

STATE OF MICHIGAN
COURT OF APPEALS

MARIE M. VANATOR, trustee of the MARIE M.
VANATOR TRUST,

UNPUBLISHED
October 16, 2007

Plaintiff-Appellee,

v

JUDITH ANDERSON,

No. 268260
Eaton Circuit Court
LC No. 03-000766-CH

Defendant-Appellant.

Before: Markey, P.J., and Saad and Wilder, JJ.

PER CURIAM.

This is an action to quiet title to property situated in the northwest (NW) corner of the NW ¼ of the southeast (SE) ¼ of section 31, Walton Township, Eaton County. The disputed property is between 12 and 14 acres and has a southeastern boundary running along the northwesterly shoreline of Pine Lake. The lake presently does not extend into the west half of the northeast (NE) ¼ of section 31. After trial, the circuit court determined that defendant owned the disputed property. Specifically, the court ruled that on the effective date of the Marketable Record Title Act (MRTA), MCL 565.101 *et seq.*, September 6, 1945, defendant's "predecessors in interest held an unbroken chain of title to the property for more than 40 years." We affirm.

I. Summary of Facts and Proceedings

Plaintiff asserts title to the disputed property primarily on the doctrine of reliction and the original 1825 government survey showing that Pine Lake touched the NW ¼ of the NE ¼ of section 31, to which plaintiff traces her title. Plaintiff asserts that as the waters of Pine Lake receded, she and her predecessors acquired title by reliction to the disputed property in the NW corner of the SE ¼ of section 31. Plaintiff also claimed title by adverse possession.

Defendant claims the 1825 government survey was inaccurate because Pine Lake never extended to touch property owned by plaintiff's predecessors in title. Defendant traces her claim to title to the disputed property to an 1839 United States patent of the south ½ of section 31 and an 1873 conveyance of the SE ¼ of section 31 that excepted, "a parcel in the Northwest corner of Section thirty One (31) on the West side of Pine Lake, containing twelve (12) acres, be the same more or less." Defendant contends the reference to the "Northwest corner of Section thirty One" is an obvious scrivener's error intended to refer to the NW corner of the SE ¼ of section 31 because there is no claim that Pine Lake ever extended anywhere near the NW corner of section

31. Defendant asserts that in 1945 the disputed property was specifically described in deeds in her chain of title as “that part of the Southeast quarter (1/4) of Section 31 . . . lying West of the Easterly shore of Pine Lake.” A 1961 deed in defendant’s chain of title described the disputed property as being “that part of the Southeast ¼ of Section 31 lying . . . Northwest of Pine Lake.”

The trial court determined that the original 1825 government survey and its meander line for Pine Lake were “clearly flawed and inaccurate.” The court also opined that *Palmer v Dodd*, 64 Mich 474; 31 NW 209 (1887) “is probably fatal” to plaintiff’s theory because extending plaintiff’s property south to Pine Lake required crossing another’s property. As noted already, the court determined that defendant owned the disputed property because on the effective date of the MRTA, defendant’s “predecessors in interest held an unbroken chain of title to the property for more than 40 years.” The trial court did not decide defendant’s theories of ancient fence or acquiescence. *Id.* Finally, the court found that “defendant has not met her burden on the exclusive and hostile prerequisites [to establish] adverse possession.”

II. Standard of Review & Pertinent Legal Principles

“An action to quiet title is an equitable action, and the findings of the trial court are reviewed for clear error while its holdings are reviewed de novo.” *Fowler v Doan*, 261 Mich App 595, 598; 683 NW2d 682 (2004).

We first note pertinent legal concepts and terms of art used in analyzing this largely fact-driven appeal. Littoral or riparian rights are property rights that arise when land actually touches or includes a body of water. *Peterman v Dep’t of Natural Resources*, 446 Mich 177, 191; 521 NW2d 499 (1994). “The basis of the riparian doctrine, and an indispensable requisite to it, is actual contact of the land with the water.” *Id.* at 192 n 19, quoting *Hilt v Weber*, 252 Mich 198, 218; 233 NW 159 (1930). “Strictly speaking, land which includes or abuts a river is defined as riparian, while land which includes or abuts a lake is defined as littoral.” *Thies v Howland*, 424 Mich 282, 288 n 2; 380 NW2d 463 (1985). Nevertheless, court decisions often refer to property rights of people owning land abutting either a lake or a river as “riparian rights.” See *Glass v Goeckel*, 473 Mich 667, 672 n 1; 703 NW2d 58 (2005), and *Dyball v Lennox*, 260 Mich App 698, 705 n 2; 680 NW2d 522 (2003). In general, riparian rights include: (1) the right to use the water for general recreational purposes, (2) the right to “wharf out to navigability,” (3) the right to access navigable waters, and (4) the “right to accretions.” See *Hilt, supra* at 225-227. The “the right to acquisitions to land, through accession or reliction, is itself one of the riparian rights.” *Peterman, supra* at 192, quoting *Hilt, supra* at 218.

Accretion or reliction are similar doctrines describing processes by which land abutting water is increased either by adding material to the bottomland of the water (accretion), or by the withdrawal of the water from the shoreline (reliction). See 1 Cameron, Michigan Real Property Law (3rd ed), § 3.19, at 119. Provided the new land is exposed naturally and gradually, the abutting riparian property owner is its owner. *Id.* The *Hilt* Court defined “reliction” by quoting *Shively v Bowlby*, 152 US 1, 35; 14 Sup Ct 548; 38 L Ed 331 (1894):

“The rule, *everywhere admitted*, that where the land encroaches upon the water by gradual and imperceptible degrees, the accretion or alluvion belongs to the owner of the land, is equally applicable to lands bounding on tide waters or on fresh waters, and to the King, or the State as to private persons; and *is independent of*

the law governing the title in the soil covered by the water.” [Hilt, *supra* at 219, quoting Shively, *supra* at 35 (emphasis in Hilt).]

In the present case, plaintiff contends that the waters of Pine Lake extended to the NW ¼ of the NE ¼ of section 31 at the time her predecessor received title by United States patent on September 15, 1854. Plaintiff asserts that the waters of Pine Lake gradually receded south all the way across the SW ¼ of the NE ¼ of section 31 to the present location of the north shore of Pine Lake in the NW ¼ of the SE ¼ of section 31. Thus, plaintiff asserts her legal claim of ownership of the disputed property by the riparian right (actually, littoral right) of reliction. Plaintiff bases her factual claim that the waters of Pine Lake extended to the NW ¼ of the NE ¼ of section 31 at the time her predecessor received a patent on the meander line for Pine Lake according to the original 1825 government survey.

When the United States was a young nation, Congress had the countryside surveyed. See 43 USC 751-753. “Meander lines were established in the original government survey ‘for the purpose of ascertaining the quantity of land remaining after segregation of the water area.’” Cameron, *supra*, § 5.2, at 163, quoting Bureau of Land Management, US Dept of Interior, Manual of Surveying Instructions (1973). Meander lines were not boundary lines, nor did they actually depict where land and water met. Thus, “it is the water’s edge or shoreline, and not the meander line as actually run on the land, that is the true boundary.” *Boekeloo v Kuschinski*, 117 Mich App 619, 631; 324 NW2d 104 (1982). In *Hilt*, our Supreme Court, citing and quoting the seminal case of *Railroad Co v Schurmeir*, 74 US 272, 286; 7 Wall 272; 19 L Ed 74 (1869), expounded on these distinctions.

[T]he meander line was not run at the water’s edge in fact. . . . They were run as merely general, not accurate, representations of the shore. . . .

“Meander lines are run in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity of the land in the fraction subject to sale, and which is to be paid for by the purchaser.” [Hilt, *supra* at 204, quoting *Schurmeir, supra* at 286.]

When the principles discussed *supra* are applied to plaintiff’s claim, it is clear she must establish not just that the meander line of the original 1825 survey extended through the NW ¼ of the NE ¼ of section 31 but also that at the time her predecessor received a patent for that property, the waters of Pine Lake actually intruded into that quarter-quarter section. Thus, the critical factual issue in this case is the location of Pine Lake in 1854 when plaintiff’s predecessor in title first received a patent for the NW ¼ of the NE ¼ of section 31. If Pine Lake did not touch the land described in the patent, plaintiff’s claim of reliction fails. Further, plaintiff bore the burden of proof regarding the location of Pine Lake. “[I]n an action to quiet title to land that the claimant alleges was added to his land by accretion, the claimant has the burden of proving the allegations of his claim, and therefore must establish not only that the land in question was formed by accretion, but also that it was added to the claimant’s land by that process.” *Boekeloo, supra* at 630, quoting 21 Am Jur Proof of Facts 2d, Change in Shoreline, § 22, at 217.

II. Analysis

A. The Trial Court's Fact Finding

Plaintiff first points to several misstatements and obvious typographical errors in the trial court's written opinion, for example, referring to the original survey as having been performed in 1925, stating plaintiff and her husband acquired their property in two rather than one purchase, and referring to plaintiff's husband as her son. We find these errors to be inconsequential, thus harmless. MCR 2.613(A).

Plaintiff also contends the trial court erred by finding defendant traced her claim to title to the disputed property to an 1873 warranty deed. We disagree. Plaintiff has not established the trial court clearly erred. The deed in question (Frost to Preston) conveys property in both section 31 and section 32. The section 31 property the deed conveyed is only in the SE $\frac{1}{4}$, so the "northwest corner" can only refer to the northwest corner of the SE $\frac{1}{4}$ of section 31. Further, the deed also describes the excepted property as being on the west side of Pine Lake and consisting of 12 acres. Thus, the deed itself supports defendant's position and the trial court's finding. Additionally, even the original 1825 survey on which plaintiff relies does not place Pine Lake in the W $\frac{1}{2}$ of the NW $\frac{1}{4}$ of section 31. The trial court did not clearly err.

Next, plaintiff claims the trial court erred by finding:

The 1825 government survey and meander line are clearly flawed and inaccurate. That conclusion was reached and driven, to some degree, by Plaintiff's own expert witnesses. The failure of the meander line to close by over 730 feet, the inconclusive testimony relative to when and if Pine Lake encompassed a greater area than the present, the age of various trees on the parcel, exhibit 29, and other factors testified to all point to an erroneous survey. The mistaken survey taints, if it doesn't destroy, Plaintiff's theory of reliction.

We conclude plaintiff has not established that the trial court clearly erred in its relevant finding that plaintiff did not establish its predecessor in title owned land that was riparian to Pine Lake. The critical question before the trial court was whether the shoreline of Pine Lake extended to the NW $\frac{1}{4}$ of the NE $\frac{1}{4}$ of section 31 so that its waters abutted the land of plaintiff's predecessor in title. If the waters of Pine Lake did not enter the NW $\frac{1}{4}$ of the NE $\frac{1}{4}$ even if the meander line did, then plaintiff's claim fails.

First, it was undisputed at trial that the 1825 meander line was inaccurate. William Crane testified that the original surveyor's distances and courses describing the meander line failed to close, leaving a gap of over 730 feet. Speculation regarding the source of the undisputed error in the meander line does not establish plaintiff's claim. Thus, the trial court did not clearly err by failing to find the surveyor's speculation regarding the original surveyor's error established plaintiff's factual claim as to the Pine Lake's location.

Second, plaintiff's argument with respect to defendant's so-called admissions fails. Defendant's so-called admissions relate to the original 1825 survey and its estimate of the

amount of acreage outside the meander line. While defendant did not dispute what the survey showed, she disputed its accuracy. Indeed, plaintiff concedes the survey is inaccurate, which the trial court found as a fact. Moreover, defendant disputed the single most salient fact on which plaintiff's claim rested: she denied that the waters of Pine Lake had ever receded. In essence, defendant denied that plaintiff's property in the NW ¼ of the NE ¼ of section 31 was ever riparian.

With respect to the critical question regarding the size of Pine Lake in 1825, plaintiff concedes that the evidence was inconclusive. But plaintiff bore the burden of proof in her quiet title action. *Boekeloo, supra* at 630. Plaintiff has not shown that the trial court clearly erred in reaching the mixed factual and legal conclusion that the inaccurate government survey "taints, if it doesn't destroy, Plaintiff's theory of reliction."

Third, plaintiff argues that the trial court misapplied evidence regarding trees growing on the disputed property. We disagree.

The parties agree that the land at the top of a knoll on which the ancient oak tree grew was not covered by water at the time of the 1825 government survey. They disagree on the inference to be drawn from the testimony of William Botti, a forester, with respect to a green ash tree at the base of the knoll. Botti testified that he conservatively estimated that the ash was 200 years old. Botti also testified that although the ash was a wetlands tree, it could not survive year around inundation. Botti conceded he did not measure the elevation of terrain where the ash tree grew relative to the current lake level but that it was on generally flat terrain that might have been one foot above the current level of Pine Lake. Botti assigned a 10 to 15 percent margin of error to his estimate of the age of the ash tree.

From this testimony the trial court could have inferred that the ash tree did not sprout until 1835. This, in turn, would permit the inference that the flat area surrounding the ash could have been inundated in 1825. On the other hand, if the trial court accepted Botti's testimony that the ash tree was 200 years old, then the court could have drawn the further inference that the knoll was not an island in Pine Lake in 1825 as plaintiff theorized. The trial court did not indicate the specific inferences it drew from Botti's testimony, but it did use "the age of various trees" as one factor in concluding that the 1825 survey and its meander line did not accurately reflect the actual location of Pine Lake. It was the inaccuracy of the 1825 survey that the trial court determined "taints, if it doesn't destroy, Plaintiff's theory of reliction." Plaintiff concedes the 1825 survey was inaccurate. Further, plaintiff concedes on appeal that the evidence regarding the past extent of Pine Lake was inconclusive. Because plaintiff bore the burden of proof regarding the past extent of Pine Lake to establish her claim to title through reliction, *Boekeloo, supra* at 630, the trial court did not clearly err by concluding plaintiff had not established title to the disputed property through reliction.

Next, plaintiff argues that the trial court misapplied the *Palmer* case because its facts are distinguished from the instant case. Initially, plaintiff notes that Dodd's property was not riparian, and, second, none of the land lying south of the NW ¼ of the NE ¼ of section 31 was patented when plaintiff's predecessor received their patent in 1854.

We conclude that *Palmer* is on point and controls this case in favor of defendant. If Pine Lake did not touch the NW ¼ of the NE ¼ of section 31 when that property was patented to

plaintiff's predecessor, then, as in *Palmer*, plaintiff and her predecessors had no riparian rights to lands lying to the south. As discussed above, the trial court did not clearly err in finding plaintiff failed to establish that Pine Lake extended to the NW ¼ of the NE ¼ of section 31. Accordingly, the *Palmer* Court's conclusion with respect to the defendant in that case applies to plaintiff's claim in this case:

The principles which govern the rights of riparian proprietors do not apply to defendant's grant. No part of the land granted to him in the description contained in his patent was bounded by a lake or other water. His grant extended no further south than the east and west quarter line of the section, and this line did not touch or intersect the shore of any lake. Indeed, the lake is nearly 40 rods south of this line. [*Palmer, supra* at 476.]

Plaintiff further argues that the trial court erred by opining: "Bounded on the south" on a quit claim deed or tax statement does not meet this court's test." We find no error because, in context, the trial court's statement can only be read as supporting its immediately preceding finding that "plaintiff never did pay taxes on the [disputed] parcel despite their beliefs." Alice Williams, Walton Township treasurer since 1974 who testified that since 1962 the disputed twelve-acre parcel had its own tax identification number, supported this finding. Williams testified that defendant was assessed and paid taxes on the disputed property; Williams had no knowledge of plaintiff's ever paying the taxes on the disputed property.

Plaintiff also argues the trial court erred by finding defendant's chain of title to the disputed property was adequate. She cites *Fleming v Conklin*, 237 Mich 243; 211 NW 638 (1927) for the proposition that each party bore the burden of proof to establish her title, and defendant failed to meet her burden. Plaintiff's reliance on *Fleming* is misplaced. The *Fleming* Court did not hold that each party in a quiet title action bears the burden of proving its title. In that case, the plaintiff in a quiet title action relied on an unrecorded, destroyed deed. The Court held that the plaintiff was required to substantiate his own allegations of title and "cannot prevail on the weakness of [the] defendants' title." *Fleming, supra* at 246. See MCL 600.2932(3): "If the plaintiff established his title to the lands, the defendant shall be ordered to release to the plaintiff all claims thereto . . ." "[I]n an action to quiet title to land that the claimant alleges was added to his land by accretion, the claimant has the burden of proving the allegations of his claim, and therefore must establish not only that the land in question was formed by accretion, but also that it was added to the claimant's land by that process." *Boekeloo, supra* at 630.

Next, plaintiff argues that the trial court did not accord sufficient weight to the testimony of a geologist that the "swamp and lowlands extending to the north line of section 31" could be flooded by a one-foot rise in the level of Pine Lake. We disagree.

Plaintiff bore the burden of proof to establish that her property was riparian to Pine Lake at the time her predecessor received a patent for it. The trial court determined that the 1825 survey and meander line were flawed and that the other evidence regarding the location of Pine Lake in the past was inconclusive. In essence, the trial court ruled that plaintiff had not sustained her burden of proof. The testimony of geologist Jerome B. Blaxton does not establish the trial court clearly erred in making this ruling.

It is difficult to discern the exact location of the areas Blaxton testified about because this Court did not receive exhibits that were marked at trial. See MCR 7.210(C). A party may not leave it to this Court to search for the factual basis to sustain or reject his position. *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 388; 689 NW2d 145 (2004).

Blaxton testified that the soil in the area of Pine Lake resulted from melted glaciers that formerly covered Michigan 10,000 years ago and deposited assorted sediment known as “glacial till.” Blaxton found what he believed to be one “ancient or pre-existing shoreline,” and testified that at one time Pine Lake extended beyond the north line of section 31, including extending to the NW ¼ of the SE ¼ and covering much of the SW ¼ of the NE ¼ of the section. Blaxton opined that a one-foot increase in the present level of Pine Lake “would probably inundate the whole area.” Blaxton did not take elevation measurements to reach this conclusion but “looked at the actual water table, the, the standing water that’s in the swamp, and that is by definition as a part of the water table the same level as the lake.” He also acknowledged the disputed area contained several areas of higher ground. Blaxton conceded he had no expertise to date the old lake based on the trees growing in the swampy area, and that he could not date the old lake with the degree of accuracy the parties would require. Specifically, Blaxton admitted that he could not say the ancient, extended Pine Lake existed within the last two hundred years.

This testimony does not show clear error by the trial court but rather supports the trial court’s conclusion that the evidence regarding the past extent of Pine Lake was inconclusive. The testimony suggests, however, that the government surveyor in 1825 may have attempted to enclose within the meander line not only Pine Lake but also a larger surrounding low-lying swampy area. This would be the same situation that existed in *Palmer, supra*.

B. Plaintiff’s Other Arguments

Plaintiff argues that defendant waived reliance on *Palmer, supra*, because she failed to plead that case as an affirmative defense. This argument has no merit. The legal principles embodied in *Palmer* are not affirmative defenses that are waived if not pleaded. An affirmative defense does not controvert the plaintiff’s prima facie case; it concedes that the plaintiff had a cause of action but otherwise denies relief to the plaintiff. *Stanke v State Farm Mutual Automobile Ins Co*, 200 Mich App 307, 312; 503 NW2d 758 (1993). Here, defendant did not concede plaintiff could establish a prima facie case that was defeated by a defense; she disputed that plaintiff could establish a factual requisite of her claim - - that the waters of Pine Lake extended to the NW ¼ of the NE ¼ of section 31. If plaintiff could not establish her factual claim, the legal principles discussed in *Palmer* dictate that plaintiff’s property was not riparian. Thus, plaintiff’s claim to title via reliction fails.

Plaintiff also argues that the trial court erred by finding in defendant’s favor on the basis of the MRTA. According to plaintiff, this case involves parallel claims to the same property, each with record chains of title in excess of 40 years. Plaintiff cites Michigan Land Title Standard (5th ed), Standard 1.7, problem B, and *Lysogorski v National City Mortgage Co*, unpublished opinion per curiam of the Court of Appeals, decided December 9, 2003 (Docket No. 244375), for the proposition the competing claims must be resolved outside the MRTA by using other property law principles.

We conclude that the trial court properly ruled in defendant's favor based on the MRTA. The Act was adopted effective September 6, 1945, and amended with respect to mineral rights effective December 22, 1997. Defendant produced certified recorded documents establishing that as of September 6, 1945, her predecessors in interest held an unbroken chain of title in excess of 40 years to the disputed property. In the same forty-year period preceding September 6, 1945, there were no recorded documents indicating a claim to the disputed property by plaintiff's predecessors in interest. Every recorded document in plaintiff's chain of title before September 6, 1945 referred only to the NE ¼ of section 31. The first document to suggest a claim by plaintiff's predecessors to property south of the NE ¼ of section 31 is the 1925 quiet title judgment in *Sanders v Talbot*, but it was not recorded until February 18, 1948. Thus, on the effective date of the MRTA, defendant's predecessors in title had a 40-year recorded chain of title to the disputed property in the NW ¼ of the SE ¼ of section 31. On that same date, plaintiff's recorded claims were limited to the NW ¼ of the NE ¼ of section 31. So, when the MRTA became effective, two competing recorded claims to the disputed property did not exist. See *Fowler, supra* at 600-602.

By arguing that two competing 40-year chains of title to the disputed property exist, plaintiff concedes that defendant is the successor to one of the 40-year chains of title. But plaintiff's claim to the disputed property was not recorded until 1948. The first document to indicate a claim by plaintiff's predecessors to property south of the NE ¼ of section 31 is the 1925 quiet title judgment in *Sanders v Talbot*, but it was not recorded until February 18, 1948, after the expiration of the savings period of § 9 of the MRTA, MCL 565.109. In 1926, Sanders conveyed to Johnson the NW ¼ of the NE ¼ of section 31, describing the parcel as "being eighty acres more or less." Johnson sold to plaintiff's predecessor, Godward, the NW ¼ of the NE ¼ of section 31 by a 1942 land contract. Johnson's estate deeded to Godward the NW ¼ of the NE ¼ of section 31 and "all lands lying South of [the NW ¼ of the NE ¼ of section 31] which are bounded by the North end of Pine Lake." But this deed was not recorded until April 10, 1948, also after the expiration of the § 9 savings period. Plaintiff's interest, if she had one, was "declared to be null and void and of no effect whatever at law or in equity" by § 3 of the MRTA, MCL 565.103. Thus, the trial court properly applied the MRTA to the facts of this case by ruling that defendants held the superior title to the disputed property. *Fowler, supra* at 603.

Plaintiff raises three other non-issues that do not merit extended discussion. She did not preserve her argument regarding the trial court's failing to rule on defendant's counter-claim for damages. *Polkton Twp v Pellegroni*, 265 Mich App 88, 95; 693 NW2d 170 (2005). Plaintiff's argument regarding the wording of the judgment has no merit because a judgment in a quiet title action affects only those who are parties or persons claiming through parties to the action. See MCL 600.2932(3), and MCR 3.411(H). Finally, plaintiff cites no authority for her claim that it is improper for the trial court to describe property that is the subject of litigation by alternative means. When "a party fails to cite any supporting legal authority for its position, the issue is deemed abandoned." *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

C. Defendant's Issues

Defendant, in her brief on appeal, argues that the trial court erred by not finding in her favor on the basis of theories of ancient fence, acquiescence, and adverse possession. Defendant does not appear to assert that these theories are alternative grounds for affirming the trial court. Further, this Court's docket sheet does not indicate that defendant perfected a cross-appeal.

Generally, an appellee is limited to the issues raised by the appellant unless he cross-appeals as provided in MCR 7.207. *Martin v Rapid Inter-Urban Transit Partnership*, 271 Mich App 492, 502; 722 NW2d 262 (2006). An exception to this rule permits an appellee to argue alternative grounds for affirming the trial court that do not enhance the appellee's position beyond the decision reached by the trial court. *Middlebrooks v Wayne County*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994); *In re Herbach Estate*, 230 Mich App 276, 284; 583 NW2d 541 (1998). Defendant's arguments appear to fall within the general rule. We therefore decline to address them.

We affirm.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Kurtis T. Wilder