

STATE OF MICHIGAN
COURT OF APPEALS

JOHN B. KELLAR, JR., and PATRICIA J.
KELLAR,

UNPUBLISHED
July 17, 2003

Plaintiffs-Appellants,

v

SILVER COVE CONDOMINIUM
ASSOCIATION,

No. 237711
Genesee Circuit Court
LC No. 1997-061104-CH

Defendant-Appellee.

Before: Markey, P.J., and Cavanagh and Hoekstra, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's judgment of no cause of action following a bench trial. This trespass and nuisance action arose after defendant constructed a dock that extended across lakefront property claimed by plaintiffs and placed a picnic table on the property. Rather than grant plaintiffs relief, the trial court found that their lot ("Lot 2") and defendant's lot had accreted new land. The trial court drew a new boundary line that provided defendant with 40.42%, or 33.38 feet, of the new shoreline and left plaintiffs with 59.58%, or 49.20 feet, of the new shoreline. We affirm.

Plaintiffs and defendant own property along a cove on Lobdell Lake. The evidence indicates that at the time plaintiffs' lot was platted in 1960, the cove was probably shaped something like a right angle, with plaintiffs' lot facing the water from the west and defendant's property facing the water from the northwest and north. The plat for plaintiffs' property explains that the lot's northern boundary line extends to the water's edge. The trial court, having visited the site and having presided over the bench trial, found that the land plaintiffs claim was gradually accreted to both lot's owners, so plaintiffs trespass claims were unfounded.

On appeal, plaintiffs challenge the trial court's finding of accretion, arguing that the shoreline could not have changed due to accretion because accretion requires a gradual and permanent change. Plaintiffs claim that the evidence demonstrates that there is a permanent shoreline, unchanged by accretion, but changed only by normal, expected, temporary water-level fluctuations.

We review a trial court's factual findings for clear error. MCR 2.613(C). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed." *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). Accretion is "[t]he natural accumulation of land by natural forces, esp. as alluvium¹ is added to land situated on the bank of a river or on the seashore." Black's Law Dictionary (7th ed).

Although the record reveals that plaintiffs presented evidence in support of their position, including that a dam prevented the water level of the lake from varying significantly, that a mature black willow tree located on their property three feet from the claimed permanent shoreline could not have survived had it been under water for any amount of time over two months, approximately, and witnesses testified that that the shoreline has remained the same, defendant presented evidence to the contrary. Defendant presented evidence that the cove collects leaves and other debris, that ice regularly pushed up dirt at the lake's shore, and that the lake level is not constant. Defendant's surveyor, who lives on property abutting the lake, testified that he personally saw the dramatic impact of water-level fluctuations on the cove's shoreline and that Lot 2's platted northeastern corner and the shoreline gradually grew farther apart over the course of many years. He testified that the concrete monument that identified Lot 2's northeast corner sat six inches below the surface of the ground when it had once probably sat at or slightly above the surface. Further, he testified that several surveys reflected water-level fluctuations, and he opined that plaintiffs' property changed due to accretion. He also testified that the tree plaintiffs refer to was on high ground and agreed with plaintiff's arborist's assessment that it could survive if the water level had increased for two months out of the year. From the evidence on the entire record, we are not left with the definite and firm conviction that a mistake has been made, and thus we conclude that the trial court did not clearly err in finding that accretion occurred.

Plaintiffs next argue that the evidence negates a finding of reliction. In support of this argument, plaintiffs rely on testimony that the lake level has been regulated by dam since 1929 and that a mature tree on their property would not have survived if under water for over two months, approximately.

"Relicted land is made by the withdrawal of the waters by which it was previously covered." *Mumaugh v McCarley*, 219 Mich App 641, 644 n 3; 558 NW2d 433 (1996). Again, while plaintiffs presented evidence that the lake's levels were strictly controlled, defendant presented evidence to the contrary, as described above. To the extent that the trial court's order may be interpreted to indicate the court's reliance on reliction,² we find no clear error because, given the evidence before the trial court addressed above and the trial court's visit to the site, we are not left with the definite and firm conviction that a mistake has been made. *Walters, supra*.

¹ Alluvium is "[a] deposit of soil, clay, or other material caused by running water; esp., in land law, an addition of land caused by the buildup of deposits from running water, the added land then belonging to the owner of the property to which it is added." Black's Law Dictionary (7th ed).

² Whether reliction or alluvium accounts for an altered shoreline, the remedy is the same. *Gregory v LaFaive*, 172 Mich App 354, 362 and n 6; 431 NW2d 511 (1988).

Plaintiffs also claim that defendant has no claim to the property by way of deed. While documents describing defendant's lot vary in their depiction of the lot's southern boundary, defendant never argued at trial that it possessed a portion of the disputed land through an express grant. Because the trial court reapportioned the shoreline based on equity and not a claim of law, it did not commit any error in this regard.

Finally, plaintiffs argue that they presented evidence that defendant's conduct constituted a trespass as a matter of law. Plaintiffs fail to demonstrate, however, that defendant intruded onto their land. The evidence indicates that all the improvements and alterations that defendant undertook were on the property that the trial court allotted to them. Because defendant acted upon its own land, the trial court did not err in ruling that plaintiffs had no cause of action for trespass or nuisance.

Affirmed.

/s/ Jane E. Markey
/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra