# STATE OF MICHIGAN

# COURT OF APPEALS

| | |
|---|---|
| SHARON CHAPIN and KELLY RETH,<br><br>Plaintiffs-Appellants, | UNPUBLISHED<br>February 3, 2009 |
| v | No. 275666<br>Berrien Circuit Court |
| GEORGE E. DOREY, JR. and JANICE A. DOREY,<br><br>Defendants-Appellees. | LC No. 04-003007-CH |

Before: Markey, P.J., Whitbeck and Gleicher, JJ.

PER CURIAM.

In this quiet title action, plaintiffs appeal as of right the trial court's entry of a December 2006 judgment quieting title in favor of defendants. The December 2006 judgment vacated a prior, 2005 judgment partially quieting title in plaintiffs. We reverse.

The parties contest the ownership of a small peninsula (the Point) that extends about 100-feet into Little Paw Paw Lake in Coloma Township.[1] Plaintiffs Sharon Chapin and Kelly Reth, mother and daughter, respectively, own lots 15 and 16 in the Rupley Subdivision in Coloma Township. The southern border of Lot 15 runs along Little Paw Paw Lake. The Rupley Subdivision plat specifically provides, "Lots 9 to 15 extend to edge of Little Paw Paw Lake." In a 2002 complaint, plaintiffs raised a quiet title count, theorizing that they had a priority interest in a portion of the Point on the basis that they and their predecessors in interest always had ownership "to the water line of Little Paw Paw Lake." Plaintiffs suggested that their ownership encompassed a portion of the Point, which had grown or expanded to some degree, given that "[t]he water level in Little Paw Paw Lake has receded considerably over the passage of time since the Property was originally patented, causing new land to emerge through 'reliction.'" The complaint alternatively sought title to a portion of the Point through adverse possession.

Defendants George E. Dorey, Jr. and Janice A. Dorey, husband and wife, own approximately 40 acres in Coloma Township, which lie almost entirely west of the Rupley

[1] The Point is bordered by Dedrick Creek to the west, and juts into Little Paw Paw Lake in a southeasterly direction.

Subdivision. Defendants premised their claim of priority to ownership of the Point on the fact that their deed, and those of their predecessors in interest, contained the following relevant description allegedly encompassing the Point: "ALSO, so much of the Southeast ¼ of said Section 9 as lies North and West of Little Paw Paw Lake . . . ."

After a one-day bench trial in June 2005, the trial court explained in a bench opinion that plaintiffs owned a portion of the Point:

> . . . I'm not satisfied that at least as to . . . [defendants] they have any claim in writing as to the property in dispute. In other words, they haven't established on this record any ownership to any property that's east of Dedrick Creek and it pertains to this peninsula here. . . .
>
> * * *
>
> But the burden of proof is on the Plaintiffs, but it does seem to me that the testimony of the two surveyors supported the Plaintiff's [sic] position more than the Defendant's [sic] position. Both of the surveyors felt that the . . . property line as platted in Exhibit Three looked like the farther most monument was the concrete—concrete monument that was referred to in Exhibit Three. And so that does suggest that there has been some increase in land, decrease in the lake level since the time it was platted.
>
> And it also states—and again, I'm looking at the documents now. Since I'm saying the deeds have not shown that there is entitlement of the Defendants to the property, do the Plaintiffs' documents show that they have entitlement to the property. And it does state, as we've indicated, in Exhibit Three: "Note: Lots 9 to 15 extend to edge of Little Paw Paw Lake." And therefore, it makes most sense to the Court, giving—honoring this document, that to the extent that the lake rises and falls over . . . the years, as long as you follow that edge, the western most edge as platted, to the tip of the water, that that is the Plaintiff's [sic] property within the width of lots 16 and 15. And therefore I believe that Plaintiff [sic] has established that this is their property and that they have riparian rights from that line—so I believe a new survey indeed probably should be drawn up—from that line down to the water's edge in accordance with Michigan law, riparian rights, . . . . But I think that Plaintiffs have proven their case by a preponderance of the evidence, and I find in favor of the Plaintiffs on this point . . . .

In June 2005, the trial court entered a "judgment of quiet title" in conformity with its bench opinion.

In July 2005, defendants filed a motion for new trial "pursuant to MCR 2.611," averring that (1) the trial court had wrongly interpreted the conveyance to defendants as not encompassing the Point, and (2) a recently located 1942 photograph, which purportedly depicted an iron post

on the Point, undermined plaintiffs' reliction theory. At the motion hearing, defense counsel focused exclusively on the newly discovered evidence. Defense counsel initially conceded that the 1942 photograph "would not be admissible at trial" because she could not authenticate it, in part because the photographer had died.[2] But counsel went on to apprise the trial court that since filing the motion for new trial, she had located other newly discovered evidence, specifically aerial photographs of the area between 1955 and 1989. According to defense counsel, the aerial photographs also refuted plaintiffs' reliction theory. When the trial court questioned whether defense counsel could "have discovered that [evidence] with due diligence," counsel replied as follows:

> Well, I feel that I did what I could do. Now I don't know. Due diligence, I searched for maps. You know, we're sort of at an inconvenient–or a situation, first of all, that Berrien County doesn't keep historical maps and . . . most counties I believe do. And secondly, that Coloma Township's Hall burned down.
>
> So, those maps, which might have shown what the area looked like in 1960 don't exist. And so whereas other townships would have something like that, that certainly would have probably cleared this thing up to everyone's satisfaction if those maps existed. They don't exist. So it's a little bit of a different situation.

---

[2] Defense counsel described her discovery of the 1942 photograph as follows:

> . . . [T]he photo was discovered by me in an old file of a former client of ours in our basement. Because I was working on what was a glitch in our conflict system and in doing so discovered a name of a person who is relevant in this case in the sense that—and I did not put it in my motion at the time because I was trying to locate the client who had the photograph that I included a picture of was in the file. It is of the point.
>
> However, after . . . trying to contact this person, who would have been the person, obviously, who would have had to authenticate the picture—
>
> * * *
>
> I have come to the conclusion that, which I was afraid in the beginning, that person is deceased. Also, I could not locate any relative of that person.
>
> Therefore, that part of my . . . motion . . .—
>
> * * *
>
> It's not relevant under the court rule because I can't authenticate it.

> Could I have discovered that these—that these maps existed or were being kept in a place? I wish I would have. You know, I—again, I called the state because I knew the state had such things, but they said well, we only go back to '74. The person I talked to then didn't volunteer, let me see if anybody else knows.
>
> So . . . it's a due diligence that I understand if I had asked—if the right person would have answered the phone and I would have figured this out, . . . you know, I did not know that this place existed . . . at Michigan State [University]. I didn't know what they had available. It's a great collection and very valuable. But it's—you know, it's due diligence. I wish I would have discovered it. And I did make efforts to find available maps, but obviously these did exist. It's just that I did not realize where they were collated and collected so that one would be able to find them and use them for this type of purpose.

Plaintiffs' counsel responded that defense counsel had not exercised reasonable diligence, emphasizing that she had 18 months to conduct discovery or investigate defendants' case between the filing of the complaint and the trial, and that she had managed to locate the aerial photographs within just two months after trial. The trial court observed that the evidence appeared to be newly discovered and potentially highly probative of defendants' position, and conditionally granted the motion for new trial, pursuant to MCR 2.611(A)(1)(f), provided that defense counsel file an affidavit documenting her initial, pretrial efforts to obtain aerial photographs.

In April 2006, defendants filed an amended motion for new trial. The amended motion reiterated the request for a new trial under MCR 2.611(A)(1)(f) on the basis of the newly discovered photographic evidence, but the motion was not accompanied by an affidavit of defense counsel. The amended motion also invoked as proper grounds for a new trial subrules (A)(1)(e) (verdict against the great weight of evidence), (g) (trial court's mistake of fact), and (h) (any grounds in the motion for relief from judgment rule, MCR 2.612). When the motion hearing resumed, the trial court noted at the outset that defense counsel still had not supplied the requested affidavit, to which counsel responded as follows:

> I think I told your Honor, I checked here, I checked—I just didn't realize that that place existed. I looked for—I ordered a book of maps, I didn't find it. I went and got maps of fishing things out at the bate [sic] store showing, you know, historical maps. I called—there's a guy in Coloma who knows everything and has written books. I asked him did he have anything? He has a book. And I just didn't realize that there was this repository at Michigan State that carried them. And it was only after I had just went out and looked on the internet [sic], and it wasn't easily available to me to find that place, but it does exist.
>
> So . . . that's the best excuse I have. I mean, I had looked. I couldn't find them here, the aerial maps that they did have at the county were not prior to the dating to the platting of the subdivision. So I can't do any better than that.
>
> *It—obviously they were there. They didn't just appear. It's just that I just didn't realize that Michigan State had that service.* And I do now. And I tell

everybody about it if they're ever looking for anything. *But I just didn't realize it. And I just didn't have anything*. [Emphasis added.]

With respect to the 1942 photograph of the Point, defense counsel further informed the court that since the August 2005 new trial hearing she had located an individual who identified his mother's handwriting on the back of the photograph and supplied an affidavit describing his recollections of the time he spent living near the Point.[3] Most of the parties' arguments at the lengthy new trial hearing concerned defense counsel's newly discovered evidence, and the trial court ultimately granted the motion for new trial on this basis.

Well, I've really gone back and forth on this. Frankly, it's a close call.

But applying the factors of *Parlove v Klein*, 37 Mich App 537[; 195 NW2d 3 (1972), criticized on other grounds in *Kiefer v Kiefer*, 212 Mich App 176, 182; 536 NW2d 873 (1995),] to this case, the court looks at the first factor.

---

[3] Defense counsel explained her subsequent investigative efforts concerning the 1942 photograph as follows:

Additionally, I did find that the picture that did [sic] in a file, and at the time we had the hearing, I had been unable to get a hold of this Mrs. Meisenbach, although I had a phone number for her and I had called. The phone number still worked. The internet [sic] search still had her name on this phone number. I did one of those $30 checks on the internet [sic] so you can chase people down. And I just couldn't figure out. It still showed her as living there, etcetera. But at the time I couldn't follow that through.

In the meantime, I kept calling that number and never—it just kept ringing and nothing ever happened until two weeks ago when someone answered the phone. And not—didn't answer the phone. A voice mail came on said, . . . you've reached the number and leave a message. So I left a message.

And last week I got a phone call from a person named Ed Meisenbach, whose parents owned the property. Apparently his sister lives at that house and lived there with his mother until she passed away in December of either '04 or '05. And he—she said he asked her . . . the sister asked him to call me.

So since then, I have talked to Mr. Meisenbach. He lives in Florida and works at the space—Kennedy Space Center.

And I've asked him some questions. I sent him the picture, the photograph, to see if he recognized it. You know, he recognized his mom's handwriting. He remembers living there from—his mom sold the property in 1997. And I did have him do an affidavit.

It's this evidence, and this would be in the form of aerial photographs over the period between 1955 and 1975, a 20 year period.

Is it newly discovered? Yes. Is the photograph newly discovered and the person that goes with the photograph newly discovered? Yes.

Is the evidence cumulative? Second factor. No. It's not cumulative.

Is it such as to render a different result probable on retrial? This is where I've gone back and forth. And it was a—it was a close call the first time around. I think it's a closer call now. It—you know, viewing this—the evidence in the form of the affidavit and the aerial photos, and further argument regarding the language in the deed and the survey.

So while I can't guarantee that I would reach a different conclusion, I think that there is a decent probability that I might.

And then the last time, again, I've had some problems with. And that is factor four, the party could not with reasonable diligence have discovered and produced it at the trial. It gets close call as to the photographs. They were there. They were in existence at the time of the trial. It's just counsel and her client weren't aware that they were in existence.

And the question is, should they have used more diligence than they did? Sounds like they did use a lot of diligence in trying to come up with evidence on this.

And as to the photograph and the son of the woman who took the photograph or had the photograph, I find that due diligence was used with regard to trying to locate that person that could authenticate the picture, and that that could not have been produced for the—in time for the trial.

So while it is a close call, and as I say I've kind of gone back and forth, I'm going to grant the motion for a new trial.

The trial court ordered that it would take additional testimony pursuant to MCR 2.611(A)(2)(b).

After hearing additional testimony and receiving the new evidence, the trial court reversed its initial decision and quieted title in the Point in defendants. The trial court explained that defendants had refuted plaintiffs' reliction theory because the Point was essentially the same size before the Rupley Subdivision was platted, and that a monument on lot 15, not the water line, marked the lot's southwest boundary.

Plaintiffs contend that the trial court erred in granting defendants' motion for new trial on the ground of newly discovered evidence. We review for an abuse of discretion a trial court's ruling on a motion for new trial. *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Id.*

Under MCR 2.611(A)(1)(f), a court may grant a new trial "on all or some of the issues, whenever" a party's "substantial rights are materially affected" by "[m]aterial evidence, newly discovered, which could not with reasonable diligence have been discovered and produced at trial." The moving party must establish that "(1) that the evidence itself and not merely its materiality is newly discovered; (2) that it is not merely cumulative; (3) that it is such as renders a different result probable on retrial; and (4) that the party could not with reasonable diligence have discovered and produced it at trial." *Hoven v Hoven*, 9 Mich App 168, 173; 156 NW2d 65 (1967).

It has long been held that Michigan courts will not favorably view a motion for new trial citing newly discovered evidence because parties ought to act with "care, diligence, and vigilance in securing and presenting evidence." *Garazewski v Wurm*, 204 Mich 227, 235-236; 169 NW 871 (1918) (internal quotation omitted); see also *Kroll v Crest Plastics, Inc*, 142 Mich App 284, 291; 369 NW2d 487 (1985). A court should deny a motion for new trial alleging newly discovered evidence where the moving party by exercising ordinary "reasonable diligence" would have known these facts at the time of trial. *Second Michigan Coop Housing Ass'n v First Michigan Coop Housing Ass'n*, 362 Mich 460, 463-464; 107 NW2d 905 (1961). A new trial will not be granted where the purported newly discovered evidence consists of public records. *Mexicott v Prudential Ins Co of America*, 263 Mich 420, 425; 248 NW 856 (1933) (moving party did not exercise reasonable diligence where the newly discovered evidence consisted of public probate court records); *Harrison Granite Co v Grand Trunk R Sys*, 175 Mich 144, 155; 141 NW 642 (1913) (moving party did not exercise reasonable diligence where the newly discovered evidence appeared in public inquest motion papers). Furthermore, in considering a motion for new trial on grounds of newly discovered evidence, the lapse of a significant period of time between the commencement of an action and the trial date reflects the moving party's lack of diligence. *Union Guardian Trust Co v Lundy*, 274 Mich 487, 489; 265 NW 443 (1936) (14 months); *Lewis v Whitney*, 238 Mich 74, 77; 213 NW 456 (1927) (30 months); *Romanuick v Highland Park State Bank*, 235 Mich 217, 222; 209 NW 129 (1926) (25 months); *Levy v Israelite House of David*, 216 Mich 373, 377; 185 NW 750 (1921) (six months); *Harrison Granite Co*, *supra* at 155 (34 months).

In this case, the trial court abused its discretion by granting defendants' motion for new trial on the basis of newly discovered aerial photographs. First, 16 months elapsed between the filing of plaintiffs' complaint on January 7, 2004 and the trial's occurrence on June 1, 2005.[4] Our Supreme Court has deemed lesser intervals between the filing of an action and the trial date as establishing a lack of reasonable diligence. *Union Guardian Trust Co*, *supra* at 489 (14 months); *Levy*, *supra* at 377 (six months).

Furthermore, the parties do not contest that they should have realized from the outset of the litigation the potential probative value of photographic evidence, aerial or otherwise. We observe that the exhibit lists the parties filed well before trial specifically contemplated potential

[4] Defense counsel filed her appearance on February 9, 2004, and defendants filed their answer on February 27, 2004.

photographic evidence. Defendants' list of exhibits included the warranty deed conveying plaintiffs' property, the deed conveying defendants' property, property surveys, an abstract of title to defendants' property, a letter from an attorney to George Dorey's mother, and "any exhibits identified by plaintiffs." Plaintiffs identified, among other exhibits, any and all satellite images of the subject property, and any and all maps of the property. And within two months after the June 2005 trial, defense counsel "discovered" the relevant photographs at a major public university.

Keeping in mind the disfavored nature of motions for new trial, *Garazewski*, *supra* at 235-236, we conclude that defendants failed to demonstrate that with the exercise of reasonable diligence, they could not have produced the newly discovered aerial photographs in time to present at trial. MCR 2.611(A)(1)(f); *Second Michigan Coop Housing Ass'n*, *supra* at 463-464. In summary, the trial court's grant of a new trial on the basis of the newly discovered aerial maps fell beyond the range of principled outcomes because (1) about 16 months passed between the commencement of the action and the trial, (2) the parties knew of the potential importance of the aerial photographs well before trial, see *Union Guardian Trust Co*, *supra* at 489; *Levy*, *supra* at 377, and (3) the newly discovered photographic evidence consisted of public records undisputedly located at Michigan State University, and which defense counsel quickly found within two months of the trial. MCR 2.611(A)(1)(f); see also *Mexicott*, *supra* at 425; *Harrison Granite Co*, *supra* at 155.[5]

With respect to the 1942 photograph of the Point and Ed Meisenbach's related affidavit, we reach a similar conclusion. The photograph appeared from defense counsel's firm's own client files. In the course of the two new trial hearings, defense counsel offered only a vague explanation for her failure to locate the photograph or search for similar items from landowners who had resided close to the Point before the platting of Rupley's subdivision. In light of these considerations, and the facts that defense counsel had ample time (nearly 16 months) before trial to search for photographs or other information from adjacent landowners, and that she successfully located the old photograph within two months after the 2005 trial, we conclude that the trial court abused its discretion in granting a new trial on the basis that defense counsel exercised due diligence in locating the 1942 photograph and discovering its genesis.

---

[5] Defendants' brief on appeal recycles their cursory and unsupported contentions that a new trial was warranted under MCR 2.611(A)(1)(e), (g), and (h), which we decline to address. An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims; nor may he give issues cursory treatment with little or no citation of supporting authority. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003).

We reverse the trial court's grant of a new trial premised on newly discovered evidence, and reinstate the June 16, 2005 judgment quieting title partially in favor of plaintiffs.[6]

Reversed.

/s/ Jane E. Markey
/s/ William C. Whitbeck
/s/ Elizabeth L. Gleicher

[6] Given our resolution of this dispositive issue, we need not review plaintiffs' other arguments on appeal.