# STATE OF MICHIGAN

# COURT OF APPEALS

JOHN and MICHALENE O'BRIEN,

Plaintiffs-Appellants,

v

JAMIE and MICHELLE HICKS, MICHELLE M. HIGGINS and JUDITH MARCEAU,

Defendants-Appellees.

UNPUBLISHED
November 20, 2012

No. 307332
Otsego Circuit Court
LC No. 09-013121-CH

Before: BORRELLO, P.J., and FITZGERALD and OWENS, JJ.

PER CURIAM.

In this property rights case, plaintiffs appeal the circuit court's opinion and order concluding that defendants have access to Otsego Lake as conveyed by the plat dedication, but do not have the right to engage in activities that are not incidental to navigation. The order provided an exception for five named defendants who were also granted a prescriptive easement for riparian purposes, such as picnicking, sunbathing, constructing and maintaining a dock and the overnight mooring of boats. Plaintiffs also appeal the trial court's award of $500 in attorney fees to defendants. We affirm in part and reverse and remand in part.

## II. BASIC FACTS AND PROCEDURAL HISTORY

This case involves one of two parkways located beside Otsego Lake in the Hazel Banks Plat. The plat contains parkways between lots 2 and 3 and lots 6 and 7, which run perpendicular to Otsego Lake. The parkways are identified as "Parkway 2-3" and "Parkway 6-7." The Plat of Hazel Banks was recorded on March 25, 1943 and contains a dedication that reads in part, "and that the streets and alleys and parkways as shown on said plat are hereby dedicated to the use of the public." In a 2003 case, *McDonald v Hicks* (Otsego County Circuit Court Case No. 03 - 10398-CH) the court vacated the "public's" interest in parkway 2-3 and parkway 6-7 because the dedication was never accepted by any public authority, and thus failed as a matter of law. However, the *McDonald* court also concluded that "[t]he plattors of the Hazel Banks Subdivision clearly intended, and specifically established, 2 separate parkways in the plat to provide for balanced access by the back-lotters." That case addressed parkway 2-3 more specifically, and concluded that the defendants (back-lot owners) had established a reasonable objection to the plaintiff's proposed vacation of parkway 2-3. It concluded that "the elimination of platted

Parkway 2-3 would certainly lead to an overburdening of the Subdivision's only other remaining parkway, located between Lots 6-7."

Plaintiffs O'Brien own two lakefront lots (7 and 8) in the Hazel Banks subdivision. Parkway 6-7 abuts plaintiffs' lot 7. Defendants are owners of non-lakefront lots in the Hazel Banks subdivision. Several defendants used parkway 6-7 for a number of different riparian and non-riparian purposes. Some defendants erected permanent mooring structures on the lake bottom and have boats docked at the end of parkway 6-7.

In 2009, the O'Briens filed a complaint seeking to vacate parkway 6-7 so that no one could use it to access Otsego Lake, seeking an injunction to prohibit use of, and to require removal of a dock at parkway 6-7, and seeking to prevent defendants and members of the general public from mooring boats, erecting docks, erecting boat hoists and wet anchorage devices, and storing personal property in the riparian extension of parkway 6-7. Before trial, the court dismissed the claim concerning vacation of parkway 6-7. The issue remaining for the trial court was whether defendants and other lot owners should have rights in parkway 6-7.

The trial court issued a written opinion dated May 2, 2011, ruling that defendants have access to Otsego Lake as conveyed by the plat dedication, but they do not have the right to engage in activities that are not incidental to navigation. However, the trial court granted defendants-appellees Hicks, Marceau, and Higgins a prescriptive easement for riparian purposes.[1]

The court entered an order granting five named back-lot owners riparian rights on parkway 6-7, including but not limited to, sunbathing, lounging, picnicking and overnight mooring of boats. The court clarified that these rights were not personal rights, but constituted a real property interest that runs with the land of the respective lot owners. The court also concluded that all Hazel Banks lot owners have lake access rights in parkway 6-7 (separate and distinct from riparian rights). And the public has no right of any kind in either parkway lot.

The trial court heard post-trial motions and based on those motions, an order was entered regarding the scope of the subject parkway. A second order granting defendants' motion for attorney fees was entered on October 17, 2011. A final order denying plaintiffs' motion for reconsideration was entered on November 14, 2011. Plaintiffs now appeal.

## II. STANDARDS OF REVIEW

This Court reviews de novo a trial court's ruling in a declaratory action. *Toll Northville Ltd v Northville Twp,* 480 Mich 6, 10; 743 NW2d 902 (2008). The trial court's holding regarding the existence of a prescriptive easement is reviewed de novo. *Blackhawk Dev Corp v Village of Dexter,* 473 Mich 33, 40; 700 NW2d 364 (2005). The trial court's factual findings, including the scope of rights under an easement, are reviewed for clear error. *Dobie v Morrison,*

[1] The trial court also granted a prescriptive easement to defendants Debra and Noel Altman and Sheri Inglehart, however they were not parties to this appeal.

227 Mich App 536, 541; 575 NW2d 817 (1998). "A finding is clearly erroneous where, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made." *Alan Custom Homes, Inc v Krol,* 256 Mich App 505, 512; 667 NW2d 379 (2003).

## III. ANALYSIS

Plaintiffs argue that the trial court erred in concluding that defendants had acquired riparian rights through prescriptive easement. We agree.

A prescriptive easement may be acquired in two ways. First, a prescriptive easement can be established by a use that is made pursuant to the terms of an intended but imperfectly created servitude, when all the other requirements are met. *Plymouth Canton Community Crier, Inc v Prose,* 242 Mich App 676, 684; 619 NW2d 725 (2000), quoting 1 Restatement of Property, 3d, Servitudes, § 2.16, pp 221–222. Thus, when an express easement is treated as though it had been properly established for the prescriptive period, although it ultimately fails because of a defect, a prescriptive easement is established. *Prose,* 242 Mich at 684–685.

Second, a prescriptive easement may arise in a manner similar to adverse possession, when use of another's property has been open, notorious, adverse or hostile, and continuous for a period of 15 years. MCL 600.5801(4); *Higgins Lake Prop Owners Ass'n v Gerrish Twp,* 255 Mich App 83, 118; 662 NW2d 387 (2003). Adverse or hostile use is use inconsistent with the right of the owner and cannot be established if the use is permissive, regardless of the length of the use. *Id.* at 681 (citation omitted); *West Mich Dock & Market Corp v Lakeland Investments,* 210 Mich App 505, 511; 534 NW2d 212 (1995). It is under this second method that defendants claim to have gained a prescriptive easement on parkway 6-7.

Defendants claim a prescriptive easement because they, and their predecessors in title, openly and notoriously maintained a dock and moored boats adjacent to parkway 6-7, without permission and in a manner consistent with traditional riparian rights, continuously for the prescriptive period of 15 years. It is well established that a riparian owner enjoys "certain exclusive rights" which include "the right to erect and maintain docks along the owner's shore, and the right to anchor boats permanently off the owner's shore." *Thies v Howland,* 424 Mich 282, 288; 380 NW2d 463 (1985) (citations omitted). A nonriparian owner, on the other hand, has "a right to use the surface of the water in a reasonable manner for such activities as boating, fishing and swimming," as well as "the right to anchor boats temporarily." *Id.; Jacobs v Lyon Twp (After Remand),* 199 Mich App 667, 671–672; 502 NW2d 382 (1993). The extent to which the right of public access includes the right to erect a dock or boat hoist or the right to sunbathe and lounge at the road ends depends on the scope of the dedication. Additionally, the Court stated in *Thies* that rights normally afforded exclusively to riparian lot owners may be conferred by easement. *Id.* at 288; *Little v Kin,* 249 Mich App 502, 509; 644 NW2d 375 (2002).

The *Jacobs* court considered the circumstances that existed at the time of the dedication. In *Jacobs* the plat was dedicated in 1902. There was evidence presented that members of the public had used the area for the disputed uses as far back as the 1920s. Yet, the *Jacobs* court concluded the activities were not within the scope of the dedication. The testimony of the witnesses also indicated that during the 1920s and 1930s few people lived in the area and that

those who did freely used the entire lakefront area for recreational purposes and for access to the lake. The *Jacobs* court reversed the trial court regarding the shore activities and the erection of boat hoists, concluding that such uses were not intended by the plattor and that the trial court's findings in that regard were not supported by the record and were clearly erroneous.

In *Higgins Lake Property Owners Ass'n*, 225 Mich App 83, a panel of this court addressed the scope of the public's right to access the lake from roads that terminate at the water's edge pursuant to dedicated plats. Historically, owners of backlots in the subdivisions surrounding Higgins Lake, as well as members of the general public, used the road ends for lounging, sunbathing, and picnicking, and also moored boats and/or placed boat hoists at the road ends.

This Court rejected the plaintiffs' argument that *Jacobs* was dispositive, but instead specifically analyzed the facts of the case. After review, the court was unable to distinguish the dedications at issue from *Jacobs* "in a meaningful way." Although the defendants again presented evidence that the road ends had historically been used for the disputed activities, in each case the court decided that, in light of the sparse population of the area at the time of the dedications, it was reasonable to conclude that the dedications intended nothing more than access to the lake. If road ends were appropriated to private use by a few individuals, owners would not be inclined to dedicate such roads to public use. If the owners wanted to dedicate the road ends to private use, they were free to do so at the time of the dedication.

In *Higgins Lake*, the court also rejected the defendant's reliance on *Dobie v Morrison*, 227 Mich App 536; 575 NW2d 817 (1998). The *Higgins Lake* Court concluded that the historical uses of the road ends were relevant to the determination of the scope of the dedication, and that the intent of the plattor should be determined with reference to the language used in connection with the facts and circumstances existing at the time of the grant. Accordingly, the Court decided that, in the absence of evidence that the historical uses of the road ends were contemporaneous with the dedication, the road end activity occurring after the dedication is not helpful in determining the dedicator's intent.

As case law makes clear, the rights of nonriparian owners should be determined by examining the language of the grant. *Dyball v Lennox,* 260 Mich App 698, 703; 680 NW2d 522 (2004). "Where the language of a legal instrument is plain and unambiguous, it is to be enforced as written and no further inquiry is permitted." *Little,* 468 Mich at 700. Courts should consider the circumstances existing at the time of the grant to determine the scope of the dedication but only if the language of the grant is ambiguous. *Id.* at 703–704. Here, the dedication unambiguously grants use of the parkway to the public. The prior circuit court case, *McDonald v Hicks* (Otsego County Circuit Court Case No. 03 -10398-CH) held that subdivision lot owners had established a reasonable objection to the vacation action of parkway 2-3 by the plaintiff riparian lot owner. That case established that both parkway 2-3, and parkway 6-7 "specifically provide the owners of all lots in the Hazel Banks Subdivision two clearly defined legal access points to Otsego Lake." However, the *McDonald* case did not specify the scope of that access, other than to require that "owners of all property located within Hazel Banks Subdivision have a joint obligation to maintain the parkways between lots 2 and 3 and between lots 6 and 7 proportionate to the total number of lots they own . . .".

Because the scope of the use in the dedication was undefined either by that document, or by the circuit court in *McDonald*, it is appropriate to consider the circumstances surrounding the grant of the easement to determine the dedicator's intent. Limited evidence, however, was presented by defendants about how parkway 6-7 was used at the time the plat was dedicated in 1943. Sheri Inglehart, whose grandfather originally owned much of the relevant property, only testified about use of the property after it had been dedicated; she provided no information about how her grandfather had intended the parkways to be used.

Specifically, language in a plat dedicating certain property for "the use" of lot owners is generally considered to grant an easement to those lot owners to whom the use is dedicated. *Dobie v Morrison,* 227 Mich App 536, 540; 575 NW2d 817 (1998). Further, "[t]he use of the terms 'streets' and 'alleys' implies passage, and public roads that terminate at the edge of navigable waters are presumed to provide public access to the water . . . [Thus], the burden rests with defendants to establish that anything other than mere access to the lake was intended." *Higgins Lake Prop Owners Ass'n v Gerrish Twp,* 255 Mich App 83, 102; 662 NW2d 387 (2003).

Here, the trial court accepted defendants' claim of a prescriptive easement on the basis that a prescriptive easement had arisen through defendants' historical use of parkway 6-7. A prescriptive easement arises in a manner similar to adverse possession, when there is "use of another's property that is open, notorious, adverse, and continuous for a period of fifteen years." *Higgins Lake Prop Owners Ass'n,* 255 Mich App at 118. We conclude that there is no basis for the establishment of a prescriptive easement because of the absence of the element of adversity. The backlot owners clearly had some right to use parkway 6-7, just not as extensive a use as they believed. Hostile or adverse use cannot be established if the use is permissive, regardless of the length of the use. *West Michigan Dock & Market Corp v Lakeland Investments,* 210 Mich App 505, 511; 534 NW2d 212 (1995). Here, a prescriptive easement could not have arisen because defendants and other lot owners used parkway 6-7 for an extended time period openly and without any dispute arising. The use of parkway 6-7 was a permissive and accepted use and cannot be deemed to be hostile. One may not acquire a prescriptive easement to property already subject to an easement for the benefit of an entire subdivision and created through a private dedication simply because an owner "overuses" the easement. *See Banacki v Howe* (unpublished per curiam opinion, docket no. 302778, rel'd March 20, 2012).

As far as plaintiff's claim that the trial court erred in awarding sanctions to defendants for frivolous lawsuit, we conclude that plaintiff abandoned this argument on appeal, because it was not included as a "question presented" as required by court rule. An issue is abandoned when a party fails to raise it in the statement of questions presented. See *Ypsilanti Fire Marshal v Kircher,* 273 Mich App 496, 543; 730 NW2d 481 (2007). Nonetheless, were we to address the matter of the $500 in attorney fees awarded to defendants we would affirm the trial court on the merits. The trial court made clear that the sanctions were assessed against plaintiffs for the portion of the lawsuit requesting that the trial court vacate parkway 6-7. This matter was clearly resolved by the 2003 complaint to vacate parkway 2-3 in the matter of *McDonald v Hicks* (Otsego County Circuit Court Case No. 03-10398-CH). Although the pleadings did not specifically address whether parkway 6-7 should be vacated, the former opinion made clear that both parkway 2-3 and parkway 6-7 were points of access to Otsego Lake and by inference that parkway 6-7 was to be maintained as an access point. Pursuant to MCL 600.2591: (1), at least one of the following conditions must be met for an action to be frivolous (1) the primary purpose

of the action was to harass, embarrass or injure the prevailing party, (2) the party had no reasonable basis to believe the facts underlying the party's legal position were in fact true, or (3) the party's legal position was devoid of arguable legal merit. Plaintiffs' predecessor in title was a party to the previous lawsuit, and plaintiffs acknowledged that they were aware of the lawsuit. Therefore, we conclude that plaintiffs were aware that the count seeking to vacate parkway 6-7 was devoid of legal merit and the trial court did not err in awarding attorney fees.

Affirmed as to the trial court's award of attorney fees, and reversed and remanded for proceedings consistent with this opinion on the matter of prescriptive easement.

/s/ Stephen L. Borrello
/s/ E. Thomas Fitzgerald
/s/ Donald S. Owens