

COURT OF APPEALS, STATE OF MICHIGAN

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COA Case Name: Mushovic v Bloomfield Hills Sch Dist & Fellin v Bloomfield Hills Sch Dist
COA Case No.: 303372 & 303374 Lower Court Case No.: 09-098669-AW & 09-100784-AW

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2. This brief is filed by or on behalf of [*insert party name(s)*]: Plaintiffs Mushovic, et al. & Fellin, et al.

3. This brief is in response to a brief filed on 30 Aug 2011 by Defendants/Appellees

4. ORAL ARGUMENT: REQUESTED NOT REQUESTED

5. THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID.
[See MCR 7.212(C)(1) to determine if this applies.]

6. As required by MCR 7.212(C), this brief contains, in the following order: [*check applicable boxes to verify*]

- Table of Contents [MCR 7.212(C)(2)]
- Index of Authorities [MCR 7.212(C)(3)]
- Jurisdictional Statement [MCR 7.212(C)(4)]
- Statement of Questions [MCR 7.212(C)(5)]
- Statement of Facts (with citation to the record) [MCR 7.212(C)(6)]
- Arguments (with applicable standard of review) [MCR 7.212(C)(7)]
- Relief Requested [MCR 7.212(C)(9)]
- Signature [MCR 7.212(C)(9)]

7. This brief is signed by [*type name*]: Terrence L. Hall Signing Attorney's Bar No. [*if any*]: (P-28922)
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STATEMENT OF SUPPLEMENTAL QUESTIONS PRESENTED

I. IS THE PLAINTIFFS' COMMON-LAW DEDICATION CLAIM INDEPENDENT OF THOSE CLAIMS ADDRESSED BY THE COURT OF APPEALS AND, THEREFORE, STILL VIABLE IN LIGHT OF THE LAW OF THE CASE DOCTRINE?

Plaintiffs-Appellants answer: Yes

Defendants-Appellees answer: No

II. ASSUMING, *ARGUENDO*, THE TRANSFER OF CERTAIN FEE INTERESTS FROM THE HEIRS OF DONOR MAE CALLOW TO THE DEFENDANTS, WOULD THAT TRANSFER NECESSARILY TERMINATE THE OPTION OF THE PLAINTIFFS TO ENFORCE THEIR EASEMENT RIGHTS AS PUBLIC BENEFICIARIES OF A COMMON-LAW DEDICATION?

Plaintiffs-Appellants answer: No

Defendants-Appellees answer: Yes

III. SHOULD CERTAIN PLAINTIFFS WITH COURT OF APPEALS RECOGNIZED "SPECIAL INTERESTS" BE ALLOWED TO CONTINUE THEIR ACTION AGAINST THE DEFENDANTS IN ORDER TO EXERCISE THEIR RIGHTS AS PUBLIC BENEFICIARIES OF A COMMON-LAW DEDICATION?

Plaintiffs-Appellants answer: Yes

Defendants-Appellees answer: No

REPLY TO DEFENDANTS' INTRODUCTION

Defendants' Introduction contains a number of inaccuracies which need to be addressed. Principal among them is representation of the nature of the interest which was acquired by the defendants when, before they were exercisable, defendants purchased the contingent reverter rights of the donors' heirs. Such a purchase took place while the property still was being used "for School purposes" as defined by the previous Court of Appeals panel. A clandestine deal for the sale of those reverter rights had been made contingent upon the plaintiffs' not appealing that panel's decision to the Michigan Supreme Court, and was publicly announced the day after the time to appeal had expired. Plaintiffs had chosen not to appeal that panel's decision because they had relied upon the public testimony and the private representations of the donor's heirs to the effect that they wished the gift of their grandmother to continue to be used by the children of the Pine Lake Community. It did come as quite a shock to many that the public and private assurances about the heirs' continued generous intentions had been so falsely portrayed, and that they had sold their conditional reverter rights to the defendants.

Reference to the "unmooting" of the issue of common-law dedication in the lower court was more than a bit disingenuous since the concept of a matter being "unmooted" clearly was explained to the court and to all parties as being a term which was intended to be a not-so-serious look at the serious concept of placing a previously moot item back before the court. In this instance, Judge Warren initially had ruled that the facts of this case had resulted in the creation of a "statutory charitable trust" per MCL § 554.351, *et seq.* In so doing Judge Warren had chosen not to rule on the plaintiffs' claim of "common-law dedication" and ruled that consideration of that claim was moot in light of his ruling. (Defendants' Response Brief Exhibit 2). Plaintiffs, upon remand by the first Court of Appeals panel, were faced with the panel's ruling that there no longer could be a statutory charitable trust and that, instead, there was "a determinable or qualified fee, subject to termination and reversion on cessation of that use." Further, with the unexpected alleged sale of the

heirs' contingent reverter rights to the defendants, the matter of common-law dedication remained the only claim which had not been fully addressed by either court. As such, it became "unmooted."

As to what exactly may have been conveyed by the heirs - that remains subject to evaluation. Clearly the heirs' interest, given the then current use of the Pine Lake School property "for School purposes", as defined by the initial appeals panel, had not matured to the point where they could have exercised their contingent reverter rights. How, then, could such immature contingent rights be converted into the transfer of "fee simple absolute"? The documents drafted by the defendants certainly attempt to turn such a transfer into a *fait accomplis* or, as so commonly applied to actions by the defendant school board, "a done deal", without sufficient consideration given to the rights of the district's neighboring public beneficiaries. Defendants also purport to expand the nature of what they received beyond the scope of what is reasonable, given that still pending is the instant appeal brought by "the minor children as potential students and land owners abutting or with a direct view of the property [who continue to] *have* standing based on their special interest." (COA Opinion at p. 9) (Defendants' Response Brief Exhibit 4, emphasis added).

Defendants' assertion that "the Callow Deed conveyed a determinable fee and not some other interest" is misleading. First, it needs to be pointed out that the initial panel did not find the simple conveyance of "a determinable fee" but, more specifically, found "[a] conveyance of land to be held as long as it is used for a school creates a determinable or qualified fee, subject to termination and reversion on cessation of that use." (COA Opinion at p. 5) (Defendants' Response Brief Exhibit 4). Second, a narrow interpretation of the law of the case doctrine, in the face of the sale of the heirs' contingent reverter rights, improperly prohibits the resurrection of the Plaintiffs' claim for "common-law dedication." That theory had been not ruled upon by Judge Warren since, given his finding of a "statutory charitable trust", it was not necessary for him to address that additional claim. Common-law dedication also had not been ruled upon by the initial panel of the Court of Appeals since it appeared to presume that its finding of "a determinable or qualified fee, subject to termination and reversion on cessation of that use" would be sufficient to resolve the

matter. The panel found its ruling to be “a resolution” of this matter, and not “the resolution” of the parties’ claims. (Opinion at pp. 4-5) (Defendants’ Response Brief Exhibit 4). As such, the undecided claim of common-law dedication remained dormant during the relatively short appeal period which followed. Clearly the current non-use of the Pine Lake School property for any meaningful “School purpose” is in violation of the intent of Mae Callow as expressed in the restrictive terms of the deed which conveyed its use. If the panel’s expressed theory is now moot, and if the conditions have been met for the formation of a common-law dedication which also embodies that intended use, then there is no reason why the courts should be not now be applying the common-law dedication principal in order to continue the property’s use “for School purposes only” on behalf of the foreseeable community beneficiaries of that gift. The plaintiffs in this action are among such beneficiaries.

REPLY TO DEFENDANTS’ STATEMENT OF FACTS

It should be noted that the property which was solicited by the defendant district, and which was charitably conveyed by life-long Pine Lake Community resident Mae Callow, clearly had been intended to be the site for the replacement of the then existing, but aged, Pine Lake School. That school building was one which Mae Callow had attended in the late 1800s, and was the third such school in what, for over one hundred years, had been the Pine Lake School District. The fourth Pine Lake School building was constructed entirely on the 11.74 acres which were charitably conveyed by Mae Callow “for School purposes only.”

Defendants’ reference to the lower court’s finding that the claim of common-law dedication was moot in light of its finding of a statutory charitable trust and a covenant running with the land also is misleading. The lower court, after finding for the plaintiffs on those claims, and while declaring the matter of common-law dedication to be moot, made a passing remark that “all the cases reviewed by the Court involve common law dedication of highways.” (Second Amended

Findings of Fact and Conclusions of Law, p. 15) (Defendants' Response Brief Exhibit 1). Judge Warren's failure to look beyond highway easements, given his initial positive ruling in favor of the Plaintiffs, is certainly understandable. Still, it should be noted that there are numerous other situations in which common-law dedications coexist with fee interests. The common areas of shopping malls, for instance, have been found to have replaced the town squares of old, and "[t]he nature of the public right to use, promenade and concourse, in and about the 'public areas' of a modern shopping center" have been found to be subject to a common-law easement for public use. *Amalgamated Clothing Workers v Wonderland Shopping Center*, 370 Mich 547, 568; 122 NW2d 785 (1963). Also included as potential sites of common-law dedications for public use were "a school and college...." *Id.*, at Mich 571, FN 7. Hence, the lower court's failure to find common-law dedications in situations other than highways should carry no weight in defendants' wrongful efforts to persuade this Honorable Court that such common-law easement situations do not exist.

In addition to showing the existence of common-law dedications outside of the context of highway dedications, the *Amalgamated Clothing* case clearly shows that the owner of a shopping center (which certainly must have a fee interest in the premises) can simultaneously be subjected to the rights of the public by way of common-law dedication. That is, fee interests can be vested in a property owner who, at the same time, must respect the rights of the public which, at the same time, maintains easement rights by way of common-law dedication.

It is interesting to note that the defendants quote a section of the initial panel's Opinion for the proposition that "the word 'School,' because it is capitalized, suggests a specific rather than a general reference." (Defendants Response Brief at p. 5). This does show how the wording of the deed itself is not precise on its face, and is subject to interpretation. This being so, then it is not too much of a stretch to look to the facts and circumstances associated with the conditional conveyance in order to interpret the intent of the language in the deed. And those facts and circumstances clearly demonstrate the meeting of all elements necessary to the creation of a common-law dedication, in addition to the conveyance of a use subject to the conditional reverter rights of Mae Callow's heirs.

Also misleading is the defendants' assertion, at page 7 of its Response Brief, that the initial panel "after articulating the standing rule, concluded the Plaintiffs had standing to initiate this litigation." Such a quote is deceptive in that the initial panel found greater standing than what the defendants represent. In fact, the correct quote from the initial panel, is as follows:

Consistent with [the previously described] definition of standing, we agree with the trial court that the minor children as potential students and land owners either abutting or with a direct view of the property *have* standing based on their special interest.⁴

(Opinion at p. 9) (Defendants' Response Brief Exhibit 2)

Per footnote 4, those plaintiffs who *have* standing, include "Christopher Fellin, Alan Peterson, Mia and Sofia Mushovic, Chanon and Charon Stringer." *Id.* The inference which defendants are asking this Court to draw is that all rights have been adjudicated by the first panel, and have been extinguished by the clandestine purchase of the immature contingent reverter rights from heirs of the restrictive conveyer of the Pine Lake School property. Such an implication clearly is not justified by the panel's use of the present tense when referring to the named parties who *have* standing. And what rights do they have remaining if not the rights to enforce the terms of the common-law dedication which clearly was established by the actions of the parties?

Reference to the terms of the self-serving drafted documents between the defendant district and the heirs of Mae Callow (the initial conditional conveyer of the Pine Lake School property) should not obscure the fact that a document may say that it conveys "fee simple absolute" yet, at the same time, convey something less, such as a fee subject to an easement for the benefit of the public. Such easement rights, based on the plaintiffs' claims related to common-law dedication, do exist in this case. Such rights and the district's ownership of the heirs' contingent reverter option are not mutually exclusive.

Reference to "Plaintiffs' attorneys" having appeared at the April 30, 2010 Board meeting of defendant school board also is misleading. First, the author of this brief, by himself alone, and in the capacity of a parent and resident of the defendant district, appeared at the public comment

section of that board meeting seeking the board's continued use of Pine Lake School for the benefit of community families. Such an appearance was in no way official, and was not then informed by the contents of the agreement which secretly had been drafted by counsel for the defendants. The terms of that agreement had even till then been kept confidential, and any reference to its still secret contents is of no value from a legal standpoint. Two counsel for the defendants, who had drafted that agreement, were present and there with both of their hourly time meters running. The undersigned, as a member of the local community, always had been working on a *pro bono* basis for that local community, and was not there acting in any representative capacity. The undersigned also was reacting to a clear betrayal by the heirs of Mae Callow who, while pretending to continue to work with plaintiffs' counsel, secretly had been negotiating to sell away the gift which they, up to that point, had been seeking to maintain.

The two older heirs of Mae Callow, after all, had testified as follows:

...every time we'd drive by the little schoolhouse she went to school at, she would point it out, and then she would say, 'We're going to have a beautiful school down here someday.' [Mae Callow] said she wanted a school there, that a school would be built there, and that's exactly what she wanted for the children of Pine Lake.

(Edwin Hodge Crabtree, Tr. II, p. 56)

She said that Bob and Gramma – that's what we called our grandparents – were selling land so a school could be built in Pine Lake for a dollar.... [My grandmother, Mae Callow, and I] went over there to look at the Callow Bell Tower [an honorary tribute to the Callows for their gift], and she said there will always be a school for the children of Pine Lake....

(Stephen Callow Crabtree, Tr. II, pp. 85-86.)

It is regrettable Mae Callow's heirs, who for such a long time assisted the plaintiffs' efforts to maintain the operation of Pine Lake School according to their grandmother's clear wishes, would sell themselves out, and the community out, and choose dollars over preserving her public charity.

SUPPLEMENTAL ARGUMENT

I. THE PLAINTIFFS' COMMON-LAW DEDICATION CLAIM IS INDEPENDENT OF THOSE CLAIMS ADDRESSED BY THE COURT OF APPEALS AND, THEREFORE, IS STILL VIABLE IN LIGHT OF THE LAW OF THE CASE DOCTRINE.

Defendants, after their purchase of the heirs' contingent reverter rights, sought to have the lower court dismiss the plaintiffs' action, based on common-law dedication, on the grounds of the law of the case. They sought to do so even though the plaintiffs' claim, based on their rights under common-law dedication, had not been addressed by the lower court, or by the initial panel of the Court of Appeals. This is not a correct application of that legal principal, since the law of the case doctrine does not apply to an issue which was raised, but not decided, by an appellate court. *Thorin v Bloomfield Hills Bd of Ed*, 203 Mich App 692, 697; 513 NW2d 230 (1994). Defendants also claim that the lower court agreed to dismiss the action because "Michigan precedent precludes a devise from being, simultaneously, a determinable fee and a common law dedication." (Defendants' Response Brief at p. 9). Such precedent does not, however, prevent a common-law dedication from arising after there is a devise of property, and independently from the terms of that devise.

The facts of this case clearly demonstrate that the conditions necessary for the creation of a common-law dedication arose after the defendant district undertook to use the property which was conveyed to it by Mae Callow "for School purposes only." There was the necessary public acknowledgment of such a gift, and acceptance and long-term use by the district of that property for its intended purposes. Community members, including several of the plaintiffs in this action, *have* standing to enforce that common-law dedication for the benefit of themselves and other members of the local community. (COA Opinion at p. 9) (Defendants' Response Brief Exhibit 4).

II. ASSUMING, ARGUENDO, THE TRANSFER OF CERTAIN FEE INTERESTS FROM THE HEIRS OF DONOR MAE CALLOW TO THE DEFENDANTS, SUCH A TRANSFER WOULD NOT TERMINATE THE OPTION OF THE PLAINTIFFS TO ENFORCE THEIR EASEMENT RIGHTS AS PUBLIC BENEFICIARIES OF A COMMON-LAW DEDICATION.

Defendants are not clear about the exact nature of the fee interest which they are supposed to have assumed when the heirs sold off their immature contingent reverter rights before being able to exercise them. Whatever form of interest was transferred, it is clear from the defendants' own transfer documents that it was on notice that there was a potentially viable claim by certain of the plaintiffs under the doctrine of common-law dedication. It is undisputed that a common-law dedication is an easement. And an easement quite clearly is an interest in land. *Peaslee v Dietrich*, 365 Mich 338, 344; 112 NW2d 562 (1961) Constructive notice of an easement by way of common-law dedication, as exists in this instance, is sufficient to make the district's purchase of interests in the Pine Lake School property "subject to such an easement." *Id.*, at Mich 347. It must honor the rights of the public easement's beneficiaries so long as they choose not to abandon them.

III. CERTAIN PLAINTIFFS WITH COURT OF APPEALS RECOGNIZED "SPECIAL INTERESTS" SHOULD BE ALLOWED TO CONTINUE THEIR ACTION AGAINST THE DEFENDANTS IN ORDER TO EXERCISE THEIR RIGHTS AS PUBLIC BENEFICIARIES OF A COMMON-LAW DEDICATION.

Marsh v Alabama, 326 US 501; 66 S Ct 276; 90 L Ed 265 (1946), as discussed with approval in *Woodland v Michigan Citizens Lobby*, 423 Mich 188, 221-22; 378 NW2d 337 (1985), states that:

Private property may, by unceremonious act and implication from act on the part of the landowner, and like act and implication from act on the part of the public, become subject to public easement by means of common-law dedication. The public right in such instance does not depend upon acceptance and use for any particular period of years. The fact of dedication and acceptance, and the extent of dedicated use, must be determined from the intent of the dedicators and acceptors and the legal significations thereof. No particular form is necessary to such dedication. The fee does not pass. An easement does. There may be a public abandonment after acceptance, and reversion to the original land owner, when the use for which the dedication was made becomes impossible of execution or where the object of the use fails.

As discussed above, Plaintiffs Fellin, Peterson, and Stringer continue to possess a “special interest” in maintaining the “School purposes” character of the Pine Lake School property, and continue to *have* the standing necessary to enforce those rights as public beneficiaries of a common-law dedication. (COA Opinion at p. 9) (Defendants’ Response Brief Exhibit 4). It is those rights which they seek to continue to enforce.

CONCLUSION & RELIEF REQUESTED

Public policy concerns should be considered in the treatment of conveyances of property for public use. If courts were to permit public entities to accept gifts of property subject to restrictions on use, and then later jettison those restrictions on their own whim, donors would be discouraged from making such gifts in the future. Further, a public entity has a moral duty to act equitably when it accepts a conditional gift from a donor for the public's benefit. That duty is reinforced if, along with accepting property with restrictive terms on use, such acceptances can carry with them the elements requisite to the creation of a common-law dedication. In this instance, if the defendants were allowed to avoid the use restrictions on the property set forth in the Callow Deed—despite having expressly agreed to those restrictions upon accepting the contingent property gift—this no doubt would discourage future such gifts from other donors. Such a violation of public trust is

compounded when, at the same time, the holder of the property also attempts to ignore the clear existence of a common-law dedication to public use, and attempts to defeat the claims of public members who have a recognized “special interest” and the legal standing necessary to enforce the continuation of that beneficial public use.

The circumstances surrounding the grant and the expressed intent of Mae Callow were unselfish, praiseworthy, and charitable. Moreover, by using the terms “restriction” and “only,” the deed restriction patently emphasizes that the deeded property was to be used for that purpose, and only for that purpose. The Pine Lake School site is clearly better and more valuable than that of the neighboring school which the district chose to keep open instead. Its fine qualities were its temporary downfall, as the district has been seeking to sell valuable properties to raise unrestricted funds for projects which do not necessarily have the support of the district’s tax-paying residents. These less than honorable objectives, when combined with the preference of Mae Callow’s heirs for personal gain over the preservation of a family gift to the community, should not be permitted to defeat the lawful interests of the public beneficiaries of that gift.

Plaintiffs-Appellants respectfully request that this Court affirm the trial court’s factual findings, apply them to the legal principals of common-law dedication, and rescind the summary dismissal of the remaining plaintiffs’ common-law dedication action. The plaintiffs should be permitted to retain the public easement which donor Mae Callow and the defendant district created after the conditional conveyance of a portion of her Centennial Farm for public benefit “subject to the restriction that these premises shall be used for School purposes only.”

Respectfully submitted,

/s/ Terrence L. Hall

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