Appeal No. ED105494

IN THE MISSOURI COURT OF APPEALS

EASTERN DISTRICT

INCLINE VILLAGE BORD 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
The Honorable Daniel G. Pelikan, Division 7
Case No. 1211-CC00407

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

Respondent adopts Appellants' Jurisdictional Statement and agrees jurisdiction of this appeal lies in this Court.

STATEMENT OF FACTS

Prior to, and in anticipation of trial, the parties agreed to a Stipulation of Facts. (TR – 2:16-20). The Stipulation of Facts (SOF) was signed by the parties, by and through their attorneys, and submitted with the case. The SOF is reproduced in the Legal File at LF0127-LF0135.

In 1974, Sherwood Builders, Inc., ("Sherwood") developed what is now Incline Village Subdivision ("Incline Village"). [**SOF 1 at LF0127**]. As part of that development, an ***artificial, man-made lake*** was created, known as "Main Lake" or "Incline Village Lake" (the terms are used interchangeably throughout). [**SOF 5 at LF0128**]. Main Lake was built for the *sole and exclusive* purpose of providing recreational enjoyment to the platted lot owners of Incline Village. [**SOF 5 at LF0128**]. Indeed, Main Lake is not and has never been openly accessible to the public. [**SOF 10 at LF0128**]

Main Lake was eventually deeded from Sherwood to Trustees (Respondents herein), who thereafter took control of Main Lake pursuant to an Indenture of Trust (the "Indenture"); this Indenture, among other things, required Trustees to maintain Main Lake and to "make reasonable rules and regulations relating to the use of said bod[y] of water." [**SOF 4 and 6 at LF0127- LF0128**,] One such rule, identified in the Indenture, was to limit the Incline Village lot owners' ability to construct boat docks or slips upon the Main Lake; to do so, the lot owners are *required* to own an Incline Village platted lot that abuts Main Lake and receive prior approval from Trustees. [**SOF 7 at LF0128**]. Besides Incline

Village lot owners whose lot abuts the lake, no one has ever been permitted to erect a dock upon Main Lake. [**SOF 8 at LF0128**]. Other than residents of Incline Village who own a plotted lot that abuts Main Lake, no one has ever requested to erect a dock on Main Lake. [**SOF 8 at LF0128**].

The Trustees are charged with maintenance and upkeep of Main Lake. **[SOF 14 at LF0129]**. Approximately $2,864,000 has been spent by the Trustees on maintenance related expenditures for Main Lake since its creation. These expenses include dredging, operations, dam reconstruction and shoreline improvements. [**SOF 28 at LF0131].** To pay these costs, Trustees' sole source of funding comes from assessments levied against the Incline Village lot owners. [**SOF 15 at LF0129]**. Originally, the annual assessment was $50 dollars per lot; it has since grown to $595 per lot, per year ($495 "annual assessment" + $100 "special assessment" as ordered by the Circuit Court of Warren County). [**SOF 16, 20, 25 at LF0129- LF0131]**. This increase was necessary to fund several dredging operations, a dam reconstruction project as required by the Missouri Department of Natural Resources, and a shoreline improvement project that was mandated by the Circuit Court of Warren County, Missouri. [**SOF 19-23 at LF0130].**

By 2014, Main Lake once again required dredging that as of June 17, 2015 has cost Incline Village approximately $465,000 [**SOF 27 at LF0131**]. The total cost to the Incline Village lot owners to complete the dredging of Main Lake is expected to be $1.2 million. [TR 31:7-8]

The Edlers' property is adjacent to the Main Lake, but is not part of Incline Village

Subdivision. [**SOF 42 at LF0134].** This property, known as Sumac Lot #23, Sumac Ridge Drive, Foristell Missouri 63348 specifically excluded access to Main Lake when it was first platted and deeded to the Edlers' predecessor-in-interest, Peter Lenzenhuber. [**SOF 29-34 at LF0132-LF0133**].

On April 8, 1997, Lenzenhuber, the developer of what eventually became Sumac Ridge Subdivision where Lot 23 is located, purchased a tract of land, including Lot 23, that was to be developed into Sumac Ridge Subdivision. [**SOF 29 at LF0132**]**.** Lenzenhuber advertised this property as having access to Main Lake; however, after counsel for Incline Village reached out to Lenzenhuber about the logistics of having access to Main Lake, Lenzenhuber changed course and declined any access to Main Lake, saying he "did not need Lake access." [**SOF 29, 30 at LF0132**]**.**

Lenzenhuber further explained:

> "[B]ased 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 … Purchasers of Sumac Ridge are aware that the lake is owned by Incline Village Trustees." [**SOF 30 at LF0132**].

Lenzenhuber bought the tract of land that became Sumac Ridge, including Lot 23, from HealthQuarters of Incline Village, L.P., on April 8, 1997. [**SOF 31 at LF0132**]. This purchase specifically excluded Main Lake. [**SOF 33 at LF0132**]. Lenzenhuber platted the tract into individual lots and deeded Lot 23 to Andrew and Deanna Karandzieff; the Karandzieffs, then known as the Gormans, deeded Lot 23 to Harold and Beverely Cissell; the Cissells deeded Lot 23 to StoneCastle Development, LLC.; and StoneCastle

Development, LLC., deeded Lot 23 to the Edlers. [**SOF 35-38 at LF0132**].

The Edlers orally requested permission to build a boat dock or slip extending from Lot 23 into Main Lake—this request was denied by Trustees. [TR 23:8-11; 18-20]. The Edlers again requested permission to build a boat dock or slip and, again, were denied by Trustees. [TR 24:2-7]. The Edlers have since constructed a dock on Main Lake [**SOF 41 at LF0134**]. The dock is located in an area that was specifically excluded in the transfer between Lenzenhuber, the Edlers' predecessor-in-interest, and HealthQuarters; said differently, the dock is located in an area that the Edlers do not own. [**SOF 32-34 at LF0132-0133]**.

POINTS RELIED ON

I. The Trial Court Did Not Error in Deciding the Edlers Do Not Have Riparian Rights to the Main Lake Because the Conditions That Would Cause Common Law Riparian Rights to Attach Are Not Present in this Case and The Appellants Have Not Shown the "Artificial Becomes Natural" Theory Applies to the Edlers' Property.

- Bollinger v. Henry, 375 S.W.2d 161 (Mo. 1964)
- Greisinger v. Klinhardt, 321 Mo. 186 (Mo. 1928)
- Alderson v. Fatlan, 898 N.E.2d 595 (Ill. 2008)
- Ramada Inns, Inc. v. Salt River Valley Water Users' Ass'n, 523 P.2d 496 (Ariz. 1974)

II. The Trial Court Did Not Error in Awarding the Incline Village Trustees a Judgment for Attorney's Fees Because Equitable and Special Circumstances Exist to Support the Award in that The Attorneys Fees Would Not Have Been Incurred but For the Edlers' Intentional Acts.

- Klinkenfuss v. Cronin, 289 S.W.3d 607 (Mo. App. ED 2009)
- Ellis v. Hehner, 448 S.W.3d 320 (Mo. App. ED 2014)
- In Re C.W., 257 S.W.3d 155 (Mo. App. Ed 2008)
- R.S.Mo. § 527.100

ARGUMENT

POINT I

I. The Trial Court Did Not Error in Deciding the Edlers Do Not Have Riparian Rights to the Main Lake Because the Conditions That Would Cause Riparian Rights to Attach Are Not Present in this Case and The Appellants Have Not Shown the "Artificial Becomes Natural" Theory Applies to the Edlers' Property.

Standard of Review

A judge tried case is affirmed on appeal unless it is not supported by substantial evidence, it is against the weight of the evidence or it erroneously declares or applies the law. *Murphy v. Carren*, 536 S.W.2d 30, 32 (Mo. Banc. 1976); Ridgeway v. TTnT Development Corp., 126 S.W.3d 807, 812 (Mo. App. 2004). A judgment is presumed correct and the appellant has the burden of proving it erroneous. *Wingate v. Griffin*, 610 S.W.2d 417, 419 (Mo. App. 1980). We review the evidence and all reasonable inferences in the light most favorable to the judgment and disregard all contrary evidence and inferences. *Arndt v. Beardsley*, 102 S.W.3d 572, 574 (Mo. App. 2003). When reviewing a bench tried case, the appellant court's primary concern is the correctness of the trial court's result, not the route taken to reach it. *Copp v. Franks*, 792 S.W.2d 413, 419 (Mo. App. SD 1990). Regardless of whether the trial court's proffered reasons are wrong or insufficient, if the correct result was reached the appellant court must affirm. *Smith v. Estate of Harrison*, 829 S.W.2d 70, 73 (Mo. App. ED 1992).

Discussion

The Appellants, Matthew and Andrea Edler, claim to have "Riparian" rights to a privately owned lake to which they admit they have no ownership rights but have divinely acquired rights through a form of adverse possession because their property abuts the Main Lake, which has been owned by the Trustees of Incline Village for over 40 years. The basis of their claim is a seldom used (never in Missouri) doctrine called the "artificial becomes natural" theory. The only legal authority cited by the Edlers in support of these claims in *Bradley v. County of Jackson* and *Greisinger v. Klinhardt*, neither of which stand for the proposition proffered by the Edlers and both support the Trustees' position on these issues.

At the center of the dispute is the Edler's alleged right to build a dock upon Main Lake, a private man-made lake, owned by the Trustees [**SOF 6 at LF0128]**. In resolving this issue, Missouri littoral and riparian rights law must be addressed. Unfortunately, Missouri law is not well-developed in the area of littoral and riparian rights, particularly when considering distinctions between artificial and natural watercourses, that ordinarily have opposing rules. However, a careful review of the law that is available reveals one fundamental canon, a canon followed by Missouri courts and echoed by Missouri's many sister states: with *very narrow* exception, riparian and/or littoral rights do not attach to artificial bodies of water. Bollinger v. Henry, 375 S.W.2d 161, 166 (Mo. 1964) ("as a general rule, riparian rights do not ordinarily attach to artificial streams in artificial channels").

Under Missouri law, an owner of a private body of water has exclusive rights to it

and may exclude others from using it. See State v Taylor, 214 S.W.2d 34, 36 (Mo. 1948); Bollinger, 375 S.W.3d at 166. The only meaningful exception to this rule found under Missouri law comes in the form of easements, grants or prescriptive rights. See, e.g., Greisinger v. Klinhardt, 321 Mo. 186 (Mo. 1928) (holding no riparian rights attach to [Lake Killarney] as an artificial body of water and that plaintiff was entitled to the use of Lake Killarney *only* because plaintiff had an implied easement in the lake arising when the predecessor-in-interest, who first created the lake, severed the land into two halves and thereafter sold plaintiff one of those halves).

This case does not involve easements, grants or prescriptive rights. There is no question that Main Lake is fully and completely vested in Trustees. [**SOF 6 at LF0128**]. Instead, the Edlers argue their property's proximity to Main Lake, alone, justifies giving them littoral rights to it. Courts that have considered this argument have uniformly rejected it, finding it to be in direct conflict with the basic rule that no littoral rights attach to artificial bodies of water. See, e.g. Crenshaw v. Graybeal, 597 So.2d 650 (Miss. 1992) (owner of land adjoining artificial lake had no riparian rights and was not entitled to use of lake in immediate area of their property's lake frontage where nothing in their deed conferred such a right); Anderson v. Bell, 433 So.2d 1202 (Fla. 1983) (owner of adjacent property beneath man-made lake is not entitled to use of the surface waters by sole virtue of the fact that he has contiguous lands); Brasher v. Gibson, 419 P.2d 505, 509 (Ariz. 1966) ("where the owner of land has created an artificial lake … the right to use the water thus stored is exclusively in such owner; and the owners of land bordering on the artificial lake

… do not acquire any right to the water…"); see also Alderson v. Fatlan, 898 N.E.2d 595 (Ill. 2008); City of Highland Haven v. Taylor, 2015 WL 655278 (Tex. App. Feb. 12, 2015); Lake Mille Lacs Inv., Inc. v. Payne, 401 N.W.2d 387 (Minn. App. 1987); Ours v. Grace Property, Inc., 412 S.E.2d 490 (W. Va. 1991); White's Mill Colony, Inc. v. Williams, 609 S.E.2d 811 (S.C. App. 2005); Holton v. Ward, 847 N.W.2d 1 (Mich. App. 2014); Sullivan v. Viar, 1986 WL 3334 (Tenn. App. Mar. 14, 1986); Mayer v. Grueber, 138 N.W.2d 197, 205 (Wis. 1965); Rutledge v. Young, 646 S.W.2d 349 (Ky. App. 1982); Kirk v. Hoge, 97 S.E. 116 (Va. App. 1918); Miller v. Lutheran Conference & Camp Ass'n, 200 A. 646, 650 (Pa. 1938).

The Edlers cite *Bradley v. County of Jackson,* 347 S.W.2d 683 (Mo. 1961) to support their creative proposition that simply because a property abuts an artificial lake, the abutting lot owner acquires rights to the lake without the benefit of an easement, grant or prescription. [Appellants' Brief ¶ 10]. Doubling down on this absurd theory that finds no countenance in Missouri law, the Edlers say the trial judge cited *Bradley* in support of the theory that ownership of abutting property alone, justifies rights to access or build on the Main Lake. The trial judge's Findings of Fact and Conclusions of Law make clear his understanding of the *Bradley* case and its pronouncements on riparian/littoral rights. The judge finds:

> "In *Bradley v. County of Jackson*, 347 S.W.2d 683 (Mo. 1961), the court decided that riparian rights arise from the ownership of land abutting property after the owners of the abutting land had acquired a prior right to use the land or the lake through easements:"

[¶58 at LF0145, A10]

Aimed with the general law as set out in *Bradley* the court concluded "proximity alone, as in the case at bar, not enough to confirm riparian or littoral rights in an artificial body of water" [**¶ 59 at LF0145, A10**] and "the fact that the Edlers' property abuts the Main Lake alone, does not give the Edlers riparian rights to the lake". [**¶ 61 at LF0145, A10**]. The court's reliance on *Bradley* in finding these facts against the Edlers is well-reasoned considering the plaintiffs who were seeking littoral rights in *Bradley* gained their rights from reservations made by predecessors in interest in a series of deeds for the benefit of the original grantors who reserved easement rights to the lake in favor of the abutting lot owners. (See *Bradley* at 686, holding "that this reservation…constituted a reservation of the right to these grantors, respectively, and to [abutting lot owners] to use the lake for the purposes for which a lake would ordinarily be appropriate.").

The Edlers acknowledge they have no claim to Main Lake based on grant, easement, reservation or prescription and submit their claim is solely based on "common law". Indeed, the Edlers urge this Court to ignore the deed history as irrelevant (*See* Appellants' Brief at ¶ 15). The *Bradley* case does not support the Edlers' "common law" claim.

Missouri has expressed the basic rule that no littoral rights attach to artificial bodies of water. Bollinger, 375 S.W.3d at 166. There is no reason to believe it would disagree with the *overwhelming authorit*y of its sister states which, under this rule, have uniformly rejected any notion that proximity, alone, imbues the Edlers with littoral rights. Legal commentaries also side with Trustees that riparian and/or littoral rights do not attach to artificial bodies of water. (See, e.g., 1 WATERS & WATER RIGHTS § 6.02(e) at 6-173,

6-174 (2007) ("it is axiomatic that riparian rights do not attach to artificial bodies"); Peter Davis, *Recreational Use of Watercourses*, 4 MO. ENVT'L L. & POL'Y REV. 71 (1996) ("there is no riparian rights to use the surface of an artificial body of water"); see also 78 Am.Jur.2d Waters § 265 (2014); 93 C.J.S. Waters § 12 (2014); L. OF WATER RIGHTS AND RESOURCES § 3:26 (2015); R. Reis, CONNECTICUT WATER LAW: JUDICIAL ALLOCATION OF WATER RESOURCES, p. 89 (1967); 1 H. Farnham, LAW OF WATERS AND WATER RIGHTS § 58a, p. 268 (1904)). Accordingly, upon the facts available, it is clear the Edlers possess no littoral rights to Main Lake and have, therefore, trespassed by constructing a dock upon it without Trustees' permission. See, e.g., Lake Mille Lacs Inv., Inc., 401 N.W.2d at 391 (Minn. App. 1987) (adjacent lot owners did not acquire riparian rights in artificially-created harbor by virtue of their proximity and trespassed by tearing out a section of dock owned by harbor developer, entitling developer to damages); Bellinger v. Lindsey, 480 S.W.3d 348 (Mo. App. E.D. Apr. 28, 2015) (in a case involving allegations of trespass upon a lake, the court noted that "liability for trespass exists whether or not the trespass was done in good faith … in ignorance, or under mistake of law or fact").

The Edlers also claim that proximity combined with the seldom recognized "artificial-becomes-natural" theory gives them common law rights to Main Lake. Not only is the Edlers reliance on this theory grossly misplaced, they fail to identify the elements necessary to establish their right to Main Lake or show a scintilla of evidence proving compliance with any of the prerequisites for gaining property rights using this theory; most likely because the Edlers cannot show any facts that would support their theory, nor do any

facts exist that would justify the trial court to rule in the manner in which the Edlers suggest. The Edlers cite *Greisinger v.* Klinhardt, 321 Mo. 186 (Mo. 1928) as justification for this Court to invoke the theory, never applied in Missouri, that they are entitled to the right to construct a dock on Main Lake because the "artificial lake becomes natural". Similar to their assessment of the *Bradley* case, even the most strained interpretation of *Greisinger* does not support the Edlers "artificial-becomes-natural" theory.

In *Greisinger*, a tract of property owned by the Arcadia Country Club was flooded thereby creating Lake Killarney. After the Arcadia Country Clubs mortgage was foreclosed, the plaintiff and defendant each acquired ownership of the land beneath the lake with plaintiff taking deed for the upper half and defendant taking deed of the lower half.

Each party built rental cottages, rental boats and generally operated their half of the lake and surrounding property as a resort. After a number of years, a dispute arose between the parties and the defendant erected a wire fence along the property line through the middle of the lake and threatened to lower the water on plaintiff's end of the lake to the extent that plaintiff's use of the lake would be impossible. Plaintiff brought suit to enjoin the defendant and the court determined the defendant could not interfere with the plaintiff's riparian rights to use the entirety of the lake, not because of the "artificial-becomes-natural" theory advanced by the Edlers, but rather, due to the parties having received deeds to their respective properties from a common source that created reciprocal easements in favor of the owners of each parcel. Unlike the plaintiff in *Greisinger,* the Edlers do not claim they

have any deed ownership to Main Lake or right to the Main Lake by easement. *Greisinger* does not support their claims.

The "artificial-becomes-natural" theory tries to settle disputes between parties when the passage of a significant amount of time obscures a body of water's history as either artificially or naturally created. See Alderson, 898 N.E.2d at 602. This rule has been criticized as "vague" and "difficult to apply," yet all modern courts agree that, *at minimum*, the rule applies only "where the party invoking [it] has ***relied*** upon use of the artificial body of water without dispute for a ***lengthy period of time***." Id.; see also Ramada Inns, Inc. v. Salt River Valley Water Users' Ass'n, at 498. Ergo, the "artificial-becomes-natural" theory is part and parcel with modern notions of adverse possession.

The few courts to consider the theory apply a three-part test: (1) *intent* of the creator of the artificial watercourse; (2) *reliance* by adjacent landowners, if any; and (3) whether the artificial watercourse has taken on a *permanent character over years*. See, e.g., Ramada Inns, Inc. v. Salt River Valley Water Users' Ass'n, 523 P.2d 496, 498 (Ariz. 1974).

There has been no evidence set forth by the Edlers, whatsoever, that the Trustees intended the Main Lake to be anything other then a private lake built for the exclusive use of Incline Village platted lot owners. [**SOF 5 at LF0128**]. The lake was constructed in 1974 by the developer, Sherwood Forest, and deeded to the Trustees for the exclusive use and benefit of Incline Village lot owners. [**SOF 5 and 6 at LF0128**]. The Edlers have advanced nothing to suggest that the lake has undergone a change that is contrary to the developer's intent. Mike Vickrey testified that the lake is "used for fishing, swimming,

boating…those type of activities" (TR 16:1-2) and the Trustees authority over the lake is found in the 1974 Indentures that allows the Trustees to make "regulations and rules over the common grounds, lakes and parks" (TR 16:18-20). Mr. Vickrey further testified that there is no interstate commerce on the lake (TR 17:16-18) and that the lake remains self-contained, meaning if you want to get your boat out of the lake and into any other body of water you cannot do it without crossing ground somewhere (TR 18:18-25).

Permanency, as calculated by the running of time alone, can hardly be said to have occurred here when case law is available suggesting that, based on the *intent* and *reliance* elements, a watercourse in existence for more than 400 years can remain artificial in some respects. See Alvin E. Evans, *Riparian Rights in Artificial Lakes and Streams*, *MISSOURI LAW REVIEW*, Vol. 16, Iss. 2, Art. I. (1951)(hereinafter "Evans Law Review Article").

Based on the case law cited in Evans Law Review Article, it is clear that there is some overlap between the intent, reliance, and permanency elements. For example, permanency could arguably be established by the running of years alone where a watercourse is so ancient that no record exists to establish that it is artificial (e.g. it is conceivable that any "natural" lake currently existing is, in fact, not natural at all but created by the labor of ancient civilization—an act so far removed from modern society that it is impossible to distinguish the lake's character as either artificial or natural). On the other hand, where such records exist (as here), the more prudent question is to look at the creator's intent—whether he or she intended their watercourse to benefit them alone or the public-at-large. This intent element insures that a private property owner is not divested of

their property interest without some conduct on their part giving up certain known property rights.

The Edlers conveniently failed to address "the circumstances under which the [Main Lake] was created" (intent) or the "mode in which it has been used and enjoyed" (reliance). Ramada Inns, Inc., 523 P.2d at 498. As to intent, the Main Lake was created for the exclusive enjoyment of the landowners of Incline Village Subdivision [**SOF 5 at LF0128**] which has an Indenture agreement that vests the Trustees with the following rights, powers and authority with respect to all land and bodies of water in the subdivision:

> "A. To exercise control over easements, streets, common driveways, lights and all common property for the purpose of improving, maintaining and ensuring the proper use thereof…
>
> **I.** To provide for the maintenance, and care of any and all bodies of water, which may be locate don common property or parks in the subdivision and to make reasonable rules and regulations relating to the use of said bodies of water." [**SOF 4 at LF0127]**

The Trustees have the power to limit the use of the Main Lake including that no docks shall be built without permission of the trustees. [**SOF 7 at LF0128]**. Main Lake has been enjoyed exclusively by the Incline Village Subdivision landowners and their invitees since its creation. Outside of Incline Village Subdivision landowners and their invitees, the community-at-large has had no use of the Main Lake. [**SOF 10 at LF0128**]

No court has been willing to apply the "artificial becomes-natural" rule based on the passing of time alone; instead, these courts require, at the very least, an *established, long-term, undisputed reliance* by adjacent landowners. See Alderson v. Fatlan, 898 N.E.2d 595, 602 (Ill. 2008) ("the artificial-becomes-natural rule has been called 'somewhat vague' and

'difficult to apply.' We do not attempt to define the rule with any completeness here. We note, however, that as a minimum requirement, cases applying the rule have done so only in situations where the party invoking the rule has relied upon use of the artificial body of water without dispute for a lengthy period of time."). This reliance element is crucial, and fatal to any claim the Edlers could have based upon the "artificial-becomes-natural" theory. The Stipulated Facts and transcript testimony are devoid of any fact, or even a mild reference, that the Edlers, or anyone else for that matter, have relied on anything that would suggest Main Lake now is anything other than what the developer intended when Main Lake was constructed in 1974.

No Missouri court has ever applied the "artificial-becomes-natural" theory. The vast majority of Missouri appellate decisions involving disputes over artificial watercourse, including those cited by the trial judge in his Findings of Fact, Conclusions of Law and Judgment, involve the application of grants, easements or reservation based on dominant and servient estates, not the award of riparian rights due to the passage of time via a prescription-based theory of land ownership. (See *Greisinger* involving application of reciprocal easements; see also *Smith v. Musgrove*, 32 Mo. App. 241 (Mo. App. E.D. 1888) finding that defendant, by remaining silent and making no claim upon his easement to the flow of water in a particular channel, was estopped from further claiming such easement after *the public* had relied upon his silence in purchasing and improving their land based on the fact that such channel was dry). No Missouri opinion appears to have ever granted a riparian/littoral interest in an artificially-created lake within its borders on a "common law" theory without the aid of a deed, grant, or reservation (such as that found in *Bradley*).

The most recent courts who have faced substantially similar situations to the facts in this case have all concluded that the adjacent landowner (here, the Edlers) have no riparian/littoral interest in a man-made lake. See, e.g., City of Highland Haven, Texas v. Taylor, 2015 WL 655278, *3 (Tex. App. Feb. 12, 2015) ("Taylor and Fenner's pleading asserts rights stemming from the fact that their properties are adjacent to the Wolf Creek Channel, an arm of Lake LBJ … it is widely known, easily ascertainable, and undisputed by Taylor and Fenner that Lake LBJ is a man-made lake … [therefore] Taylor and Fenner's respective properties cannot be vested with common-law riparian rights, including the right of access asserted here, because those properties are adjacent to a man-made waterway"). Such opinions only serve to support the little guidance Missouri courts have as they relate to littoral rights: bolstering instruction from the Missouri Supreme Court more than 50 years ago announcing that, *ordinarily, no riparian rights attach to artificial watercourses* but for certain situations involving easements across dominant and servient estates—an issue uniquely distinct from the case involved here. *Bollinger* at 166.

The "artificial-becomes-natural" theory has never been based upon permanency alone and is, in fact, chiefly focused on proof of reliance by the party invoking the rule. (See *Alderson* at 602). Indeed, the Edlers have not argued (or can argue) that they have *relied* upon the uninterrupted use of Main Lake; to wit, the first non-subdivision entity or person to attempt to call the Main Lake their own—the Edlers—were promptly sued in court for trespass. Thus, there is no fact or argument in the record supporting a finding that the Edlers have come to reasonably rely on the Main Lake as their own. See Alderson, 898 N.E.2d at 602 (refusing to apply the "artificial-becomes-natural rule" when plaintiffs

purchased property abutting a lake and quickly became embattled in a longer running dispute about whether they had the right to use it). Moreover, there have been no facts set forth by the parties to find that the community-at-large has relied upon free use of the Main Lake such that the Main Lake has taken on public character.

Accordingly, the only factor remotely in the Edlers' favor is that a certain length of time has passed; this alone is an arbitrary condition that would divest property owners of their constitutional right to permanently own and protect private real property and, equally as important, fails to recognize the evolved application and understanding of the "artificial-becomes-natural" theory. The Edlers have not shown satisfaction of any of the elements of the "artificial-becomes-natural" theory thus have no riparian and/or littoral interest in the Main Lake.

The Illinois Supreme Court having occasion to review the artificial-becomes-natural theory found that the principle purpose of the courts who reject riparian and/or littoral rights to adjacent landowners do so out of equitable concern. The Illinois Supreme Court aptly explained:

> "unlike a nature body of water, which exists because of natural processes, ***an artificial body of water is the result of someone's labor***. An artificial body of water is ***not a natural resource to be share by all***."
>
> Alderson, 898 N.E.2d at 554.

Indeed, the rule that no riparian and/or littoral rights arise from an artificial body of water "has its origins in the most ancient property right: the right to exclude [others]."

Holton, 847 N.W.2d at 7. This right to exclude others is, in part, driven by the recognition that labor, like the labor of creating an artificial body of water, is expensive—both in time and monetary cost; this expense necessarily invokes in the landowner a right to exclude those he does not wish to enjoy in the spoils of his labor.

Main Lake, as an artificial body of water, was exceptionally costly to make and is even more costly to maintain, with maintenance-related expenses alone approaching the three million dollar mark. [**SOF 28 at LF0131**]. It is the Incline Village lot owners who bear the burden of these costs through annual assessments. [**SOF 15 at LF0129**]**.** In paying these costs, the Incline Village lot owners expect that others will abide by (and that Trustees will enforce) the Indenture governing their subdivision—including restrictive covenants aimed at maintaining certain community features. One such communal restriction is the haphazard building of docks upon Main Lake; docks may *only* be constructed after careful review and approval by Trustees. [**SOF 7 at LF0128**].

POINT II

The Trial Court Did Not Error in Awarding the Incline Village Trustees a Judgment for Attorneys Fees Because Equitable and Special Circumstances Exist to Support the Award The Attorney's Fees Would Not Have Been Incurred but For the Edlers' Intentional Acts.

Standard of Review

Generally, this Court reviews an award of attorney's fees under an "abuse of discretion" standard. *Volk Construction Co. v. Wilmescherr Drusch Roofing Co.*, 58 S.W. 3d. 97, 901 (Mo. App. ED 2001). This Court reviews whether there is sufficient evidence in the record for this Court to "gauge" the propriety of the trial court's awarded fees. *Realty Resource, Inc. v. Trudocugraphics, Inc.*, 312 S.W. 3d. 393, 401 (Mo. App. ED 2010).

Discussion

The trial judge in this bench tried case is considered an expert on attorney's fees, including fees for services on appeal and the Court has discretion in determining the fee award. *In re C.W.*, 257 S.W. 3d. 155 (Mo. App. ED 2008). The burden of showing an abuse of discretion in the award of attorney's fees rests with the complaining party. *Id.* The Court abuses this discretion when the amount is arbitrarily arrived at or are so unreasonable, as to indicate indifference and a lack of proper consideration. *Id.* The trial judges award of Plaintiff's attorney's fees in the amount of $70,000 in this case was not an abuse of discretion.

The Appellants do not challenge the amount of the attorney's fee award, nor do they allege the Judge arrived at the amount of attorney's fees in an arbitrary or unreasonable manner. The Appellants' sole challenge to the award is their claim that "special circumstances" do not exist in this case to justify the award. The Appellants, as the complaining party, have not carried their burden to establish the trial judge's award in this case was an abuse of discretion.

To the contrary, the facts of this case show were it not for the Appellants' intentional misconduct, the Trustees would not have been forced to hire counsel and incur attorney's fees. The Edlers' unjustified, intentional conduct forced the Trustees to file suit to declare their rights to property that had been under the ownership and control since 1974. The Trustees denied Edlers permission to build the dock not once, but twice. At trial, Mrs. Edler's primary justification for moving forward with her placement of the dock on the Trustees' property fell mostly on her reliance on "legal" research she had extracted from the internet. (TR 40:13-21).

The Edlers apparently intended to proceed with construction of the dock with or without permission from the Trustees. Significant is Mrs. Edler's testimony at trial that "we weren't necessarily asking for permission" (TR 36:19-20). Mrs. Edler also testified that "Sumac was not a part of Incline Village. We understand that." (TR 41:3-4) "and Incline Village had nothing in relation to do with Sumac Ridge" (TR 43:17-18) dispensing with any notion the Edlers might have been confused about the true ownership of Main Lake. Undaunted and with the internet as their legal guide, the Edlers proceeded with construction of the dock knowing they did not have permission from the Trustees to do so.

Ample authority exists for the proposition that intentional misconduct constitutes "special circumstances" justifying an award of attorney's fees. *Klinkenfuss v. Cronin*, 289 S.W. 3d. 607, 618 (Mo. App. ED 2009). An exception to the American rule on attorney's fees exists in special or very unusual circumstances where necessary to balance the benefits. *Id.* at 618. Indeed, special circumstances may be found when, like here, a plaintiff incur attorney's fees that it would not have incurred but for [the] defendant's intentional acts. *Id.* at 618. Moreover, in declaratory actions under R.S.Mo. 527.100 a court may award attorney's fees when there are special circumstances. *Ellis v. Hehner*, 448 S.W. 3d. 320 (Mo. App. ED 2014).

To borrow a colloquialism, the Edlers decided to ask for forgiveness rather then seek permission. With the highly unusual presumption they were somehow justified in building a dock on a private lake, the Edlers began construction of their dock without first seeking a declaration from the court to settle their claim. Even after the Trustees filed the instant action requesting a temporary restraining order to prevent further construction of the dock, the Edlers proceeded to complete the dock and force the Trustees to litigate this case for the past six years.

The Edlers contend they should not be responsible for attorney's fees because there is a lack of cases on point. (*See* Appellants Brief at 20). Perhaps the scarcity of law on point with the issue in this case is due to the highly unusual position taken by the Edlers; that they have the right to build a structure on another's property simply because the properties abut one another. There is no legal precedent in Missouri for their self-interested

proposition, which is likely the reason for the paucity of law addressing their unusual and unsupported claim to the property of another.

The Edlers' actions were intentional, deliberate and taken knowing the owners of the property they intended to trespass were antagonistic to their claim. The Trustees were forced by the Edlers' intentional acts to incur attorney's fees to declare the parties' rights and to further enjoin trespass onto their property. The special circumstances of this case justify the award of attorney's fees and the trial judge's ruling granting plaintiff attorney's fees should not be disturbed.

CONCLUSION

The Edlers do not possess littoral or riparian rights to use and enjoy Main Lake by virtue of owning adjacent property. This is the rule of Missouri—including its many sister states—and the rationale for said rule is unassailable: this rule protects private property ownership and ensures those who elect to improve their private property, by erecting an artificial body of water upon it, retain the bounty of their labor. See, e.g., *Bollinger* at 166 ("rights do not ordinarily attach to artificial streams in artificial channels"); *Fatlan* at 601 ("an artificial body of water is the result of someone's labor. An artificial body of water is not a natural resource to be shared by all.").

In 1983, the Florida Supreme Court was wary of "untold horrors" that might emerge if this rule were any different. It was stated:

> "Adherence to the district court's bright-line rule"—a rule in which an adjacent landowner has riparian rights by virtue of proximity alone—"in many situations may lead to unjust results. One such consideration, as tailored to the facts in this case, would be the various riparian owners' rights to enjoin Anderson from reclaiming his land. ***If Bell truly has acquired 'riparian rights' in the water, it seems apparent that these 'rights' would include the right to enjoin Anderson from draining the lake."*** Anderson, 433 So.2d at 1206 (emphasis added).

The Edlers invite this Court to open the floodgate of "untold horrors" which so greatly concerned the Florida Supreme Court. They demand riparian rights without considering what this means, or what the law will tolerate, as a practical consequence. If the Edlers (or anyone who owns property in Sumac Ridge abutting the Main Lake) possess riparian rights to Main Lake, then they have the *perpetual* right to use and enjoy Main Lake

regardless of Trustees' consent (or lack thereof); insisting that the Main Lake be forever maintained at Trustees' labor and expense. Concordantly, if the Edlers' prevail, Trustees would not only lose the ability to exclude unwelcomed trespassers, but also the ability to decide the fate of Main Lake.

For example, if the trial court imbued the Edlers with riparian rights to Main Lake, then Trustees would be barred from draining Main Lake and creating, in its place, a golf course or other communal attraction benefiting the Incline Village lot owners—a key concern of the Florida Supreme Court, who worried about inadvertently seizing basic property rights from landowners through the creation of an unwieldy riparian doctrine. *Anderson*, at 1206. While there are no plans to drain Main Lake, the fact remains that Trustees, as owners of Main Lake, should have the ultimate right to decide what happens to it—not the Edlers.

Long before the Edlers purchased their adjacent Sumac Ridge property, the land that encompasses Main Lake was exclusively vested in the Trustees (subject to the mandates of the Incline Village Indenture). [**SOF 6 at LF0128**]. The Edlers asked the trial judge to ignore that reality, seeking a judgment which takes from Trustees what has always been their exclusive property and, instead, investing at least a portion of it in the Edlers as adjoining neighbors.

The weight of evidence in favor of the Trustees was overwhelming and the trial judge was correct in his judgment granted in favor of Trustees on their request for declaratory relief and for trespass, so his ruling should be affirmed. Likewise, considering

the circumstances that forced the Trustees to file suit to enjoin the Edlers from taking Incline Village's property, it was not an abuse of discretion for the trial judge to award plaintiff attorney's fees. The trial court's judgment should be affirmed.

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 6594 words as determined by the word count feature of Microsoft Word 2016, exclusive of the Cover, the Table of Contents, the Table of Authorities, the signature block, the Certificate of Service and Certificate of Compliance.

2. This Respondent's 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 Respondent's Brief were scanned for viruses and are virus-free.

By: /s/ Martin L. Daesch
Martin L. Daesch #40494

CERTIFICATE OF SERVICE

An electronic copy of the foregoing Respondent's Brief was sent this 9th day of May, 2018 to Jess W. Ullom, attorney of record for Matthew Edler and Andrea Edler via the Court's electronic filing system.

By: /s/ Martin L. Daesch
Martin L. Daesch #40494