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# STATE OF MICHIGAN

# COURT OF APPEALS

MARC MENDELSON and LISA MENDELSON,

Plaintiffs/Counterdefendants-Appellants,

v

ROBERTUS SCHMIT,

Defendant/Counterplaintiff/Third-Party Plaintiff-Appellee,

BANK OF AMERICA,

Defendant,

and

MICHAEL SUCHOWSKI and ROXIE SUCHOWSKI,

Third-Party Defendants.

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No. 376730
Oakland Circuit Court
LC No. 2020-184854-CK

Before: LIEVENSE, P.J., and SWARTZLE and MARIANI, JJ.

PER CURIAM.

In this real-property action, plaintiffs/counterdefendants, Marc and Lisa Mendelson, appeal by right the trial court's order awarding nominal damages and permanent injunctive relief to defendant/counterplaintiff/third-party plaintiff, Robertus Schmit, on his ejectment and trespass claims. We affirm.

## I. BACKGROUND

This case returns to this Court following a remand to the trial court in November 2023. See *Mendelson v Schmit*, unpublished per curiam opinion of the Court of Appeals, issued November 30, 2023 (Docket Nos. 363177; 364285) (*Mendelson I*); see also generally *Mendelson v Schmit*, unpublished per curiam opinion of the Court of Appeals, issued November 13, 2024 (Docket No. 368265) (*Mendelson II*).[1] This Court previously detailed the relevant factual and procedural background, see *Mendelson I*, unpub op at 2-3; *Mendelson II*, unpub op at 1-2, but to summarize for purposes of this appeal: Plaintiffs purchased property in West Bloomfield near Walnut Lake in 2008, and defendant purchased property immediately north of them in 2013. *Mendelson I*, unpub op at 2. Defendant's property includes a portion of Walnut Lake's bottomlands. *Id*. at 2, 4; *Mendelson II*, unpub op at 1. Plaintiffs kept a dock in the lake year-round and used it seasonally, but the dock was partially situated on defendant's bottomlands. *Mendelson I*, unpub op at 2, 6. Defendant learned of this encroachment in 2020 and asked plaintiffs to move their dock. *Id*. at 2. Plaintiffs refused and filed suit against defendant in 2020, raising claims of quiet title and adverse possession or prescriptive easement related to their dock. *Id*. at 2. In response, defendant filed a counterclaim against plaintiffs, raising claims of ejectment, nuisance, and trespass. *Id*. at 2-3. The trial court dismissed plaintiffs' adverse-possession claim but granted them a prescriptive easement for their dock and correspondingly dismissed all of defendant's counterclaims. *Id*. at 3.

Defendant appealed, and this Court affirmed in part, reversed in part, and remanded for further proceedings. *Id*. at 2, 7. As relevant to this appeal, this Court concluded that neither plaintiffs' dock on, nor their mooring of their boat over, defendant's bottomlands established the 15-year period of continuous, unopposed trespass necessary to establish a prescriptive easement. *Id*. at 5-6. This Court held that the trial court had thus erred by granting summary disposition in favor of plaintiffs on their prescriptive-easement claim and by denying defendant's motion for summary disposition on his ejectment and trespass claims. *Id*. at 7. Accordingly, this Court remanded to the trial court to "consider whether it is proper to award [defendant] additional relief, i.e., injunctive relief or damages," for his ejectment and trespass claims. *Id*. at 7.

On remand, the parties provided the trial court with prehearing briefs regarding appropriate relief, and the trial court thereafter held an evidentiary hearing.[2] Defendant maintained that permanent injunctive relief was necessary to prohibit plaintiffs "from installing or using any docks or hoists on or above [his] deeded Walnut Lake bottomlands" and from "docking or hoisting any boats or other watercraft on or above those bottomlands." Defendant also argued that he should receive "a nominal damages award of $1,000 for each year since 2009, when [plaintiffs] initiated

[1] *Mendelson II* pertains to a separate action plaintiffs filed during the pendency of the *Mendelson I* appeal to establish a prescriptive easement for their irrigation tube on defendant's bottomlands. *Mendelson II*, unpub op at 1-2. In that case, this Court concluded that because the issue "involve[d] the same time, facts, origin, and motivation as the issue of their dock," plaintiffs "could have raised the issue . . . in the prior case, and therefore, res judicata applie[d] to preclude their" claim regarding the irrigation tube. *Id*. at 4.

[2] At the hearing, the parties argued consistently with their briefs, and both defendant and plaintiff Marc Mendelson also briefly provided additional testimony.

their trespass and prevented [him] from installing a dock on his own bottomlands." Plaintiffs countered that defendant should be awarded only "nominal damages in the amount of $1.00" because there was no evidence demonstrating he suffered any loss as a result of any trespass by plaintiffs. Plaintiffs also argued that although defendant could eject them from his bottomlands, pursuant to *Rosema v Constr Materials Corp*, 258 Mich 457, 458; 243 NW 24 (1932), defendant could not prohibit their "floating boat from crossing over his property line while moored unless 'reasonable access' is obstructed," and so "any injunctive relief should be limited to encroachment on [defendant's] bottomlands."

Following the evidentiary hearing, the trial court issued a written opinion and order awarding defendant nominal damages and permanent injunctive relief. Regarding damages, the court concluded that defendant was entitled to "nominal damages in the amount of $1.00" because he "did not provide any testimony or other admissible evidence to suggest he incurred any monetary damages as a result of the trespass." Regarding injunctive relief, the court concluded that defendant was "entitled to an injunction preventing the Plaintiffs from erecting a dock over any part of his deeded bottomlands," but that it "agree[d] with Plaintiffs that the injunctive relief should not go so far as to prevent the Plaintiffs from floating a boat over Defendant's Property if such an action is not intentional and ancillary to Plaintiffs' use and storage of their boat." Like plaintiffs, the court relied on *Rosema* in support of this latter conclusion, and ultimately ordered that plaintiffs were "enjoin[ed] . . . from installing or using any docks or hoists on Defendant's deeded bottomlands, with the exception of incidental and unintentional trespass by a floating watercraft used and/or owned by Plaintiffs over Defendant's property line."

Plaintiffs thereafter moved for reconsideration and clarification of the trial court's order "to ensure that it preserve[d] their riparian rights" and limited the injunctive relief to trespass upon defendant's bottomlands. Plaintiffs asserted they were "indisputably riparian owners" and asked the court to reconsider its order because the order did "not consider the prejudice to [plaintiffs] that could occur due to the limitation of their riparian rights." According to plaintiffs, "the general nature of the language contained" in the order could "be interpreted to limit [their] use of the entire surface of Walnut Lake to which they are entitled and d[id] not account for the changing shore lines and water levels associated with the lake." Plaintiffs also noted that the court's order did "not specify a timeframe for [their] use of Walnut Lake" and asked the court to "clarify that [their] right to use and store a boat and use and install a dock or hoist is a year round proposition." In a written order, the court denied plaintiffs' motion. Regarding the request for clarification, the court stated, "[T]he Court's Order is clear. [Plaintiffs] are entitled to use *their* deeded property as they see fit. They are enjoined from installing a dock and/or hoist on [defendant's] bottomlands."

This appeal followed.

## II. STANDARDS OF REVIEW

We review "a trial court's decision whether to grant injunctive . . . relief for an abuse of discretion." *Moore v Genesee Co*, 337 Mich App 723, 731; 976 NW2d 921 (2021). Such a ruling will not be disturbed unless the court's decision "falls outside the range of reasonable and principled outcomes," which necessarily occurs when the court makes an error of law. *Id*. We review the trial court's underlying factual findings for clear error, which occurs when we are "left with the definite and firm conviction that a mistake has been made." *Nash Estate v Grand Haven*,

321 Mich App 587, 592; 909 NW2d 862 (2017) (quotation marks and citation omitted). Claims of riparian rights are reviewed de novo. *Holton v Ward*, 303 Mich App 718, 725; 847 NW2d 1 (2014).

## III. DISCUSSION

On appeal, plaintiffs do not challenge the trial court's award of nominal damages or the fact that the court awarded permanent injunctive relief to defendant. Plaintiffs only challenge the scope of the injunctive relief awarded, arguing that the trial court erroneously failed to account for their riparian rights when determining appropriate relief for defendant. According to plaintiffs, they are "riparian owners" entitled "to boat on the whole surface of the water that borders on [their] property and to construct a dock or pier," and the court's "fail[ure] to appreciate the nuances of riparian rights" resulted in an injunction that unduly impedes their ability to exercise and enjoy those rights. We disagree.

To start, while plaintiffs have conclusorily asserted at times that they are "riparian owners," at no point during these lengthy proceedings did plaintiffs ask the trial court to determine that they are, in fact, riparian owners or what the scope of their riparian rights may be.[3] Nor, for that matter, is that status or scope apparent from the record before us. Plaintiffs rely on aerial photos of the parties' properties with property lines drawn on top of them, arguing that the photos demonstrate that their property "is in physical contact with Walnut Lake" and thus that they are riparian owners. This Court, however, previously acknowledged that these photos with "purported property lines" may be "imprecise," *Mendelson I*, unpub op at 5 n 5, and even as presented, the photos do not make clear that plaintiffs' property extends to the water's edge. Moreover, the description of the plaintiffs' property in their deed, unlike that of defendant's, does not include any portion of the lake or its bottomlands, or contain any language indicating that plaintiffs' property extends to the water's edge. Simply put, plaintiffs did not adequately raise the issue of the existence and scope of their riparian rights for determination below; as such, they have failed to preserve it for appellate review and we see no basis to overlook that failure. See *Tolas Oil & Gas Exploration Co v Bach Servs & Mfg, LLC*, 347 Mich App 280, 289; 14 NW3d 472 (2023) (explaining that, because "Michigan follows the 'raise or waive' rule of appellate review," this Court is not obligated to consider an issue that a litigant does not properly raise in the trial court) (quotation marks and citation omitted).

We further note that, even assuming plaintiffs are riparian owners, it is not apparent to us how the trial court's ordered relief would (in plaintiffs' words) "wholly contradict[]" any riparian rights they may have. As noted, the court enjoined plaintiffs "from installing or using any docks or hoists on Defendant's deeded bottomlands," but—in an effort to accommodate plaintiffs' position and in reliance on *Rosema*, the very authority plaintiffs had offered in support—the court made clear that this injunction would not reach "incidental and unintentional trespass by a floating watercraft used and/or owned by Plaintiffs over Defendant's property line." As the court would subsequently summarize, plaintiffs were thus "enjoined from installing a dock and/or hoist on [defendant's] bottomlands" but "entitled to use *their* deeded property as they see fit." While

[3] Indeed, plaintiffs' counsel seemingly acknowledged as much at the hearing on remand, noting that the court "hasn't adjudicated and frankly . . . ought not to adjudicate the riparian rights of all those on . . . Walnut Lake."

plaintiffs express concern about aspects of the order's phrasing and the possibility of future conflicts with defendant over it, they have not shown reversible error in the court's fashioning of relief on remand, particularly given the evidence and arguments that the court had before it.[4]

The same basic rationale and conclusion apply to plaintiffs' arguments that the trial court erred by (1) failing to consider issues such as soil erosion, accretion, reliction, and fluctuations in the lake's water levels as part of a riparian-rights analysis; and (2) failing to specify in its order that plaintiffs' "use of Walnut Lake extends year round and for 24 hours a day." These matters were not raised meaningfully, if at all, before the trial court until plaintiffs' motion for reconsideration, thereby rendering them unpreserved for appellate review. See *Tolas Oil & Gas*, 347 Mich App at 300-301. Nor are the arguments, as belatedly presented below and now on appeal, particularly well developed—and from what we can glean of their merits, we see no grounds in them for assigning reversible error to the trial court's ruling.

Affirmed.

/s/ Andrew J. Lievense
/s/ Brock A. Swartzle
/s/ Philip P. Mariani

[4] We also note that, at oral argument before this Court, counsel for defendant affirmatively represented and confirmed that the injunction's "incidental and unintentional trespass" language is properly read as identifying two categories of trespass that the injunction does not prohibit—i.e., the injunction does not prohibit an "incidental . . . trespass by a floating watercraft used and/or owned by Plaintiffs over Defendant's property line," and does not prohibit an "unintentional trespass by a floating watercraft used and/or owned by Plaintiffs over Defendant's property line."