2011 IL App (2d) 101223-U
No. 2-10-1223
Order filed October 17, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

HOWARD FASSNACHT and LORI A. FASSNACHT,	)	Appeal from the Circuit Court of McHenry County.
Plaintiffs-Appellants,	)	No. 05-CH-602
v.	)	
TIMOTHY E. BALDWIN, TONI M. BALDWIN, DAVID A. ESPOSITO, DIANE ESPOSITO, JEFFERY THOMPSON, KRISTEN THOMPSON, and THOMAS PIEPER,	)	Honorable Michael T. Caldwell,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE BOWMAN delivered the judgment of the court.
Justices Zenoff and Birkett concurred in the judgment.

ORDER

Held: The trial court properly determined that plaintiffs did not own a 10-foot strip that bordered a channel to the Fox River. Accordingly, plaintiffs did not have superior rights to interfere with defendants' use of their express easement. Trial court order was affirmed.

¶ 1 Plaintiffs, Howard and Lori A. Fassnacht, and defendants, Timothy E. And Toni M. Baldwin, David A. and Diane Esposito, Jeffery and Kristen Thompson, and Thomas Pieper, own residential homes in a subdivision located in McHenry County. After defendants removed a jet ski station from

a channel of water adjacent to plaintiffs' property, plaintiffs sought a declaratory judgment to enforce their riparian rights to the middle of the channel. After the trial court granted defendants' motion for a directed finding, plaintiffs appealed to this court. We reversed and remanded the cause for further consideration regarding the property boundaries. *Fassnacht v. Baldwin*, No. 2-08-0635 (Dec. 29, 2009) (unpublished order pursuant to Supreme Court Rule 23 (Ill. Sup. Ct. R. 23 (eff. May 30, 2008)). We specifically instructed the trial court to determine whether the 10-foot strip marked on the plat was a utility easement. After continuing and completing the bench trial upon remand, the trial court entered judgment in favor of defendants, finding that plaintiffs did not have riparian rights and that their property line ended approximately 10 feet before the channel wall. The trial court concluded that the 10-foot strip was not a utility easement, but rather an "out lot," which no one owned and which everyone had equal rights to use. Plaintiffs appealed, arguing that the trial court erred in determining that the 10-foot strip was an "out lot" that nobody owned when the facts illustrated that they owned the strip. We affirm.

¶ 2 I. BACKGROUND

¶ 3 The following facts are undisputed. In 1996, plaintiffs purchased a residential property consisting of two lots, lots 14 and 15, in a subdivision near the Fox River. Defendants also individually own four residential properties in the same subdivision, lots 16 through 19. Pursuant to the original plat of subdivision recorded in 1956, plaintiffs' lots run parallel to a channel of water that eventually flows into the Fox River.[1] The channel of water ends at the northeast corner of

[1]The manmade channel did not yet exist when the plat of subdivision was recorded in 1956, so the plat refers to the channel as a "Proposed 50 ft Channel." Likewise, the seawall along the channel did not exist at the time the plat of subdivision was recorded.

plaintiffs' property, and unlike plaintiffs' property, defendants' lots do not evenly abut the channel. Defendants' properties are located at the end of the channel, and pursuant to the plat, are bordered by an express easement giving them access to the channel. The plat denotes the channel with a solid, thick, black line. At issue in this case is the significance of a thin, black, dash line that runs along the outside of the channel at a distance of 10 feet. The 10-foot strip represented by the dash line is present on all properties adjacent to the channel, including plaintiffs' property.

¶ 4 A. The Pleadings

¶ 5 On December 12, 2005, plaintiffs filed a first amended two-count complaint, which alleged as follows. Defendants each maintain a boat lift for their water craft at the end of the channel, "including within the portion of the channel that is between the middle of the channel and plaintiffs' property boundary." Defendants' maintenance of boat lifts at the end of the channel blocks plaintiffs from maintaining a boat lift at the end of the channel adjacent to its property. Count I sought, among other things, a declaratory judgment awarding plaintiffs title "to that portion of the channel that adjoins Plaintiffs' land and extends out to the middle thread of the channel." Plaintiffs' amended complaint further alleged that up until 2004, plaintiffs also maintained a boat lift for their jet ski in the portion of the channel between the middle of the channel and the boundary of plaintiffs' property (the left corner of the end of the channel). Count II alleged intentional trespass, in that defendants forcibly removed plaintiffs' jet ski lift without permission and damaged it. In addition, plaintiffs alleged that defendants continue to trespass on plaintiffs' property by maintaining their respective boat lifts at the end of the channel.

¶ 6 B. The First Bench Trial

¶ 7 A hearing commenced on May 5, 2008. During opening arguments, plaintiffs argued that the thrust of the complaint is that they have superior rights to the corner of the channel. Based on

the premise that plaintiffs' property boundary extends to the seawall of the channel itself, plaintiffs argued that they are riparian owners of the channel. As riparian owners, plaintiffs are entitled to a higher interest in the channel than their neighboring defendants, who are separated from the channel by an easement. Defendants countered that the original plat of subdivision shows that neither plaintiffs nor any other property owner owns up to the channel. Rather, the plat reveals that the original subdivider reserved 10 feet, which is confirmed by the iron rod located on plaintiffs' property. Defendants argued that all parties have equal rights, and the sole issue is whether one property owner's use of the channel interferes with another property owner's use.

¶ 8 Plaintiff (Howard Fassnacht) testified first as follows. Plaintiff described his property as having 160 feet of waterfront with a home on one lot and a garage on the other lot. The channel in the back of his property is a 50-foot, manmade channel that leads to the Fox River. A seawall bordering the channel runs along plaintiffs' property. Exhibits 8, 9, and 10 were photos of plaintiffs' two boats. One boat was "parked in the [left] corner directly off of [plaintiffs'] seawall" at the end of the channel. The other boat was along the seawall but not at the end of the channel. At some point, plaintiffs sold the boat parked in the left corner of the end of the channel and replaced it with jet skis. Exhibit 11 was a picture of plaintiffs' jet ski parked in the same place the boat used to be. In addition to plaintiffs' jet ski, exhibit 11 also showed two boats owned by defendants at the end of the channel to the right of the jet ski. A fourth boat in the right corner of the end of the channel belonged to the property owner directly across from plaintiffs' property, who is not a party to this appeal. No one objected to plaintiffs' jet ski parked in the left corner of the channel, and it remained there for two or three years. However, on April 17, 2004, defendants removed plaintiffs' jet ski lift from the water and put it on plaintiffs' property. Defendants did not have permission to do so and

they damaged the lift. Defendant contacted the police, who responded to the incident and filed a report.

¶ 9 On cross-examination, plaintiff admitted that two defendants had asked him when he intended to remove his jet ski lift. Plaintiff denied saying that he had not done so because of the weather. If the police report indicated that there was no damage to the jet ski lift, that was because he had not yet discovered the damage. Plaintiff testified that when they bought the property, the survey reflected their property boundary to be at the edge of the seawall of the channel; it did not show the boundary to the center of the channel. Plaintiff thought that the survey was obtained in 1999 by James Anderson Company, Lake County Land Survey. Plaintiff agreed that members of the public use boats in the portion of the channel that he was seeking title to, which was acceptable to him. Plaintiff was not seeking to prevent defendants from boating in that part of the channel, although he stated in his deposition that he did not believe defendants had the right to maintain a boat docked in the channel.

¶ 10 On redirect, plaintiff testified that his intention in filing suit was to use his property and to prevent defendants from keeping their lifts and boats on his property. Plaintiff sought title to the area adjacent to the seawall, including the left corner of the end of the channel.

¶ 11 Illinois professional surveyor, James Anderson, testified next as follows. Licensed in 1992, Anderson worked for James Anderson Company, which was founded in 1891. The company had a sister company, Lake County Land Survey Company, where much of the survey work was done. Plaintiff (Howard Fassnacht) was a childhood friend of Anderson's. In 1998, plaintiffs contacted Anderson to prepare a plat of survey for title insurance purposes after they purchased the property. In order to create a survey for plaintiffs, Anderson needed the original plat of subdivision to retrace the steps of the original surveyor who recorded the plat. Anderson needed "to find the monuments,

[or] the corners, that are called for on this plat," because the original plat indicated where the corners were. After that, it is "time to go out in the field and recover the evidence that is available to reconstruct and then create a plat of survey."

¶ 12 Exhibit 19 was the plat of survey created by Anderson for plaintiffs' property. Anderson recovered monuments, namely old iron pipes set by the original surveyor, that substantiated the three corners of the property bordering the street (and not the channel). These iron pipes were the same. On the southeast corner of lot 14 adjacent to the channel, Anderson found an old iron rod, which was not original but "obviously set by a later surveyor." Instead of measuring 10 feet from the channel, the rod measured 4.72 feet from the channel. Anderson did not find original iron pipes for the next two corners adjacent to the channel, so he inserted new iron pipes. He noted that the channel was in "slightly an incorrect but different location than it was proposed."

¶ 13 Anderson treated the channel as a natural monument. The original plat of subdivision depicts the channel with a dark, thick, black line, because it is a water boundary. The plat also contains a dash line that runs parallel to the channel. Anderson explained that "the dash line is merely a sort of a meander line, but it's not technically a meander line. It is what we would call a construction line." Pursuant to the original plat of subdivision, "we have a 70-foot record measure across said channel" and "we know that it's only a 50-foot wide physical channel.[2] Therefore, we know that this 10-foot record indicated between the heavy water boundary line and our construction line are [sic] meander line." Anderson's survey showed plaintiffs' property boundary to be at the seawall. His survey also referred to the dash line as an "assumed meander line," because it "only controls for line.

[2]The 70-foot measure referred to by Anderson appears on the plat of subdivision at the mouth of the channel.

It is up [there] to allow you to reconstruct a water boundary, which is typically considered a natural monument." In noting that two of the original pipe monuments near the water were gone, Anderson explained that that "is precisely why we would consider [the dash line] a meander or construction line is [sic] because [the monuments] so often are damaged even when they're just close to the water line, let alone being right on the water line." When asked why he placed the monuments 10 feet back rather than on the sea wall itself, Anderson replied that the seawall "has become a natural monument," and that "in the hierarchy of monumentation, natural monuments are at the top. So I have to respect those first. I also have to respect monuments second, even if they're artificial and placed by others. And angles and distances are lower on the hierarchy."

¶ 14 Anderson's survey noted an easement for lots 16 through 19. In contrast to other easements labeled on the original plat of subdivision, nothing in Anderson's research showed that the dash line represents an easement.

¶ 15 On cross-examination, Anderson agreed that the original plat of subdivision shows a dash line running all along the channel, which Anderson referred to as a meander line. He also agreed that the plat shows that the meander line runs consistently 10 feet from the channel. Anderson believed that the original subdivider intended to subdivide the 10-foot area; the subdivider's "intention was for this [channel] to be a riparian boundary with that [dash line] being a meander line." Anderson agreed that all of the iron pipe monuments are located some distance short of the channel itself and are on the dash line. However, according to Anderson, the monuments "do not indicate the actual edge of the property" or plaintiffs' riparian boundary, which he believed is the seawall. Anderson testified that it is standard practice in surveying to have a meander line adjacent to a water boundary, and that monuments are normally used to mark meander lines rather than property edges.

¶ 16 On redirect, Anderson testified that iron pipe monuments cannot be placed into a channel because they would be destroyed immediately.

¶ 17 Following the testimony of one defendant and the deputy who responded to the jet ski removal incident, plaintiffs asked the trial court to consider the April 15, 2008, deposition testimony of Carol Perschke, the McHenry Township Assessor. Perschke testified that there were many factors to consider when assessing a property, such as whether it is a dry parcel or waterfront property. In reviewing the plat of subdivision, defendants' properties, lots 16 through 19, are located at the end of the channel. Defendants' properties are separated by a dry parcel of land or an easement that allows them access to the water. Due to the easement, defendants' lots 16 through 19 are "water access only properties" and are not classified as waterfront properties because the lots are not contiguous to the channel of water. On the other hand, plaintiffs' property, lots 14 and 15, is classified as waterfront property. Typically, there is a higher market value for waterfront properties versus non-waterfront properties. When asked if she knew whether plaintiffs own the property "all the way up to the channel" of water, Perschke replied that there is no delineation between plaintiffs' property line and the channel of water, so she assumed that they owned up to the waterfront. However, Perschke explained that this assumption was based on the "County maps," which "don't show water lines as what might be shown on this [original] plat of survey." When asked about the lines on the plat of subdivision, Perschke did not know what those lines represent; it was outside the scope of her knowledge. In particular, she did not know what the dash line paralleling the channel depicted. Perschke had not reviewed plats of survey specifically for lots 14 and 15. In the event the plat of survey revealed that plaintiffs' property line did not go up to the water channel itself, she did not know whether plaintiffs' property would need to be reassessed as water access property as opposed to waterfront property. Perschke believed that in order to be assessed as waterfront

property, "the property owner would need to actually own the land up to the water." Perschke admitted that she was not a licensed land surveyor and did not have expertise in determining property boundary lines.

¶ 18 Plaintiffs rested and defendants moved for a directed finding. The trial court granted defendants' motion for a directed finding, reasoning as follows. The court had "problems" with Perschke's deposition testimony and Anderson's testimony. The court did not agree with Perschke's assessment of plaintiffs' property as waterfront property, and it did not agree with Anderson's definition of meandering. In the court's experience, meandering is a technical word or a word of art. The court believed that the 10-foot strip was "reserved by the subdivider for the purpose of providing access to the channel, not only for the owners of lots 14 and 15, but all of the other lots which are in the immediate vicinity of that channel and which have water access."

¶ 19 According to the court, the issue was not whether plaintiffs' riparian rights were being infringed upon, the issue was whether plaintiffs owned the property that abuts the channel. The court noted that the complaint did not address riparian rights, but rather ownership of the shoreline, and thus ownership of all the land to the center of the channel. However, there was no evidence demonstrating that plaintiffs "own the property which is adjacent to this particular channel." The court reasoned that plaintiffs' property line was drawn on dry property and is established by iron rods in the ground. The channel was created after that on property that was not owned by plaintiffs. In the court's view, the "ten feet that is shown between the edge of [plaintiffs'] property and the edge of the channel is the ten feet which has been reserved for the use and benefit of other owners of property." The court concluded that no riparian rights were at issue in plaintiffs' case.

¶ 20 After this ruling, the court heard arguments regarding a counterclaim filed by defendant property owner of lot 16. After removing plaintiffs' jet ski lift from the left corner of the channel,

this defendant placed a shore station in the same corner. Essentially, this defendant sought a declaratory judgment to continue to use that corner for his shore station without interference from plaintiffs, who had allegedly located their shore station "directly behind" and thus too close to defendant's shore station. Plaintiffs argued that allowing defendant's shore station to remain in the corner deprived them of approximately 40 feet of lot 15, and that defendants' express easement did not provide for boat docks. Defendant property owner of lot 16 argued that plaintiffs' property allowed plaintiffs to place their shore station south of the corner, and that the corner was the only possible location for his shore station.

¶ 21 The court denied the counterclaim, finding that neither plaintiffs nor defendants have a superior right to that corner. The court ruled that defendants have access to the channel through the easement for lots 16 through 19, and plaintiffs have an "implied right" to use the 10-foot strip in front of their property to access the channel. According to the court, defendants' express easement extends down the sides of the channel via the 10-foot strip, giving plaintiffs an implied easement to access the channel. The court stated:

> "[T]he platters didn't do us any favors here because they gave no terms as to what the easement is and what those rights are. It is simply an easement of access, ingress and egress, what is implied, what is expressed. There's nothing here. But the same considerations that apply to lots 16 through 19 also apply to lots 14 and 15. [Plaintiffs] have just as much right to the access of this stream as [defendant lot owner 16]. Now we get to the corner. While - nobody has a superior right to the corner, not [plaintiffs] and not [defendant lot owner 16]. *** But for me to declare the right of [defendant lot owner 16] to use the entire corner for his shore station would indeed be depriving [plaintiffs] of the use of that portion of the shoreline which is directly in front of their property. I mean, nobody has the right to use

both shores that comprise this angle. It's just not here. It's not in the easement. It's not expressed in the easement. What I see is an implied right for [plaintiffs] to use the 10-foot strip in front of their property to get to - onto from and use the channel, just as lots 16 through 19 have the right to use the channel from the end. *** You want a declaration of rights here, I'll give you a declaration of rights. Nobody - nobody along this stream may use it in any fashion, shape or form which clearly interferes with the right of anybody else to use it. What I don't have in this case is clear proof that, in fact, there is the-there is any injury to the right. I don't have-the proof as far as I am concerned is equivocal on whether or not an additional amount of footage is necessary for the operation of [defendant lot owner 16's] shore station."

¶ 22 The court went on to say:

"The problem here is that nobody has defined what the use of this channel is, its access to it. The case that was given to me indicates that, yes, you can use the channel. Yes, you can put in piers. Yes, you can put in boat lifts and you can use it for boating."

¶ 23 Because the parties were unclear whether the court was ordering the "status quo," the court clarified that that was "the effect" of the order." The court expressly ordered that "the access to this channel by any of the parties to this case shall not be such as to interfere with the right of access of any one else to this channel."

¶ 24 C. The December 29, 2009, Order

¶ 25 In our order, we reviewed the plat at issue *de novo* to determine whether plaintiffs owned the 10-foot strip extending to the channel. We questioned whether the 10-foot strip was a utility easement based upon language on the plat and the fact that there were express easements outlined on the plat. *Fassnacht*, No. 2-08-0635, slip order at 18-19. After additional briefing and oral

arguments on this issue, which the parties had not raised, we concluded that the trial court had not considered the possibility that the 10-foot strip could be a utility easement and accordingly erred in granting the motion for a directed finding. *Fassnacht*, No. 2-08-0635, slip order at pg. 20. We instructed the trial court to consider this issue and to consider whether the plat was ambiguous. *Id.* We instructed that if the trial court deemed the plat ambiguous, it could consider parol evidence. *Id.* Finally, we instructed that if the trial court determined that the 10-foot strip was a utility easement, the next step was to determine who owned the land subject to the easement. *Id.* at 21.

¶ 26 D. The Continuation of the Bench Trial Upon Remand

¶ 27 On November 4, 2010, the trial court re-opened plaintiffs' trial pursuant to our order, picking up where it had left off, which was at the close of plaintiffs' case. Defendants called plaintiff Howard Fassnacht as an adverse witness. Plaintiff identified the closing statement from the purchase of his property and a survey done by Conway at the seller's expense. The documents were admitted into evidence over plaintiffs' objection as to the survey since the maker of the document was not being called as a witness. Defendants questioned plaintiff on a real estate transfer declaration document, which he did not recall ever receiving at closing. The document indicated that his lot size was 150 feet by 160 feet. The document was admitted over objection. Plaintiff did not agree with those dimensions. He testified that he obtained another survey to contest the dimensions. He obtained that survey within a year of the 1996 purchase through The James Anderson Company. He was unaware whether his attorney filed an amended real estate transfer declaration form to the county. When asked about an email that he sent to the surveyor, plaintiff denied that he instructed the survey be amended to conform to his legal theory. Plaintifft testified that he asked the surveyor whether the survey needed to be amended to show that his property extended into the channel. Plaintiff further testified that he believed that he owned the land past the

dash line to the water channel because the property was sold to him as waterfront property and because he was assessed as waterfront property.

¶ 28 Defendants next called defendant Jeffery Thompson, the owner of lot 17. When he purchased his property, Thompson was aware of an easement that allowed him to access the water. At the time of his purchase, there were no piers or boat slips on the easement. Thompson had a pier and shore station put in about ten feet from the side of the sea wall, allowing easy access to the water from both lots 16 and 17. Thompson has stored a boat each season at the pier. Defendants Espositos and Baldwins also have a pier and shore station next to Thompson's. Thompson shares his pier and shore station with defendant Pieper. Thompson identified a deed, which was referred to as Defendants' Ex. No. 12 but that exhibit does not appear in the record. Thompson testified that the deed states he purchased the easement land. He testified that he purchased the land from the heirs of W.E. Knight. He denied purchasing land from another neighbor. It is entirely unclear from the questioning of Thompson what was purchased, when, and from whom. Thompson testified that no one from the public could use the easement area where his pier was located and could not access the channel from that property because they would have to walk through his private property.

¶ 29 Defendant Pieper, owner of lot 16, testified to much of the same as Thompson regarding the pier and shore station and access to the channel.

¶ 30 Paul Madsen, vice president of operations at Heritage Title Company, testified that he reviewed the chain of title to plaintiffs' lots 14 and 15. He also reviewed the plat of the subdivision. He testified that the iron stakes were depicted on the plat about 10 feet off of the proposed channel. Madsen also testified that the plat owner still owned the 10-foot strip. Based on the plat's utility

easement language, Madsen believed the 10-foot strip was a utility easement.[3] On cross-examination, Madsen admitted that he was not a licensed surveyor. He also admitted that he did not talk to any heirs of W.E. Knight. He also did not find any document that demonstrates the heirs still own the property. Madsen admitted that the land was held in a trust by W.E. Knight but that he did not have access to that trust. However, Madsen did not believe that the presence of the utility easement would prevent owners of the properties from using the land to access the channel.

¶ 31 After defendants rested, plaintiffs called Jo Ellen Treadman, vice president and senior trust administrator for Harris Bank. She identified Plaintiffs' Exhibit No. 25, the trust documents related to W. E. Pistakee Terrace. The documents were admitted into evidence. The documents show that the trust was closed out.

¶ 32 Plaintiffs next called James Anderson to testify again in this matter. He believed the property line for lots 14 and 15 was the sea wall. He identified the dash line 10 feet from the sea wall as a meander line. According to Anderson, solid lines indicate boundary lines. When Anderson surveyed the Fassnacht property, he did not find any utilities along the channel. Anderson did not believe the 10-foot strip was a utility easement because other areas marked on the plat with a dotted or dashed line were also labeled as "utility easements". The 10-foot strip along the channel was not labeled as a utility easement. Anderson reiterated that a surveyor would not place an iron stake in an area of water because it would be lost or destroyed. Additionally, all of the other lots in the subdivision have boundary lines marked by solid lines, not dash lines.

[3] The plat states that utility easements were to be marked with dotted lines on the plat and marked "utility easement."

¶ 33 During closing arguments, plaintiffs characterized this court's concern as whether the utility easement that runs from the park near lots 6 and 7 extends around the rear of lots 8 through 15. Plaintiffs argued that it did not and that the 10-foot strip in question was not a utility easement. Plaintiffs argued that all of the other utility easements on the plat were explicitly labeled as such. Plaintiffs also argued that the plat was unambiguous. However, if the court deemed that 10-foot strip a utility easement, this court wanted to know who owned the strip, and plaintiffs argued that Madsen was incorrect in assuming the heirs of W.E. Knight owned the land. The trust documents admitted relating to the land trust demonstrated that the heirs closed the trust upon the final sales of property. According to plaintiffs, the 10-foot strip was thus sold to the lot owners. Plaintiffs argued that if the court ruled that the lot owners were land locked, then every owner along the channel would have to get their boats out. According to plaintiffs, the evidence and the plat establish that plaintiffs own up to the edge of the channel, and therefore their rights were superior and defendants would have to remove their boat slips.

¶ 34 Defendants argued that the utility easement issue was irrelevant and that plaintiffs failed to establish that they had any right through the center of the channel. Defendants argued that the iron stakes clearly established the boundary lines, and those stakes were placed well short of the channel itself. The type of line used by the surveyor was irrelevant, according to defendants. Defendants also argued that because there was no title transfer to this 10-foot strip, the land was still owned by the heirs of W.E. Knight, the original subdivider of the property.

¶ 35 The trial court stated that it was very clear from the subdivision plat itself that the lot corners were marked by iron pipes, and the lot corners were 150 feet by 80 feet. The court held that there was no intention to convey any right, title, or interest of any part of the 10-foot strip at issue between

the 150-foot boundary and the start of the water. The trial court doubted it was a utility easement because all of the other utility easements were clearly labeled on the plat. The trial court held:

> "What I see here is an intention that the property surrounding the proposed channel that wasn't developed or under water was reserved as an out lot. Nobody in this subdivision has a superior right to any party of that out lot to the exclusion of any of the others.
>
> The Fassnachts are not the owner of the ten foot strip.
>
> There will be a judgment for the defendants on both counts."

¶ 36 Plaintiffs timely appealed, arguing that the trial court erred in determining that the 10-foot strip at issue was an out lot.

¶ 37 II. ANALYSIS

¶ 38 In a bench trial, the trial court must weigh the evidence and make findings of fact. *Eychaner v. Gross*, 202 Ill. 2d 228, 251 (2002). Reviewing courts will defer to the findings of the trial court unless they are against the manifest weight of the evidence. *Id.* A decision is against the manifest weight of the evidence only when an opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary, or not based on the evidence. *Id.* at 252. The reviewing court must not substitute its judgment for that of the trier of fact. *Id.* Where the trial court also construes and rules on the legal effect of documents, the review of the trial court's conclusions of law is performed *de novo*. *Id.* Thus, where the trial court made factual findings, we review the finding using the manifest weight of the evidence standard, and where the court interpreted a document, we review its conclusions of law *de novo*.

¶ 39 Turning to the merits, we first review the trial court's legal conclusion that the plat clearly showed the boundary lines of plaintiffs' lots to not include the 10-foot strip in question. We agree with the trial court that the plat is unambiguous by considering the face of the original plat recorded

March 14, 1956. The meaning of a plat is a question of law for the court. *Davis v. deVore,* 16 Ill. App. 3d 334, 336 (1974). We interpret a plat using the same rules of construction as a deed, giving meaning to every word, figure and line. *Id.* We construe the instrument as a whole. *Id.* In this case, plaintiffs argue that the dash line where the iron stakes were found did not represent the property boundary for their lots; rather, they argue it was a meander line, placed short of the channel wall, which was the true boundary line. We disagree with plaintiffs' argument.

¶ 40 The survey was performed by L.B. Howard, a registered Illinois land surveyor whose certification appears on the plat as follows:

> "I, L.B. Howard, a registered Illinois land surveyor, No. 1455, do hereby certify that I have surveyed and subdivided the lands shown on the annexed plat and described in the above caption, and that the said annexed plat, drawn to a scale of 100 feet per 1 inch, is a true and correct representation of said survey and subdivision. I do further certify that I have placed iron stakes at all lot corners and curve control points, from which surveys may be made. All measurements are shown in feet and decimal parts of a foot."

¶ 41 The boundary measurements on the plat indicate that plaintiffs' lot measurements are each 150 feet by 80 feet. The iron stakes, as Howard certified, were placed at these corners. No where on the plat is there any reference to meander lines or any indication that the lots bordering the channel have measurements beyond the 150 feet marker. "The generally accepted rule in Illinois is that unless an intention to the contrary is manifest, a grant of land bounded on a stream will convey the land to the middle thread of the stream." *Rowland v. Shoreline Boat & Ski Club,* 187 Ill. App. 3d 144, 147 (1989). While the presumption that a grant of land bounded on a stream will convey the land under water to the middle thread of the stream is based on the theory that the grantor will not be presumed to have reserved a strip of land covered with water which will be of no

practical value to him (*Heckman v. Kratzer*, 43 Ill. App. 3d 844, 848 (1976)), we still must consider the instruments of conveyance on their face to determine what was intended to be conveyed (*id.* at 850).

¶ 42 In *Rowland*, a property dispute arose among lots bordering the Fox River. *Id.* at 145. The original plat of the subdivision showed that lots 1, 2, and 3, which abutted the Fox River, noted that the length of the lots with a "+" symbol, which indicated no limit to the length of the lots as they extended to the river. *Id.* The lots were later conveyed in deeds as "water lots." *Id.* The court held that the sole issue before it was the intent of the original grantor of the lots and whether he intended to convey riparian rights with the lots. *Id.* at 147. The court held that there was nothing in the record, given the plat and the deeds describing the lots as "water lots," that showed a contrary intent on the part of the grantor other than to extend the northern boundary of the three lots to the Fox River. *Id.*; see also *Heckman*, 43 Ill. App. 3d at 850 (construing language in deed and surveyor's certificate demonstrated that grantor did not intend to convey title to the river bed or the island at issue and that the grantor retained ownership). Unlike in *Rowland*, the plat in this case does indicate a contrary intent of the original grantor. Here, the boundary measurements are clearly marked 150 feet by 80 feet and the surveyor expressed that he marked the lot corners with iron. The deed contained no additional language describing the property but merely incorporated the plat. Thus, we have no "water lot" description or a boundary description that included the channel wall or the channel itself.

¶ 43 We further reject plaintiffs' argument that the line in question is a meander line. No line on the plat is marked as a meander line, and there are several lines around the channel border. See *North Shore, Inc. v. Wakefield*, 530 N.W.2d 297 (N.D. 1995) (involving deed that explicitly referenced a "meander line" in boundary description). The term "meander line" arose as a land

surveying term to describe the technique used to approximate the amount of acreage contained in a given parcel of land. *Houser v. United States*, 12 Cl. Ct. 454, 467 (1987). The *Houser* court explained the background of meander lines:

> "This technique was used in the late 19th and early 20th centuries because, given the technology of the time, a computation of the actual acreage of a parcel of land with an irregular border, such as land abutting a navigable river, was difficult if not impossible to accomplish. The meander line located on a land survey plat would be used to approximate the sinuosity, or bends and curves, of the ordinary high water line of a navigable river. Fixed monuments would be set, in the property being surveyed, at the changes in the water course. The meander line would then be depicted on a plat as a straight line connecting these fixed points. Thus, because the actual, irregular boundary of the land was depicted as a straight line, the acreage computation was greatly simplified. However, the ordinary high water line, rather than the meander line, would remain the true boundary of the parcel of land. Grantees who were purchasing land abutting a navigable river would purchase not to the actual 'meander line' but would purchase the land to the ordinary high water line of the river that the 'meander line' was meant to represent. This became a legal presumption as to the intent of the parties in purchasing land that abutted a navigable river." *Id.* at 467-67.

¶ 44 The legal presumption as to meander lines is applicable to government surveys in surveys of public lands bordering navigable waters and to surveys conducted for conveyances between private parties. *Id.* at 468. In *Houser*, the plaintiffs sued the United States and the State of Idaho over a tract of land bordering the Snake River that they argued they owned because their boundary line was the Snake River, not the meander line on the plat. *Id.* at 460. The plaintiffs supported their argument with significant evidence, including two credible, disinterested witnesses who testified to

the chain of title and that the title insurance had concluded that the State of Idaho had erred in claiming the disputed land. *Id.* at 469. The plaintiffs also introduced documents showing that the language of the various conveyances of the property described the western border of the property as the " 'east bank of the Snake River.' " *Id.* The court also noted that the original abstract of title prepared in 1906 showed that the western boundary ended in points marked as a " 'post in stone' " and the western side of the conveyance, labeled a " 'meander line,' " connects these two posts in stone. *Id.* at 470. "Most significantly, however, this meander line, as drawn, directly abuts the Snake River; also the river's name is written in immediately above the labeled meander line." *Id.* The defendants offered no evidence to rebut the presumption that the boundary line was the Snake River and not the meander line, and the court noted that the defendants' own exhibits supported the plaintiffs' position. *Id.* at 468. Thus, the court concluded that the plaintiffs rightfully owned the land in question that abutted the Snake River. *Id.* at 472.

¶ 45 In the case at bar, plaintiffs presented Anderson, his childhood friend and a surveyor, to testify that the line in question was a meander line. He testified that the dash line was a "sort of" meander line; something like a "construction line." He then testified that the original subdivider intended for the channel to be a riparian boundary with the dash line being a meander line. We find this testimony as to the original subdivider's intentions to be pure speculation. Anderson did not explain why there is no mention of a meander line on the plat or why Howard certified that he placed stakes at the lot corners. The township assessor (Perschke) also testified for plaintiffs but testified that she did not know if plaintiffs owned the property all the way up to the channel wall. Perschke assumed that plaintiffs did based on "county maps," which she did not identify, and stated that she did not know what the lines on the plat submitted into evidence meant. She also did not know whether plaintiffs' property would need to be reassessed if it was determined that plaintiffs did not

own up to the channel wall. She thought that in order to be assessed as waterfront property, plaintiffs would have to own up to the water line.

¶ 46 Unlike in *Houser*, where the plat was created in the late 19th century when it was difficult to survey the natural land near the Snake River, the final channel in this case was not yet created when the plat was created, which was in the 1950's. Further differentiating this case from *Houser*, there is no evidence here of any conveyance that indicates the border of plaintiffs' property was the channel wall. The deeds simply recorded the plat and the measurements on the plat. Certainly, the measurements could have been used to determine the price to be paid for the lot but if there was an intention to convey the land to the channel wall, that intention is not manifested in the plat, in the deed, or in any of the evidence adduced at trial. Anderson could only speculate as to the intent of the original grantor and surveyor, and he himself at first testified that the dash line was some type of "construction line." Thus, we are not persuaded by plaintiffs' assertion that the 10-foot strip was a meander line and intended to be included in the conveyance.

¶ 47 Even if the line in question was a meander line, it does not necessarily follow that the meander line was not meant to be the border. As discussed, neither the plat nor the deed indicates that the lots were water lots or that the border would be the channel's edge. In *Heckman*, the court found it persuasive that the grantor retained ownership of the river bed and island for his continued use to rebut the presumption that land bordering a stream conveys title to the middle of the stream. *Heckman*, 43 Ill. App. 3d at 838. Plaintiffs in this case presented evidence that the heirs of W.E. Knight closed the trust and seemingly this establishes that they had no use to retain the land. However, we do not agree that the fact the trust was closed establishes *per se* that Knight did not retain ownership of this tract. The fact the trust was closed simply does not overcome the clear intention of the plat to convey a lot measuring 150 feet by 80 feet. We therefore conclude that the

plat unambiguously demonstrated that plaintiffs' lots measured 150 feet by 80 feet and not 160 feet by 80 feet or into the center of the channel.

¶ 48 Even if we did deem this plat ambiguous, the parol evidence admitted at trial does not support plaintiffs' position, as discussed earlier in our meander line analysis. The real estate transfer declaration filed in 1996 after plaintiffs' purchase of the property reflects the lot size as 150 feet by 160 feet (two 80 feet lots). The larger plat, labeled as Plaintiffs' Exhibit No. 1, which shows all of the subdivisions created by the W.E. Knight trust, also indicated that plaintiffs' lots were 150 feet by 80 feet. That exhibit does not show the proposed channel or even the Fox River, and therefore does not really assist in plaintiffs' case. Additionally, the deed merely incorporated the plat as the description of the lots so unlike in *Rowland*, we have no references to any "water lots." Plaintiffs only offered the testimony of Anderson, a surveyor who could provide only speculative testimony regarding the intent of the original grantor and the actions of the original surveyor. See *Chambers v. Gough*, 4 Ill. App. 3d 336, 340 (1972) (finding trial court properly excluded surveyor's testimony as to original surveyor's placement of various stakes because his testimony would be mere speculation). No other evidence was produced to establish plaintiffs' claim that they owned through the center of the channel, such as any title insurance clauses that suggest ownership to the center of the channel. Accordingly, even if we deemed the plat ambiguous, plaintiffs still failed to establish that the boundary of his property was 160 feet and not 150 feet.

¶ 49 Having determined that plaintiffs failed to establish that they own the 10-foot strip, this still leaves open their complaint that they could store their jet skis at the corner of where the 10-foot strip meets the corner of defendants' easement and that defendants could not maintain any boats at the end of the channel. Arguably, the trial court could have ended its findings with its determination that their boundaries did not include the 10-foot strip because plaintiffs' merely sought to establish

ownership of the 10-foot strip in their complaint and did not raise any other theory to defend their claimed superior right. However, since the trial court went on to determine that the 10-foot strip was an "out lot," we will address it.

¶ 50 The trial court first determined that the 10-foot strip was not a utility easement because the other utility easements were clearly labeled on the plat. We agree with the trial court's determination, given that other utility easements were clearly labeled as such on the plat and in the absence of any credible evidence suggesting otherwise. The trial court then deemed the 10-foot strip lining the channel as an "out lot" that everyone could use but to which no one had superior rights over another. We agree with the trial court though we believe it would be more correctly called an implied easement created by the original grantor of the land. Defendants' have an express easement, clearly marked on the plat at the corner of the channel. This is likely because the four corner lots owned by defendants do not neatly line up against the channel wall, as do plaintiffs' lots and the surrounding lots lining the channel. Because plaintiffs' failed to establish that the original grantor ever conveyed the 10-foot strip to them, we presume that the grantor retained the strip but intended for residents to be able to use the man-made channel to access the Fox River.

¶ 51 An easement by implication requires the following elements: (1) unity of ownership and separation of title; (2) before the separation of the tracts occurs, the use which would give rise to an easement must have been so long-continued, obvious or manifest that it would show the use was meant to be permanent; and (3) the use of the claimed easement must be essential to the beneficial enjoyment of the land granted or retained. *O'Hara v. Chicago Title and Trust Company*, 115 Ill. App. 3d 309, 309-10 (1983). Whether an easement by implication was created must be determined as of the time it was severed from the other land of the grantor. *Id.* at 310. The party seeking the easement carries the burden of establishing the required elements. *Id.*. Reviewing courts will not

disturb the findings of a trial court as to the proof of the elements unless they are against the manifest weight of the evidence. *Id.* Plaintiffs established that the original grantor (W.E. Knight trust) owned the entire tract and subdivided the land into various lots. It was also established that the channel was contemplated before the lots were sold, with an intention for that channel to give the residents lining the subdivision access to the Fox River. Such an intention was obviously meant to be a permanent use of the land as the channel's existence was likely anticipated to be permanent. Finally, access to the channel was essential to the lot owners' use of their land. Plaintiffs' testified that they, like all of the surrounding lot owners, purchased the property because it provided access to the waterway for the purposes of boating, jet skiing, and other recreational activities. Plaintiffs and their neighbors have used the land in this manner since the subdivision was created. Accordingly, it makes sense that plaintiffs and the other bordering lot owners have an implied easement to access the channel akin to defendants' express easement, which requires four owners to share.

¶ 52 In conclusion, in reviewing the plat *de novo*, we agree with the trial court's interpretation that the plat was unambiguous and did not convey property to the channel wall. We also cannot say that, after considering the evidence adduced at trial, that the trial court's determination that plaintiffs had an implied easement was against the manifest weight of the evidence. As the trial court stated, no individual owner has superior rights to another to access the channel, meaning no individual may interfere with another's access to the channel.[4] Thus, if the placement of plaintiffs' jet skis

[4] We further note that even if we granted plaintiffs' their desired outcome, which is that they own to the shore or into the middle of the channel, plaintiffs have provided no authority to support their argument that their "superior" riparian rights could block defendants' use of their express

prohibited defendants from the access intended by the express easement, plaintiffs would have to move their jet skis to another location along the implied easement in front of their lots. Conversely, if defendants' boats interfered with plaintiffs' access to the channel, defendants would have to move their boats. On this point, no evidence was adduced at trial to support that the location of the boats or the jet skis (prior to their removal) caused any party to be unable to access the channel.

¶ 53 III. CONCLUSION

¶ 54 For the reasons stated, we affirm the judgment of the circuit court of McHenry County.

¶ 55 Affirmed.

---

easement as they argue in their brief. Plaintiffs relied on *Gibbons v. Clarkson Grain Co.*, 281 Ill. App. 3d 529 (1996) to support their claim of superior riparian rights but we find that case inapplicable. *Gibbons* addressed whether the defendant boat operator, who had a right to navigate on a public waterway, could park its barge for extended periods of time in front of the property of plaintiff, who had riparian rights. The court determined that the defendant exceeded his right to navigate the waters by parking the barge for commercial uses for extended time periods and interfering with the plaintiff's use of her property. Instead, this case involved defendants' use of an express easement, involving a right to access the channel which is something more than just a right to navigate the waters. Plaintiffs and defendants have put forth no argument and no evidence regarding the extent and scope of defendants' easement.