STATE OF MICHIGAN

COURT OF APPEALS

ROBERT MARTIN and CATHY MARTIN,

Plaintiffs-Appellants,

v

PETER R. CAVAN, KATHY CAVAN, f/k/a KATHY A. DEGASPERIS, DONALD L. BARROWS, AMY M. BARROWS, WILLIAM E. STANISCI, and TERESA M. STANISCI,

Defendants-Appellees,

and

SAMUEL D. BRANDT, LOIS A. BRANDT, EDWARD DAVIES, and KAREN A. DAVIES,

Intervening Parties-Appellees,

and

ABN AMRO MORTGAGE GROUP, INC., NEW CENTURY FINANCIAL, L.L.C., WORLD WIDE FINANCIAL SERVICE, INC., OXFORD TOWNSHIP, STATE TREASURER, OAKLAND COUNTY DRAIN COMMISSIONER, OAKLAND COUNTY ROAD COMMISSION CHAIRMAN, and CONSUMERS ENERGY COMPANY, f/k/a CONSUMERS POWER COMPANY,

Defendants.

UNPUBLISHED
June 29, 2006

No. 266888
Oakland Circuit Court
LC No. 1998-007800-CH

Before: Cooper, P.J., and Neff and Borrello, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order denying their motion for summary disposition and granting summary disposition in favor of the intervening parties pursuant to MCR 2.116(C)(10).[1] For the reasons set forth in this opinion, we affirm.

I.

Plaintiffs commenced this action to establish their ownership to the northerly portion of property described as "Outlot A" in the recorded plat for the Tan Lake Shores Subdivision in Oxford Township. Plaintiffs are the owners of Lot 21, which is adjacent to Outlot A. The plat was recorded in 1969, and the plat dedication shows that all of Outlot A was "reserved for the use of the lot owners." James Fritch, who owned both Lot 21 and the disputed portion of Outlot A at the time it was platted, signed the plat dedication, but then subsequently conveyed both Lot 21 and the disputed portion of Outlot A in 1976. Lot 21 and the disputed portion of Outlot A have been continuously sold in tandem since then.

The trial court originally voided the dedication language with respect to the disputed portion of Outlot A, relying on theories of laches and estoppel. In a prior appeal, this Court affirmed the trial court's decision for a different reason, concluding that the dedication of Outlot A was a private dedication, which was not permitted under § 253 of the Land Division Act, MCL 560.253(1). *Martin v Redmond*, 248 Mich App 59, 65-66; 638 NW2d 142 (2001). However, this Court also commented that equitable principles favored a judgment in plaintiffs' favor. *Id.* at 72-74. On further appeal, our Supreme Court reversed this Court's decision and held that private dedications are expressly permitted by the Land Division Act, and that the private dedication of Outlot A conveyed a fee simple interest to the donee lot owners. *Martin v Beldean*, 469 Mich 541, 548-549; 677 NW2d 312 (2004). The Supreme Court further held that plaintiffs were required to file their claim to vacate, correct, or revise the plat dedication of Outlot A under the Land Division Act (LDA), MCL 560.221 *et seq*., and remanded the case to the trial court for further proceedings. *Id.* at 550-552.

On remand, plaintiffs filed an amended complaint seeking to vacate the plat dedication with respect to the disputed portion of Outlot A. Plaintiffs added several new defendants in accordance with MCL 560.224a, and the trial court permitted two couples, Samuel and Lois Brandt, and Edward and Karen Davies, who each owned a lot in the subdivision, to intervene.

Plaintiffs subsequently moved for summary disposition, arguing that the plat dedication should be vacated because the disputed portion of Outlot A had always been sold in tandem with Lot 21, and because they and their predecessors had exercised responsibilities of ownership over the disputed portion by paying property taxes and insurance coverage, and by physically maintaining the land. In response, defendants and the intervening parties argued that they had used the disputed portion for recreational purposes, and that their right to use the property enhanced the value of their homes. They argued that their interest in the continued use of the

[1] Although the trial court also cited MCR 2.116(C)(8) as a basis for its decision, it is clear that the court considered evidence beyond the pleadings and, therefore, its decision was solely based on MCR 2.116(C)(10).

property was reasonable grounds for the trial court to oppose vacation. The intervening parties filed a cross motion for summary disposition, arguing that all conveyances of the disputed portion of Outlot A since the plat was recorded were void, because the original owner, Fritch, no longer had an interest in the disputed portion of Outlot A to convey after he signed the plat dedication.

The trial court found that plaintiffs were not entitled to summary disposition because defendants' objections to vacation were reasonable. The court further found that Fritch transferred the disputed portion of Outlot A as part of the private dedication. Therefore, his subsequent conveyance of that property was ineffective because he no longer had title to the property. Thus, the trial court granted summary disposition in favor of the intervening parties pursuant to MCR 2.116(C)(10).

II.

Plaintiffs argue that the trial court erred in denying their motion for summary disposition because the intervening parties' casual recreational use of the disputed portion of Outlot A did not constitute a reasonable basis for objecting to their petition to vacate the plat.

We review de novo a trial court's resolution of a motion for summary disposition. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Kraft v Detroit Entertainment, LLC*, 261 Mich App 534, 539; 683 NW2d 200 (2004). The trial court must consider all evidence submitted by the parties in a light most favorable to the nonmoving party, and grant summary disposition if there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 539-540; MCR 2.116(C)(10) and (G)(4).

MCL 560.221 *et seq*. governs proceedings to vacate, correct, or revise a plat. MCL 560.226(1) states that "[u]pon trial and hearing of the action, the court may order a recorded plat or any part of it to be vacated, corrected, or revised," subject to exceptions not applicable here. Although the statute does not set forth the burden of proof that applies when an objection is made to a petition to vacate part of a recorded plat, this Court in *In re Gondek*, 69 Mich App 73, 75; 244 NW2d 361 (1976), adopted the "reasonable objection" standard from the predecessor statute, the Plat Act of 1929, 1929 PA 172. The Court held that a party opposing a petition to vacate a portion of a plat must establish a reasonable objection to the proposed vacation. *Id.* at 74. The Court observed that "cases interpreting this statutory language of 'reasonable objection' nearly always turned on the particular facts proven." *Id.*

In *Yonker v Oceana Co Rd Comm*, 17 Mich App 436, 443; 169 NW2d 669 (1969), the plaintiffs sought to vacate a plat dedication of a publicly dedicated road. The plaintiffs presented evidence that traffic on the road was hazardous to pedestrians, and that closing the road would enhance property values and tax revenues. *Id.* at 440. The defendants opposing vacation presented evidence that members of the public enjoyed using the road to view the lake and sand dunes. *Id.* The plaintiffs argued that the defendants' objections "were fanciful, visionary, or shadowy and therefore not reasonable." *Id.* at 443. This Court agreed that "reasonable objections" meant objections that were "of substance and of value to the public," but concluded that the defendants' objections were reasonable, because the public has a legitimate interest in preserving access to a scenic area. *Id.* at 443-444. The Court also found that the plaintiffs failed

to present sufficient evidence that traffic, speeding, littering, and noise from the road was harmful to public health, safety and welfare. *Id.* at 444-445.

Private dedications are intended to benefit the private lot owners, not the general public, so requiring a public benefit as a condition of their preservation makes little sense. Applying *Yonker* by analogy to private dedications, it follows that persons objecting to vacations of private dedications must raise objections that are of substance and of value to the intended beneficiaries of the dedication, namely, the lot owners.

This extrapolation of a private dedication standard from *Yonker* is consistent with this Court's decision in *Vander Meer v Ottawa Co*, 12 Mich App 494; 163 NW2d 227 (1968). In *Vander Meer*, the plat dedicated a lakeside road to the public, but there had never been public acceptance of the road. *Id.* at 496. The road was the only means of access to a row of "boat lots" used for boat storage. *Id.* The boat owners used the road at the beginning and end of the season to transport their boats, trailers, and sometimes docks to the boat lots. *Id.* at 497. The owners of the boat lots objected to the proposed vacation of the road because they wanted to continue using the road for access to the lots. *Id.* at 496. This Court agreed that these objections were reasonable, stating:

> The test of whether an objection to vacation of a portion of a recorded plat is reasonable is not capable of precise answer. In *Westveer v. Ainsworth* (1937), 279 Mich 580, 585 [273 NW 275], the Supreme Court stated:
>
> "It is reasonable objection to vacation of the plat that it is proposed to take from the lot owners the conditions they prize as advantages and for which they have paid."
>
> We are constrained to agree that access to one's property as it existed under a recorded plat at the time of purchase forms the basis of a reasonable objection to impairment of that access by vacation. [*Id.* at 497.]

Vander Meer is also relevant to the instant case. Although the road in *Vander Meer* was publicly dedicated, the absence of formal acceptance rendered it substantively similar to a private dedication, in which private owners sought to protect their private rights. *Id.* at 496. The boat lot owners maintained that they benefited from the dedication, because they used the road to bring their boats to and from the lake. *Id.* at 497. This use is comparable to defendants' use of the disputed portion of Outlot A for launching boats and using the area for outdoor recreation. The Court in *Vander Meer* agreed that seasonable use for boat transportation was a legitimate reason for denying vacation of the plat. It follows that defendants' use of the disputed portion of Outlot A for similar purposes also constitutes a reasonable objection to plaintiffs' proposed vacation.

Plaintiffs argue that the disputed portion of Outlot A is not suitable for launching boats. However, the trial court denied plaintiffs' motion for summary disposition on this issue because it found a genuine issue of material fact as to whether defendants stated a reasonable objection to the proposed vacation. Samuel Brandt and Edward Davies both testified in their depositions that the disputed portion of Outlot A was the best available spot for launching boats, and other lot

owners submitted affidavits in agreement. Thus, the trial court correctly found a question of fact on this issue.

III

Plaintiffs argue that the trial court erred in granting summary disposition in favor of the intervening parties, because there is evidence that Fritch and the other platters made a mutual mistake when they included the disputed portion of Outlot A in the plat dedication. Plaintiffs did not present this argument in the trial court. Instead, plaintiffs argued below that Fritch severed and conveyed the disputed portion of Outlot A before he signed the dedication and, therefore, had no interest in the disputed portion to dedicate. Because plaintiffs did not raise their mutual mistake issue in the trial court, the issue is not preserved and, accordingly, plaintiffs must establish a plain error to avoid forfeiture. To establish plain error, plaintiffs must satisfy three requirements: (1) the error must have occurred; (2) the error was plain, i.e., clear or obvious; and (3) the plain error affected their substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

A court may "grant relief by way of reformation of a conveyance of property, or other instrument in writing, on the ground of mutual mistake." *Potter v Chamberlin*, 344 Mich 399, 407; 73 NW2d 844 (1955). "[R]eformation [is] proper so as to carry out the express actual intent of the parties where the evidence is clear that both parties had reached an agreement and, as a result of a mutual mistake . . . the instrument did not express the true intent of the parties." *Blake v Fuller*, 274 Mich 534, 538; 265 NW 455 (1936) In *Stevenson v Aalto*, 333 Mich 582, 589; 53 NW2d 382 (1952), our Supreme Court stated:

> In order to decree the reformation of a written instrument on the ground of mistake, that mistake must be mutual and common to both parties to the instrument. The burden of establishing such mistake is upon the party who seeks reformation. The evidence must be convincing and must clearly establish the right to reformation.

In *Stevenson*, the Supreme Court upheld reformation of three deeds where the grantor and grantees agreed that the property descriptions did not match the lots the grantees were shown at the time of purchase, and where the only persons disputing this evidence were persons who would benefit from denial of reformation. *Id.* at 588-590. In *Potter*, *supra* at 407, our Supreme Court affirmed a trial court's order reforming a deed where there was "a fair inference . . . that the parties did not intend to describe a parcel embraced within the description contained in the conveyance previously executed." This inference arose from evidence that the parties meant the description to cover all of the grantor's land that had not been previously conveyed. *Id.* at 402-403.

In the instant case, plaintiffs' evidence establishes only that Fritch may have been mistaken about the dedication of the disputed portion of Outlot A. Plaintiff relied on evidence that Fritch continued to pay taxes on the disputed portion of Outlot A, and also included the disputed portion in the property description when he conveyed Lot 21. It is equally possible, however, that Fritch mistakenly believed that the taxes he was paying, and the property he later conveyed, only encompassed Lot 21. Regardless, proof of mutual mistake requires evidence that the other parties to the instrument also operated under the same mistake. See, e.g., *Stevenson*,

supra at 585-586; *Cline v Daniels*, 346 Mich 375, 378-379; 78 NW2d 102 (1956); and *Zomerhuis v Blankvoort*, 235 Mich 376, 377; 209 NW 56 (1926). Here, plaintiffs failed to present evidence that any of the other platters never believed or intended that the disputed portion of Outlot A was not to be included in the plat dedication. Because plaintiffs have failed to demonstrate a mutuality of mistake, that claim must fail.

This issue raises another rationale for a judgment in favor of defendants. The record indicates that the conveyance of the disputed portion of Outlot A was made subsequent to Fitch signing and thereby authorizing the plat. Once the plat was formally dedicated, Fitch did not, nor could he, possess the right to transfer any portion of Outlot A. Therefore, because Fitch never possessed title to that portion of Outlot A which is the subject of this appeal, he was never able to properly convey title to plaintiffs or their predecessors in interest to the disputed portion.

IV

We disagree with plaintiffs' contention that the law of the case doctrine obligated the trial court to enter judgment in their favor on equitable principles.

Under the law of the case doctrine, if an appellate court resolves a legal issue and remands the case to the trial court for further proceedings, the legal question determined by the appellate court will not be decided differently in a subsequent appeal in the same case if the facts remain materially the same. *In re Wayne Co Treasurer*, 265 Mich App 285, 297-298; 698 NW2d 879 (2005). The doctrine applies when the subsequent appeal involves the same set of facts, the same parties, and the same question of law. *Id.* These requirements are not satisfied here. Our Supreme Court remanded this case, directing that plaintiffs were required to proceed with their claim under the statutory LDA, which necessitated the joinder of additional defendants. Defendants and the intervening parties submitted evidence that the trial court did not consider originally, and the proceedings on remand were governed by the LDA, which obligated the court to consider whether there was a "reasonable objection" to the proposed vacation. Accordingly, the law of the case doctrine did not apply.

V

Plaintiff argues that if the dedication of Outlot A included the disputed portion, the dedication expired in 1994, pursuant to the 25-year expiration clause in the deed restrictions document. Plaintiffs' argument is based on the following language from the deed restrictions document:

> 17. All the restrictions, conditions, covenants, charges, easements, agreements and rights herein contained shall continue for a period of twenty-five years from date of recording this instrument.
>
> * * *
>
> 19. The subdividers are in the process of subdividing other and further lands in the area and adjacent to Tan Lake Shores Subdivision which further subdivisions will include certain "outlots" to be reserved for recreational purposes and it is the intent of the subdividers that such "outlots" when dedicated will be

> for the use and benefit of the residents of Tan Lake Shores Subdivision as well as the residents of later subdivision.

Plaintiffs raised this argument in their earlier appeal before the Supreme Court, which squarely rejected it, explaining:

> We disagree with plaintiffs. Nothing in the plat itself restricts any of its dedications to a twenty-five year period. Moreover, the deed restriction clearly uses the phrase "herein contained," which means paragraph 17 applies to the restrictions found in the deed restriction document itself and not something contained in a different document, i.e., the plat. [*Martin*, *supra*, 469 Mich 549-550 n 20.]

The law of the case doctrine precludes plaintiffs from raising this issue in this appeal. Although this appeal involves different defendants, plaintiffs are re-asserting the same argument that the Supreme Court previously rejected. In *Monat v State Farm Ins Co*, 469 Mich 679, 691-692; 677 NW2d 843 (2004), our Supreme Court held that "the lack of mutuality of estoppel should not preclude the use of collateral estoppel when it is asserted defensively to prevent a party from relitigating an issue that such party already had a full and fair opportunity to litigate in a prior suit." We believe this principle is equally applicable to the law of the case doctrine, and that plaintiffs are therefore precluded from relitigating this issue in the present appeal.

Even if the law of the case doctrine does not apply, however, we see no reason to decide this issue differently. The Supreme Court's reasoning is consistent with the principle that plain and unambiguous language in an instrument must be enforced as written. *Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 88; 662 NW2d 387 (2003). Plaintiffs argue that the references to outlots in paragraph 19 of the deed restrictions indicate that the platters intended for outlots to also be subject to the 25-year period prescribed in the deed restrictions. We disagree. Paragraph 19 merely indicates that residents of the Tan Lake Shores Subdivision will be permitted to use outlots in other subdivisions the platters intended to develop. Plaintiffs also argue that the deed restrictions and the plat should be read together, as one document. Where one writing references another instrument for additional contract terms, the two writings should be read together. *Forge v Smith*, 458 Mich 198, 207; 580 NW2d 876 (1998). Here, however, there is no cross-reference between the plat and the deed restrictions. Furthermore, the writings do not pertain to the same subject matter. The plat shows how the land in the subdivision will be divided; whereas the deed restrictions govern the use and development of the lots. Accordingly, the 25-year limitation for the deed restrictions does not apply to the outlot dedications.

Affirmed.

/s/ Jessica R. Cooper
/s/ Janet T. Neff
/s/ Stephen L. Borrello