court relied on both MCR 2.116(C)(8) (failure to state a claim upon which relief may be granted) and MCR 2.116(C)(10) (no genuine issue as to any material fact).

This Court reviews a trial court's decision on a motion for summary disposition de novo, reviewing the record in the same manner as the trial court to determine whether the movant was entitled to judgment as a matter of law. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008).

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the claim on the pleadings alone to determine whether the plaintiff has stated a claim on which relief may be granted. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). When considering a party's motion under (C)(8), the court must construe the pleadings in the light most favorable to the nonmovant. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The moving party must specifically identify the matters that have no disputed factual issues, and it has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Coblentz v Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006). The party opposing the motion then has the burden of showing by evidentiary materials that a genuine issue of disputed material fact exists. *Id.* The existence of a disputed fact must be established by substantively admissible evidence, although the evidence need not be in admissible form. *Maiden*, 461 Mich at 121. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

III. ANALYSIS

Plaintiffs argue that Callow's donation constituted a common-law dedication and that, contrary to the trial court's belief, this Court's prior determination that the deed granted a fee simple determinable did not preclude a finding that a common-law dedication was created. We disagree. We hold that plaintiffs' claim that the Callow deed created a common-law dedication is barred by the law of the case doctrine because this Court implicitly rejected such a theory when it determined that the Callow deed granted a determinable fee.

Under the law of the case doctrine, an appellate court ruling on a particular issue binds the appellate court and all lower tribunals with regard to that issue. The law of the case mandates that a court may not decide a legal question

differently where the facts remain materially the same. The doctrine applies to questions specifically decided in an earlier decision and to questions necessarily determined to arrive at that decision. [*Webb v Smith*, 224 Mich App 203, 209; 568 NW2d 378 (1997) (citations omitted).]

In the prior appeal, this Court found that the Callow deed conveyed a determinable fee. A determinable fee, or fee simple determinable, is a present estate. Cunningham, Stoebuck & Whitman, *The Law of Property* (2d ed), §2.4 pp 39-40. It is an estate subject to a specific limitation of use, which is also subject to termination and reversion on cessation of that use. *Id.* The interest that the grantor retains under this arrangement, the reversionary interest, is called a possibility of reverter. *Id.* As noted in the earlier appeal, it is not a true reversionary interest, but only a possibility of reverter, because the reversion is not guaranteed to take place; it will only take place on cessation of the specified use. *Mushovic*, slip op at 6. In the immediate case, this Court ruled that the use required by the Callow deed did not cease, and thus the estate did not terminate, when defendants leased the property to the Waterford School District. *Id.* at 7.

“A dedication is merely an appropriation of land to some public use, accepted for such use by or in [sic] behalf of the public.” *Clark v Grand Rapids*, 334 Mich 646, 656-657; 55 NW2d 137 (1952). Our Supreme Court summarized the rules of common-law dedication, as follows:

“Private property may, by unceremonious act and implication from act on the part of the landowner, and like act and implication from act on the part of the public, become subject to public easement by means of common-law dedication. The public right in such instance does not depend upon acceptance and use for any particular period of years. The fact of dedication and acceptance, and the extent of the dedicated use, must be determined from the intent of the dedicators and acceptors and the legal significations thereof. No particular form is necessary to such dedication. The fee does not pass. An easement does. There may be a public abandonment after acceptance, and reversion to the original owner, when the use for which the dedication was made becomes impossible of execution or where the object of the use fails.” [*Woodland v Mich Citizens Lobby*, 423 Mich 188, 221-222; 378 NW2d 337 (1985), quoting *Amalgamated Clothing Workers v Wonderland Shopping Ctr*, 370 Mich 547, 567; 122 NW2d 785 (1963) (BLACK and SMITH, JJ., *for modification and affirmance*).]

A common-law dedication typically arises in the context of streets, where a private owner or developer dedicates a street for public use and the public then maintains the street. See *2000 Baum Family Trust v Babel*, 488 Mich 136, 148; 793 NW2d 633 (2010). A common-law dedication provides the public with an easement and does not “ordinarily convey the fee.” *Id.*

In the immediate case, plaintiffs raised the issue of a common-law dedication in the earlier appeal. Although this Court did not explicitly address or reject that theory, it did so implicitly when it determined that the Callow deed granted the defendants a fee simple determinable. There cannot be both a common-law dedication *and* a fee simple determinable. Thus, a subsequent action under a common-law dedication theory cannot be maintained because the two doctrines are inherently inconsistent for a number of reasons.

First, it is well established that a common-law dedication confers an easement, not a fee, and that the dedication grantor retains legal title to the property, subject to the easement. *2000 Baum Family Trust* 488 Mich at 148; *Woodland*, 423 Mich at 222. Finding a common-law dedication here would contradict this Court’s determination that Callow granted a fee to the school system and retained a reversionary interest (i.e., granted a fee and did not retain legal title).

Second, the facts and circumstances required to prove intent on the part of the dedicator must be “clearly and expressly shown by his acts and declarations, or by a line of conduct the only reasonable explanation of which is that a dedication was intended.” *Hawkins v Dillman*, 268 Mich 483, 491; 256 NW 492 (1934), quoting *Vance v Village of Pewamo*, 161 Mich 528, 535; 126 NW 978 (1910). Here, there is not only another reasonable explanation for Callow’s acts (i.e., that Callow granted a fee simple determinable), but this Court conclusively determined in the prior appeal that this was the only explanation for what had occurred.

Third, even if a devise could simultaneously grant a fee simple determinable and act as a common-law dedication, and even if this Court concluded that the devise or other facts constituted a common-law dedication in this instance, such a finding would do little to help plaintiffs, the adjoining landowners or parents of potential students, under the facts of this case. This is because a common-law dedication may be abandoned. *2000 Baum Family Trust*, 488 Mich at 146 (“The law will give effect to a dedication of land that has been ‘solemnly devoted to the use of the public’ for as long as the land continues to be exercised in accordance with its dedicated public use.”), quoting *Patrick v YMCA of Kalamazoo*, 120 Mich 185, 191, 193; 79 NW 208 (1899); *Mich State Hwy Comm v St Joseph Twp*, 48 Mich App 230, 237; 210 NW2d 251 (1973) (“Abandonment is composed of two elements, namely, an intention to relinquish the right or property, but without intending to transfer title to any particular person, and the external act by which such intention is carried into effect.”), quoting *Clark*, 334 Mich at 656. Thus, even if there was a common-law dedication, the school district would not be required to maintain the property as a school on that basis. The school district could freely abandon its rights under the dedication by expressing such an intention and acting to do so.

For these reasons, this Court necessarily rejected plaintiffs’ common-law dedication claim when it determined that the Callow deed conveyed a fee simple determinable. *Webb*, 224 Mich App at 209. Accordingly, the trial court did not err in granting defendants’ motion for summary disposition.¹

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Kurtis T. Wilder
/s/ Mark T. Boonstra

¹ Given our resolution of this issue, we will not address defendants’ arguments regarding alternative bases for affirming the trial court’s decision.