

STATE OF MICHIGAN
COURT OF APPEALS

JAMES E. PLASTOW, JR. and ISABELL JUNE
PLASTOW,

UNPUBLISHED
September 2, 2014

Plaintiffs/Counter Defendants-
Appellees,

v

No. 313653
Antrim Circuit Court
LC No. 2008-008408-CH

DONALD G. HIGMAN, JOAN C. KOESTER,
MICHAEL A. WERKEMA, CYNTHIA
ANDREWS, NONA EDWARDS, STEVEN C.
REYNOLDS, KAREN S. REYNOLDS, MARY L.
MCKENNA, GARY E. MCKENNA, JACK A.
BODIS, CATHARINA STOHLER, and
CHRISTIAN STOHLER,

Defendants-Appellees,

and

KATHLEEN E. HIGMAN, GARY OLSON,
TERESA OLSON, KARL DITTMEAN,
KATHLEEN A. DITTMAN, TIMOTHY M.
MCCARTHY, KATHLEEN M. MCCARTHY,
JEFFREY A. GUNSHER, GRETA M.
GUNSHER, JOHN A. SCHNEIDER, GEORGE S.
ALBARELLI, REBECCA A. ALBARELLI,
LARRY BRANDNER, BRANDNER FAMILY
TRUST, ILENE E. ARNOLD, COLIN M.
ARNOLD, JENNIFER R. ARNOLD, GREGORY
W. ARNOLD, DEMENICO A. MOCERI,
DENISE K. MOCERI, MARTIN V. DEAN,
DIANA L. DEAN, CHARLES O. SCHLOSSER,
SHIRLEY SCHLOSSER, LEE A. WOLLGAST,
JULIE WOLLGAST, RICHARD M. PARKER,
VICTORIA PARKER, DONALD SCHMEICHEL,
DONNA SCHMEICHEL, DAVID J. SIBBOLD,
JANET A. SIBBOLD, EDWARD J. COFFMAN,
ANTHONY M. DEROO, BARBARA K. DEROO,
CHARLES E. AILSWORTH, MAUREEN A.

FREY, MARY STRATTON, LARRY J.
NOBACH, SANDRA K. NOBACH, DANIEL L.
SYLVESTER, BONNIE J. CRAIG, THOMAS F.
KOHN, ROSALYN KOHN, WILSON D.
MCQUEEN, NANCY L. MCQUEEN, WILLIS E.
MCQUEEN, RICHARD S. LUTHER,
KATHLEEN H. LUTHER, PETER SZAFRAN,
PENELOPE SZAFRAN, THOMAS S. NEER,
MARY B. NEER, KEVIN D. BARTLETT,
REBECCA B. BARTLETT, KENNETH C.
CHRISTIANSSEN, DARLENE L. KWIT, GEAR
SECOND FAMILY LTD PARTNERSHIP,
JAMES R. STAPLETON, IMOGENE E.
STAPLETON, TERRI L. STAPLETON, J.B.
MCQUEEN, BONNIE L. MCQUEEN, EUGENE
MCQUEEN, MARGERY A. MCQUEEN,
STEVEN C. FALES, LISA M. FALES, JAMES
M. GRANT, MARILYN J. GRANT, MICHAEL
E. BREEN, PATRICK K. BREEN, DANIEL R.
MURRAY, EVELYN R. MURRAY, JEFFREY T.
SMITH, COLLEEN L. SMITH, LARS E.
TYSKLIND, and MARVIN J. RUBINGH,

Defendants/Counter Plaintiffs-
Appellees,

and

MARJORIE A. BERNDT, ROBERT E.
BRAZELL, GENEVIEVE MARIE BRAZELL,
MICHAEL FREEDLAND, SUE ANNE
FREEDLAND, CALVIN P. KERN and EVELYN
K. KERN, Trustees for the CALVIN P. KERN and
EVELYN K. KERN JOINT TRUST, BARBARA
A. KORTES, Trustee for the BARBARA A.
KORTES TRUST, NANCY K. KORTES, Trustee
for the NANCY K. KORTES TRUST, MARTHA
LAWSKI, HAROLD A. MANLEY, DONNA A.
MANLEY, JON J. MANLEY, GREGORY A.
MARKS, THOMAS P. MCLAUGHLIN,
SHARON K. MCLAUGHIN, ARMEN
MEGREGIAN, RONALD M. MEGREGIAN,
KAY MEGREGIAN, DOROTHY R. MILLER
REVOCABLE LIVING TRUST, ANTOINETTE
L. NOVOTNEY and NORBERT J. NOVOTNEY,
Trustees for the ANTOINETTE K. NOVOTNEY
TRUST, CHAR LYNN SCOTT, STANLEY B.

SMITH, STANLEY B. SMITH AND
CHARLOTTE E. SMITH TRUST, MARILYN J.
SMITH, HAROLD O. STEELE II, Trustee for the
HAROLD O. STEELE II TRUST, ELEANOR P.
STEELE, Trustee for the ELEANOR P. STEELE
TRUST, FREDERICK W. STEHR, MARY ANN
STEHR, STEVEN M. TRACY REVOCABLE
LIVING TRUST, and MARTHA E. ZIMMER
REVOCABLE LIVING TRUST,

Defendants,

and

THEODORE L. SMITH,

Defendant-Appellant.

JAMES E. PLASTOW, JR. and ISABELL JUNE
PLASTOW,

Plaintiffs/Counter Defendants-
Appellants,

v

DONALD G. HIGMAN, JOAN C. KOESTER,
MICHAEL A. WERKEMA, CYNTHIA
ANDREWS, NONA EDWARDS, STEVEN C.
REYNOLDS, KAREN S. REYNOLDS, MARY L.
MC KENNA, GARY E. MC KENNA, JACK A.
BODIS, CATHARINA STOHLER, and
CHRISTIAN STOHLER,

Defendants-Appellees,

and

KATHLEEN E. HIGMAN, GARY OLSON,
TERESA OLSON, KARL DITTMEAN,
KATHLEEN A. DITTMAN, TIMOTHY M.
MC CARTHY, KATHLEEN M. MC CARTHY,
JEFFREY A. GUNSHER, GRETA M.
GUNSHER, JOHN A. SCHNEIDER, GEORGE S.
ALBARELLI, REBECCA A. ALBARELLI,

No. 313740
Antrim Circuit Court
LC No. 2008-008408-CH

LARRY BRANDNER, BRANDNER FAMILY TRUST, ILENE E. ARNOLD, COLIN M. ARNOLD, JENNIFER R. ARNOLD, GREGORY W. ARNOLD, DEMENICO A. MOCERI, DENISE K. MOCERI, MARTIN V. DEAN, DIANA L. DEAN, CHARLES O. SCHLOSSER, SHIRLEY SCHLOSSER, LEE A. WOLLGAST, JULIE WOLLGAST, RICHARD M. PARKER, VICTORIA PARKER, DONALD SCHMEICHEL, DONNA SCHMEICHEL, DAVID J. SIBBOLD, JANET A. SIBBOLD, EDWARD J. COFFMAN, ANTHONY M. DEROO, BARBARA K. DEROO, CHARLES E. AILSWORTH, MAUREEN A. FREY, MARY STRATTON, LARRY J. NOBACH, SANDRA K. NOBACH, DANIEL L. SYLVESTER, BONNIE J. CRAIG, THOMAS F. KOHN, ROSALYN KOHN, WILSON D. MC QUEEN, NANCY L. MC QUEEN, WILLIS E. MC QUEEN, RICHARD S. LUTHER, KATHLEEN H. LUTHER, PETER SZAFRAN, PENELOPE SZAFRAN, THOMAS S. NEER, MARY B. NEER, KEVIN D. BARTLETT, REBECCA B. BARTLETT, KENNETH C. CHRISTIANSEN, DARLENE L. KWIT, GEAR SECOND FAMILY LTD PARTNERSHIP, JAMES R. STAPLETON, IMOGENE E. STAPLETON, TERRI L. STAPLETON, J.B. MC QUEEN, BONNIE L. MC QUEEN, EUGENE MC QUEEN, MARGERY A. MCQUEEN, STEVEN C. FALES, LISA M. FALES, JAMES M. GRANT, MARILYN J. GRANT, MICHAEL E. BREEN, PATRICK K. BREEN, DANIEL R. MURRAY, EVELYN R. MURRAY, JEFFREY T. SMITH, COLLEEN L. SMITH, LARS E. TYSKLIND, and MARVIN J. RUBINGH,

Defendants/Counter Plaintiffs-
Appellees,

and

MARJORIE A. BERNDT, ROBERT E. BRAZELL, GENEVIEVE MARIE BRAZELL, MICHAEL FREEDLAND, SUE ANNE FREEDLAND, CALVIN P. KERN and EVELYN K. KERN, Trustees for the CALVIN P. KERN and EVELYN K. KERN JOINT TRUST, BARBARA

A. KORTES, Trustee for the BARBARA A. KORTES TRUST, NANCY K. KORTES, Trustee for the NANCY K. KORTES TRUST, MARTHA LAWSKI, HAROLD A. MANLEY, DONNA A. MANLEY, JON J. MANLEY, GREGORY A. MARKS, THOMAS P. MC LAUGHLIN, SHARON K. MC LAUGHIN, ARMEN MEGREGIAN, RONALD M. MEGREGIAN, KAY MEGREGIAN, DOROTHY R. MILLER REVOCABLE LIVING TRUST, ANTOINETTE L. NOVOTNEY and NORBERT J. NOVOTNEY, Trustees for the ANTOINETTE K. NOVOTNEY TRUST, CHAR LYNN SCOTT, STANLEY B. SMITH, STANLEY B. SMITH and CHARLOTTE E. SMITH TRUST, THEODORE L. SMITH, MARILYN J. SMITH, HAROLD O. STEELE II, Trustee for the HAROLD O. STEELE II TRUST, ELEANOR P. STEELE, Trustee for the ELEANOR P. STEELE TRUST, FREDERICK W. STEHR, MARY ANN STEHR, STEVEN M. TRACY REVOCABLE LIVING TRUST, and MARTHA E. ZIMMER REVOCABLE LIVING TRUST,

Defendants.

Before: SAAD, P.J., and OWENS and K. F. KELLY, JJ.

PER CURIAM.

In these consolidated cases, plaintiffs and a subset of defendants appeal the trial court's order that granted summary disposition to another subset of defendants under MCR 2.116(C)(10). For the reasons stated below, we reverse and remand for proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

As can be seen from the five-page caption, this dispute involves multiple parties: (1) plaintiffs James and Isabell Plastow ("plaintiffs"); (2) defendants who own property in Timberlane Terrace ("Timberlane Terrace defendants"); and (3) defendants who own property in White Pine Shores ("necessary defendants"). The sheer number of parties in this dispute belies its simple subject matter, however: a boundary dispute between two neighbors.

The two parcels at issue are plaintiffs' property, White Pine Shores Lot 1, and a private park jointly owned by the Timberlane Terrace defendants.¹ Plaintiffs' lot is located in the White Pine Shores subdivision, while the park is part of the Timberlane Terrace subdivision. Both parcels are located in Antrim County and were subdivided in the late 1950s: White Pine Shores in 1955 and Timberlane Terrace in 1958. Plaintiffs' lot and Timberlane Terrace park are located along the boundary between the two subdivisions, and are separated by a section line that divided the original governmental lots that each subdivision now occupies.

Though many of the parcels in each subdivision border the Grand Traverse Bay, some of the parcels in Timberlane Terrace do not touch the lakefront.² Though the Timberlane Terrace defendants claim that the purpose of the park was to provide backlot owners with lake access—and that the park has been used for such purpose since the 1960s—the park itself does not border the lakeshore. To reach the water's edge, park users must walk along a path that runs down from the park to the lakeshore. It is unclear whether the park ever bordered the lake, and there is conflicting evidence as to whether the plat of Timberlane Terrace intended the park's boundaries to extend to the water's edge.³ Plaintiffs' lot and the park are situated in such a way that if the side boundaries of plaintiffs' property are extended in straight lines to the lake, they occupy most of the beach area between the park and the lake. By contrast, the park's side boundaries that face the lake are not parallel, and intersect before they reach the water's edge.

In 2007, plaintiffs tore down the cottage on their property and built a new home that faced the beach directly in front of the Timberlane Terrace park. Accordingly, plaintiffs' home had a new, and to plaintiffs' eyes, unpleasant, vista: Timberlane Terrace residents walking along the path from the park to the beach. In August 2008, plaintiffs filed suit against all lot owners in Timberlane Terrace, in their capacity as joint owners of the private park. Plaintiffs claimed that the park's boundaries did not reach the shoreline, and that the park users were trespassing on their property to access the lake. They asked the trial court to quiet title in their favor, enjoin defendants from entering or using the specific portion of contested property on the lakefront, and award damages for defendants' alleged trespassing.

¹ Each property owner in Timberlane Terrace, whether riparian or non-riparian, owns a 1/87th share of the park.

² The properties involved in this case are properly termed "littoral," which describes "land that abuts or includes a lake." *Holton v Ward*, 303 Mich App 718, 721 n 1; 847 NW2d 1 (2014). Though, strictly speaking, "'riparian' lands abut or include a river," Michigan courts frequently use the term "riparian" to "encompass both types of property," and we follow that approach in this opinion. *Id.*

³ The trial court noted that the Timberlane Terrace plat failed to indicate the high water mark or the location of the shoreline, which made it difficult to determine whether the park was actually riparian at the time of platting. Furthermore, plaintiffs and defendants produced two different versions of the plat: one which indicates that the park's boundaries were intended to reach the water's edge (and thus be riparian); the other that indicates that the boundaries were not intended to reach the water's edge (and thus not be riparian).

The Timberlane Terrace defendants contested these assertions, and argued that the park’s boundaries extended to the water’s edge, which would entitle the park users to use the path from the park to access the lake. They asked the trial court to perform an equitable reapportionment of property boundary lines, under the methodology specified for that purpose in *Stuart v Greanyea*.⁴ Plaintiffs responded that a reapportionment under *Stuart* would adjust their northern boundary line, while leaving the southern boundary line in place—resulting in an unfair reduction of their beach frontage. Accordingly, they argued the court should limit its focus to the northern boundary line of their property (White Pine Shores Lot 1), and only adjust the property lines of the park and their lot.

The Timberlane Terrace defendants then moved to add other property owners in White Pine Shores to the suit, so that the southern boundary line on plaintiffs’ lot could be adjusted accordingly if the lot lost beach frontage, and so on at each property down the waterline. Plaintiffs responded that, under this logic, every property along Lake Michigan would have to be equitably reapportioned, and that the suit could be decided by focusing only on the boundary lines of the park and plaintiffs’ lot. The trial court disagreed with plaintiffs’ assertions and granted defendants’ motion to add the additional defendants from White Pine Shores (the “necessary defendants”), which dramatically expanded the scope of the lawsuit.

Several parties filed motions for summary disposition under MCR 2.116(C)(8) and (C)(10). The trial court granted the Timberlane Terrace defendants’ motion for summary disposition, and held that: (1) the Timberlane Terrace park was platted to the water’s edge and was thus “riparian” in character; (2) reliction, or the process by which a body of water “shifts its location, causing the recession of water from its bank,”⁵ had occurred along the Grand Traverse Bay, adding land between the lots at issue and the lakefront; (3) Michigan case law did not require either party to prove the precise amount of reliction for a court to equitably apportion the beach among riparian property owners; and (4) reapportionment, via the methodology outlined in *Stuart v Greanyea*, was appropriate to preserve the riparian nature of all the waterfront parcels involved in the suit. The court then heard additional argument, and appointed a surveyor to reapportion the property boundaries on the basis of information provided to and by the court.

Both plaintiffs and some of the necessary defendants appealed the ruling to our Court, and argue that the trial court erred when it: (1) held that Timberlane Terrace park was riparian in character; and (2) added the necessary defendants to the lawsuit. Specifically, they argue that the riparian character of the park was an issue of material fact that should have properly been resolved at trial, not pursuant to a motion for summary disposition. Accordingly, plaintiffs and the necessary defendants also assert that the trial court’s equitable reapportionment, based on its conclusions that Timberlane Terrace park was riparian and reliction had occurred, was invalid. They further contend that the trial court erred when it added the necessary defendants to the lawsuit, and that any future proceedings should focus solely on the dispute between plaintiffs and the Timberlane Terrace defendants.

⁴ 154 Mich 132; 117 NW 655 (1908).

⁵ Black’s Law Dictionary (9th ed).

II. STANDARD OF REVIEW

A trial court's decision on a motion for summary disposition is reviewed de novo. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). "A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone." *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998). In reviewing a motion for summary disposition under MCR 2.116(C)(8) motion, we accept all factual allegation in the claim as true "to determine whether the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery." *Id.* When reviewing an order of summary disposition under MCR 2.116(C)(10), we examine all documentary evidence in the light most favorable to the nonmoving party to determine whether there is a genuine issue of material fact. *Ardt*, 233 Mich App at 688.

A trial court's findings of fact are reviewed for clear error. MCR 2.613(C). "[F]actual 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 court "is not permitted to assess credibility, or to determine facts on a motion for summary judgment." *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). "Instead, the court's task is to review the record evidence, and all reasonable inferences therefrom, and decide whether a genuine issue of any material fact exists to warrant a trial." *Id.*

III. ANALYSIS

1. RIPARIAN NATURE OF TIMBERLANE TERRACE PARK

Riparian land abuts or includes a watercourse. *Holton*, 303 Mich App at 721 n 1.⁶ "To interpret [a] plat correctly we should place ourselves as nearly as possible in the position of the proprietor when he made it, and have its subdivisions before us as they were before him at that time." *Quinnin v Reimers*, 46 Mich 605, 608; 10 NW 35 (1881). "The intent of the plattors should be determined with reference to the language used in connection with the facts and circumstances existing at the time of the grant." *Dobie v Morrison*, 227 Mich App 536, 540; 575 NW2d 817 (1998). "It is . . . beyond question that any owner of water-rights within [a] subdivision could determine for himself in what way he would subdivide and parcel out his own property." *Jones v Lee*, 77 Mich 35, 41; 43 NW 855 (1889).

Here, the Timberlane Terrace park is not riparian—it does not abut or include a watercourse. As noted, there is conflicting evidence as to whether it was riparian when it was platted. The Timberlane Terrace plat states that the subdivision consists of 87 lots and one park. The plat depicts the park and lots 1 to 36 as facing the lake, but its description specifies only that lots 1 to 36 extend to the water's edge—and does not mention the park. Moreover, as noted, plaintiffs and defendants produced two different versions of the Timberlane Terrace plat: one which indicates that the park's boundaries were intended to reach the water's edge (and thus be

⁶ See n 1, supra, on the distinction between "littoral" and "riparian."

riparian); the other that indicates that the boundaries were not intended to reach the water's edge (and thus not be riparian). The parties also offer conflicting accounts of how the beach area in front of the park has been used: the Timberlane Terrace defendants state that it has served as a conduit for backlot owners to access the beach for many years, while plaintiffs and the necessary defendants claim that such a use has not been established over a long period of time.

Accordingly, the historical question of whether the Timberlane Terrace park was ever riparian is one of fact, not law. Questions of fact cannot be decided by a judge on a motion for summary disposition. *Skinner*, 445 Mich at 161. The trial court thus erred when it held, on a motion for summary disposition, that the park was riparian.

2. EQUITABLE REAPPORTIONMENT

In instances where formerly riparian lands lose their riparian character because of reliction, a court may reapportion property boundaries on the relicted land to ensure “each riparian owner . . . receive[s] a portion of the new lakeshore that is proportionate to the owner’s prior lakefront ownership.” *Mumaugh v McCarley*, 219 Mich App 641, 647; 558 NW2d 433 (1996). This reapportionment is performed on an equitable basis outlined in *Stuart*, 154 Mich at 138–139. *Id.* Needless to say, the *Stuart* methodology only applies to land that was riparian and has suffered reliction—a backlot owner, who never had water access cannot demand that the court reapportion land in such a way that grants him water access. See *Stuart*, 154 Mich at 138–139.

Here, the trial court performed an equitable reapportionment of plaintiffs’, the Timberlane Terrace defendants’, and the necessary defendants’ lots under the *Stuart* methodology. But, as plaintiffs and the necessary defendants observe, the Timberlane Terrace park is not currently riparian. Nor is it clear that it ever has been riparian, and the answer to that question is disputed by the parties. Because it was error of the trial court to classify the park as riparian, it was also error of the court to apply the *Stuart* equitable reapportionment to the properties at issue, because that method is only used to reapportion properties that are (or have been) riparian.

The reapportionment of the property boundary lines was thus predicated on a legally impermissible assessment of the Timberlane Terrace park as riparian, and therefore must be reversed.⁷

3. ADDITION OF THE NECESSARY DEFENDANTS

“[B]oundary lines, actually run and marked in the surveys . . . shall be established as the proper boundary lines of the sections, or subdivisions, for which they were intended, and the length of such lines, as returned, shall be held and considered as the true length thereof.”

⁷ Because we hold that the trial court should not have equitably reapportioned the boundaries of the properties at issue, we need not reach plaintiffs’ and the necessary defendants’ claims that the trial court applied the *Stuart* methodology improperly.

Boekeloo v Kuschinski, 117 Mich App 619, 624–625; 324 NW2d 104 (1982), quoting 43 USC § 752. But “[i]f a case should occur where the enforcement of the [above] rule . . . would do great injustice to one of two parties, equitable principles appropriate to effect a just result may then be determined.” *Id.* at 632.

Here, as noted, plaintiffs’ lot and Timberlane Terrace park are located along the boundary between the White Pine Shores and Timberlane Terrace, and are separated by a section line that divided the original governmental lots that each subdivision now occupies. The trial court acknowledged the existence of this section line, but held that equity required it to ignore the section line and reapportion the necessary defendants’ lot boundary lines—i.e., lots not belonging to plaintiffs and the Timberlane Terrace defendants, the parties at the heart of this dispute.

Plaintiffs and the necessary defendants convincingly argue that the trial court’s decision to add the necessary defendants was actually inequitable. The necessary defendants own property in White Pine Shores, which was platted so that each property boundary runs in straight, parallel lines that are not subject to intersecting with one another, regardless of reliction or an increase in water-level. By contrast, Timberlane Terrace was platted with several angled and nonparallel boundaries, which led to the boundary conflict between the park and plaintiffs’ lot. It is not equitable to force the necessary defendants to suffer a loss of beachfront property because the plattor of Timberlane Terrace chose to create lot lines that had the potential to intersect with one another and cause a boundary dispute.

We therefore hold that the trial court erred when it did not respect the section line between White Pine Shores and Timberlane Terrace, and added the necessary defendants to this lawsuit.

IV. CONCLUSION

Accordingly, we hold that: (1) the riparian character of the Timberlane Terrace park is a question of fact that must be resolved at trial, not on a motion for summary disposition; (2) because Timberlane Terrace park is not riparian, and it is unclear if it ever was riparian, the trial court erred when it equitably reapportioned the parcels at issue under the method specified in *Stuart*; and (3) the trial court improperly added the necessary defendants to this lawsuit. The necessary defendants are dismissed from this action. The ruling of the trial court is reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

Reversed and remanded.

/s/ Henry William Saad
/s/ Donald S. Owens
/s/ Kirsten Frank Kelly