

STATE OF MICHIGAN
IN THE COURT OF APPEALS

WILLARD P. WILCOX, GORDON W. WILCOX,
THEODORE W. WILCOX, DAVID W. PALMER,
And CAROLYN P. SHAH,

Plaintiffs/Appellees

v

ELK RAPIDS TOWNSHIP and ELK RAPIDS
TOWNSHIP BOARD,

Defendants/Appellants

and

ELK RAPIDS SPORTSMAN'S CLUB, INC., a
Michigan nonprofit corporation,

Intervening Defendant/Appellant.

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ELK RAPIDS SPORTSMAN'S CLUB, INC.'S
REPLY BRIEF ON APPEAL IN CASE NO. 261142

* * * ORAL ARGUMENT REQUESTED * * *

Dated: June 7, 2005

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INTRODUCTION

On May 4, 2005, Intervening Defendant/Appellant Elk Rapids Sportsman's Club, Inc. ("ERSC" or the "Club") filed its initial brief in Case No. U-261142. On May 24, 2005, Plaintiffs filed their response brief. The Club now files this reply focusing on new matters raised by Plaintiffs. The Club's reliance on its initial brief, and corresponding failure to address any of Plaintiffs' assertions, should not be deemed to constitute an acceptance of any assertion.¹

ARGUMENT

I. THE TOWNSHIP'S LAND IS OWNED IN FEE SIMPLE, AND IS NOT RESTRICTED IN USE NOR SUBJECT TO REVERSION.

The Club explained (pp 7-8) that the Township owns the land in fee simple, pursuant to the terms of Mina Wilcox's Codicil and the deed from the administrator of her estate (Appendices 4 and 5).² Plaintiffs respond (pp 10-19) that there is a "line of cases" concerning lesser interests in property that, unlike a fee simple interest, may be abandoned. Plaintiffs present the same type of analysis that misled the Circuit Court – they simply assume that a lesser property interest exists. The essential first step in the analysis, however, is to examine the controlling documents to determine the nature of the Township's property interest.

Here, the Executor's Deed has a broad granting clause that transferred all property interests, including reversions and remainders, to the Township forever (Appendix 5). There is no reverter clause in any document. Therefore, an unqualified title in fee simple passed to the Township. Quinn v Pere Marquette Ry Co, 256 Mich 143, 151; 239 NW 376 (1931).

¹ On May 9, 2005, Defendants/Appellants Elk Rapids Township and Elk Rapids Township Board (collectively, the "Township") filed an initial brief in Case No. U-261139, which the Court has consolidated with this case. The Club concurs with the Township's arguments, but maintains its own positions to the extent that the Township may take a different position.

² Parenthetical page cites are to the referenced party's initial brief. Unless otherwise indicated, Appendix cites are to the Appendices accompanying the Club's initial brief.

There is no merit in Plaintiffs attempt (p 15) to limit Quinn, since Quinn, set forth broad principles supported by numerous citations. There is also no merit in Plaintiffs' attempt (p 14) to rely on Quinn for the proposition that there may be a reversion without a reverter clause. Quinn simply noted that two old cases from other states reached a result contrary to Michigan law. Irrespective of what might be (or have been) the law in other states, as reflected in Michigan dicta, Am Jur or otherwise, the Circuit Court was required to follow controlling Michigan law.

Our Supreme Court has just confirmed the controlling law that the Club previously presented (pp 7-8), but which the Circuit Court failed to even consider, and which Plaintiffs now seek to distinguish. In Michigan Dep't of Nat'l Resources v Carmody-Lahti Real Estate, Inc., ___ Mich ___; ___ NW2d ___ (May 27, 2005), our Supreme Court followed Quinn, explaining that an inquiry into the scope of the interest conveyed by a deed “necessarily focuses on the deed’s plain language” (Slip Opinion, p 12, attached as Appendix 10). Michigan Dep't of Nat'l Resources concerned an easement, but our Supreme Court set forth a detailed analysis contrasting that easement with the fee interest in Quinn. The Court explained that the deed in Quinn contained broad conveyance language (like the conveyance language here) that “unambiguously showed the grantors’ intent to convey their entire estate” (Appendix 10, p 21, emphasis added). The Court further explained:

“‘Had the grant contained a reverter clause the title would have been a determinable fee upon condition subsequent.’

* * *

“Fee simple estates revert to the grantor only if they contain language providing for reversion” (Appendix 10, pp 26-27, quoting Quinn, supra, 256 Mich at 152, emphasis added).

The Circuit Court violated this controlling Michigan law by failing to recognize that the Township obtained an unqualified fee simple interest through the granting clause of the Executor’s Deed (Appendix 5). The Court-ordered reversion to Plaintiffs is unlawful because there is no

reverter clause in any document. This required result is unaffected by Plaintiffs' (and the Circuit Court's) heavy reliance on Baldwin Manor Inc v City of Birmingham, 341 Mich 423; 67 NW2d 812 (1954), particularly since the instrument of conveyance in that case contained a reverter clause. 341 Mich at 425-26. Our Supreme Court explained:

“Inasmuch as Mrs. Baldwin’s conveyance contained a reverter clause we are not concerned with issues that might be raised had such clause been omitted. See in this connection Briggs v. City of Grand Rapids, 261 Mich. 11, 14, 245 N.W. 555.” (341 Mich at 434).

The cited page of Briggs (261 Mich at 14) discusses Quinn.

II. THE TOWNSHIP DID NOT ABANDON THE LAND.³

The Club explained (pp 8-13) that assuming for the sake of argument that the Township had less than a fee simple interest in the land, there was no abandonment that would operate as a reverter to Plaintiffs. The Court need not reach this question since the first question is dispositive (see also, Appendix 10, p 11, explaining that the appeal concerned interpretation of a deed to determine the property interest conveyed, and not how the land ought to be used).

Plaintiffs respond (pp 19-31, see also Counter Statement of Facts at pp 2-10) with a barrage of alleged “facts” that are apparently designed primarily to confuse the analysis and vilify the Club. The page limit for this reply precludes a full response, but one is not necessary, since Plaintiffs’ alleged facts are largely irrelevant to a correct analysis focusing on the documents (attached as Appendices to the Club’s initial brief). In summary, the Club objects to Plaintiffs’ tactics; disputes Plaintiffs’ allegations; and stands ready to provide any additional information or analysis requested by the Court.

³ Plaintiffs suggest (pp 8, 12, 25) that this issue is not properly before the Court, claiming that the Club did not raise it below. Plaintiffs’ suggestion lacks merit because they raised the issue (e.g., Plaintiff’s Appendix 2, Argument D), the Club opposed it (e.g., 11/15/04 TR 35-36), and the Club is aggrieved by the Circuit Court’s decision (Appendix 1).

Two points bear emphasis. First, nothing has been abandoned. The Township has continued to use the property as Mina Wilcox used it during her lifetime, and as she suggested that the Township use it. It is Plaintiffs who propose to change that use, since they do not share Mina Wilcox's view that shooting is recreation, and that a shooting range is appropriate on the land. If Mina Wilcox wanted to limit the Township's discretion or evict the Club (as Plaintiffs contend), then her Codicil would not have expressed her "wish" that the Township continue "at the discretion of the Township Board" entering leases with the Club (Appendix 4).⁴

Second, Mina Wilcox established no limit on the Township's discretion to enter leases with the Club, and imposed no requirement that the Township establish any type of "park" at any particular time.⁵ The Circuit Court violated the controlling documents by precluding further leases,

⁴ Plaintiffs complain (pp 9, 24, 25) about the 1986 lease. The Township's and Club's attempts to negotiate a lease that would be agreeable to Plaintiffs failed due to Plaintiffs' insistence that the Club vacate the property (11/15/05 TR 31) Plaintiffs' additional contentions (pp 5, 6, 9, 23, 24, 26, 32) that the Club must be located on 3 acres and fenced in are inaccurate and disputed. Mina Wilcox was aware of, and consented to, the Club's use of the property beyond the 3 acres described in the 1938 lease (Club's Answer to Complaint, ¶¶ 22, 23). Ten years after that lease, the Codicil (Appendix 4) and Deed (Appendix 5) said nothing about fencing, and gave the Township discretion to continue leasing to the Club "the site of its present shooting range." Plaintiff also inaccurately indicate (pp 7, 27) that the appropriate rent is \$1500 per month and that the Club agreed to this amount. This amount is based on the Club paying rent on the property and its own buildings as a condition of a stay pending this appeal, and subject to return depending on this Court's decision. The only evidence of appropriate rent on this record is Mina Wilcox's 10-year lease to the Club for one dollar (\$1.00) and two memberships in the Club (Appendix 3).

⁵ There are various types of "parks" and permissible uses of the property, as the Club previously explained (pp 11-13). Plaintiffs propose (pp 23-24, and the Circuit Court agreed (Appendix 1, p 7)) to re-write the documents to require, for example, that the property must be completely open to the public, free of charge. In fact, Mina Wilcox's Codicil states: "It is my understanding that the use of Michigan public parks is not denied to any person because of race, creed or color" (Appendix 4). The Club does not deny access based on race, creed, gender or other such criteria (8/19/04 TR 5-6; 11/15/04 TR 6). The Club is a nonprofit corporation that collects money to cover expenses, and maintains certain rules as necessary to safely operate a shooting range (Club answer, ¶ 43). It is well-established that private entities may contract, operate and charge for facilities in parks. Huron-Clinton Metropolitan Authority v Attorney General, 146 Mich App 79; 379 NW2d 474 (1986). It is also well known, and the Court might take judicial notice, that various parks have entrance fees, shooting ranges, hours of operation and other rules.

and exceeded its authority by usurping the Township's legislative policy decisions regarding when and how to use its land. See, in addition to cases cited previously, Warda v City Council of the City of Flushing, ___ Mich ___; ___ NW2d ___ (May 18, 2005), where our Supreme Court reversed an analogous judicial intrusion into municipal decisionmaking due to the absence of any fixed standard to review the municipality's exercise of discretion (Slip Opinion, pp 8, 10, attached as Appendix 11).

III. PLAINTIFFS' CLAIMS ARE BARRED BY CONSENT, WAIVER AND ESTOPPEL.

The Club explained (pp 13-15) that equity also bars Plaintiffs' claims. Plaintiffs' response (pp 31-35) adds little to the analysis, but asserts as a matter of policy that there would be a chilling effect on donations if the Circuit Court's decision is reversed. Plaintiffs' assertion is backwards. It is the intent of the donor, not the intent of some of the donor's heirs, that is controlling. If a donor wants a particular result, then the donor presumably will draft his or her documents accordingly, and courts are bound to enforce the documents as written. Donations are chilled where, like here, a court re-writes documents and ignores history in favor of some plaintiff's new claim. See, in addition to cases cited previously, Thom v Rasmussen, 136 Mich App 608, 613; 358 NW2d 569 (1984) (explaining that the acquiescence of the plaintiffs and other residents for at least 25 years strongly supported the Court's determination of the scope of a dedication of property).

Respectfully submitted,

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Dated: June 7, 2005

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