COURT OF APPEALS
DECISION
DATED AND FILED

June 6, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1065 **Cir. Ct. No. 2006CV1668**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

BLOOMFIELD ROAD, LLC,

PLAINTIFF-RESPONDENT,

V.

SCHMIDT FINANCIAL GROUP, JOHN KOSOWSKI, JUDITH KOSOWSKI, RAYMOND KOSOWSKI, KAREN KOSOWSKI, ROBERT MARTWICK, GLORIA MARTWICK, KENNETH RAPP, JANET L. RAPP AND BERNADINE DEMICHELE,

DEFENDANTS,

PAUL DEMICHELE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed*.

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Paul DeMichele appeals pro se from an order declaring that owners of adjacent lakefront properties on Powers Lake are required to place their piers based on the right angle method, and enjoining DeMichele from placing his pier in a location declared to be an unreasonable interference with the riparian rights of Bloomfield Road, LLC. DeMichele argues that the trial court's decision is based on the misapprehension that the right angle method is the general rule in Wisconsin, that the placement of DeMichele's pier was not long standing, and that there is a question as to the legality of DeMichele's pier.[1] We reject DeMichele's contentions and conclude that the trial court properly exercised its discretion in fashioning equitable relief in this case. We affirm the order.

¶2 Bloomfield Road commenced this action against DeMichele and other owners of adjacent lakefront property to enforce its right to full access and use of its riparian zone on Powers Lake.[2] It sought declaratory and injunctive relief in addition to injunctive relief under WIS. STAT. § 30.294 (2009-10),[3] to abate the private nuisance caused by encroachment into its riparian zone.

> Wisconsin case law sets forth three general methods for determining where riparian boundaries lie. First, "where

[1] DeMichele's appellant brief is lacking in organization and is rife with assertions of irrelevant facts and citation to materials not presented during the trial to the court. Our statement on DeMichele's arguments is what we discern from his brief. To the extent DeMichele raises other arguments, we do not address them as undeveloped. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

[2] Property owners have riparian rights, including the right to place a pier on water frontage. ***Doemel v. Jantz***, 180 Wis. 225, 234, 193 N.W. 393 (1923). Lakefront property owners are also entitled to exclusive possession of the waterfront to the extent necessary to reach navigable water, to have reasonable ingress and egress to navigable water, and to have reasonable access for bathing and swimming. ***Nosek v. Stryker***, 103 Wis. 2d 633, 640, 309 N.W.2d 868 (Ct. App. 1981).

[3] All references to the Wisconsin Statutes are to the 2009-10 version.

> the course of the shore approximates a straight line and the onshore property division lines are at right angles with the shore, the boundaries are determined by simply extending the onshore property division lines into the lake." Second, if "the boundary lines on land are not at right angles with the shore but approach the shore at obtuse or acute angles … the division lines should be drawn in a straight line at a right angle to the shoreline without respect to the onshore boundaries." Third, "where the shoreline is irregular … then the boundary line should be run in such a way as to divide the total navigable waterfront in proportion to the length of the actual shorelines of each owner taken according to the general trend of the shore."

Manlick v. Loppnow, 2011 WI App 132, ¶14, 337 Wis. 2d 92, 804 N.W.2d 712 (citations omitted) (quoting ***Nosek v. Stryker***, 103 Wis. 2d 633, 635-37, 309 N.W.2d 868 (Ct. App. 1981)).

¶3 DeMichele owns property with his wife, Bernadine DeMichele, which has no lake frontage. The DeMicheles and Kenneth and Janet Rapp own a ten-foot wide walkway to the lakeshore that widens to twenty-five feet at the lake. They have a joint pier on the lake at an angle that lies within the extended boundary lines of the lakefront portion of the walkway. To the south of DeMichele's pier is the pier placed by owners of the Breezy Oaks Condominium property.[4] That pier is angled northerly in approximation to the extended lot lines. To the north of DeMichele's pier is the pier placed by Bloomfield Road. Bloomfield Road's pier is placed roughly in the center of its lake frontage and at a right angle to the shore. As a result of the configuration of the three piers, DeMichele's pier is in close proximity to the Bloomfield Road pier.

[4] The Breezy Oaks owners are the remaining defendants in this action.

¶4 Bloomfield Road sought an injunction requiring the adjacent property owners to place their piers based on the right angle method.[5] The case was tried to the court. It determined that the shoreline is not irregular, that application of the right angle method has the advantage of giving all owners a riparian zone proportionate to their lakefront ownership, that an overwhelming majority of the piers on Powers Lake are placed at right angles to the shore, that use of the right angle method would not have a domino effect on surrounding properties, and that there was no showing that DeMichele and Breezy Oaks would incur costly modifications to enjoy the riparian zone established by the right angle method. It further determined that application of the extended lot line method is manifestly unfair to Bloomfield Road as it would severely compact its riparian zone if its northly neighbor sought the same delineation. The court ordered the placement of piers by the parties to the action according to the right angle method.

¶5 The determination of what method to use in determining the riparian zone "is a discretionary decision to be determined based upon principles of fairness." ***Manlick***, 337 Wis. 2d 92, ¶19. Issues of fairness are founded in equity. ***Id.*** We review whether the trial court properly exercised its discretion in concluding that the right angle method was the most equitable method by which to define the parties' riparian rights. *See* ***id.***, ¶23; *see also* ***Torke/Wirth/Pujara, Ltd. v. Lakeshore Towers of Racine***, 192 Wis. 2d 481, 508, 531 N.W.2d 419 (Ct. App. 1995) (a decision in equity is reviewed under the erroneous exercise of discretion standard). We will affirm a discretionary determination when the record reflects

[5] The method described as drawing division lines in a straight line at a right angle to the shoreline is also known as the coterminous method. ***Manlick v. Loppnow***, 2011 WI App 132, ¶¶14-15, 337 Wis. 2d 92, 804 N.W.2d 71. As the parties do, we utilize the term right angle method.

that the trial court considered the applicable law and facts of record and reasoned to a conclusion that a reasonable judge could reach. ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16, 20-21 (1981).

¶6 DeMichele first argues that the trial court erred when it said the right angle method is the general rule in Wisconsin. This is a claim that the trial court proceeded on an incorrect view of the law. *See* ***Connor v. Connor***, 2001 WI 49, ¶18, 243 Wis. 2d 279, 627 N.W.2d 182 (an erroneous exercise of discretion will result if our review of the record indicates that the trial court applied the wrong legal standard). DeMichele's claim is a nonstarter. The trial court specifically acknowledged the holding in the seminal case ***Nosek*** that there is no set rule in Wisconsin regulating pier placement. *See* ***Nosek***, 103 Wis. 2d at 634-35. The trial court properly recognized that ***Nosek***'s general rule is that where the course of the shore approximates a straight line and lot lines are at right angles to the shore, the riparian boundaries can be determined by simply extending the lot lines but where lot lines are not at right angles to the shore it is more appropriate to draw the riparian division lines in a straight line at a right angle to the shore. *See* ***id.*** at 635-36. Additionally the trial court repeated DeMichele's citation to ***Borsellino v. Kole***, 168 Wis. 2d 611, 617, 484 N.W.2d 564 (Ct. App. 1992), that the methods are "not wooden requirements," and that ***Nosek***'s description of when each of the methods is appropriate "was descriptive of a general rule rather than a mandatory one." We are not persuaded that the trial court proceeded on an incorrect view of the law.

¶7 DeMichele next contends the trial court erred in assessing the length of time that his pier had been in its location. This is a claim that the trial court relied on a finding of fact that is clearly erroneous. We review the record in the light most favorable to the trial court's finding to determine whether that finding is

clearly erroneous. ***Rohde-Giovanni v. Baumgart***, 2003 WI App 136, ¶18, 266 Wis. 2d 339, 667 N.W.2d 718. The trial court's finding of fact is clearly erroneous when it is against the great weight and clear preponderance of the evidence. ***Royster-Clark, Inc. v. Olsen's Mill, Inc.,*** 2006 WI 46, ¶12, 290 Wis. 2d 264, 714 N.W.2d 530. "Under the clearly erroneous standard, 'even though the evidence would permit a contrary finding, findings of fact will be affirmed on appeal as long as the evidence would permit a reasonable person to make the same finding.'" ***Id.*** (citation omitted). We cannot reject an inference drawn by a fact finder when the inference drawn is reasonable. ***Onalaska Elec. Heating, Inc. v. Schaller***, 94 Wis. 2d 493, 501, 288 N.W.2d 829 (1980).

¶8 The specific finding to which DeMichele's argument pertains is that "there is abundant evidence that both Breezy Oaks and Raap/DeMichele piers were formerly, and fairly recently, in different locations." The trial court identified the two picture exhibits it relied on in determining that the piers had at one time been in previous locations. Testimony identified that the "old piers" depicted in a 1997 photo were the DeMichele and Breezy Oaks piers and they were in different locations at a previous point in time. Testimony also explained that the Breezy Oaks pier was previously located in a line with a staircase coming down a hill to the lakeshore and that the DeMichele pier was more or less a ninety degree "straight-out pier." The trial court also explained that it drew an inference from the right angle placement of the deck at the point where DeMichele's walkway meets the shoreline that the pier was formerly aligned at a right angle from that deck. The inference is reasonable in light of testimony that formerly a

person could walk down the DeMichele walkway[6] and straight out onto the pier. There was also testimony that the pier had previously been flush with the deck and that DeMichele changed the angle of his pier in response to the two times Breezy Oaks changed the angle of its pier towards the DeMichele pier.

¶9 There was evidence the trial court was entitled to believe and rely on to find that the DeMichele pier had not always been placed in the same location and at the same angle.[7] The trial court did not exercise its discretion based on a clearly erroneous finding of fact.

¶10 DeMichele's final claim is that the trial court erred when it questioned the legality of his pier. This is a claim that the trial court factored into its decision an irrelevant factor. The trial court raised the possibility that DeMichele lacked a proper permit for his pier.[8] The court's comments followed a

[6] The walkway owned by the DeMicheles and Rapps was formerly public property subject to an access easement.

[7] We do not consider DeMichele's reliance on an affidavit of the prior owner of his property which was filed well in advance of the trial to the court. The affidavit was not evidence at the trial. Additionally, DeMichele's discussion of the evidence regarding whether Bloomfield Road's predecessor in title knew or didn't know of the location of the DeMichele pier when the property was purchased is irrelevant to the challenged finding of fact.

[8] The trial court wrote:

> It strikes me that it took a special dose of chutzpah for Mr. DeMichele to write to the Town Board to protest the plaintiff's permit application, given the questions about the legality of his own pier. The orders in this case are structured as they are, with no order regarding the proper placement of the Rapp/DeMichele pier, because I have considerable doubt as to the right of those parties to erect any pier into Powers Lake at all unless and until they comply with all applicable laws and regulations, which are specifically designed to prevent feuds like this." The plaintiff has made no request for the removal of the pier, and the town is not a party to this action, so I reach no conclusion on this issue, and issue no order on this subject.

section of its decision discussing DeMichele's claim that Bloomfield Road's predecessor in title was too blame for creating the conflict and bringing the matter to court. The court had just explained that the "transient personal motives of the current owners of these properties are not a major consideration in the decision to be made." Although the court then raised certain questions about DeMichele's motivation, it recognized the legality of the DeMichele pier as outside the scope of this litigation. We reject the notion that the trial court's determination was affected by the possibility that the DeMichele pier was not legal.

¶11 We observe that although DeMichele generally asserts the extended lot line method is better, his arguments on appeal are not really focused on the real issue presented: whether the trial court erroneously exercised its discretion in fashioning equitable relief to resolve the dispute between the parties as to the placement of their piers. We have conducted a sufficient review of the record to conclude that the court correctly analyzed the law, considered the facts of record, and balanced the proper factors such that the decision was a proper exercise of discretion.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.