

STATE OF MICHIGAN
COURT OF APPEALS

GARY WARD and CLAUDIA WARD,

Plaintiffs/Counter-Defendants-
Appellees/Cross-Appellants,

v

BARRON PRECISION INSTRUMENTS, LLC
and HASSAN PROPERTY MANAGEMENT,
LLC,

Defendants/Counter-Plaintiffs-
Appellants/Cross-Appellees.

UNPUBLISHED
December 20, 2011

No. 298857
Genesee Circuit Court
LC No. 03-077358-CH

GLENN M. HOWARTH and ANNE M.
HOWARTH,

Plaintiffs-Appellees/Cross-
Appellants,

v

BARRON PRECISION INSTRUMENTS, LLC
and HASSAN PROPERTY MANAGEMENT,
LLC,

Defendants-Appellants/Cross-
Appellees.

No. 298879
Genesee Circuit Court
LC No. 03-077850-CH

Before: K. F. KELLY, P.J., and METER and GLEICHER, JJ.

GLEICHER J. (*concurring in part, dissenting in part*)

I agree with the analysis of those issues substantively addressed in the majority opinion. I part with the majority's view, however, on the scope of this Court's remand order and the permissible scope of the trial court's review. The majority artificially restricts the trial court's post-remand review to the use and maintenance of a strip of land between Lots 1-6 and Warwick Lake (the "reserved strip"). This limitation is problematic because the easement attached to the

reserved strip allows access to and use of the lake in addition to the use of the land, leaving plaintiffs' lake use rights unresolved. I therefore dissent from the majority's conclusion that issues regarding the use of the lake and island and the enjoyment of motor boats are beyond the scope of this Court's remand order.

I. SCOPE OF TRIAL COURT'S REVIEW ON REMAND

"The power of the lower court on remand is to take such action as law and justice may require so long as it is not inconsistent with the judgment of the appellate court." *Sokol v Nickoli*, 356 Mich 460, 464; 97 NW2d 1 (1959). This maxim flows naturally from the law of the case doctrine, under which "an appellate court's decision concerning a particular issue binds courts of equal or subordinate jurisdiction during subsequent proceedings in the same case." *McNees v Cedar Sprints Stamping Co (After Rem)*, 219 Mich App 217, 221-222; 555 NW2d 481 (1996). See also *Johnson v White (After Rem)*, 430 Mich 47, 52-53; 420 NW2d 87 (1988). Consistent with the law of the case doctrine, a lower court is "free on remand to consider and decide any matters left open by [the appellate court's] mandate." *Grievance Administrator v Lopatin*, 462 Mich 235, 261; 612 NW2d 120 (2000). The prohibition of additional review "applies only to those questions specifically determined in the prior decision and to questions necessarily determined in arriving at that decision." *McNees*, 219 Mich App at 222. Wherever an issue is "left open," the trial court may take any "proper" action not otherwise inconsistent with this Court's judgment in order to reach an effective and complete resolution of the issues raised by the parties. *Meyering v Russell*, 85 Mich App 547, 552-553; 272 NW2d 131 (1978). "To straightjacket proceedings subsequent to a decision on a case by an appellate court by making assumptions regarding the disposition of arguments which the appellate court did not see fit to consider is not, in our opinion, the wisest of policies." *People v Fisher*, 449 Mich 441, 447; 537 NW2d 577 (1995), quoting *Taines v Munson*, 42 Mich App 256, 259-260; 201 NW2d 685 (1972).

Where this Court includes specific instructions in a remand order, the lower court obviously must obey those instructions. If disobeyed, the lower court's actions would clearly be inconsistent with the remand order. *K & K Constr, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 544-545; 705 NW2d 365 (2005). A review of *K & K Constr* is helpful to understand the parameters of a lower court's review on remand and to highlight the majority's mistaken belief that the current lower court exceeded the bounds of its authority. *K & K Constr* involved a regulatory taking in which the Department of Environment Quality (DEQ) declared a portion of the plaintiff's property a wetland, precluding the plaintiff's opportunity to develop that portion. *Id.* at 531. The trial court found the DEQ's actions to be a complete taking of the entire property (which encompassed four contiguous parcels) and this Court affirmed. *Id.* at 531-532. The Supreme Court disagreed, however, and reversed the trial court's judgment. In doing so,

Our Supreme Court held that (1) the trial court erred when it considered only the parcel of land that contained wetland (parcel one) and did not include two other contiguous parcels of land owned by plaintiffs (parcels two and four) and (2) plaintiffs were not deprived of all economic use of the land and thus there was no "categorical taking." Further, our Supreme Court remanded to the trial court with instructions (1) to include the value of the two other parcels, (2) to make a finding of fact regarding whether a third parcel (parcel three) should be included in the

value, and (3) to apply the balancing test articulated by the United States Supreme Court in *Penn Central Transportation Co v New York*, 438 US 606; 121 S Ct 2448; 150 L Ed 2d 592 (2001),] to determine whether plaintiffs proved their regulatory taking claim. [*K & K Constr*, 267 Mich App at 532, citing *K & K Constr, Inc v Dep't of Natural Resources*, 456 Mich 570; 575 NW2d 531 (1998).]

This Court held that “the trial court failed to adhere to the Supreme Court’s mandates,” *id.* at 545, by continuing to treat the wetland designation as a complete taking even though much of the property could be and indeed was developed. *Id.* at 546-547. This Court also found lacking the lower court’s meager analysis of the *Penn Central* factors. The trial court’s analysis was so sparse that this Court determined it could not have conducted the review ordered by the Supreme Court. *Id.* at 547-549.

The trial court’s review in this case is inapposite of *K & K Constr*. The trial court originally ruled that plaintiffs were riparian¹ owners and extended their lot lines to the water’s edge. As the trial court gave plaintiffs full riparian rights, it was not required to consider the parties’ alternative arguments regarding their rights to the reserved strip and lake. This Court reversed that judgment in *Ward v Barron Precision Instruments, LLC*, unpublished opinion per curiam of the Court of Appeals, issued January 19, 2006 (Docket No. 263616) (*Ward I*). Although the plat belied the conclusion that plaintiffs owned property to the water’s edge, the plat did make an ambiguous reservation of the strip of land. This Court remanded to the trial court for additional fact-finding regarding the intended scope of that reservation. *Id.*, slip op at 5-6. This Court’s order revived and created new issues regarding plaintiffs’ right to use and enjoy the reserved strip and their potential acquisition of certain riparian rights through the grant of the easement. *Id.*, slip op at 6-7.

On first remand, the trial court deemed the reserved strip an irrevocable easement in plaintiffs’ favor. The court ruled that defendants owned the reserved strip and lake and could make reasonable rules regarding their use and maintenance. However, the trial court did not limit plaintiffs’ easement to ingress and egress of the lake and allowed other activities such as dog walking. The trial court further noted plaintiffs’ right to use the lake for swimming, fishing and boating.

In *Ward v Barron Precision Instruments, LLC*, unpublished opinion per curiam of the Court of Appeals, issued May 26, 2009 (Docket No. 280461) (*Ward II*), relevant to the current appeal, this Court addressed the trial court’s ruling that defendants, as owners of the reserved strip, had the exclusive right to maintain the reserved strip. *Id.*, slip op at 7. This Court vacated that ruling because (1) an easement holder has the duty to maintain the land under Michigan law, and (2) an easement includes rights “incident or necessary to enjoyment of such right or

¹ The term “riparian” actually describes the owner of land abutting a river or stream. “Littoral” is the correct term for the owner of lakeside property. See *2000 Baum Family Trust v Babel*, 488 Mich 136, 138 n 1; 793 NW2d 633 (2010); *Glass v Goeckel*, 473 Mich 667, 672 n 1; 703 NW2d 58 (2005). I use the term “riparian” here to be consistent with the prior decisions of the trial court and this court, as well as the majority.

passage.” *Id.*, quoting *Lakeside Assocs v Toski Sands*, 131 Mich App 292, 299-300; 346 NW2d 92 (1983). This Court remanded for further proceedings as follows:

Where an easement does not specifically denote its acceptable uses, then the surrounding circumstances may be considered to ascertain the intent of the parties. . . . [T]he intent of the plattors should be determined by referencing the language used in the instrument in conjunction with the facts and circumstances existing at the time of the grant. . . . [T]he non-riparian owners’ dedicated use also may be determined according to the traditional and historical use of the easement area

Here, the parties provided the trial court with evidence about the historical and traditional uses and maintenance of the easement. . . . [T]he trial court may use this information to determine the scope of the subdivision lot owners’ use and maintenance of the easement.

It is not the role of this Court to create rules in this situation. Therefore, *we remand this issue to the trial court with the specific instruction that the subdivision lot owners must be allowed to reasonably use and maintain the reserved strip. We leave the scope of that use and maintenance to the trial court.* We remind the trial court that the reasonableness of the rules should be determined in light of the testimony about the intent of the original plattors as to how the reserved strip was to be used and maintained as well as testimony about the historical and traditional uses and maintenance of the property. [*Id.* (emphasis added).]

I find nothing in the trial court’s most recent review inconsistent with *Ward II*. In adjudging the scope of plaintiffs’ right to reasonable use and maintenance of the reserved strip, the trial court relied on “the testimony about the intent of the original plattors as to how the reserved strip was to be used and maintained as well as testimony about the historical and traditional uses and maintenance of the property.” *Id.* In defining the scope of plaintiffs’ rights, the trial court heeded this Court’s admonishment that “the grant of an easement includes ‘such rights as are incident or necessary to the enjoyment of such right or passage.’” *Id.*, quoting *Lakeside Assocs*, 131 Mich App at 299-300. This Court specifically directed the trial court to define the scope of plaintiffs’ rights. The majority thwarts the trial court’s appropriate effort to resolve necessary issues, and guarantees further unnecessary controversy.

Even were the use of the lake and island outside the scope of plaintiffs’ right to reasonably use and maintain the reserved strip, I would find the trial court’s resolution “not inconsistent” with this Court’s order. Neither *Ward I* nor *Ward II* “specifically determined” these issues, nor were they “necessarily determined in arriving at” our previous decisions. See *McNees*, 219 Mich App at 222. This Court’s prior opinions simply did not address the use of motor boats or the use of the island. The parties continue to argue over the lot owners’ specific uses of the lake and island, not solely the “reserved strip,” and the court appropriately rendered additional findings to halt the battle. Defendant’s counsel conceded before this Court that defendants consented to the litigation of these issues after *Ward II*. As noted by plaintiff’s counsel, these issues naturally arose only after this Court decided that plaintiffs are not riparian

owners but possess some level of rights to use and maintain the easement consistent with certain riparian rights. Plaintiff's appellate counsel aptly stated, "As a person who both tries cases and appeals them, these things evolve."

The majority has now reversed two rulings entered by the trial court deemed outside this Court's remand order. Important disputes regarding use and maintenance of the island and use of motor boats remain unsettled. The next time defendants institute a "reasonable rule" precluding plaintiffs from using any type of boat on Warwick Lake, plaintiffs will likely file a new lawsuit. The next time defendants file a police report regarding plaintiffs' trespass on the island, plaintiffs will likely file yet another lawsuit. Rather than wasting judicial resources in this manner, I would affirm the propriety of the trial court reaching these issues and then review them on the merits.²

II. USE OF THE ISLAND

I agree with the majority that we should reverse the trial court's conclusion that the plaintiff lot owners established historical and traditional use of the island supporting an easement for continued use. Unlike the majority, I reach this decision on substantive grounds. Plaintiffs failed to present evidence of historical and traditional use of the island for camping and hiking to establish that the plattors intended to convey such an easement.

A non-riparian owner's easement to a lake may be limited to access alone or may include certain riparian rights. As stated in *Little v Kin*, 249 Mich App 502, 511-512; 644 NW2d 375 (2002):

[R]ights normally afforded exclusively to riparian landowners may be conferred by easement. . . . The scope of a nonriparian lot owners' rights under an easement on riparian land must be examined in light of the intent of the plattors and "the intent of the plattors must be determined from the language they used and the surrounding circumstances." [Quoting *Thies v Howland*, 424 Mich 282, 289; 380 NW2d 463 (1985).]

Defendants are clearly the owners of the island in Warwick Lake as they own the lake and all surrounding land. See *United States v Chandler-Dunbar Water Power Co*, 209 US 447, 451-452; 28 S Ct 579; 52 L Ed 881 (1908); *Wheeler v United States*, 770 F Supp 1205, 1211 (WD Mich, 1991) (both noting, under Michigan common law, that a riparian owner also owns the bed of the adjacent river or lake to its center point along with islands rising from the bottomlands). Defendants possess the rights of a riparian to use the island. Whether the easement granted to the plaintiff lot owners' included use of the island "must be examined in light of the intent of the plattors" as evidenced by "the surrounding circumstances." *Little*, 249 Mich App at 511-512. As correctly noted by the majority, the intent of the plattors must be

² Significantly, none of the parties contested the trial court's consideration of these issues. The majority has *sua sponte* restricted the scope of review, absent any appellate briefing on the subject.

judged contemporaneously to or shortly after the creation of the subdivision plat and dedication of the reserved strip. *Ante* at 10. That evidence encompasses only the testimony of Edna Hovey, Jack Sweet and Walter Janke. *Id.* Sweet testified that lot owners within the subdivision had planted vegetation and trees on the island for aesthetic purposes. Yet, there is no record evidence that the plaintiff lot owners used the island for camping and hiking before the 1980s, well after the creation of the plat and dedication of the reserved strip. Absent any evidence that the original plattors intended to convey an easement to the lot owners for such use, I would reverse the trial court's judgment to the contrary.

III. USE OF MOTOR BOATS ON THE LAKE

I am confounded by the majority's conclusion that the trial court exceeded the scope of this Court's remand order in considering the use of motor boats on Warwick Lake. The majority approves the lower court's consideration of the lot owners' right to maintain existing docks because those docks physically touch the reserved strip. The obvious purpose of those docks is to moor boats and use those boats on the lake. Under the majority's reasoning, defendants could preclude plaintiffs from using any type of boat on the lake and the trial court would have no power to determine if defendants' actions hinder plaintiffs' rights "incident or necessary to the enjoyment of [the easement]." The parties disagree regarding the types of boats that should be allowed. This issue was not resolved in *Ward I* or *Ward II* and the parties continue to dispute it. Accordingly, I believe the trial court properly entered a ruling in this regard.

As I believe the trial court properly considered this issue, I believe we should engage in substantive review. Defendants, the owners of the reserved strip and the lake, admitted that they now personally use electric power boats on the lake. Yet, plaintiffs presented no evidence that motor boats were historically or traditionally used on Warwick Lake by the lot owners. To comport with this Court's remand order, the trial court was limited in the evidence it could review. Defendants' own use of electric power boats is a recent, not historic and traditional, use of Warwick Lake. Moreover, defendants are owners, not mere easement holders. The trial court could not consider evidence of current use or the historic and traditional use of the lake owners and, therefore, properly precluded plaintiffs' use of motor boats on Warwick Lake. As the trial court complied with this Court's remand order, I would affirm this portion of the trial court judgment.

/s/ Elizabeth L. Gleicher