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IN THE
COURT OF APPEALS OF INDIANA

Todd Thalls, Trustee of the M. Todd Thalls Revocable Trust, and Robert Conrad,

Appellants,

v.

Elizabeth A Draving, Co-Trustee of the Leonard R. Draving and Elizabeth A. Draving Joint Revocable Living Trust dated July 26, 2004,

Appellee.

February 9, 2022

Court of Appeals Case No. 21A-PL-1138

Appeal from the Kosciusko Superior Court

The Honorable Curtis D. Palmer, Special Judge

Trial Court Cause No. 43D04-1904-PL-40

Brown, Judge.

[1] Todd Thalls as Trustee of the M. Todd Thalls Revocable Trust ("Thalls") and Robert Conrad (together, "Appellants") appeal the trial court's judgment regarding title to a certain walkway parcel providing access to Big Chapman Lake in Kosciusko County. Appellants raise several issues which we restate as whether the judgment of the trial court is clearly erroneous. We affirm.

Facts and Procedural History

[2] This case concerns the ownership and use of a narrow strip of land or walk, approximately six feet wide, which provides access to Big Chapman Lake. Thalls owns a parcel described as lot 20 ("Lot 20") and Robert Conrad owns a parcel described as lot 19 ("Lot 19") on an original plat of Waw-Wil-A-Way Park recorded in March 1924. Lots 19 and 20 abut Big Chapman Lake on one side and a street on the other. The walk at issue is situated between Lots 19 and 20 and extends from the street to the water's edge. Elizabeth A. Draving as the Co-Trustee of the Leonard R. Draving and Elizabeth A. Draving Joint Revocable Living Trust dated July 26, 2004 ("Draving") owns Lots 19B and 20B, which are located across the street from the six-foot walk between Lots 19 and 20.

[3] On April 22, 2019, Draving filed a Complaint for Quiet Title Action, Adverse Possession, and Prescriptive Easement against Thalls, Conrad, and Daniel

Robert Shroyer and his heirs or devisees.[1] Draving alleged that her family owned Lots 19B and 20B since 1959, a title search showed Daniel Robert Shroyer was the owner of the six-foot walk between Lots 19 and 20, and the Draving family had openly possessed and used the walk since they took title to their lots, made improvements on the walk including the installation of stairs to access the lake, used a pier installed lakeward from the walk, moored boats on the pier, and paid to have the seawall resurfaced at the shoreline of the walk. She alleged that Daniel Robert Shroyer and his successors have not made any claim to the walk and there were no real estate taxes assessed pertaining to the walk. Draving requested that the court enter judgment that she is the fee simple owner of the walk and raised a claim of adverse possession. She also alleged that, if she did not acquire title by adverse possession, then she acquired a prescriptive easement over the walk. Lowell A. Shroyer filed an Answer and Disclaimer on May 17, 2019, stating in part that, on behalf of himself and the heirs, assigns, and devisees of Herbert Shroyer, Lola Shroyer, Elma Shroyer, and Herbert Lowell Shroyer, he disclaimed any interest in the walk.

[4] In February 2021, the trial court held a two-day hearing. The court admitted exhibits including the original plat of Waw-Wil-A-Way Park and three

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[1] An entry in the chronological case summary states: "Proof of Publication on Notice Filed Notice of Summons-Service by Publication published 4/25, 5/2, 5/9 in the Warsaw Times Union." Appellants' Appendix Volume II at 3 (some capitalization omitted). The Notice of Suit in Appellee's Appendix provides: "This Summons by Publication is specifically directed to all the living heirs, devisees, legatees, successors and assigns of Daniel Robert Shroyer, who may have a claim or interest in the above-described real estate." Appellee's Appendix Volume II at 3.

additions to the plat, conveyance instruments, aerial photographs, photographs of the walk, and title reports. The court heard testimony from, among others, members of the Draving family, Bradley Hall[2] regarding title to the walk, and Chasity Sandy[3] regarding tax assessments related to the walk. Appellants moved for judgment on the evidence.

[5] On May 18, 2021, the court entered a nineteen-page Judgement in Favor of Draving. The court found that the 1924 original plat shows a "'Main Street' and what is referred to as a 'Public Road'" and "twelve unplatted, narrow strips of land running from the main street and public road to the water's edge, interspersed between twenty-four of the twenty-nine lots," the plat "does not show any property line or other demarcation dividing these 6' walkways from the main street," and "[o]ne of the narrow, unplatted strips of land runs between [Lots 19 and 20] from the street to the water's edge." Appellants' Appendix Volume II at 10-11. The court found the Draving family acquired Lots 19B and 20B in 1959 and maintained ownership of them continuously for the prior sixty-two years, those lots do not include any lakefront property, the Draving family continuously used the walk between Lots 19 and 20 as their exclusive access to the lake since 1959, and none of the deeds in the chain of

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[2] Hall testified that he had forty-six years of experience in the title insurance industry and that he and his partner started his title services firm in 2005 and described the nature of his work including title searches and examinations.

[3] Sandy testified that she was employed at the Kosciusko County Auditor's Office, she was the GIS Coordinator, and her primary duties include maintaining parcel data for taxation.

title for Lots 19 and 20 make any mention of the six-foot walkway. The court found that a title search for the walk "shows it as a part of the plat recorded in 1924," "[i]t was then a part of a larger overall parcel containing the unsold lots in the Original plat conveyed via warranty deed from Luella Wilcox to Daniel Robert Shroyer and Mildred Shroyer . . . in 1945 (shortly thereafter quitclaimed to Daniel Robert Shroyer alone)," and "[t]here have been no subsequent conveyances pertaining to the 6' walkway." *Id*. at 13-14. The court found there was no evidence of a relationship between Daniel Robert Shroyer and the Shroyers mentioned in the May 17, 2019 Answer and Disclaimer.

[6] The court found the original plat "refers to 'A Public Road' used to connect the newly created lots to the nearest existing roadway" and "[o]ther than that roadway language, none of the three involved plats contain any language or other reference to dedicating any portion of the plats 'to the public' or 'for public use.'" *Id*. at 15. It found there was no evidence the Kosciusko County Commissioners ever affirmatively determined the walk to be dedicated to the public, a majority of the six-foot walks had been vacated and placed on the tax rolls, and no real estate taxes have ever been assessed on the walk between Lots 19 and 20. The court found that, beginning in 1959, the Draving family began using the walk to access the lake for swimming, fishing, and boating, in the early 1960s the family installed concrete block steps in the walk for their use, each year the family repaired or replaced the blocks as needed, Conrad also helped maintain the block steps, in approximately 2002 the Draving family upgraded the steps by installing a set of wooden stairs with a handrail in their

place, and the Draving family never asked for or received any permission from the owners of Lots 19 and 20 to install the concrete steps or wooden stairway. It found that, beginning in 1959 or 1960, the Draving family had a fishing boat which they kept anchored off the end of the walk, in approximately 1968 Draving asked Conrad's permission to place a pier at the end of the six-foot walk to moor his fishing boat and Conrad told him that it was all right with him, from 1959 through 2019 no owners of Lots 19 or 20 or any other person objected to the Draving family's use of the walk or their placement of a pier at the end of the walk, and in 2019, Thalls, the new owner of Lot 20, notified the Draving family that he was objecting to the placement of their pier.

[7] The court found there was no conclusive evidence that anyone other than the Draving family regularly used the walk to access the lake, there was some evidence that Conrad and the previous owners of Lot 20 occasionally mowed half of the lower portion of the walk, since the pier was installed in 1966 no one other than the Draving family and their guests moored a boat to the pier, and over the years the family's pier gradually expanded in length for a pontoon boat, fishing boat, and jet ski. It found the Draving family paid to have a section of seawall refaced at the lake end of the walk, installed crushed stone between the top of the stairway and the street, and planted arborvitae bushes along the Lot 20 property line. It found Conrad and Thalls did not make any claim of ownership of the walk and the last legal owner of the walk was Danial Robert Shroyer.

[8] With respect to Draving's claim of adverse possession, the court found:

> [Draving] and her predecessors in interest have occupied and used the 6' walkway for over sixty years. They have installed concrete block steps and later a wooden stairway. They have installed landscaping and maintained the landscaping and the steps. They have regularly used the walkway each year to access the lake for fishing, swimming, boating and recreation. They have installed and removed their pier on a seasonal basis every year. They have moored boats to their pier each year. Taken together, all of the acts show the necessary control, intent, notice and duration by clear and convincing evidence.
>
> The last named title holder to the real estate, Daniel Robert Shroyer, nor his descendants, have appeared in this action to controvert [Draving's] claim of adverse possession.
>
> Without the property ever being placed on the tax roll and no real estate taxes ever being assessed, [Draving] has satisfied her burden of having a reasonable and good faith belief that all real estate taxes owed had been paid.
>
> [Draving] has acquired title to the 6' walkway between lot 19 and lot 20 of the Original plat of Waw-Wil-A-Way Park from the public road to the shoreline of Big Chapman Lake by adverse possession.

Id. at 19-20. The court further found Draving satisfied the elements for a prescriptive easement. In addition, it found "[t]he only expert evidence regarding the public versus private nature of the 6' walk was contained within the Certificate (Plaintiff's Exhibit N) and testimony of Brad Hall stating the 6' walkway was still held in private ownership by Daniel Robert Shroyer" and there was no contrary expert testimony or documentary evidence and no evidence the Kosciusko County Commissioners ever accepted the plats or the walk as dedicated to the public as a right of way. *Id*. at 25.

[9] The court entered judgment in favor of Draving and denied Appellants' motion for judgment on the evidence. The court ordered that Draving has fee simple title by adverse possession to the walk between Lots 19 and 20, free and clear of any claims by the adjacent lot owners, Thalls and Conrad, and of any descendants of Daniel Robert Shroyer. The court also ordered that, in the event of any later adjudication reversing the judgment by adverse possession, Draving had established an exclusive prescriptive easement over the walk.

Discussion

[10] The issue is whether the trial court's judgment is clearly erroneous. When a trial court enters findings of fact and conclusions thereon, the findings control as to the issues they cover and a general judgment will control as to the issues upon which there are no findings. *Yanoff v. Muncy*, 688 N.E.2d 1259, 1262 (Ind. 1997). A general judgment entered with findings will be affirmed if it can be sustained on any legal theory supported by the evidence. *Id.* When a court has made findings of fact, an appellate court first determines whether the evidence supports the findings of fact and then whether those findings support the court's conclusions. *Id.* Findings will be set aside only if they are clearly erroneous. *Id.* Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference. *Id.* A judgment is clearly erroneous if it applies the wrong legal standard to properly found facts. *Id.* In order to determine that a finding or conclusion is clearly erroneous, an appellate court's review of the evidence must leave it with the firm conviction that a mistake has been made. *Id.*

[11] Appellants assert the trial court erred in concluding that the walk was not a public way and that Draving acquired the walk by adverse possession. In particular, they argue the evidence establishes a valid common law dedication occurred and shows the express intent of the original developers to dedicate the walks depicted in the original and first addition plats as public ways. They argue those plats show the walks were to be regarded as separate from the numbered lots, the absence of a line on the plats between Main Street and the walks signifies that the walks were intended to be part of the public way, Sandy's testimony supported this conclusion, and the non-payment or assessment of taxes on the walk and the fact other platted walks had been vacated evidences a common understanding that the walks were public in nature. Appellants argue Draving could not have reasonably believed she owned the walk as private property while having no obligation to pay taxes on it. They also assert that, as Draving failed to show she acquired an interest in the walk by adverse possession or a prescriptive easement, she is not a riparian owner and her placement of the pier is unlawful.

[12] Draving maintains the trial court properly weighed the evidence and judged the credibility of the witnesses, and that Appellants point to limited portions of an extensive record from a two-day bench trial to claim no evidence supports the court's judgment. She argues that Appellants ignore the high standard required to prove an express or implied dedication, the evidence supports the finding that the walk was owned by Shroyer, and the 1945 deed conveying property to Shroyer included the walk.

[13] To the extent Appellants do not challenge the court's findings of fact, the unchallenged facts stand as proven. *See In re B.R.*, 875 N.E.2d 369, 373 (Ind. Ct. App. 2007) (failure to challenge findings by the trial court resulted in waiver of the argument that the findings were clearly erroneous), *trans. denied*.

A. *Evidence of Dedication*

[14] With respect to Appellants' assertion the evidence shows that a common law dedication occurred, two elements are required for a common law dedication: (1) the intent of the owner to dedicate and (2) the acceptance of the public of the dedication. *Sagarin v. City of Bloomington*, 932 N.E.2d 739, 747 (Ind. Ct. App. 2010) (citing *Jackson v. Bd. of Comm'rs of County of Monroe,* 916 N.E.2d 696, 704 (Ind. Ct. App. 2009), *reh'g denied*, *trans. denied*), *reh'g denied*, *trans. denied*. Dedication may be express or implied, which arises by the acts of the owner. *Id.* Express dedication typically involves a deed, a plat, or some other document specifically using the word "dedication." *Jackson*, 916 N.E.2d at 704. "The intention must clearly appear, and the acts and declarations of the owner relied on to establish it must be clear, convincing, and unequivocal." *Id.* (quoting *Town of Poseyville v. Gatewood*, 65 Ind. App. 50, 52, 114 N.E. 483, 484 (1916)). The burden of proof is on the party asserting a dedication. *Id*.

[15] Here, the trial court rejected Appellants' claim and found that they did not prove the intent for a common law dedication by clear, convincing, and unequivocal evidence and that the property which included the walk was conveyed to Daniel Robert Shroyer in 1945. The court also found the original

plat referred to a public road but did not contain any language or reference to dedication of any other portion of the plats to the public or for public use and there was no evidence the Kosciusko County Commissioners accepted the walk as dedicated to the public.

[16] The record reveals the original plat of Waw-Wil-A-Way Park, recorded in March 1924 and executed by Frank and Luella Wilcox, depicted Lots 19 and 20 and the walk between those lots extending from the roadway to the lakefront. As noted by the trial court, the plat depicts a roadway, labels the roadway as "Main Street," and, to the side of the depiction, provides "[a] Public Road to Waw-Wil-A-Way Park runs as follows . . ." and includes a legal description of the street which is thirty feet wide where it abuts Lots 19 and 20.[4] Plaintiff's Exhibit A. While Appellants observe the plat did not depict a line between the street and the walks extending to the lakefront, the plat did not refer to any public use except for the reference to the street. A First Addition to the plat, recorded in August 1933, stated "there were 6' walks between the following lots: . . . 19 and 20 . . ." and did not refer to any dedication for public use. Plaintiff's Exhibit B. A Second Addition to the plat, recorded in October 1944, depicted Lots 19, 20, 19B, and 20B and the walk between Lots 19 and 20 and did not refer to any dedication for public use. A Third Addition to the plat,

[4] Hall testified the legal description for the street on the original plat did not include the walks between the numbered parcels or the walk between Lots 19 and 20.

recorded in August 1946, did not refer to any dedication for public use.[5] The plats do not indicate they were signed or accepted by the Kosciusko County Commissioners.

[17] In addition, Draving presented evidence that the land which included the walk between Lots 19 and 20 was conveyed to Daniel Robert Shroyer in 1945. Hall testified that Plaintiff's Exhibit N consisted of a Certificate which he prepared based upon a title search of the walk. The Certificate referred to, and included as attachments, a warranty deed by Luella Wilcox, dated September 4, 1943, and recorded on April 27, 1945, conveying certain property consisting of eighty acres, except for the lake lots already sold, to Daniel Robert Shroyer and Mildred Shroyer; a quitclaim deed by Daniel Robert Shroyer and Mildred Shroyer dated and recorded on April 27, 1945, conveying the property to Lou H. Haymond, Trustee; and a quitclaim deed by Lou H. Haymond, Trustee, dated and recorded on April 27, 1945, reconveying the property to Daniel Robert Shroyer. Luella Wilcox also conveyed certain parcels, including Lots 19B and 20B as shown on the Second Addition to the plat to Daniel Robert Shroyer by warranty deed dated and recorded in October 1944. The Certificate states: "We hereby certify that we have completed a search of the public records

[5] As noted below, the court heard evidence that property taxes were never assessed or payable with respect to the walk between Lots 19 and 20. Sandy testified that, if there was a determination of adverse possession, then the walk would be placed on the tax rolls and that, if there was a determination of a prescriptive easement, then the parcel would not necessarily be placed on the tax rolls. She also indicated the Auditor's Office did not make determinations regarding whether a parcel was dedicated for public use or who owned the parcel.

in the Office of the Recorder of Kosciusko County, Indiana, as to the real estate referred to as the walkway between Lots 19 and 20 . . . and found the last deed of record to be a Quitclaim Deed from Lou H. Haymond, Trustee to Daniel Robert Shroyer dated April 27, 1945 and recorded April 27, 1945."[6] Plaintiff's Exhibit N. Hall testified that the walks between the numbered lots, including the walk between Lots 19 and 20, were included in the legal description of the property conveyed to Daniel Shroyer in 1945.

[18] Appellants were required to show the intent of the owner to dedicate the walk by acts and declarations which were clear, convincing, and unequivocal. *See Jackson*, 916 N.E.2d at 704. Based upon the record, including the recorded plats and deeds, we cannot say the court's finding that Appellants did not make this showing is clearly erroneous, and our review of the evidence does not leave us with the firm conviction that a mistake has been made.

B. *Adverse Possession*

[19] The Indiana Supreme Court has held:

> [T]he doctrine of adverse possession entitles a person without title to obtain ownership to a parcel of land upon clear and convincing proof of control, intent, notice, and duration, as follows:
>
> > (1) Control—The claimant must exercise a degree of use and control over the parcel that is normal and customary

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[6] The description of the property provided: "The West Eighty (80) acres of the Northeast Quarter and the East Fractional Half of the Northwest Quarter, all in Section 26, Township 33 North, Range 6 East, excepting therefrom the lake lots heretofore sold." Exhibits Volume IV at 43.

> considering the characteristics of the land (reflecting the former elements of "actual," and in some ways "exclusive," possession);
>
> (2) Intent—The claimant must demonstrate intent to claim full ownership of the tract superior to the rights of all others, particularly the legal owner (reflecting the former elements of "claim of right," "exclusive," "hostile," and "adverse");
>
> (3) Notice—The claimant's actions with respect to the land must be sufficient to give actual or constructive notice to the legal owner of the claimant's intent and exclusive control (reflecting the former "visible," "open," "notorious," and in some ways the "hostile," elements); and
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> (4) Duration—The claimant must satisfy each of these elements continuously for the required period of time (reflecting the former "continuous" element).

Fraley v. Minger, 829 N.E.2d 476, 486 (Ind. 2005). "These elements must be satisfied for the statutory period of ten years." *Morgan v. White*, 56 N.E.3d 109, 115 (Ind. Ct. App. 2016). "Additionally, the claimant must have a reasonable and good faith belief that they and their predecessors in interest have paid all taxes due on the disputed real estate in accordance with Ind. Code § 32-21-7-1."[7] *Id*. at 116. Substantial compliance satisfies the tax payment requirement. *Celebration Worship Ctr., Inc. v. Tucker*, 35 N.E.3d 251, 254 (Ind. 2015).

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[7] Ind. Code § 32-21-7-1 provides:

> [I]n an action to establish title to real property, possession of the real property is not adverse to the owner in a manner as to establish title to the real property unless the adverse possessor pays all taxes and special assessments that the adverse possessor reasonably believes in good faith to be due on the

[20] The trial court found the evidence established that Draving acquired title to the walk between Lots 19 and 20 by adverse possession. It found that Draving and her predecessors occupied and used the walk for over sixty years, installed concrete block steps and later a wooden stairway, installed landscaping and crushed stone for a walkway, planted bushes along the Lot 20 property line, paid to have a six-foot section of seawall refaced at the lake end of the walk, maintained the landscaping and steps, regularly used the walk each year to access the lake, installed and removed a pier on a seasonal basis every year, and moored boats at the pier each year. The court found that Draving satisfied the requirement that a claimant pay any taxes reasonably believed in good faith belief to be due. The court also found Daniel Robert Shroyer and his descendants did not controvert Draving's claim and the deeds for Lots 19 and 20 did not refer to the walk.

[21] The record reveals that the 1924 original plat depicted Lots 19 and 20 and the walk between them and the Second Addition to the plat showed the location of Lots 19B and 20B relative to the walk. The court admitted the conveyance instruments showing that Daniel Robert Shroyer held title to the walk and evidence regarding the owners of Lots 19B and 20B and their use of, and acts related to, the walk between Lots 19 and 20. As for Lots 19B and 20B, the court admitted evidence of a warranty deed recorded in September 1959

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real property during the period the adverse possessor claims to have adversely possessed the real property.

conveying the lots to Otto Floyd Draving ("Floyd") and Florence Mae Draving. Floyd's son Roy Draving became an owner in 1988 and the sole owner when Floyd died in 1991. The lots were conveyed to Leonard R. Draving and Elizabeth Draving in 2001 and later to their trust in 2004. The court also admitted evidence that Conrad held title to Lot 19, Thalls held title to Lot 20, and the legal descriptions for Lots 19 and 20 did not include the walk.

[22] As for the Draving family's use of and acts related to the walk, the court heard testimony that the Draving family used the walk between Lots 19 and 20 as their private access to the lake beginning in 1959 and made improvements to and maintained the walk. Mary Landes, Floyd's daughter, testified that Floyd constructed a cottage on Lots 19B and 20B in about 1960, installed cement blocks to serve as steps within the walk, and installed a pier into the lake where he kept fishing boats. She testified that he placed the pier in the same area every year and would stack the pier on the walk near the shore in the off-season. She indicated the family continued to use the walk each year when Roy owned the lots, and that the family reset the cement blocks each spring to make certain they were sturdy. Mary further testified the lots were conveyed to Leonard and Elizabeth in 2001 and they tore down the cottage, constructed a home on the lots, and made significant improvements to the walk. She testified Leonard and Elizabeth installed wooden steps in the walk area, planted a row of shrubs, extended the pier because they had a pontoon which required a little more depth, and installed a seawall at the end of the six-foot-wide walk. She testified that members of the Draving family owned the property for over sixty

years, the family's use of the walk to access the lake never changed, to her knowledge only her family members and their guests used the walk, and only family members installed the pier. She indicated the Conrad family might have used the walk to access the lake based on where they parked but that she did not recollect seeing them use it.

[23] Draving presented the testimony of two of Mary's children and one of Leonard and Elizabeth's children which was consistent with Mary's testimony. Michael Draving, the son of Leonard and Elizabeth, testified that, shortly after the lots were conveyed to his father, his father had a survey of the walk completed,[8] constructed permanent steps on the walk to replace the cinder block steps, and tore down the cottage and built a home on Lots 19B and 20B. He testified that the family performed maintenance every year including cleaning up weeds and leaves and staining the wood. He testified they installed stepping stones and planted arborvitaes along the side of the walk which bordered Conrad's property in an effort to make the walk more exclusive. He testified that his father extended the pier lakeward, installing a couple of additional sections every few years. He testified that his father had six feet of the seawall that was lakeward of the walk refaced at his expense. He also testified he observed only members of the Draving family use the walk. The court admitted receipts showing Leonard's expenses related to an addition to the pier and refacing the seawall. The court also admitted a number of aerial photographs from various

[8] Plaintiff's Exhibit M contains a survey of the "strip of land between lots 19 & 20." Plaintiff's Exhibit M.

years showing the lots and pier as well as photographs of the walk and surrounding area showing the pier, the boats, and the improvements to the walk.

[24] The court also heard evidence that taxes were never payable with respect to the walk and found that Draving met her burden with respect to paying the taxes she reasonably believed to be due. The court was able to consider the evidence that the Draving family exercised control over the walk, that their acts showed an intent to claim full ownership, they provided sufficient notice of their intent and exclusive control, and their activities were sufficiently regular for the prescribed period. Based upon the evidence set forth above and in the record, we cannot say the trial court's judgment that Draving acquired the parcel by adverse possession is clearly erroneous.[9]

[25] For the foregoing reasons, we affirm the judgment of the trial court.

[26] Affirmed.

May, J., and Pyle, J., concur.

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[9] As we affirm the trial court's entry of judgment that Draving has fee simple title to the six-foot-wide walk parcel which abuts the lake, Draving has the property rights associated with ownership of such a property including the right to build a pier. *See Parkison v. McCue*, 831 N.E.2d 118, 128 (Ind. Ct. App. 2005) (noting a property owner whose property abuts a lake possesses certain riparian rights associated with ownership of such a property which generally include the right of access to navigable water, the right to build a pier, the right to accretions, and the right to a reasonable use of the water for general purposes such as boating and domestic use), *trans. denied*.