

ED 105494

**IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT**

**INCLINE VILLAGE BOARD OF TRUSTEES,
Respondent/Plaintiff-Counterclaim Defendant,**

vs.

**MATTHEW EDLER AND ANDREA EDLER
Appellants/Defendants-Counterclaim Plaintiffs.**

Appeal from the Eleventh Judicial Circuit Court (St. Charles County) Missouri

Honorable Daniel G. Pelikan, Division 7

Case No. 1211-CC00407

BRIEF OF APPELLANTS MATTHEW F. EDLER AND ANDREA L. EDLER

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JURISDICTIONAL STATEMENT

This is an appeal of a Judgment after a bench trial by the Honorable Daniel G. Pelikan of the Eleventh Judicial Circuit (St. Charles County), Missouri in favor of Respondent-Plaintiff/Counterclaim Defendant Incline Village Board of Trustees on December 8, 2016. Thereafter, on or about January 26, 2017, Appellants-Defendants/Counterclaim Plaintiffs Matthew F. Edler and Andrea L. Edler timely filed their Motion to Vacate, Reopen, Correct, Amend or Modify the Judgment and/or for a New Trial. Judge Pelikan denied the Motion on March 28, 2017. Defendants/Counterclaim Plaintiffs timely filed their Notice of Appeal on April 7, 2017.

Jurisdiction of this appeal lies in this Court under Article V, §3 of the Missouri Constitution because the Eleventh Judicial Circuit Court (St. Charles County) is within the boundaries of this appellate district and none of the exceptions for exclusive jurisdiction of the Missouri Supreme Court, is present in this case. This case does not involve the validity of a treaty or statute of the United States, the validity of a statute or provision of the Constitution of this State, the construction of revenue laws of this State, the title to any state office, or the imposition of the death penalty.

STATEMENT OF FACTS

The trial court's Judgment includes Findings of Fact that are relevant to this Appeal. (LF 136-48; A1-7, Judgment ¶¶1-46. These are set forth here in the same numerical format as the Judgment.

1. Plaintiff/Counterclaim Defendant Incline Village Board of Trustees ("Incline Village") is a Missouri not-for-profit corporation.

2. Defendants/Counterclaim Plaintiffs Matthew F. Edler and Andrea Edler (the "Edlers") are individuals residing at Lot 23, Sumac Ridge Subdivision, 10637 Village Dr. West, Foristell, Missouri 63348, in the County of St. Charles (the "Property").

3. The Court has jurisdiction over the parties and subject matter jurisdiction over the dispute between the parties. The parties have agreed that venue is proper in this Court.

4. Sherwood Builders, Inc. (Sherwood) developed Incline Village as a recreational subdivision in 1974.

5. There exists a body of water in the Incline Village Subdivision called the "Main Lake," (also "Incline Village Lake") which was built by Sherwood for the purpose of providing recreational enjoyment to the platted lot owners of Incline Village. The Indentures at Article II states that "all common areas ... are hereby dedicated to the exclusive use and benefit of the lot owners of said plats, collectively, forever."

6. The Main Lake is a common area owned by the Trustees and title to the Main Lake, including the bed of the Main Lake up to its high water mark, is vested in the Trustees.

7. There exists a body of water in the Incline Village Subdivision called the "Main Lake," (also "Incline Village Lake") which was built by Sherwood for the purpose of providing recreational enjoyment to the platted lot owners of Incline Village. The Indentures at Article II states that "all common areas ... are hereby dedicated to the exclusive use and benefit of the lot owners of said plats, collectively, forever."

8. The Main Lake is a common area owned by the Trustees and title to the Main Lake, including the bed of the Main Lake up to its high water mark, is vested in the Trustees.

9. Pursuant to the rights, powers and authority vested in the Trustees, only the owners of platted lots of the Incline Village subdivision abutting the Main Lake are allowed, after receiving the prior approval of the Trustees, to construct boat docks or slips on the Main Lake.

10. The Edlers' have no ownership interest in Main Lake.

11. The Edlers' have access to the use and enjoyment of Main Lake by virtue of owning 1 or more lots in the Incline Village Subdivision. The Edlers' do not have access to the use and enjoyment of Main Lake by virtue of their ownership of the Property.

12. The Main Lake is not openly accessible to the public, but has only been available for recreational enjoyment of the platted lot owners of Incline Village and their invitees.

13. The Main Lake is a man-made body of water formed by a dam of Indian Camp Creek and is not navigable.

14. The Main Lake is a permanent body of water.

15. The sole source of funding to repair and maintain the Main Lake is, and always was, derived from assessments paid by Incline Village lot owners pursuant to the obligations set forth in the Indenture.

16. Originally, Trustees were to maintain the Main Lake through an annual assessment "not to exceed fifty dollars" per lot.

17. On July 26, 1996, the Circuit Court of Warren County ordered the Incline Village lot owners to begin paying a "special assessment" of \$415.00 per-year for five years (beginning in 1995); the Circuit Court found the lot owners were responsible for funding an "improvement program" contemplating the removal of silt that accumulated in the Main Lake requiring a "dredging operation.

18. The Circuit Court of Warren County found that restoration of Main Lake was "unquestionably in the best interest of each and every member of the class, in that each will benefit from the use and enjoyment of the lake and each will benefit from the prospect of increased property values

19. In addition, the Circuit Court of Warren County ordered the lot owners to pay \$100 per year as an assessment to fund a "preventative and remedial maintenance program" over the life of the Main Lake.

20. On December 12, 2002, Trustees were furthered ordered by the Circuit Court of Warren County to maintain "Sand Beach-Number Two" (Lots 619, 620, & 621) as a beach and common ground for the benefit of the Incline Village lot owners.

21. Between 2002 and 2003, Trustees paid to Magruder Construction Company, Inc. ("Magruder") at least \$263,775.50 in dredging operation expenses associated with the Main Lake.

22. On August 2, 2007, the Missouri Department of Natural Resources required Trustees to hire a licensed professional engineer to determine whether the Incline Village Dam posed a "downstream haphazard." This necessitated the hiring of engineer Robert Heagler and Geotechnical Engineering, Inc.—at a cost of approximately \$20,000 to \$30,000—to conduct a geotechnical engineering evaluation of Incline Village Dam and further necessitated the initiation of a construct project to increase the Dam's height by approximately six feet.

23. The dam construction project was awarded to Cannon Excavation Company, LLC, on July 14, 2009, for a bid amount of \$131,372.00.

24. On June 25, 2012, Trustees—in an effort to meet their maintenance obligations under the Indenture—entered into a Class Action Settlement Agreement with the Lot Owners of Incline Village Subdivision that raised the minimum per-year assessment fees to \$495.00—with any future increases to be decided by simple majority vote of the Lot Owners, or otherwise by Trustees in their discretion by an amount not exceeding five percent of the previous year's assessment.

25. The \$495.00 per-year-assessment was in addition to the "special assessment" as ordered by the Circuit Court of Warren County in 1996.

26. By 2014, the Main Lake once again required dredging; Magruder was contracted to handle the dredging project that, as of June 17, 2015, has cost approximately \$465,000.000 in fees.

27. Up to the present date, approximately \$2,864,000.00 has been spent in maintenance-related expenses of Main Lake since its creation—including multiple dredging operations, a dam reconstruction project, and shoreline improvements. This figure does not include additional expenses related to equipment costs, common ground cleanup, and water patrol enforcement (i.e. lake security).

28. On or about July 26, 1996, Peter Lenzenhuber ("Lenzenhuber") began the process of purchasing certain property adjacent to the Incline Village Lake (the Main Lake) that Lenzenhuber was advertising as having "access" to the Incline Village Lake.

29. Thereafter, Lenzenhuber said he did not seek "Lake access" and further "based on the cost of joining Incline Village ... and the potential future liabilities associated with the lake at Incline Village, I see no reason to have Sumac Ridge join Incline Village ... Title will be passed to future purchasers with any and all rights as described in the deeds of record. Purchasers of Sumac Ridge are aware that the lake is owned by Incline Village Trustees."

30. By General Warranty Deed on April 8, 1997, (the "Lenzenhuber Deed") Peter Lenzenhuber ("Lenzenhuber") did, in fact, purchase property adjacent to Incline Village Lake from HealthQuarters of Incline Village, L.P., ("HealthQuarters") which included Sumac Lot #23, Sumac Ridge Drive, Foristell, Missouri 63348 (the "Lot 23 Property").

31. In particular, the Lot 23 Property—as well as other lots that make up what is now Sumac Ridge Subdivision—was included in the transfer of "Parcel No. 1" to Lenzenhuber as described in the Lenzenhuber Deed.

32. However, the Lenzenhuber Deed specifically excepted ownership of "Incline Village Lake" from transfer to Lenzenhuber.

33. The Lenzenhuber Deed does not refer to riparian rights. Rather, the language of the Lenzenhuber Deed provides in the legal description that the Main Lake is not owned by Lenzenhuber: Excepting therefrom the following: Incline Village Lake
A lake containing approximately 220 acres of water lying in the West Half of the Northwest Quarter of Section 7, Township 47 North, Range 1 East, St. Charles County; and the East Half of the Northeast Quarter, the Southeast Quarter, the Southwest Quarter, all in Section 1; the East Half of the Southeast quarter, the Northwest Quarter of the Southeast Quarter, the Northeast Quarter of the Southwest Quarter, and the Southeast Quarter of the Northwest Quarter all in Section 2, Township 47 North, Range 1 West, Warren County, Missouri.

34. On August 18, 1997, Lenzenhuber transferred the Lot 23 Property to Andrew and Deanna Karandzoeff.

35. On February 28, 2006, the Karandzoeff's—then known as the Gormans—transferred the Lot 23 Property to Harold and Beverly Cissell.

36. On July 23, 2009, the Cissells transferred the Lot 23 Property to StoneCastle Development, LLC.

37. On October 16, 2009, StoneCastle Development transferred the Lot 23 Property to Andrea and Matthew Edler (the "Edlers").

38. The Edlers' General Warranty Deed does not contain any language concerning the ownership of or rights to Main Lake.

39. Neither the Sumac Ridge Plat nor the Sumac Ridge Indenture make reference to rights of Sumac Ridge lot owners to use Main Lake."

40. Lot 23 Property is not a platted property in the Incline Village Subdivision.

41. The Edlers' Lot 23 Property abuts the Main Lake.

42. The Edlers' constructed a boat dock slip extending from the Property into the Main Lake, Section 1.

43. The Edlers' did not seek permission from the Incline Village Subdivision Trustees to build their dock.

44. At least one of the Trustees told the Edlers' they were not allowed to build a dock on the Lake prior to the construction of the dock.

45. On February 27, 2015 this Court granted Summary Judgment in favor of the Defendants.

46. On June 23, 2015 this Court granted Plaintiff's Motion to Reconsider and vacated its grant of Summary Judgement after the parties revealed new and additional disputed facts to the Court. Thereafter, this Court denied the parties' cross motions for summary judgement and set the matter for trial. Trial was held on September 8, 2016, with a Joint Stipulation of Facts and live testimony and evidence.

Not noted in the trial court's Findings of Fact is that prior to the trial, the Court denied Incline Villages' Motion for a Temporary Restraining Order on April 25, 2012 (LF 38) and later its Motion for Preliminary Injunction on June 13, 2014. LF 99.

The Edlers both testified about their attempts beforehand to present to the Incline Village Trustees their plans to build a dock and their sincere opinion that they were within their legal rights to do so. T 36, 47-8. Andrea Edler recalled showing the trustees' documents concerning riparian rights she had obtained from the internet and their plan to build a small dock. T 36, 40. Their position was their riparian rights arose from their ownership of the Sumac Ridge lot which abuts the Main Lake (A7, Judgment ¶41), not from their lot in Incline Village. Her intent was to reach a "neighborly agreement". T 44. Matt Edler recalled providing the trustees a letter from their attorney supporting their claim for riparian rights. T 48.

Both Edlers testified the trustees said they would review the matter with their attorney and reply. T36-7, 48-9. After having no response, even though Matt called the trustees leaving two messages (T 49), the Edlers' proceeded to install the dock about a couple months after the meeting. T 37. It is a small dock, 24 feet long by 12 feet wide encompassing a single 10 foot bay. T 37, 48. Andrea testified it is situated at the shoreline of their Sumac Ridge lot in a small cove off the Main Lake and does not interfere with activity on the Main Lake. T37.

POINTS RELIED ON

I. The trial court erred in deciding the Edlers' do not have riparian rights to the Main Lake because the conditions that cause common law riparian rights to attach are present in that the Main Lake has become a permanent and thus natural body of water which the Edlers' property abuts; therefore, riparian rights attach by common law.

- Bradley v. County of Jackson, 347 S.W.2d 683 (Mo. 1961)
- Greisinger v. Klinhardt. 9 S.W. 2d 978 (Mo. 1928)
- *Alvin E. Evans, Riparian Rights in Artificial Lakes and Streams*, 16 Mo.L.Rev. (1951) (cited in Judgment as Missouri Law Review, Vol. 16. Iss 2 (1951), Art 1)
- *Black's Law Dictionary (7th ed. 1999)*

II. The trial court erred in awarding the Incline Village Trustees a judgment for attorney fees because equitable and special circumstances did not support the award in that the Edlers' construction of the dock was done in the sincere and reasonable belief they had this legal right to do so.

- Ridgway v. TTnT Development Corp., 126 S.W.3d 807 (Mo. App. 2004)
- 527.100 R.S. Mo attorney

ARGUMENT

I. The trial court erred in deciding the Edlers do not have riparian rights to the Main Lake because the conditions that cause common law riparian rights to attach are present in that the Main Lake has become a permanent and thus natural body of water which the Edlers' property abuts; therefore, riparian rights attach by common law.

Standard of Review

This Point addresses the trial court's judgment entering a Declaratory Judgment and Trespass in favor of Incline Village and against the Edlers. In a court-tried case as here, the judgment will be reversed if it lacks substantial evidence, is against the weight of the evidence, or misapplies or misinterprets the law. Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. Banc 1976). The court's legal determination is reviewed *de novo*. 66, Inc. v. Crestwood Commons Redevelopment Corp., 130 S.W.3d 573, 584 (Mo. Ct. App. 2003).

A "riparian owner" is the owner of land bounded by a watercourse or through which a watercourse flows. Edmondson v. Edwards, 111 S.W.3d 906 (Mo.App. 2003). An owner of property abutting a natural stream has riparian rights to use the waters of a stream. Meyers v. City of St. Louis, 8 Mo.App. 266 (St. L. App. 1880). Riparian rights arise from ownership of land abutting natural lakes. Bohannon v. Camden Bend Drainage District, 208 S.W.2d 794, 801 (Mo.App. 1948).

A lake that is initially man-made, thus artificially created, but over time becomes permanent, will then be legally considered a natural body of water, which will provide

abutting landowners riparian rights. Greisinger v. Klinhardt, 9 S.W.2d 978 (Mo.1928); Bradley v. County of Jackson, 374 S.W.2d 683 (Mo. 1961). The riparian owner need not own the submerged land. Bradley, at 688.

The trial court made all the key findings of fact necessary to support the conclusion that the Edlers' have riparian rights to Main Lake from their lot in Sumac Ridge. The court found that Incline Village's Main Lake is a permanent body of water as also stated in the parties' stipulation. LF 129, Joint Stipulation ¶12; A3, Judgment ¶14. The finding of permanency is further supported by Findings in the Judgment where the trial court recites the history of projects and investments, often under court orders, to maintain the Main Lake (although that may not have been the trial courts intention in making those findings. A3-5, Judgment ¶ 17-27.

It also found the last necessary element; that the Edlers' lot abuts the Main Lake. A7, Judgment ¶41. Under controlling Missouri law, these are the only facts necessary to conclude, the Edlers' have riparian rights to the Main Lake, a permanent lake which is legally treated as natural. Greisinger v. Klinhardt. 9 S.W. 2d 978 (Mo. 1928);

The trial court even stated the correct conclusion from these facts as it defined the doctrine of riparian rights, quoting from the trial judgment; A8-9:

53. Riparian rights are defined as: "The right of a landowner whose property borders on a body of water or watercourse." *Black's Law Dictionary* (7th ed. 1999). The riparian rights doctrine is further defined as: "The rule that owners of land bordering on a waterway have equal rights to use the water passing through or by their property." *Black's Law Dictionary* (7th ed. 1999). "At common law riparian rights attached to natural water

courses." *Missouri Law Review*, Vol. 16, Iss 2 (1951), Art 1.¹ Traditionally, they did not attach to artificial watercourses. This view changes when the artificially created watercourse, through some aspect of permanency, takes on a natural condition. *Id* at 108. "Perhaps almost enough has been said respecting riparian rights, the theory here advocated being that when a stream diversion has occurred or an artificial lake, reservoir or other body of water has been created and has continued long enough to assume in the minds of those in the neighborhood a settled condition, (sometimes called an appearance of permanency) the artificial condition is now to be regarded the same as if it had been caused by nature rather than by the hand of man. When this has occurred, riparian rights should attach. The question should not be simply with what intent was the diversion made, but rather what do general appearances lead people who may be affected thereby to believe." *Id* at 113.

The Edlers contend the facts of this case fall squarely within the trial court's own conclusions of law in paragraph 53 of the Judgment.

Their position is further supported by two other conclusions. First, by citing Greisinger, supra, at 980 that riparian rights attach where the original artificial lake over time becomes recognized as a natural body of water due to its permanency. A9-10, Judgment ¶ 57. Then the court cites Bradley v. County of Jackson, 374 S.W.2d 688 (Mo. 1961) for the legal principle that riparian rights arise simply from the ownership of land abutting water and this is regardless of the ownership of the submerged land. A10, Judgment

¹ Also cited as Alvin E. Evans, Riparian Rights in Artificial Lakes and Streams 16 Mo.L.Rev. (1951) as suggested in the article.

¶58. This latter point nullifies any significance to the courts previous findings that the Main Lake was owned by the Incline Village Trustees and that the Edlers had no ownership interest. A2, Judgment ¶8, 10.

Unfortunately, despite these determinative findings of facts and correct conclusions of law, the trial court did not follow their path in reaching its final judgment.

There are two primary points that the Edlers' contend support their position and which rebut many of the arguments made by Incline Village and the findings and conclusions reached by the trial court. First, the Edlers riparian rights to the Main Lake arise from long-standing common law principles. Those rights are not created, disturbed or lost by any indenture, deed, brochure, or other document; absent an agreement signed by the Edlers expressly conveying their riparian rights.

Second, a critical fact is that Incline Village only partially surrounds the shoreline of the Main Lake. Unlike many similar recreational communities which have their lakes and ponds wholly contained within and bordered by the community property, Main Lake is not wholly contained within the Incline Village subdivision. Main Lake is also bordered by lots in Sumac Ridge, including the Edlers' lot. Sumac Ridge is a separate subdivision. The lots in Sumac Ridge are bound by their own indenture and governed by their own chosen trustees; not the indenture nor the trustees of Incline Village. The Incline Village indenture and its trustees have no jurisdiction, authority, or power over the lot owners and properties in Sumac Ridge, including the Edlers.

Accordingly, Incline Village has no right to dictate to the Edlers any conditions affecting their use of their Sumac Ridge lot or any of the appurtenant rights to their lot ownership, including their common law riparian rights.

These concepts negate many of the findings by the trial court. Its findings on the authority and control of the Incline Village Trustees is misplaced. A 2-3, Judgment ¶¶ 6, 9, and 12. Likewise, its related findings denying the Edlers' rights and access to the Main Lake. A 2-3, Judgment ¶ 10. The Trustees authority and powers are limited to the Incline Village subdivision and lot owners, Likewise, for its Indenture. Neither extends beyond that jurisdiction. Nor can they restrict or infringe the legal rights of the others, such as the Edlers' common law riparian rights.

The entire set of findings concerning Lenzenhuber, the developer of Sumac Ridge, are also not relevant, though the trial courts recitation of them implies it found them of some significance. A5-7, Judgment ¶¶ 28 through 39. Lenzenhuber representations in mailings, advertisement, brochures and other documents cannot limit the common law rights of Sumac Ridge property owners; nor could they bestow riparian rights where none existed. A5, Judgment ¶¶ 28, 29.

Similarly, the Lenzenhuber deed's failure to mention riparian rights is of no significance, as the Edlers do not claim those rights as arising from a deed. A6, Judgment ¶¶33. In the same Finding, the exception of Main Lake from the legal description in that deed is of no moment. By nature and definition riparian rights belong to a property owner who does not own the body of water and superfluous if the owner does own it.

Finally, the courts finding that the Edlers' deed did not mention the Main Lake (id, A6, ¶ 38) is irrelevant since their claim arises from common law.

The trial court found, that the Main Lake is "not navigable" (A3, Judgment ¶13), apparently believing that issue to be of some significance. First, this findings is contrary to the law and the evidence. "Navigability" under Missouri law refers to the ability, which Main Lake has, to float recreational boats, City of Springfield v. Mecum, 320 S.W.2d 742 (Mo. 1959), and for persons to float or wade, Elder v. Delcour, 269 S.W.2d 17, 25-26 (Mo. 1954).

Incline Village's sole witness, Michael Vickrey, testified that the Main Lake was used for recreational activities, including boating. T15-16. Thus, the Main Lake is navigable.

More importantly whether Main Lake is "navigable" is irrelevant to the determination of riparian rights. As the Greisinger Court held, commercial or interstate commerce navigability is irrelevant in determining riparian rights because "riparian rights are not confined to navigable waters." 9 S.W.2d at 980, cited in Bradley, 347 S.W.2d at 688.

The Anderson case is contrary to Missouri Law

In support of its Judgment, the trial court relied heavily upon a Florida case, Anderson v. Bell, 433 So.2d 1202 (Fl. 1983) and stated that the Anderson court faced "the exact issue that is now before this Court." (Judgment ¶63). Anderson is factually and legally distinguishable.

Although Anderson cites and tries to distinguish Greisinger, which is discussed in *dicta*, the Anderson Court does not discuss the controlling Bradley decision. As discussed above, Greisinger is not simply an “implied easement” case—its holding is broader, as amplified and applied in Bradley. Further, the Anderson Court held that under different facts (facts which mirror those in the instant case), riparian rights would have attached to the artificial lake at issue there.

In Anderson, Mr. Anderson constructed an artificial lake by flooding from a small, nonnavigable creek. As a result of the creation of the lake, Anderson flooded property owned by Lewis/Watson (who later sold to Bell). Lewis/Watson sued Anderson for damages to their property from Anderson’s flooding to create the lake. That case was settled by Anderson paying \$10,000 for a flowage easement from Lewis/Watson. The flowage easement provided Anderson with the right to flow water over a small portion of the Lewis/Watson land, reserving to Anderson the right to discontinue flowage (lower the water level) at any time.

Subsequently, Bell purchased the Lewis/Watson land and Bell sought to fish and boat on the waters of the lake. Crucial to the Court’s holding was that Anderson had previously paid Bell’s predecessors \$10,000.00 for damages to their land: “the former owners chose to take monetary compensation for the ‘loss’ of their property. When Bell took possession he did so with full knowledge that a flowage easement existed on the land, and with no reason to believe that the easement contract entitled him to a dominant tenancy with respect to Anderson’s property.” Anderson at 1206.

The Anderson Court discussed the various approaches courts have taken to the issue of riparian rights concerning artificial lakes—acknowledging that many other states, including Missouri, grant abutting landowners riparian rights when an artificial lake has been in existence of some years, becoming “*de facto* natural.” Id. at 1207, citing the Evans Article, *supra*, at 113-114. To this end, the Florida court in Anderson noted that its holding was limited to the facts before it:

Had Bell’s predecessor merely acquiesced in the flowage for a significant period of time, or had he conveyed the flowage easement for nominal consideration, a different case would be presented in which one of the aforementioned principles [allowing riparian/littoral rights] may be properly applied. However, we leave the answer to this question for another day.

Id. at 1207.

Simply stated, had the facts in Anderson mirrored those in the case at bar, the result would mirror Missouri law. Factually distinguishable, the lake in Anderson only existed for a few years when suit was brought. The lake was constructed in 1975 and Bell brought suit shortly thereafter, culminating in the Florida Supreme Court’s opinion in 1983—a short 8 years after Anderson had built the lake. Main Lake is over 40 years old and neither the Edlers nor their predecessors “sold” their riparian rights to Incline Village.

II. The trial court erred in awarding the Incline Village Trustees a judgment for attorney fees because equitable and special circumstances did not support the award in that the Edlers’ construction of the dock was done in the sincere and reasonable belief they had this legal right to do so.

The trial court awarded Incline Village attorney fees in the amount of \$70,000.00. At the outset it should be noted that if this court reverses the trial court on Point I, this attorney fee award should be of no effect and this Point II does not need to be addressed.

Standard of Review

Generally, this Court reviews an award of attorneys’ fees under an “abuse of discretion” standard. Volk Construction Co. v. Wilmescherr Drusch Roofing Co., 58 S.W.3d 897, 901 (Mo.App.E.D. 2001). To this end, this Court reviews whether there is sufficient evidence in the Record for this Court to “gauge” the propriety of the Trial Court’s award of fees. Realty Resource, Inc. v. True Docugraphics, Inc., 312 S.W.3d 393, 401 (Mo.App.E.D. 2010).

The trial court awarded attorney fees under the authority of 527.100 R.S. Mo. A11, Judgment ¶ 64. That statute gives a court discretion to award fees in “proceedings under sections 527.010 to 527.130”, which relate to declaratory judgment actions. The trial court stated that there were “special circumstances” to support its large fee-shifting award to Incline Village: trespass and that the Edlers built the dock after having been told they did not have the legal right to build the dock. A11, Judgment ¶64. Section 527.100 R.S.Mo. does not authorize fee awards in trespass actions.

Further, this finding is surprisingly contrary to the evidence, the facts and the trial court's own pretrial decisions reflecting the closeness of the issues in this case. Even its Judgment noted that Missouri Law lacked cases directly on point. A8, Judgment ¶ 52. Matt Edler testified that he obtained a letter from his attorneys stating that the Edlers had riparian rights to Main Lake. T 48. He provided the research to one of trustees of the Incline Board. T48. After several weeks, Mr. Edler again inquired of the individual trustee about Incline Village's position and received no response. T49. Only then did the Edlers' install the dock T49. As Mr. Edler testified, the first time the Edlers' heard that Incline Village opposed the dock and disputed the Edlers' riparian rights was when Incline Village filed suit. T50.

The trial court cites Ellis v. Hehner, 448 S.W.3d 320 (Mo. App. ED 2014) and Klinkerfuss v. Cronin, 289 S.W.3d 607 (Mo. App. ED 2009) to support its award of fees. The facts of those cases are both very dissimilar to the Edlers. In Ellis, the parties shared a driveway through an easement. The Appellants blocked the Respondent from using the driveway easement on several occasions "for no other reason than spite" and annoyance. Ellis, 448 S.W.3d at 326. There is no evidence of spite or annoyance on the part of the Edlers; just the opposite, in fact. The Edlers did not construct the dock or act in the face of clear impediments or in the face of clearly established precedent against their rights. Rather, the Edlers informed the trustees from Incline Village and installed the dock only after months of no response from Incline Village T 49. Further, the Edlers obtained the advice of an attorney and provided that advice to the Incline Village trustees. T 48.

Similarly flawed is the Court's reliance upon Klinkerfuss, *supra*. The opinion cited does not support the concept that Incline Village incurred fees that would not "have been incurred but for the [Edlers'] intentional acts." The Klinkerfuss appeal was the third in a series of appeals in a case of a beneficiary suing a trustee of a trust. The basis of the fee award was vexatious, groundless litigation against the trustee of a trust. Despite the clear language of the trust, the beneficiary repeatedly tried to have her interest in the trust settled immediately. 298 S.W.3d at 611. There was an explicit finding that "none of the beneficiary's claims against the trustee had any merit and that the beneficiary filed suit for selfish reasons rather than to protect the trust." *Id.* at 612. Those limited, very special circumstances allowing an award of fees are not present in this case.

There is no finding in this instant case that the Edlers' legal position was vexatious or groundless. Indeed, the Court's earlier entry of summary judgment in favor of the Edlers' by the trial court confirms the reasonableness of the Edlers' position, justifies their disputing Incline Village's demand and refutes any claim of mal intent or a frivolous position. Further any trespass was minimal if at all. This was a small dock situated in a cove off the Main Lake. T37, 48. Andrea Edler testified it does not interfere with activity on Main Lake. T 37. Significantly, there is evidence that Incline Village has claimed the dock interferes with others use of the Main Lake.

"Special circumstances and very unusual circumstances are rare, and courts have confined these exceptions to limited fact situations." Klinkerfuss, 289 S.W.3d at 618. The case at bar is not the type of limited fact situation which allows for the award of attorneys' fees. Indeed, attorneys' fees are not recoverable in either a common law or statutory

trespass case, despite proof of intention, because it “is not an unusual type of case” that results in an award of fees. See Ridgway v. TTnT Development Corp., 126 S.W.3d 807, 818 (Mo.App. 2004). In short, the Court is creating an exception to the “American Rule” by awarding attorneys’ fees to the victor in a legal dispute where there is, according to the Court, no clear answer under Missouri law.

CONCLUSION

The Trial Court judgment should be reversed. The issues are clear and there is no benefit to remand for further proceedings on the merits by the Trial Court. This Appellate Court should exercise its authority under Rule 84.14 “to give such judgment as the court ought to give,”

The judgment should be in favor of the Defendants Edler on both Count 1 (Trespass) and Count II (Declaratory Judgment) of the petition; and the judgments for attorney fees and injunction should be stricken and held for naught. Judgment should be entered in favor of the Edlers on Count I of their counterclaim for declaratory judgment as prayed, establishing that the Edlers have riparian rights in the Main Lake and a right to construct and maintain the existing dock. The issue of the Edlers’ attorneys’ fees requires resolution either by this Appellate Court or by the Trial Court upon remand to determine that single issue.

CERTIFICATE OF COMPLIANCE

1. This Brief complies with Rule 55.03, the limitations contained in Rule 84.06(b) and Local Rule 360 because it contains 5537 words as determined by the word count feature of Microsoft Word 2010, Version 14.0.6129.5000 (32-bit), exclusive of the Cover, the Table of Contents, the Table of Authorities, the signature block, the Certificate of Service, this Certificate, and the Appendix.

2. This Brief has been prepared in a proportionally spaced typeface using Microsoft Word in 13-point Times New Roman font.

3. Pursuant to Rule 84.06(g), and Local Rule 362, Appellant certifies that this Brief and the Appendix were scanned for viruses and are virus-free.

By: /s/ Jess W. Ullom
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CERTIFICATE OF SERVICE

An electronic copy of the foregoing Brief and Appendix were sent this 16th day of February, 2018 to Martin Daesch attorney of record for Incline Village via the Court's electronic filing system.

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