STATE OF MICHIGAN

COURT OF APPEALS

DANIEL E. LASECKI, MARY ANN LASECKI and WILLARD LAWRENCE GIBSON,

Plaintiffs/Counter Defendants-Appellants,

v

LAKE LEANN PROPERTY OWNERS ASSOCIATION,

Defendant/Counter Plaintiff-Appellee.

UNPUBLISHED
May 31, 2011

No. 293723
Hillsdale Circuit Court
LC No. 05-000422-CK

Before: BECKERING, P.J., and TALBOT and OWENS, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's August 3, 2009 Final Judgment denying plaintiffs' motion for summary disposition and granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We reverse and remand.

I. FACTUAL BACKGROUND AND LOWER COURT PROCEEDINGS

Plaintiffs Daniel and Mary Ann Lasecki own lots 97 and 98, and plaintiff W. Lawrence Gibson owns lot 99, in the Lake LeAnn Indian Hills Subdivision No. 2. Lake LeAnn is a man-made lake, which was created around the time that Indian Hills Subdivision No. 2 was platted in 1961. The plat created lots 91-164 and Outlots B, D, E and F. Outlot D is 1.79 acres in size and is designated as a "Park." Outlot F is 14.71 acres in size and is described as "Lake LeAnn." No description is provided on the plat for either Outlots B or E. The plat employs straight lines and sharp corners rather than curved lines and contours to delineate the boundaries of Outlot F; the plattors did not employ a meander line to indicate the contour of Lake LeAnn.[1] Outlot B is a

[1] Although meandering is more characteristic of watercourses than of lakes, meander lines may be used in platting land bordered by lakes as well. See, e.g., *Hilt v Weber*, 252 Mich 198, 201; 233 NW 159 (1930). A lot extended to a formal meander line encompasses all land to the

parcel of land, approximately 2.75 acres in size, owned by defendant Lake LeAnn Property Owners Association. Defendant purchased Outlot B (together with Outlot E) in February 1975. Outlot B was deeded to defendant "for the purpose of beach or park area for the property owners of Lake LeAnn." All lots identified by the plat, including the outlots, are delineated by way of metes and bounds descriptions. Cognizant, perhaps, that metes and bounds descriptions may not suffice to convey land in fee to the water's edge if the metes and bounds do not actually reach the water's edge, the plat expressly provides that "[o]wners of all waterfront lots shall have the right of ingress and egress to and from the water between their side lot lines." All lots, including the outlots, were transferred "[s]ubject to easement, restrictions and water levels of record."

Plaintiffs' lots do not front Outlot F; rather, they front Outlot B. There are two channels[2] that extend from Lake LeAnn south into Outlot B, neither of which is depicted on the original recorded plat of the subdivision.[3] The larger of these channels, approximately 200 feet long and 70-80 feet wide, runs parallel and very close to the easterly lot lines of plaintiffs' lots. Lot 99 contacts this channel along its northernmost 15 feet. However, the remainder of plaintiffs' property is separated from the channel by a small, triangularly-shaped strip of Outlot B, varying in widths from a matter of inches to approximately 25 feet at the southernmost end of lot 97. Plaintiffs describe the channel as having been a shallow waterway until 1997, when the Laseckis received defendant's permission to dredge the channel in order to permit motorized boat access from their lots to the main portion of the Lake.[4] The project, which also involved landscaping a portion of Outlot B on the opposite side of the channel from plaintiffs' properties, was completed in 1998. As a result of the dredging, the channel is now approximately six feet in depth at its center. After completion of the dredging project, the Laseckis created a beach area and placed docks into the water in front of their property. Gibson purchased lot 99 in October 1998, after the dredging was completed. Before he acquired the property, Gibson's predecessors had placed two docks into the channel in front of lot 99.

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water's edge, even if the meander line as formally portrayed does not actually reach the edge of the water. *Id*.

[2] The parties, documents and witnesses have also referred to these bodies of water as coves or canals.

[3] According to the affidavit of Rosemary Chapman, who worked as a real estate sales agent for an affiliate of the developer of Lake LeAnn from 1963 to 1972, the plat was recorded before Lake LeAnn was filled, and therefore, "incorrectly omits" the channel, which she asserts has existed since the lake was filled, "possibly because the plat was recorded before the lake was filled." Additional notations in the LLPOA Investigative Findings Report also indicated that the plat was prepared before the Lake was dammed. While the record does not establish with certainty whether the Lake was filled before or after the plat was created, the evidence produced by plaintiffs seems to indicate that the Lake was filled *after* the plat was prepared and recorded, and that the channel, which was a preexisting stream bed, filled at that time as well.

[4] Before the channel was dredged, evidence presented to the trial court indicated that a non-motorized row boat could navigate the channel in front of lot 98, and in front of a portion of lot 97, depending on the water level.

The instant dispute arose in May 2005, when defendant sent plaintiffs letters demanding that they "remove all of the items which you have placed (or caused to be placed) on any portion of Outlot B (including at the shoreline and beach of the channel, as that shoreline and beach is located on Outlot B) within fifteen (15) days of the date of this letter." Plaintiffs commenced legal proceedings, asserting that they were entitled to the benefit of an easement allowing them to use the western edge of Outlot B in the same manner as all other waterfront property owners are allowed to use their waterfront lots. The trial court granted summary disposition to plaintiffs, determining that they were entitled to an easement over Outlot B because: (1) there was a meeting of the minds between the parties that in exchange for plaintiffs dredging the channel, defendant would treat plaintiffs as lakefront property owners, and (2) on the basis of promissory estoppel, finding that it would be unjust to rule that plaintiffs were not lakefront owners considering the substantial and costly improvements they had made to the channel with defendants' approval. Defendant appealed. This Court reversed, concluding that an easement cannot be created by promissory estoppel and, further, that any alleged oral agreement to allow plaintiffs to use Outlot B in exchange for the dredging of the channel did not satisfy the statute of frauds. *Lasecki v Lake LeAnn Property Ass'n*, unpublished opinion of the Court of Appeals, issued February 12, 2009 (Docket No. 276053). This Court observed, however, that the statute of frauds would not bar plaintiffs' claim that there was an agreement to permit them access to the channel over Outlot B if plaintiffs could establish an oral agreement and part performance. Concluding that a genuine issue of material fact existed as to whether there was an oral agreement to allow plaintiffs to use Outlot B if the Laseckis dredged the channel, this Court remanded for further proceedings.

On remand, plaintiffs elected not to pursue a breach of contract claim premised on an oral contract with part performance. Instead, they filed an amended complaint asserting that, because the developer designated and sold their lots as waterfront lots, they were entitled to the benefit of the easement afforded by the plat to owners of waterfront lots in the subdivision to the same extent as all other waterfront lot owners.[5] To their subsequent motion for summary disposition, plaintiffs attached affidavits establishing that their lots were originally advertised and sold by an affiliate of one of the plattors as waterfront lots, with ingress and egress to the water in front of the lots in accordance with the plat and as having the same waterfront property rights as all other waterfront properties at Lake LeAnn. Additionally, the trial court was presented with evidence

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[5] In *CAF Investment Co v Saginaw Twp*, 410 Mich 428, 454; 302 NW2d 164 (1981), quoted in *Henry v Dow Chem Co*, 484 Mich 483, 526; 772 NW2d 301 (2009), the Court stated: "if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same." Here, this Court did not pass on the new theory. Moreover, while a lower court cannot exceed the scope of a remand order that gives clear instructions, *K & K Constr, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 544; 705 NW2d 365 (2005), here, this Court's instructions did not clearly preclude the filing of an amended complaint stating a new theory and the filing was not inconsistent with this Court's prior opinion.

that the lots had been taxed and treated as waterfront property from the inception of the subdivision. However, based on this Court's holding in *Mumaugh v McCarley*, 219 Mich App 641, 649; 558 NW2d 433 (1996), that boundary lines as represented on the plat control boundary disputes, the trial court concluded that, despite the evidence presented, the lots were not "waterfront" property. Consequently the trial court ruled that the easement did not apply to afford plaintiffs the right of ingress and egress over Outlot B to the channel in front of their lots. Plaintiffs now appeal.

II. ANALYSIS

The sole issue before this Court on appeal is whether the trial court erred by concluding, as a matter of law, that plaintiffs are not entitled to the benefit of the easement set forth on the plat providing "owners of all waterfront lots" with "the right of ingress and egress to and from the water between their side lot lines." For the reasons set forth below, we conclude that it did so err.

This Court reviews a trial court's decision on a motion for summary disposition de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a trial court's decision to grant summary disposition under MCR 2.116(C)(10), this Court must consider all of the substantively admissible evidence submitted by the parties at the time of the motion in the light most favorable to the nonmoving party. *Id*. at 119-120; MCR 2.116(G)(6). Summary disposition should be granted only where the evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id*. at 120. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

As this Court recently explained in *Wiggins v City of Burton*, ___ Mich App ___, ___; ___ NW2d ___ (2011):

> The language of an express easement is interpreted according to rules similar to those used for the interpretation of contracts. See *Little v Kin*, 468 Mich. 699, 700; 664 NW2d 749 (2003); *Anglers of the Ausable, Inc v Dep't of Environmental Quality*, 283 Mich App 115, 129-130; 770 NW2d 359 (2009), rev'd in part on other grounds, ___ Mich ___ (2010). Accordingly, in ascertaining the scope and extent of an easement, it is necessary to determine the true intent of the parties at the time the easement was created. *Hasselbring v Koepke*, 263 Mich 466, 477-478; 248 NW 869 (1933). Courts should begin by examining the plain language of the easement, itself. *Little*, 468 Mich at 700. If the language of the easement is clear, "it is to be enforced as written and no further inquiry is permitted." *Id.* ...
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> The language used in a plat is subject to similar rules of interpretation. "When interpreting ... plats, Michigan courts seek to effectuate the intent of those who created them." *Tomecek v Bavas*, 482 Mich 484, 490–491; 759 NW2d 178 (2008) (opinion of KELLY, J.). "The intent of the plattors must be determined

> from the language they used and the surrounding circumstances." *Thies v Howland*, 424 Mich 282, 293; 380 NW2d 463 (1985). As occurred in the present case, an easement may be created by a subdivision plat. *Jeffery v Lathrup*, 363 Mich 15, 21-22; 108 NW2d 827 (1961); see also *Kirchen v Remenga*, 291 Mich 94, 108; 288 NW 344 (1939); 1 Cameron, Michigan Real Property Law (3d ed), § 6.7, p 220. The designation of an easement on a properly recorded plat "ha[s] all the force and effect of an express grant." *Kirchen*, 291 Mich at 109; see also *Forge v Smith*, 458 Mich 198, 210 n 29; 580 NW2d 876 (1998).

If the language of an easement is ambiguous, extrinsic evidence may be considered in order to determine the scope of the easement. *Little v Kin*, 468 Mich 699, 700; 664 NW2d 749 (2003); *Dyball v Lennox*, 260 Mich App 698, 704; 680 NW2d 522 (2004). The extent of a party's rights under an easement presents a question of fact. *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 40; 700 NW2d 364 (2005); *Dobie v Morrison*, 227 Mich App 536, 541-542; 575 NW2d 817 (1998); *Soergel v Preston*, 141 Mich App 585, 588; 367 NW2w 366 (1985).

There is no dispute as to the easement's existence or validity, or that lots in the subdivision, including plaintiffs' lots and the outlots, were sold subject to the easement. Thus, there is no question that the parties are bound by the easement set forth on the plat. *Jeffrey*, 363 Mich at 21-22 ("Under Michigan law, an easement recorded on a subdivision plat by reference to which subdivision sales are made is binding on the parties."). At issue is the extent of plaintiffs' rights under the easement, if any. "[A] purchaser of platted lands receive[s] not only the interest described in their deed, but also whatever rights are reserved to lot owners on the plat." *Little v Hirschman*, 409 Mich 553, 561; 677 NW2d 319 (2004). Accordingly, when plaintiffs purchased their lots, as described in their respective deeds, they also received any applicable easement rights provided to lot owners by the plat. Hence, if plaintiffs' lots are "waterfront lots" within the meaning of the easement, then they received the same rights over Outlot B as did the owners of property fronting Outlot F. If, however, plaintiffs' lots are not "waterfront lots," then the easement affords them no benefit and they are entitled to traverse Outlot B to the water's edge only in the same manner as all other non-waterfront owners in the subdivision.

Defendant argues that the easement does not afford plaintiffs any rights, because no water is depicted on the plat in front of plaintiffs' lots. Defendant would have us read the easement as if it provided a right of ingress and egress to "owners of lots fronting Outlot F" only. However, the language of the easement is not restricted in this manner. It does not provide ingress and egress to the "lake" for owners of "lake front lots" and is not limited by its language only to lots fronting Outlot F. Rather, the easement provides a right of ingress and egress to the "water" for all owners of "waterfront lots."

Black's Law Dictionary defines "[w]aterfront" as "[l]and or land with buildings fronting a body of water." Black's Law Dictionary, 9th ed, p 1730. Thus, plaintiffs' property is "waterfront" if it fronts a body of water in the manner contemplated by the easement. The plat purports to show the boundaries of the Lake; nowhere, however, does it define the terms "waterfront" or "water." One could assume, as defendant asks us to do, that the plattors intended that only lots fronting Outlot F were to constitute "waterfront lots," but such an assumption is not consistent with the language of the easement itself, especially considering the facts and circumstances presented here. While the language of the easement unambiguously grants to all

owners of waterfront lots a right of ingress and egress to the water between their side lot lines, it is silent regarding what constitutes a "waterfront lot." Therefore, it is appropriate to consider extrinsic evidence of the plattors' intent in determining whether plaintiffs' lots are "waterfront lots" for purposes of the easement. *Little*, 468 Mich at 700; *Dyball*, 260 Mich App 704. This evidence includes the language used and the circumstances existing at the time the easement was granted. *Thies v Howland*, 424 Mich 282, 293; 380 NW2d 463 (1985); *Band v Forman*, 244 Mich 571, 576; 222 NW 96 (1928); *Dyball*, 260 Mich App at 708; *Dobie*, 227 Mich App at 540.

The trial court concluded that, despite evidence that plaintiffs' lots had been sold and treated as waterfront lots since the inception of the subdivision, this Court's holding in *Mumaugh v McCarley*, 219 Mich App 641, 649; 558 NW2d 433 (1996), required it to conclude that the lots were not "waterfront" property within the meaning of the easement. At issue in *Mumaugh*, was whether a lot in the platted subdivision was riparian, despite that it had become separated from the water by relicted lands resulting from the recession of Lake Huron. This Court noted that "[w]here land is disposed by reference to an official plat, the boundary lines shown on the plat control." *Id*. at 649, citing *Gregory v LaFaive*, 172 Mich App 354, 361; 431 NW2d 511 (1988). This Court thus determined that, because the plat indicated that the lot was bordered by the meander line of the lake, the property was riparian. We do not disagree with the holding in *Mumaugh*, that boundary lines depicted on a plat control boundary disputes. And, if the easement stated that it provided rights of ingress and egress only to owners of lots fronting Outlot F, defendant would be correct that *Mumaugh* would control the outcome here. However, the instant case does not present a boundary dispute. Plaintiffs do not argue that they front Outlot F, or that the boundary drawn between Outlot F and Outlot B is erroneous. Rather, plaintiffs assert that the plain language of the easement affords them certain rights as "waterfront lot" owners. *Mumaugh* does not address the interpretation or scope of an easement, and thus, it is inapposite here.

That the plat does not show water in front of plaintiffs' property might permit the inference that the plattors did not intend for these lots to be considered "waterfront," especially if it is established that the channels were present, and the plattors were aware of them, when the plat was prepared.[6] Considering the broad language employed by the easement, however, that the channels are not drawn on the plat is not necessarily dispositive of the issue. Had the plattors intended to limit the benefit of the easement only to owners of lots fronting Outlot F, they could have plainly limited the easement accordingly. They did not do so. Evidence that the Lake was created after the plat was prepared may indicate that the plattors were uncertain as to where the contours of the Lake would ultimately lie, and hence used the terms "waterfront" rather than "lake front" intentionally, to afford the benefit of the easement to lot owners fronting all water in the plat, wherever it would exist after the Lake was created. In this regard we again note that the plat employs straight lines and angled corners, rather than curved lines and contours more typical

[6] Defendant's position has been that the absence of water on the plat in front of plaintiffs' lots precludes a finding that plaintiffs are entitled to the benefit of the easement. Defendant has not presented any evidence, other than the plat itself, addressing the plattors' intent.

of the shape of a body of water, to delineate the boundaries of Outlot F. Similarly, evidence that the channels were formed when streambeds filled with water upon the damming of the Lake, might also favor a finding that plaintiffs' lots are "waterfront lots."[7] Finally, and perhaps most significantly, there is no dispute that the lots were marketed and sold by one of the plattors, Lake LeAnn Development Company, and its affiliate real estate company, as waterfront lots. This may constitute strong evidence that the plattors themselves viewed plaintiffs' lots as "waterfront lots" within the meaning of the easement. That there is no dispute that plaintiffs' lots have been taxed as waterfront property since they were first sold to plaintiffs' predecessors in interest, or that they have been treated as waterfront property by the parties at all relevant points preceding the instant dispute also bears on resolution of this factual issue.[8]

The evidence presented by plaintiffs was at least sufficient to establish a genuine issue of material fact as to whether their lots are "waterfront lots" within the intended meaning of the easement. Consequently, the trial court's decision to grant defendant's motion for summary disposition was erroneous. Therefore, we reverse the trial court's decision granting defendant summary disposition and remand this matter to the trial court for a determination of whether, as a matter of fact, plaintiffs' lots constitute "waterfront lots" within the meaning intended by the plattors in granting the easement. On remand the trial court shall consider all evidence presented by the parties bearing on the question whether the lots are "waterfront," including any evidence establishing when Lake LeAnn was created, and the condition of the channels, relative to the preparation of the plat. We note that, should the trial court ultimately determine that plaintiffs' lots are "waterfront lots," intended by the plattors to enjoy the benefits of the easement set forth on the plat, then plaintiffs shall have the same rights with respect to Outlot B as all other

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[7] Plaintiffs represent that, before it was dredged, the channel consisted of a preexisting streambed that filled when the Lake was dammed, and plaintiffs presented the trial court with deposition testimony that the streambeds preexisted the creation of the Lake.

[8] Defendant argues that this case is remarkably similar to *McDonald v Brecht*, unpublished opinion per curiam of the Court of Appeals, issued April 28, 2009 (Docket Nos. 281063, 281064). In that case, plaintiffs were seeking quiet title to a narrow strip of lakefront property located across the road from their property in a platted subdivision. The land was disposed of by reference to an official plat, and plaintiffs admitted that on the face of the plat, their lots did not extend to the water's edge. Plaintiffs argued that the developers must have intended to convey the beach to the purchasers of the lots because they did not explicitly reserve the beach or riparian rights to themselves and because their behavior suggested that they intended to sell lakefront lots. Unlike the present case, however, the plat in *McDonald* depicted the body of water at issue and clearly set forth the lot boundaries by reference to concrete cylinders that had been sunk into the ground, inland coordinates, and the depth of each lot. In this case, the plat does not depict the channel, makes no reference to concrete cylinder markings, and while it contains inland coordinates along the eastern edge of plaintiffs' properties, the entire plat contains inland coordinates where Lake LeAnn is depicted to border all lakefront properties, likely because the lake had not yet been created.

waterfront property owners in Indian Hills Subdivision No. 2 are afforded with regard to Outlot F.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Michael J. Talbot
/s/ Donald S. Owens