STATE OF WISCONSIN - COURT OF APPEALS - DISTRICT IV

APPEAL NO. 2021AP001027

Jack Kapinus, Renee Kapinus and Kapinus Family Trust,

Plaintiffs-Respondents,

v.

Joseph Nartowicz, Karen Nartowicz, Gina Newell and Robert Newell,

Defendants-Appellants,

Chazz Huston, Eric Fitzgerald, Shannon Fitzgerald, David Minear Roahen and Lucy M. Flesch Revocable Trust, David M. Junck, Steven D. Alf, Shannon R. Alf, Harry E. Van Camp, Susan S. George, Brian E. Penington, Tonya N. Penington, Adrienne R. Hampton, Sarah M. Dorn, Jonathon Cornell, Jill Cornell, Kristin M. Kerschensteiner, Suzanne M. Brewer, Richard F. & Doris L. McLaughlin Living Trust, Jacqueline P. Moore, Jonathan C. Schmidt, Jennie E. Schmidt, Don Goben, Julie R. Kubicek, SAJS Trust and Amy & Kevin Coombe Revocable Living Trust,

Defendants.

On Appeal from the Circuit Court for Dane County
The Honorable Frank D. Remington, Presiding
Circuit Court Case No. 2020CV001085

BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

OTHER AUTHORITIES:

STATEMENT OF ISSUES PRESENTED

1. Did the reservation in the plat of Wa-che-etcha convey the fee simple interest in Lots A, B and C to all the lot owners of the plat as tenants in common?

   Answered by the trial court: No.

2. Even if the reservation in the plat conveyed a tenant in common interest in Lots A, B and C to the first purchaser of each lot, was that interest automatically transferred to the successor purchasers of the lots without need for a deed?

   Answered by the trial court: No.

3. Are the six requirements for the piers at Lots A, B and C to be "grandfathered" under Wis. Stat. §30.131 satisfied in this case?

   Answered by the trial court: No [as conceded by the Defendants]

4. Are the piers at the shoreline of Lots A, B and C unlawful under Wis. Stat. §30.131, and both a public and private nuisance?

   Answered by the trial court: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument will help sort through the volume of foreign cases, unpublished opinions and lengthy Appendix of old newspaper clippings presented by Nartowicz and Newell (together, "Nartowicz"), and thereby arrive at the core issues under Wisconsin law.

Kapinus recommends publication. Given the 1989 adoption of Wis. Stat. §30.131 restricting riparian rights granted by easement to non-riparian owners plus the thousands of miles shoreline along Wisconsin's many lakes and rivers, the fact pattern and core issues of this case are likely to repeat. The certainty of our real estate law is essential for the stability and marketability of titles. Publication will therefore give valuable guidance to Wisconsin attorneys and property owners.

STATEMENT OF THE CASE

Kapinus supplements and clarifies Nartowicz's Statement of the Case with the following:

Procedural History. The trial court granted Nartowicz's motion to add all the lot owners within the plat as necessary parties. (R.40:1). Of the total 32 lot owners added as defendants, 19 did not participate in the case. They either defaulted or were dismissed as a party upon a stipulation to be bound by the outcome of the case. (R:151; R.159; R.178).

Only 11 of 35 total Defendants (the "Block Three Defendants") asserted the counterclaim at the heart of this appeal. (R:78:9-14; R.124:8-26). The other Defendants, in the words of the trial court, "did not care about the litigation." See Decision & Order Re: Objection to Bill of Costs, Doc. No. 274 at p. 7 (Supp. Appx.:283).

Ever since 4/28/90, non-riparian owners cannot lawfully exercise an easement right to install a pier at the shoreline of riparian lots unless the pier is "grandfathered" under Wis. Stat. §30.131.[1] On cross motions for Summary Judgment, the Block Three Defendants conceded the pier at Lot B did not satisfy the six requirements to be "grandfathered." (R.247:29).

The Block Three Defendants relied entirely upon a claim that a notation on the plat conveyed the fee simple interest in three thin riparian lots (Lots A, B and C) to all the owners of lots within the plat as tenants in common. (R.203:9-10; R.247:28-29). The notation on the plat reads as follows:

> "Lots A, B and C are **reserved** for the use of lot owners of this plat only, including boat house and pier privileges for said lot owners." (R.75:19; R.192:3).

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless noted otherwise.

Nartowicz did not dispute any of Kapinus's proposed undisputed facts filed with Kapinus' motion for Summary Judgment. (R.196). At the motion hearing, all parties agreed there were no genuine issues of material fact and the cross motions presented only questions of law. (R.247:6-11). Accordingly, upon review the Court of Appeals owes no deference to the trial court, and reviews the grant of a summary judgment de novo. American Family Mut. Ins. Co. v. Cintas Corp. No. 2, 2018 WI 81 at ¶9, 383 Wis. 2d 63, 914 N.W.2d 76.

Trial Court's Disposition. The trial court decided the "reservation" in the plat did not convey title to the fee simple interest in Lots A, B or C. Instead, the "reservation" created an interest in Lots A, B and C in the nature of an easement for lake access and pier privileges. (R.236:2; R.247:43-45).

Relevant Facts. Six important undisputed facts are not mentioned by Nartowicz:

(1) There is no conveyance of title to Lots A, B or C by the subdivider to the first purchaser of any lot. (R.180; R.181:2, at ¶¶6-7, & 64-84; R.196:1 at ¶¶5-6).

(2) There is no conveyance of a tenant in common interest in Lots A, B or C from any first purchaser of a lot to any successor purchaser, including Nartowicz. (R.180; R.181; R.196:1-2 at ¶¶4-6; R.221).

(3) None of the lot owners have been levied a tax with respect their alleged co-ownership of Lots A, B or C and the local municipality identifies the title holder as "unknown." (R.182; R.196:2 at ¶¶7-8).

(4) It is physically impossible for all upland lot owners to install 20 plus boat hoists within the pencil-thin riparian zones of Lots A, B and C; only two lot owners had piers and boat hoists installed at the time of the decision. (R.247:48-49).

(5) While the target of Kapinus's summary judgment motion was compulsory removal of the pier at Lot B, the parties by stipulation at the motion hearing agreed a denial of the counterclaim would prohibit a pier at all three Lots A, B and C. (R.247:46-51).

(6) Kapinus attacked only the installation of piers off the shore of Lots A, B and C. Kapinus never attacked and in fact conceded that the reservation created a lawful easement for lake access on, over and across Lots A, B and C. (R.75:9-10; R.113:3; R.197:1).

ARGUMENT

1. The object of the complaint was to enforce Wisconsin's pier regulations; the counterclaim at issue on appeal is an end around the regulations.

Under Wisconsin's public trust doctrine, our state owns and regulates all our navigable waters for the benefit of the public. Lake Beulah Mgmnt. Dist. v. DNR, 2011 WI 54 at ¶¶30-32, 335 Wis. 2d 47, 799 N.W.2d 73. The complaint sought to enforce Wisconsin's prohibitions and restrictions on the installation of piers off the shoreline of riparian lots by non-riparian owners.

> "Wisconsin common law has established that the right to place structures for access to navigable water is qualified, subordinate, and subject to the paramount interest of the state and the paramount rights of the public in navigable waters." Movrich v. Lobermeier, 2018 WI 9 at ¶28, 379 Wis. 2d 269, 905 N.W.2d 807.

As trustee of our public waters, the legislature in 1989 enacted Wis. Stat. §30.131, the grandfather statute. 1989 Act 217 at §1 (eff. 4/28/90). Its self evident object is to protect the scenic beauty, orderliness and cleanliness of our lake shores against over crowding by restricting the exercise of pier rights held by non-riparian owners under old easements. Piers installed by non-riparian owners are "unlawful" unless the six "grandfather" requirements of the statute are satisfied.

Four years later, the legislature in 1993 enacted Wis. Stat. §30.133. This statute *prospectively* prohibited, from and after April 9, 1994, the granting of *any* pier rights to non-riparian owners. 1993 Act 167 at §3 (eff. 4/8/94).

Who can have a pier privilege? Wis. Stat. §30.12 and §30.13 grant *only to riparian owners* the right to install a pier and boat hoist within their riparian zone without a permit from DNR. Subsection 1 of Wis. Stat. §30.12 begins with a *global prohibition* against the placement of "any structure upon the bed of navigable waters" without a permit, unless exempt from the permit requirements.[2]

[2] See, e.g., Wis. Stat. §30.12(1g) ("A riparian owner is exempt from the permit requirements under this section for the placement of a structure or the deposit of material if the structure or material is located in an area other than an area of special natural resource interest, does not interfere with the riparian rights of

As to non-riparian owners, they are not entitled to any pier permit from DNR. *Only riparian owners can obtain a pier permit or be exempt from the permit requirements*. Every section for pier permits or exemption to the permit requirements require the applicant to be a riparian owner.[3]

Pre-existing piers installed by non-riparian owners are allowed only if the six requirements of Wis. Stat. §30.131 are satisfied. Entitled "Wharves and piers placed and maintained by persons other than riparian owners," Wis. Stat. §30.131 provides:

> "Notwithstanding s. 30.133, a wharf or pier of the type which does not require a permit under ss. 30.12(1) and 30.13 that abuts riparian land and that is placed in a navigable water by a person other than the owner of the riparian land may not be considered to be an unlawful structure on the grounds that it is not placed and maintained by the owner, if all the following requirements are met: [six requirements are listed]."

In a very instructive case, the declarant of a condominium upon a riparian lot *reserved* the right to maintain piers on the riparian lot for the benefit of the declarant's non-riparian lot. Berkos v. Shipwreck Bay Condominium Ass'n., 2018 WI App 122 at ¶¶3-4, 313 Wis. 2d 609, 758 N.W.2d 215. The declaration was recorded after the effective date of Wis. Stat. §30.133, so the "grandfather" statute was not considered. The declarant argued the "reservation" in the declaration was not within the reach of the prohibition in Wis. Stat. §30.133. Id. at ¶12. The Court of Appeals disagreed *and held the reservation was in the nature of an easement* prohibited by Wis. Stat. §30.133:

> "We acknowledge that §30.133 does not explicitly refer to *reservation* of riparian rights by easement. Regardless, ABKA and Stoesser made clear that the legislature enacted § 30.133 to prohibit the reservation of riparian rights by easement upon the transfer of title of riparian land. Thus, we read the language providing that 'no owner of riparian land that abuts a navigable water may convey, by easement or by a similar conveyance, any riparian right in the land to another person' to

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other riparian owners. . .); §30.12(1k) (exemption for riparian owners of a pier or wharf that was placed before 4/17/12); §30.13(1) (exemption for riparian owners constructing a wharf or pier in aid of navigation).

[3] See preceding footnote and Wis. Stat. §30.12(2m), (3) & (3m).

> preclude the reservation of riparian rights apart from riparian land by an easement, as well as the granting of riparian rights to a non-riparian owner." Id. at ¶16.

The prospective prohibition in Wis. Stat. §30.133 and applied in Berkos does not apply in this case. **However, Berkos is instructive because it held a "reservation" of pier privileges was in the nature of an easement for purposes of Wisconsin's pier regulations.**

So what is this case about? Nartowicz concedes Nartowicz cannot show satisfaction of the six requirements for the piers at Lots A, B and C to be "grandfathered." (R.247:29). Nartowicz instead attempts an end around the pier regulations by asserting Nartowicz owns the fee simple interest in Lots A, B and C as tenant in common with all lot owners of the plat. (R.203:9-10; R.247:28). Nartowicz claims the reservation in the plat was a conveyance of the fee simple interest in Lots A, B and C. (R.203:9-10; R.247:28). If the Court of Appeals decides Nartowicz is a riparian owner, then Nartowicz is entitled to install a pier.

Significantly, there is no conveyance by deed of the tenant in common interest from the subdivider, or from the first purchaser of lots to successor lot owners. (R.180; R.181; R.196:1-2 at ¶¶5-6; R.221). To accomplish a successful end around, Nartowicz must convince the Court of Appeals not only that the reservation in the plat was a conveyance, but that the tenant in common interests automatically transferred from the first purchasers to all successor lot owners without need for any deed.

We shall show the first of these propositions is contrary to settled case law, and that the second turns Wisconsin's real estate law upside down on its head.

2. A reservation was intended because the subdivider used that word.

The 1911 platting statute relied upon by Nartowicz refers only to "grants" and "donations" noted on a plat, not to "reservations." See Wis. Stat. §2263 (1911). The words actually used by the subdivider are the best evidence of the subdivider's intention. A reservation was intended because the subdivider used that word.

When construing plats and conveyances, the court's task is to determine the true intention of the parties. Rikkers v. Ryan, 76 Wis. 2d 184 at 188, 251 N.W.2d 25 (1977). The primary evidence of a subdivider's or grantor's true intention is the words used in the governing instrument. Id. Where the language used is unambiguous, extrinsic evidence may not be referred to in order to show the intent of the parties. Id. Here, the subdivider chose to use the word "reserved." The subdivider could have used the word "conveyed," but did not. The subdivider could have used the word "grants" or "donates," but did not.

The subdivider's choice of words is not ambiguous. We repeat: a reservation, not a conveyance, was intended because the subdivider used that word. In real estate law, a "reservation" is far different than a conveyance. A reservation is defined as:

> *"Reservation.* The creation of a new right or interest (**such as by an easement**), by and for the grantor, in real property being granted to another." Black's Law Dictionary 9th Ed. at p. 1422.

Here, the subdivider reserved pier privileges in Lots A, B and C not for the benefit of the grantor, but instead for the benefit of the owners of all the lots within the subdivision. It was, therefore, in the nature of an easement.

3. The reservation in the plat was in the nature of an easement or use restriction; it did not convey title.

Significantly, the thing "reserved" for all the lots owners as to Lots A, B and C was "boathouse and pier *privileges*." In real estate law, the word "privilege" also has a special meaning:

> "*Privilege.* A privilege grants to someone the legal freedom to do or not to do a given act. It immunizes conduct that, under ordinary circumstances, would subject the actor to liability." Black's Law Dictionary 9th Ed. at p. 1316.
>
> In addition, a "privilege" to use lands is in the nature of an easement.
>
> "An easement is a liberty, *privilege* or advantage in lands, without profit, and existing distinct from the ownership of the land." AKG Real Estate, LLC v. Kosterman, 2006 WI 106 at ¶2, 296 Wis. 2d 1, 717 N.W.2d 835.

Nartowicz relies upon the platting statute last revised in 1898. It is worth repeating that the statute refers to "donations" and "grants" in plats, not "reservations." The statute reads:

> "When any map shall have been made, certified, signed, acknowledged and recorded as above in this chapter prescribed, every **donation or grant** to the public or any individual or individuals * * * marked or noted as such on said plat or map shall be deemed in law and in equity a sufficient conveyance to vest the fee simple of all such parcel or parcels of land as are therein expressed * * * to the said donee, donees, grantee or grantees **for his, her or their use for the uses and purposes therein expressed and intended and no other use or purpose whatsoever.**" Wis. Stat. §2263 (1911).

While an express "donation or grant" might constitute a conveyance by plat, a "*reservation*" in a plat is neither a donation nor a grant. The legislature could have stated a "reservation" resulted in a conveyance of the fee simple, but did not. In short, Nartowicz invites the Court of Appeals to rewrite the statute by inserting new words that change the statute's intended meaning.

The words "donation or grant" in the above quoted platting statute, same as the word "reservation" and "privilege" in the plat, are legal terms of art. "Technical words and phrases and others that have a peculiar meaning in the law shall be construed according to such meaning." See Wis. Stat. §990.01(1). We next contrast the definition of "donation" and "grant" to the above quoted definition of a "reservation" and "privilege."

> "*Donation.* A gift, esp. to a charity." Black's Law Dictionary 9th Ed. at p. 561."

> "*Donation Land.* Land granted from the public domain to an individual as a gift, usu. as a reward for services or to encourage settlement in remote areas." Id. at p. 955."

> "*Grant*. 1. To give or confer something, with or without compensation. 2. To formally transfer (real property) by deed or other writing." Id. at p. 769.

The platting statute on the one hand provides a donation or grant conveys the fee simple interest, but on the other hand states any such conveyance may be limited, same as an easement, to the "*uses and purposes therein expressed and intended and no other use or purpose whatsoever.*" Wis. Stat. §2263 (1911). This contradiction can be harmonized by simply allowing that a plat may "convey an easement" with warranty of title. Wis. Stat. §30.133 makes a similar harmony by prohibiting the grant of pier privileges to non-riparian owners "by easement or similar *conveyance*."

4. Nartowicz's legal theory requires reversal of established Wisconsin precedent on the legal effect of a reservation.

Long ago, the Wisconsin Court of Appeals decided the legal effect of a "reservation." Here, the platting statute required a "donation" or "grant" to convey title. Instead, the subdivider "reserved" use Lots A, B and C for pier privileges for all lot owners in the plat. Does the choice of words make any difference?

Wisconsin courts have already decided "the difference in terminology is significant." Somers USA v. State DOT, 2015 WI App 33 at ¶1, 361 Wis. 2d 807, 864 N.W.2d 114. "*A reservation does not involve a conveyance but restricts use of the land for the purpose stated in the reservation*." Id.

Three years later, the holding in Somers was applied and re-affirmed in Berkos, 2018 WI App 122, supra. The reservation of pier rights in a riparian condominium for the benefit of the declarant's non-riparian lot was held to be in the nature of an easement, and therefore prohibited and unlawful under Wis. Stat. §30.133. Id. at ¶12.

5. The subdivider is presumed to know the statutes and law governing plats at the time the 1911 plat was recorded.

The court's primary task is to ascertain the intention of the subdivider from the words used in the plat. For this purpose, should the subdivider be charged with knowledge of the requirements for a title transfer under the 1911 platting statute? The answer is yes.

> "It is an ancient principle of contract law that parties are presumed to have contracted with knowledge of and consistent with the law in effect at the time of the execution of the contract." Broenen v. Beaunit Corp., 440 F.2d 1244 at 1249 (7th Cir. 1970).
>
> "Every person in Wisconsin is presumed to know the law." Abbott v. Marker, 2006 WI App 174 at ¶18, 295 Wis. 2d 636, 722 N.W.2d 162.
>
> "Compliance with clearly written provisions of [a statute] is not something we can only expect of lawyers." Id.

Nartowicz himself argues that the subdivider's principals, one of whom was an attorney, had great sophistication and experience in land development and land title transactions. Appellants's Br. at p. 34. If a sophisticated subdivider intended to trigger a conveyance of title to future lot purchasers by operation of the 1911 statute, the subdivider would have used the word "donation" or "grant" instead of "reserved."

6. The choice of words used by the subdivider is and should be determinative.

Nartowicz concedes the term "reservation" is not "generally associated with a conveyance." (R.203:10). Nartowicz also concedes "the case law cited by Plaintiff might be determinative" but attempts to escape this result with the novel theory that the reservation at issue was "drafted around the time Henry Ford started selling the Model T." Id. Nartowicz contends that "words and meanings change over time," such that the subdivider's intention must be determined "after viewing the plat through the lens of the 20th Century world." Id. at 4.

Nartowicz cites a case that proves the opposite, i.e., that choice of the words at issue mattered in 1911 just as much as they matter today, and that their meanings have not changed over time. Town of East Troy v. Flynn, 169 Wis. 2d 330, 485 N.W.2d 415 (Ct. App. 1992). In Flynn, the issue on appeal was who were the riparian owners of a long strip of land that had a mere 20 feet of lake frontage, such that they had a right to install a pier. Id. at 333. While the case decided nothing about statutory

pier regulations, it did decide the legal effect of a 1912 deed to the strip of land at issue, a subsequent 1914 plat that included the same strip, plus the legal effect of the 1911 platting statute at issue in this case.

The 1912 deed "warranted a clear fee simple title." Id. This is evidence that lawyers and grantors at the turn of the century knew what plain English words were customarily used to convey the fee simple title. The grantees were all "the different owners of [the subdivision named] Beulah Lake Park, their heirs and assigns." Id. This deed also illustrates that lawyers and grantors in 1912 understood the language necessary to convey fee simple title to the owners of lots within an entire subdivision.

Two years later, a seven acre parcel within Beulah Lake Park was further subdivided into 16 lots. Id. The plat included the strip of land at issue, which had become known as Beulah Alley. Id. The plat described Beulah Alley as the same parcel previously conveyed to the owners of lots within Beulah Lake Park by the prior deed. Id. The plat further designated Beulah Alley as reserved "for the use of owners of Beulah Lake Park only." Id.

Our Court of Appeals held the language of the 1912 deed conveyed fee simple interest in the thin riparian lot to all the owners of lots within Beulah Lake Park, such that each of them became riparian owners with a common law right to install a pier. Id. at 337-39. By application of the same old platting statute at issue in this case, the Court of Appeals further held the legal effect of the 1914 plat was to layer a *use restriction* upon the riparian ownership created by deed:

> "There is no dispute that the 1912 deed conveyed fee simple title to the different subdivision owners of Beulah Lake Park, their heirs and assigns. After the plat was recorded, each owner of Beulah Lake Park owned a fee simple title in the alley with the accompanying restriction as stated in the plat." Id. at 337-38.

The use restriction in the 1914 plat did not convey the strip. Fee simple title was conveyed to the lot owners by virtue of the 1912 deed, not by the any language in the plat. In short, the choice of words at issue mattered in the early 1900's the same as they matter today.

7. There is no conveyance of title to Lots A, B or C in Nartowicz's chain of title, and the Tract Index reveals title to Lots A, B and C remains in the subdivider.

We have noted that the subdivider must be presumed to know only grants or donations noted in the plat would convey legal title under the platting statute at the time the plat was recorded. The subdivider, the first purchaser of lots, and subsequent purchasers of lots are also presumed to know the requirements of Wisconsin's recording act for the conveyance of title in effect at the time the plat was recorded and thereafter.

In 1911, Wisconsin's recording act was in Chapter 100 of the Wisconsin Statutes. Like our modern Chapter 706, Chapter 100 sets forth the formal requirements for a transfer of legal title. Section 2203 of the 1911 recording act provides:

> "Conveyances of land or any estate or interest therein may be made by deed signed and sealed by the person from whom the estate or interest is intended to pass."

Section 2208 gives examples of sufficient deeds for "conveyances in land." For example, a sufficient Warranty Deed is from "A.B., grantor," who "conveys and warrants to C.D., grantee," the described real property or interest therein. A sufficient Quit Claim Deed is from "A.B., grantor" who "quit claims to C.D., grantee," the described real property or interest therein. Section 2208 further provides:

> "Such deeds, when executed an acknowledged as required by law, shall, when [a warranty deed] of the first of the above forms, have the effect of a conveyance in fee simple to the grantee, his heirs and assigns of the premises therein named together with all the appurtenances, rights and privileges thereto belonging * * *; and when [a quit claim deed] in the second of the above forms, shall have the effect of a conveyance in fee simple to the grantee, his heirs and assigns of all right, title, interest or estate of the grantor, either in possession or expectancy, in and to the premises therein described and all rights, privileges and appurtenances thereto belonging."

Same as our modern Chapter 706, Chapter 100 in effect in 1911 and thereafter established the system for the recording of conveyances with the Register of Deeds

of the county in which the property is located. See also Wis. Stat. §§758-762 (1911) (the duties of the Register of Deeds include maintaining indexes of all recorded and filed instruments, including a tract index). Section 2241 of Chapter 100 also protected innocent purchasers for value without notice of a prior adverse claim same as our modern Chapter 706. See, e.g., Wis. Stat. §706.09.

The tract index maintained by the Register of Deeds, and the title report covering the period after the tract index to the most recent date, reveals that title to Lots A, B and C remains in the subdivider. (R.180; R.181:2, at ¶¶6-7, & 64-84; R.196:1 at ¶¶5-6). More importantly, there is no mention of the conveyance of Lots A, B or C within the tract index. (R.180; R.196:1-2 at ¶6).

The chain of title for the Nartowicz and Huston lots from and after 1911 reveals the complete absence of any conveyance of any interest in Lots A, B or C. (R.181:1, at ¶¶3-4, & 3-63; R.196:1 at ¶4). In fact, there is no evidence of any conveyance of a tenant in common interest in Lots A, B or C in the chain of title for any of the lots in the plat. (R.196:1-2 at ¶¶4-6; R.221).

If the reservation in the plat automatically conveyed a tenant in common interest in Lots A, B and C to the first purchasers of lots within the subdivision, where are the deeds that conveyed that tenant in common interest to subsequent purchasers such as Nartowicz? There are none.

8. Nartowicz cites no authority for the proposition that fee simple title automatically transferred from the first lot purchaser to each successor owner without need for a deed; only appurtenant easements transfer automatically to a successor.

Nartowicz claims that by some legal magic the reservation in the plat results in automatic conveyances of tenant in common interests in Lots A, B and C from the first purchaser of each lot to subsequent purchasers without any need for a deed that actually transfers title. See Appellants's Br. 46. Nartowicz does not reveal any legal authority in support of such legal magic. None exists.

The *only* interests in land capable of "running with the land" are restrictions, covenants and easements appurtenant to the dominant estate. As to easements, the general rule everywhere is as follows:

> "A transfer of real property passes all easements attached to the property even if not referred to in the instrument of transfer. Thus, easements on a plat are appurtenant to the property and pass with the conveyance of the property." 25 AM. JUR.2d Easements & Licenses at §80.

Wisconsin follows the general rule that a conveyance of a dominate estate automatically conveys an appurtenant easement without need for any mention of the easement in the conveyance document. "The long established rule is that an express easement passes by a subsequent conveyance of the dominant estate without express mention in the conveyance." AKG Real Estate, LLC v. Kosterman, 2006 WI 106 at ¶44, 296 Wis. 2d 1, 717 N.W.2d 835. Thus, the recording act does not apply to such a transfer "by act or operation of law." See Wis. Stat. §706.001(2)(a); see also Wis. Stat. §2302 (1911) quoted infra.

Nartowicz takes the awkward position that an automatic transfer of *title* results from a reservation, while under settled law such an automatic transfer occurs only if the reservation created an appurtenant easement that runs with the land. We repeat: Where is the case law that holds title to Lots A, B and C can transfer automatically from a predecessor lot owner to a successor? There is none.

9. Under Wisconsin's real estate law in 1911 and thereafter, title to the fee simple interest in real property can be voluntarily transferred only by a deed of conveyance satisfying certain formal requirements.

The subdivider and lot purchasers who are presumed to know the requirements for a title transfer under the 1911 platting statute are also presumed to know the statutory requirements at the time of the plat for a voluntary transfer of the fee simple interest in real estate. Chapter 104 of the 1911 Wisconsin Statutes provides at Section 2302 as follows:

> "No estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands or in any manner relating thereto shall be created, granted, assigned, surrendered or declared unless by act or operation of law or **by deed or conveyance in writing**, subscribed by the party creating, granting, assigning, surrendering or declaring the same."

The first purchaser of each lot, and his or her successor including Nartowicz, are also presumed to know the modern equivalent of the above quoted 1911 statute, now found at Wis. Stat. §706.02. This statute provides:

> "Transactions under s. 706.001(1) [being "every transaction by which any interest in land is created, alienated, mortgaged, assigned or may otherwise be affected in law or equity] **shall not be valid unless evidenced by a conveyance** that satisfies all of the following: (a) Identifies the parties; and (b) Identifies the land; and (c) Identifies the interest conveyed, and any material term, condition, reservation, exception or contingency upon which the interest is to arise, continue or be extinguished, limited or encumbered; and (d) Is signed by or on behalf of each of the grantors; * * *." Wis. Stat. §706.02(1)(a)-(d).

No matter how Nartowicz might slice and dice all the case law and historical information submitted by Nartowicz, there is no escape from the simple fact that Wisconsin real estate law has since at least 1911 and thereafter required a deed of conveyance from a grantor to a grantee in order to voluntarily transfer the fee simple interest in real property. As to the alleged tenant in common interest in Lots A, B and C, there are no such conveyances from the subdivider, or from any first purchaser, to any subsequent purchaser. (R.180; R.181; R.196:1-2 at ¶¶4-6; R.221).

10. The state of record title supports a compelling inference that lot purchasers did not intend or expect to acquire a tenant in common interest in Lots A, B and C; instead they intended and expected to acquire rights in the nature of an easement.

Every Wisconsin county has been required to have a Register of Deeds ever since our state adopted its constitution in 1848. See Article VI, §4. The official duty of the Register of Deeds is to maintain a public and searchable record of conveyances of title and other interests in land. Wis. Stat. §59.43(1c). In turn, the marketability

and stability of titles to land is secured by Wisconsin's recording act, Wis. Stat. §706.08. The place to properly register and protect a marketable title in your name is by recording your deed with the Register of Deeds. Otherwise, your title can be lost to an innocent purchaser without notice of your claim. See, e.g., Wis. Stat. §706.09.

Immediately after the plat was recorded, the subdivider owned all the lots. If the reservation in the plat was a conveyance to all the then existing lot owners, then by the reservation the subdivider conveyed Lots A, B and C to the subdivider. Where are the conveyances of the fee simple tenant in common interest in Lots A, B and C from the subdivider to the first purchaser of each lot? There are none. (R.180; R.181; R.196:1-2 at ¶¶5-6).

If the reservation in the plat was the conveyance of a tenant in common interest in Lots A, B and C to the first purchaser of each lot from the subdivider, where are conveyances from the first purchaser of each lot to his or her successor and onwards to the current lot owner? Such conveyances are nowhere to be found in the official land records. (R.180; R.181).

If the reservation was a conveyance, how does Nartowicz explain the absence of any subsequent conveyance of a title to Lots A, B or C in their chain of title, from one lot owner to the successor owner? (R.181:1, at ¶¶3-4, & 3-63; R.196:1 at ¶4). Nartowicz has no explanation.

If the non-riparian lot owners intended to acquire title as co-owners of Lots A, B and C, any prudent purchaser filled with an expectation to become a riparian lot owner would expect and require the conveyance of title as tenant in common in Lots A, B and C be set forth in the deed delivered at closing. There are no such deeds. (R.221). Why? Because the Defendants and their predecessors never understood, expected or intended that they would acquire an interest in the fee simple title of Lots A, B and C. Brokers may have advertised "deeded lake access," but matters of title do not depend upon the puffery of agents eager to earn a commission.

Incident to discovery, the Block Three Defendants produced only two conveyances that "mention or refer to Lots A, B and C." (R.221). Both conveyances refer only to the "*right of access to Lake Waubesa.*" Id. at 3-4. These references to "lake access" rights do not, however, purport to convey the fee simple interest in Lots A, B or C. These references instead support a conclusion that the grantor intended to give, and the grantee intended to receive, a mere easement for lake access, not a tenant in common interest in the fee simple.

The state of record title creates a compelling inference that the original subdivider, the current lot owners, and their predecessors in title all intended, understood and expected that the reservation in the plat created an easement that runs with the land, not a tenant in common interest in Lots A, B and C.

11. The old newspaper advertisements reveal the reservation in the plat was intended to be in the nature of an easement, not a conveyance.

Over an objection by Kapinus and Van Camp, the trial court considered old newspaper clippings and advertisements as evidence of the subdivider's intention. (R.223:1; R.224:2; R.247:41-43). These newspaper clippings and advertisements are now found in Nartowicz's Appendix. Not a single one of the offered clippings and advertisements make any statement about the conveyance of title or ownership of Lots A, B or C to the lot owners.

In fact, the subdivider's own advertisement most on point declares the subdivider's intention to give non-riparian lot owners mere lake *access*, not title or ownership of a riparian lot. (R.206:1). The on point advertisement reads:

> "The tract has just been platted in the most beautiful manner leaving *access to the lake* for all not having water frontage." Id.

When coupled with the state of record title and the absence of any conveyances of Lots A, B and C from first purchasers to all subsequent purchasers, this advertisement supports a conclusion that the subdivider and all lot purchasers intended, understood and expected that the reservation created an easement over Lots

A, B and C for lake access and installation of piers.

12. Nartowicz cites no Wisconsin case by which a "reservation" was a conveyance of legal title to a private party in the absence of a deed to transfer legal title.

Of the 53 cases cited by Nartowicz, not a single one of them holds a "reservation" in a Wisconsin plat constituted a conveyance of fee simple title to a *private party* for a private purpose without also a deed of conveyance. Substantially all of the cited cases involved dedications *to the public* for a public purpose.

We find only two Wisconsin cases where a subdivider conveyed a tenant in common interest in the fee simple title to lot owners within a plat. In both cases there was more than a notation in the plat. There was also a deed of conveyance which manifested the subdivider's intention to convey a tenant in common interest.

The first of the two cases is Town of East Troy v. Flynn, 169 Wis. 2d 330, 485 N.W.2d 415 (Ct. App. 1992). As noted above, the 1912 deed to the lot owners conveyed title of a riparian lot to non-riparian owners as tenants in common. Id. at 333 & 337-39. The 1914 plat layered a use restriction upon the ownership. Id. The deed conveyed co-ownership, not the notation on the plat.

The second of the two cases is Campbell v. Brown, 2004 WI App 125, No. 03-1625 (May 6, 2004) (unpublished opinion). Nartowitcz cited Campbell twice. However, Campbell is an unpublished, per curiam decision issued prior to 7/1/09 and thus cannot be cited as either precedent or for its persuasive value. See Wis. Stat. §809.23(3)(a)-(b).

While Kapinus has no duty to evaluate the case and the Court of Appeals need not distinguish or otherwise discuss it, id., for the following reasons Nartowicz's reliance on Campbell misses the target by a country mile:

- The subdivider wrote on the plat a single word on four lots, three of which were riparian lots. That word was "park." 2004 WI App 125 at ¶2 & fn. 3.
- The notation on the plat was not a "reservation."

- The subdivider's deeds to all first purchasers of lots within the subdivision manifested an intention to convey a tenant in common interest in the lots marked "park" to all purchasers of lots within the subdivision. The deeds for each lot provided that the park lots were "restricted to the use in common by the owners of the lots in the Greenridge Park plat for bathing, boating, fishing and recreation purposes." Id. at ¶3.

- At issue was whether the subdivider intended a dedication of the park lots to the public, or intended that the lot owners own the park lots as tenants in common. Id. at ¶4.

- The Court of Appeals held the deeds support the trial court's conclusion that the subdivider "did not intend a public dedication of the park lots," and held "the private use restriction in the lot deeds creates a strong, if not overwhelming, inference to the contrary." Id. at ¶9.

In short, it was the deeds that conveyed co-ownership of the park lots to the private lot owners, not the notation in the plat.

13. Substantially all of Nartowicz's citations to the record are incorrect.

Our review of Nartowicz's citations to the record reveals substantially all of them are incorrect. For example:

- At page 14, Nartowicz cites to Doc. Nos. 114 and 146 in reference to non-riparion owners installing piers since 1978, and Nartowicz doing so every year since 1983. Doc. No. 114 is an Affidavit of Due Diligence related to service of the Second Amended Summons and Complaint. Doc No. 146 is an Electronic Notice Status Change and not even a part of the record on appeal.

- At page 34, Nartowicz cites to Doc. Nos. 134, 156 and 117 while asserting the subdivider understood the varieties of land title interests and explaining its purported intention for obtaining a Quit Claim Deed from Interlake Land Company. Doc. 134 is an Affidavit of Mailing. Doc. 156 is a Motion to Enter a Stipulated Dismissal Order. Doc. 117 is another Electronic Notice Status Change that is not a part of the record on appeal.

- At pages 37-39, Nartowicz cites to Doc. No. 145 in reference to plats of resorts located along Wisconsin lake shores. Doc. No. 145 is not a part of the record on appeal and is an envelope for a returned Notice of Hearing.

None of the citations to the record that we looked into were correct. These errors have made this appeal more difficult and time consuming for both the Court of Appeals and Kapinus, and violated Wis. Stat. §809.19(1)(d)-(e).

14. The Court of Appeals should consider a sanction for Nartowicz's violation of appellate rules.

In addition to improperly citing to Campbell as discussed above, Nartowicz cites to two other unpublished opinions that are not citable per Wis. Stat. §809.23(3). See Appellants's Br. 17 (citing Leith Holdings, LLC v. Wisconsin Power & Light Co., 2019 WI App 21, No. 2017AP1740 (Mar. 20, 2019), an unpublished per curiam opinion) & 44 (citing Trahan v. Hinton, No. 2020AP35 (Wis. Ct. App. June 23, 2021), an unpublished per curiam opinion). Nartowicz also violated the requirement that unpublished decisions cited in an appellate brief must be included in the Appendix. See Wis. Stat. §809.19(2)(a). These citation errors and the numerous erroneous references to the record violated the rules of appellate procedure.

Under Wis. Stat. §809.83(2), the Court of Appeals has authority to impose various sanctions such as "dismissal of the appeal," or a lesser sanction such as "imposition of a penalty or costs on a party or counsel, or other action as the Court of Appeals considers appropriate."

Dismissal is of course too drastic of a remedy. As to a lesser remedy, Kapinus declines to recommend an appropriate sanction and leaves the matter to be resolved in the discretion of the Court of Appeals.

15. Nartowicz's legal theory turns Wisconsin's real property law upside down on its head.

Having shown the reservation was intended by the subdivider and accepted by the lot purchasers as being in the nature of an easement, we next show the legal theory advanced by Nartowicz turns Wisconsin's real estate title system and recording act upside down on its head.

The need for a recorded deed is underscored by the function of the searchable database required to be maintained by the Register of Deeds of each Wisconsin county since 1911 and before. See Wis. Stat. §762 (1911). That searchable database enables title companies and interested purchasers to determine the marketability of titles and secure title insurance at a reasonable cost. The need for a deed is also underscored by the 30 year statute of limitations in Wis. Stat. §893.33(3). Unless a claim of title appears of record within 30 years, the claim is barred.

The records maintained by the Register of Deeds perform another important function relating to real estate taxation. From its records, the statutory property lister compiles a list of all the parcels of real property and the names of their owners. See Wis. Stat. §70.09. The local assessor then determines the market value of each parcel, and the record owners receive a tax bill from the municipality. The magical transfer of title urged by Nartowicz without need for any deed recorded in the office of the Register of Deeds turns this sensible system into chaos. It is no wonder that none of the current lot owners or any of their predecessors ever received a tax assessment and tax bill for their pro-rata share of the claimed co-ownership of Lots A, B and C.

The absence of a chain of conveyance documents as to Lots A, B and C has resulted in the local property lister identifying the owner of Lots A, B and C as "UNKNOWN." (R.182; R.196:2 at ¶8). When the property lister cannot determine ownership of a parcel, something has gone seriously wrong with our land title system.

We have shown why Nartowicz's legal theory turns Wisconsin's real estate law upside down on its head. We next show the result urged by Nartowicz will create neighborhood chaos.

16. The result urged by Nartowicz will create neighborhood chaos.

While not determinative of the question of law presented, Nartowicz correctly points out that in 1911 recreational boating was by small row boats stored in boat houses, or tied to piers or the land. The 14 foot bulb at the shore of Lot B and the 10 foot bulb at the shore of Lots A and C were perhaps wide enough to accommodate

numerous small row boats in 1911.

With the invention and proliferation of outboard motors after 1911, recreational boating has vastly changed. Today's boats are significantly larger in length and width, often 25 or more feet long and 8 feet or more wide. Large power boats and sailboats are routinely stored upon hoists generally ten feet wide. See, for example, the size of the boats and boat hoists pictured in historical photos submitted by Kapinus and Nartowicz's pier installer diagrams. (R.192:17-18 & 23-24).

The narrow strips of land at issue are not wide enough to accommodate today's modern recreational boating. The strips cannot accommodate more than one pier and maybe one boat lift at each strip.

How can the owners of 25 riparian and non-riparian lots share the use of these strips for modern boating purposes without argument and discord? How can multiple boat hoists be installed without invasions into the riparian zone of adjacent lots? How will the neighbors and courts resolve the equal right of riparian owners such as Kapinus to maintain a pier and boat hoist at these same strips? What hellfire will burn through the neighborhood when Kapinus installs his pier at Lot B, and tells his neighbors not to use it for boating purposes, same as Nartowicz told his neighbors? (R.183:5-6 at p. 16-18).

Will each lot owner contribute to the costs of the piers and stairways for lake access? Will they each pay their share of the tax bill? If not, will there soon be a Tax Deed sale to a stranger? Will each lot owner pay their fair share of liability and casualty insurance? What is the remedy for nonpayment? Will the numerous lot owners who deliberately defaulted in this action not care enough to accept the burdens of ownership?

The result urged by Nartowicz will create the instability, chaos and probable litigation that our land title system was designed to prevent. Our real estate law is intended to secure the stability and marketability of titles and the appurtenant right to use, possession and enjoyment. Where title is doubtful or the right of use and

possession is subject to the risk of dispute and litigation, title is not marketable. "A marketable title is one that can be held in peace and quiet; not subject to litigation to declare its validity; not open to judicial doubt." Baldwin v. Anderson, 40 Wis. 2d 33 at 43, 161 N.W.2d 553 (1968). The result urged by Nartowicz will not bring peace or stability to the neighborhood. Instead, it will create chaos and the risk of future litigation.

Recognizing the likely chaos that would result if Nartowicz prevailed at trial, Nartowicz suggested regulations governing the pier and boat hoists at Lots A, B and C. (R.226:16-25). Nartowicz's proposed regulations grant priority rights as to piers and boat lifts to the lots owners who are most senior in ownership. Id. at 23, §X.4(b)-(c). This means a superior right to Nartowicz to the exclusion of other lot owners. Such superiority for Nartowicz and exclusion of other lot owners has zero foundation in the language of the plat, and rewrites the plat.

The Court of Appeals should be amused, as we are amused, by Nartowicz's suggestion on how a lot owner could wash his or her hands of all obligations to share in the maintenance of piers, payment of taxes and insurance premiums, plus the benefits of shared use of Lots A, B and C. That mechanism is the recording of a Quit Claim Deed as to Lots A, B and C in the office of the Register of Deeds. Id. at 16, §I.3(d)). In other words, there is a need for a deed. It seems to us, that Nartowicz finally has an appreciation for the wisdom of our land title system.

CONCLUSION

The Court of Appeals should affirm the trial court.

Respectfully submitted this 5th day of October, 2021.

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CERTIFICATION OF FORM & LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19 (8) (b), (bm), and (c) for a brief. The length of this brief is 34 pages. The length of those portions of the brief referred to in Wis. Stat. §809.19(1)(d), (e) and (f) is 8,062 words.

Dated this 5th day of October, 2021.

Electronically Signed By: *Nicholas J. Loniello*

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CERTIFICATION OF SUPPLEMENTAL APPENDIX

I hereby certify that filed with this brief is a supplemental appendix that complies with Wis. Stat. §809.19 (3) (b) and that contains a table of contents that conforms with §809.19 (2) (a) and a copy of any unpublished opinion cited under §809.23 (3) (a) or (b).

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 5th day of October, 2021.

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CERTIFICATION OF MAILING

I hereby certify that pursuant to Wis. Stat. §809.801(6)(c) that a true and accurate copy of this brief and the supplemental index filed with this brief were deposited in the United States Mail for delivery by first class mail, postage prepaid, to the following paper parties:

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