STATE OF MICHIGAN

COURT OF APPEALS

BERNARD A. STUDLEY,

Plaintiff-Appellant/Cross-Appellee,

and

JANET L. STUDLEY,

Plaintiff-Appellant,

v

TOWNSHIP OF HILL, MARK WILSON, LETISIA WILSON, SHELLEY E. WELLNITZ, SCOTT E. WELLNITZ, CHARLES RANDOLPH, JOHNNIE G. KARL, PAMELA M. HUNTER, GEORGE R. ALASKA, SHADY SHORES PARK LOT OWNERS ASSOCIATION, DEPARTMENT OF NATURAL RESOURCES, DEPARTMENT OF TRANSPORTATION, DEPARTMENT OF TREASURY, RHONDA S. MILES, GREGG P. MILES, RICHARD J. MAZUR, and CONSTANCE MAZUR,

Defendants-Appellees,

and

TERRY LEE ELLISON,

Defendant-Appellee/Cross-Appellant,

and

JAMES EVENINGRED and DIANE EVENINGRED,

Intervening Defendants-Appellees,

and

CLAUDE H. YOE, SR., CAROL A. YOE,

UNPUBLISHED
May 23, 2013

No. 303845
Ogemaw Circuit Court
LC No. 09-657196-CH

DENISE SUZANNE WILLIAMS, DAVID M. WILLIAMS, DAVID T. WEST, ANDREA WEST, ROMAN F. VAN THOMME, GRACE M. VAN THOMME, KURT P. TRAUTNER, JACK L. STOWE, WENDY K. SLIGER, STEVEN R. SLIGER, PAUL J. SHEMON, DAWN L. SHEMON, MICHAEL P. MARTIN, CLIFFORD MARTIN, KELLI R. KIRK, BRIDGET KAY KANICKI, TRAVIS W. KANGAS, AMANDA M. KANGAS, ROBERT P. AND CAROL KANDELL TRUST, GARY JOHN HUISKENS, ROBERT E. HENGEY, EDWARD L. HALL, DAVID L. AND JO ANN HALL TRUST, CONSTANCE E. DEBUSSCHERE, BRUCE DAWSON, VICKI L. CAROLAN, JOSEPH M. CAROLAN, JOSEPH J. BANNASCH, SR., WILBURT AND PHYLLIS BAILER TRUST, DONALD D. ASHER TRUST, OGEMAW COUNTY ROACH COMMISSION, and OGEMAW COUNTY DRAIN COMMISSION

Defendants,

and

ARTHUR ALDRICH, and CLAIRE ALDRICH,

Intervening Defendants.

Before: HOEKSTRA, P.J., and TALBOT and WILDER, JJ.

PER CURIAM.

In this property dispute, plaintiffs-appellants/cross-appellees Bernard and Janet Studley[1] appeal as of right the trial court's order dismissing their claim to vacate a private dedication. On cross-appeal, defendant-appellee/cross-appellant Terry Lee Ellison challenges the trial court's order regarding plaintiff's alternative request that the trial court interpret the scope of the private dedication and also asserts that the trial court erred by denying defendants' request for an award

[1] We refer to both Janet and Bernard Studley as plaintiffs-appellants/cross-appellees despite the fact that only Bernard is identified as a cross-appellee on the docket sheet because the Studleys filed a joint brief addressing all issues on appeal.

of taxable costs.[2] Because we conclude that the trial court properly denied plaintiffs' request to vacate, did not clearly err in determining the scope of the easement, and did not abuse its discretion by declining to award costs, we affirm.

This appeal concerns a private dedication of a strip of land referred to as a "beachway" located within Shady Shores Park, a platted subdivision dedicated in 1928. The beachway at issue is about 16 feet wide, and runs between lots 23 and 24 on block L, connecting Lake Side Drive to Rifle Lake. Plaintiffs own lot 24. The beachway was privately dedicated to the use of all lot owners in the Shady Shores Park subdivision. Specifically, the private dedication provides:

> Know all men by these presents that we, the George and Rifle Lake Resort Co., a Michigan corporation by Ceil C. Conway President and Andrew L. Foster Sec as proprietor, have caused the land embraced in the annexed plat to be surveyed laid out and platted to be known as "Shady Shores Park," Hill Township Ogemaw County Michigan and that the streets as shown on said plat are hereby dedicated to the use of the public and that the recreation park, bathing beaches & beachways are dedicated to the use of the lot owners of said plat.

On April 16, 2009, plaintiffs filed a complaint alleging that the beachway created an encumbrance on their title and that it interfered with their quiet enjoyment of their real property because it constituted a nuisance. On this basis, plaintiffs requested that the trial court vacate the beachway pursuant to MCL 560.221 of the Land Division Act (LDA). Alternatively, plaintiffs' complaint requested declaratory relief to define the scope of the beachway dedication.

Following a bench trial, the trial court summarized the testimony as establishing that plaintiffs' chief complaint was in regard to leaves blowing onto their property from the beachway, golf carts, and the existence of a dock and the permanent mooring of boats. The trial court found that those complaints did not amount to a nuisance, and that such issues were to be expected when you are adjacent to land dedicated to public or private use. Accordingly, the trial court concluded that plaintiffs failed to present a proper basis to vacate the beachway, and dismissed that part of plaintiffs' complaint.

Regarding plaintiffs' alternative request for declaratory relief to define the scope of the easement beachway, the trial court found that defendants failed to carry their burden of demonstrating a right greater than mere access to the water. The trial court noted that the beachway was only 16 feet wide, and that the term "beachway" connotes only an intention to provide a way to get to the beach. The trial court stated that despite the extrinsic evidence submitted by defendants, it could not find evidence to indicate that the beachway was meant to permit sunbathing, picnicking, parking, or permanent mooring of boats. Thus, it concluded that the beachway is "a right of passage over land to get access to the beach," and only uses consistent with the right to access the water were within the scope of the easement. The trial

[2] We note that in addition to defendant/cross-appellant Ellison, only defendants Johnnie G. Karl, Randolph Charles, and James and Diane Eveningred have filed briefs on appeal.

court found that a common dock would be permissible, but that permanent mooring of boats would not be, nor would sunbathing, picnicking or lounging. This appeal and cross-appeal followed.

On appeal, plaintiffs first argue that the trial court erred by denying their request to vacate the beachway on the basis of its conclusion that they failed to prove that the beachway constituted a nuisance. Specifically, plaintiffs claim they were not required to prove that the beachway constituted a nuisance in order to succeed under the LDA, and that they only needed to plead the elements required by MCL 560.223 in order to prevail. In effect, plaintiffs maintain that unless defendants raise a reasonable objection, the beachway must be vacated because their complaint set forth the part of the plat to be vacated and their reasons for requesting that action.

We review a trial court's findings of fact in a bench trial for clear error and review de novo its conclusions of law. *Chelsea Investment Group LLC v City of Chelsea*, 288 Mich App 239, 250; 792 NW2d 781 (2010). "A finding is clearly erroneous if there is no evidentiary support for it or if this Court is left with a definite and firm conviction that a mistake has been made." *Id.* at 251. Moreover, we give the trial court's findings of fact "great deference because it is in a better position to examine the facts." *Id.*

MCL 560.221 empowers a circuit court to "vacate, correct, or revise all or a part of a recorded plat." Under the LDA, in order to vacate, correct, or revise a recorded plat, a plaintiff must file a complaint setting forth the "part or parts, if any, sought to be vacated and any other correction or revision of the plat sought by the plaintiff," and the "plaintiff's reasons for seeking the vacation, correction, or revision." MCL 560.222; MCL 560.223.

In *Tomecek v Bavas*, 482 Mich 484, 495; 759 NW2d 178 (2008), the Court explained that the LDA "provides a process for surveying and marking subdivided property." The Court recognized that the LDA specifically allows a court to order a recorded plat or any part of it to be vacated, corrected, or revised. *Id.* In *Beach v Lima Twp*, 489 Mich 99, 109; 802 NW2d 1 (2011), the Court further explained that the "creation, termination, and vacation of plats are controlled by the statutory authority of the LDA," and consequently, a lawsuit filed pursuant to the LDA is the "exclusive means available" for a plaintiff seeking to vacate a dedication in a recorded plat.

Of significance to the resolution of this case, in *Tomecek* a majority of the justices on our Supreme Court agreed that the LDA "was never intended to enable a court to establish an otherwise nonexistent property right. Rather, the act allows a court to alter a plat to reflect property rights already in existence." *Tomecek*, 482 Mich at 496. Moreover, this holding was recently affirmed by the Court in *Beach*, 489 Mich at 109-110. In *Beach*, the Court also explained that "without a judicial decree showing that plaintiffs validly obtained record title to the property, there is no legal or record basis for plaintiffs to seek a vacation, correction, or revision of the plat," and that it is not appropriate to vacate a plat when the plat already accurately reflects the underlying substantive property rights. *Id.* at 111.

In this case, plaintiffs' complaint properly identified the part of the plat that they maintained should be vacated, and the complaint stated that vacation was sought because the beachway constituted a nuisance.[3] However, plaintiffs' complaint did not allege that they have an existing property right in the beachway or that the plat inaccurately depicted any existing property right. In light of the Court's holdings in *Tomecek* and *Beach*, we conclude that the trial court did not err by denying plaintiffs' request to vacate because plaintiffs did not claim to have any existing property right in the beachway.[4] Consequently, plaintiffs' request to vacate the beachway is meritless.[5]

On cross-appeal, Ellison argues that the trial court's determination of the scope of the easement was based on inapplicable law and, therefore, must be reversed. Specifically, Ellison maintains that the trial court should not have relied on the principles set forth by *Jacobs v Lyon Twp*, 181 Mich App 386; 448 NW2d 861 (1989), vacated 434 Mich 922 (1990), (*After Remand*), 199 Mich App 667 (1993), and *Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255 Mich App 83; 662 NW2d 387 (2003), because those cases consider the scope of public easements for lake access regarding road-ends and this case involves a private dedication. Ellison also argues that the trial court clearly erred by determining that the dedication does not include the right to sunbathe, picnic, or lounge. He maintains that the trial court ignored the extrinsic evidence demonstrating that those activities were intended by the grantor.

"The extent of a party's right under an easement is a question of fact." *Dobie v Morrison*, 227 Mich App 536, 541; 575 NW2d 817 (1998). Accordingly, we review a trial court's determination of the parties' respective rights under an easement for clear error. *Id.* "A finding is clearly erroneous if there is no evidentiary support for it or if this Court is left with a definite and firm conviction that a mistake has been made." *Chelsea Investment Group LLC*,

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[3] Plaintiffs' complaint also mentioned a cloud on their title; however, this issue was not addressed during trial or by the trial court in its opinion. Further, plaintiffs raise no argument in regard to this issue on appeal.

[4] Further, even if plaintiffs would have proved a nuisance, vacation of the beachway would not be an appropriate remedy. Generally, the remedy for a nuisance is abatement. See *Capitol Props Group, LLC v 1247 Ctr Street, LLC*, 283 Mich App 422, 430; 770 NW2d 105 (2009); *Orion Charter Twp v Burnac Corp*, 171 Mich App 450, 459; 431 NW2d 225 (1988).

[5] In light of our conclusion that plaintiffs failed to demonstrate a legal basis to vacate the beachway and that the trial court properly dismissed that portion of their complaint, we need not consider whether defendants presented any reasonable objection because the reasonable objection test comes into play only if a plaintiff demonstrates that it would be appropriate to vacate the plat under the circumstances. After a plaintiff shows vacation is warranted, a defendant may prevent vacation by raising a reasonable objection to vacation. See *In re Gondek*, 69 Mich App 73, 75-76; 244 NW2d 361 (1976). Also, we need not consider defendant Ellison's argument on cross-appeal regarding whether plaintiffs properly complied with the joinder requirements set forth by MCL 560.224a because Ellison presents that argument as an alternative ground for affirming the trial court's dismissal of plaintiffs' complaint.

288 Mich App at 251. We review de novo questions of law such as whether the trial court applied the correct legal standard. See *Beach*, 489 Mich at 106.

"Land which includes or is bounded by a natural watercourse is defined as riparian." *Thies v Howland*, 424 Mich 282, 287-288; 380 NW2d 463 (1985). Owners of riparian land enjoy exclusive rights including the right to erect and maintain docks and to anchor boats permanently.[6] *Id.* at 288. "Nonriparian owners and members of the public who gain access to a navigable waterbody have a right to use the surface of the water in a reasonable manner for such activities as boating, fishing and swimming." *Id.* Nonriparian owners also have the right to temporarily anchor boats. *Id.* A riparian owner may grant an easement for nonriparian owners' use. *Dyball v Lennox*, 260 Mich App 698, 705-706; 680 NW2d 522 (2003). "Reservation of a right of way for access does not give rise to riparian rights, but only a right of way." *Id.* at 706. However, "Michigan law clearly allows the original owner of riparian property to grant an easement to backlot owners to enjoy certain rights that are traditionally regarded as exclusively riparian." *Id.*

The intent of the grantor controls the scope of any easement. *Thies*, 424 Mich at 293. When interpreting the scope of a private dedication creating an easement, courts must begin by examining the text of the dedication itself. *Little v Kin*, 468 Mich 699, 700; 664 NW2d 749 (2003). If the language of the dedication is plain and unambiguous the court must enforce it as written and no further inquiry is permitted. *Id.* However, "[i]f the text of the easement is ambiguous, extrinsic evidence may be considered by the trial court in order to determine the scope of the easement." *Id.* Moreover, in *Dobie*, 227 Mich App at 541, this Court explained that usage rights under an easement are constrained in two different ways: (1) any use must be within the scope of the plat's dedication, and (2) any use must not "unreasonably interfere with plaintiffs' use and enjoyment of their property."

In this case, the trial court cited *Jacobs*, *Higgins Lake*, and *Thies* in support of its conclusion that plaintiffs failed to demonstrate that the original grantor intended to provide more than mere access to the water when it dedicated the beachway to the use of the lot owners of the Shady Shores plat. The trial court focused its analysis on the meaning of the term "beachway" itself, finding that the term beachway implies only "a right of passage over land to get access to the beach," and that accordingly, only uses consistent with the right to access water were permitted. The trial court further found that there is "nothing in the dedication language to indicate" that sunbathing, picnicking and parking, or permanent mooring of boats were permissible uses of the beachway. It acknowledged the newspaper advertisement for Shady Shores from 1930 promoting boating and swimming that plaintiffs presented to support their position that additional activities were intended to be permitted by the grantor, but found that evidence unpersuasive because the advertisement did not specify where those activities would be permitted within the subdivision and did not imply that such activities would be permitted in all areas. Accordingly, the trial court concluded that sunbathing, picnicking, parking, and the

[6] A riparian owner is one whose land is bounded by a waterway. *Dyball v Lennox*, 260 Mich App 698, 705; 680 NW2d 522 (2003).

permanent mooring of boats was not intended by the grantor of the easement, and the only permissible uses of the beachway are those "consistent with a right of passage."

We conclude that the trial court's opinion demonstrates that it applied the applicable law to its determination of the scope of the easement. The trial court clearly focused on the language of the dedication and on the intent of the grantor, as required by *Little*, 468 Mich at 700. Moreover, the trial court's reliance on road-end cases to conclude that plaintiffs had the burden of proving the grantor's intent to provide an easement for more than mere access to the water was not error. The instant case is analogous to a road-end case in that the beachway at issue, like the road ends in *Jacobs* and *Higgins Lake*, is a path that ends at the shore of a navigable body of water. The only difference is the dedication in this case is private and the dedications in *Jacobs* and *Higgins Lake* were public. Contrary to Ellison's argument, this is a distinction without a difference.

In *Thies*, 424 Mich at 286-290, a private dedication case, our Supreme Court recognized that principles from public dedication cases are applicable in private dedication cases. Similar to this case, the Court in *Thies* was asked to interpret the scope of an easement privately dedicating all "driveways, walks and alleys" included in a plat "to the joint use of all the owners of the plat." *Id.* at 286. The Court noted that when a road terminates at the edge of a navigable body of water there is a "presumption that the platter intended to give access to the water and permit the building of structures to aid in that access." *Id.* at 296. In support of that proposition, the *Thies* Court cited *Backus v Detroit*, 49 Mich 110, 119-120; 13 NW 380 (1882) and *Thom v Rasmussen*, 136 Mich App 608, 612; 358 NW2d 569 (1984), without acknowledging the fact that both of those cases considered the scope of an easement resulting from a public dedication. *Thies*, 424 Mich at 296. *Thies* also explicitly cited *Croucher v Wooster*, 271 Mich 337; 260 NW 739 (1935) (a public dedication case), and held that it was "equally applicable to ways dedicated to the private use of a finite number of persons." *Thies*, 424 Mich at 290. Thus, implicit in the *Thies* Court's analysis is the conclusion that the difference between public and private dedications does not affect the legal presumption that platters intend to provide access to the water when a road terminates at the edge of a body of water.[7]

Accordingly, we conclude that the trial court applied the applicable law to its determination of the scope of the beachway easement. Moreover, we conclude that the trial court's factual determination regarding the scope of the easement was not clearly erroneous.

[7] Ellison relies on *Pine Bluffs Area Prop Owners Ass'n v DeWitt Landing and Dock Ass'n*, 287 Mich App 690; 792 NW2d 18 (2010) and *Kircos v Waslawski*, unpublished per curiam opinion of the Court of Appeals, issued May 11, 2010 (Docket No. 288894) to support his contrary position. We note that neither of these cases explicitly holds that the legal principles regarding public dedication cases are inapplicable to private dedication cases under the circumstances present in this case. Moreover, in regard to *Kircos*, we note that unpublished opinions are not binding precedent. *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136 n 3; 783 NW2d 133 (2010).

Lastly, Ellison argues that the trial court erred by declining to award costs because defendants clearly prevailed on two out of the three issues before the trial court, and because plaintiffs did not entirely prevail on any of their claims. Thus, Ellison maintains that defendants were entitled to costs.

"This Court reviews for an abuse of discretion a trial court's decision on a motion for costs under MCR 2.625." *Mason v City of Menominee*, 282 Mich App 525, 530; 766 NW2d 888 (2009). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Id.* "The determination whether a party is a 'prevailing party' for the purpose of awarding costs under MCR 2.625 is a question of law, which this Court reviews de novo." *Fansler v Richardson*, 266 Mich App 123, 126; 698 NW2d 916 (2005).

In *Mason*, this Court explained the relevant law regarding taxation of costs:

> Generally, MCR 2.625(A)(1) allows a prevailing party to tax costs. "The taxation of costs is neither a reward granted to the prevailing party nor a punishment imposed on the losing party, but rather a component of the burden of litigation presumed to be known by the affected party." *North Pointe Ins Co v Steward (On Remand)*, 265 Mich App 603, 611, 697 NW2d 173 (2005). Although the decision whether to tax costs is discretionary, the authority to do so is "wholly statutory" and "the prevailing party cannot recover costs where there exists no statutory authority for awarding them." *Beach v State Farm Mut Auto Ins Co*, 216 Mich App 612, 621, 550 NW2d 580 (1996). [*Id.* at 530-531.]

"A trial court is not required to justify awarding costs to a prevailing party; rather, the court must justify the failure to award costs." *Blue Cross and Blue Shield of Mich v Eaton Rapids Community Hosp*, 221 Mich App 301, 308; 561 NW2d 488 (1997).

In this case, the trial court declined to award costs to either party because it determined that neither party prevailed in full. MCR 2.625(B) addresses the rules for determining the prevailing party and provides in pertinent part:

> (2) *Actions With Several Issues or Counts.* In an action involving several issues or counts that state different causes of action or different defenses, the party prevailing on each issue or count may be allowed costs for that issue or count. If there is a single cause of action alleged, the party who prevails on the entire record is deemed the prevailing party.
>
> (3) *Actions With Several Defendants.* If there are several defendants in one action, and judgment for or dismissal of one or more of them is entered, those defendants are deemed prevailing parties, even though the plaintiff ultimately prevails over the remaining defendants.

"Prevailing party" is defined by MCL 600.2421b(3)(a) as "the party prevailing as to each remedy, issue, or count" in an action involving several remedies or issues or counts. Further, this Court has explained that to be considered a prevailing party, "that party must show, at the very least, that its position was improved by the litigation." *Fansler*, 266 Mich App at 128 (internal quotation marks and citation omitted).

Plaintiffs' complaint alleged that the marina located on the beachway is a per se nuisance, and it requested vacation of the beachway, or in the alternative, requested declaratory relief. The declaratory relief requested was a "ruling defining the scope of the dedication of the Beachway." Further, the complaint states that plaintiffs "seek a declaratory judgment which determines that the rights of the lot owners within Shady Shores Park does not include the right to use the Beachway as a lakeside park or marina, and only includes the right to access the waters of Rifle Lake." The trial court's final judgment finds that vacation is not warranted in this case and that plaintiffs have failed to demonstrate a nuisance. Thus, plaintiffs clearly did not prevail on their nuisance count or the count seeking vacation of the beachway.

The trial court's final judgment does determine the rights of the lot owners within Shady Shores Park in regard to use of the beachway. The trial court determined that "the use of the Beach Way shall be limited to the right of passage to and from the waters of Rifle Lake." It went on to explain that a right of passage includes "the right to erect and maintain a non-exclusive seasonal dock," and the right to "on-loading or off-loading passengers or property, to launch and remove boats in a timely fashion, and to temporarily rest, refresh and resupply as needed." The trial court specifically stated that overnight mooring was not included, and that "upland activities" such as sunbathing, picnicking, or lounging are not within the scope of the beachway easement.

Defendants argue that plaintiffs did not prevail on their declaratory judgment count because they maintain that the trial court's judgment permits more than mere access and that plaintiffs clearly asked for use to be limited to mere access. However, plaintiffs argue that they prevailed on the declaratory relief count because the trial court did limit the uses permitted on the beachway, and their position has improved as a result of the trial. The trial court clearly considered plaintiffs the prevailing party on the declaratory relief count, stating that plaintiffs' "prayer to have a declaratory ruling as to the scope of the allowed usage rights of the beachway … hereby is granted." Further, the trial court stated that use of the beachway is "limited to the right of passage to and from the waters of Rifle Lake," which is exactly what plaintiffs' requested in their complaint. That the trial court interpreted a "right of passage" to include a right to launch boats from a community dock is perhaps not what plaintiffs' hoped for; however, the record does not support defendant's position that plaintiffs did not prevail on this count in light of the fact that a declaratory ruling was issued and that the trial court declared that the use of the beachway was limited to a right of passage. Thus, we conclude that the trial court did not clearly err by finding that plaintiffs prevailed in part.

Accordingly, because defendants prevailed on two counts, and plaintiffs prevailed on one count, the trial court did not clearly err by concluding that neither party prevailed in full. MCR 2.625(B)(2) provides that "[i]n an action involving several issues or counts that state different causes of action or different defenses, the party prevailing on each issue or count may be allowed costs for that issue or count." While the trial court could have awarded costs to defendants for the first two counts and to plaintiffs for the final count, we observe that the court rule says "*may* be allowed costs for that issue or count," and "may" is permissive and indicates discretionary activity. *Haring Charter Twp v Cadillac*, 290 Mich App 728, 749; 811 NW2d 74 (2010). On the basis of the plain language of the court rule, the trial court had discretion to decline to award costs to either party when neither party prevailed in full. Thus, because the record supports the trial court's conclusion that neither party prevailed in full, we cannot conclude that the trial

court's decision to deny costs to both parties was outside the range of reasonable and principled outcomes.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder