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Little v Kin

WHAT HATH THE MICHIGAN COURT OF APPEALS WROUGHT?

On February 1, 2002, one panel of the Michigan Court of Appeals decided a lake access easement case entitled Little v Kin, ___ Mich App ____ (2002) (hereinafter, the Little Case).

Many news outlets throughout the state rushed to report on this case, implying that it was either a dramatic departure from existing Michigan water law or at least it created law in an area where none had existed before. It appears that many members of the media may have rushed to judgment and have not thoroughly or properly analyzed the Little Case. I believe that a careful reading and close analysis of the Little Case will show that it is generally consistent with long-established case law in the area, although some legal experts will undoubtedly argue that it presents a slightly different view or puts a slightly different "spin" on past conventional legal analyses involving lake access easement cases.

In Little, a 66-foot-wide easement (i.e., the easement has 66 feet of frontage on the lake) existed across a riparian lot on Pine Lake in Oakland County. The easement benefited two nonriparian lots/backlots. The document which created the easement stated—"For access to and use of the riparian rights to Pine Lake."

The owners of the riparian lot initiated litigation in the Oakland County Circuit Court in an attempt to define the scope of usage rights for the easement. While the riparian property owners acknowledged the existence of the easement and the right of the backlot owners benefited by the easement to use the easement to access the lake, they asserted that the backlot owners had no right to install docks or engage in permanent boat mooring. The trial court judge agreed with the riparian property owners and summarily held that the easement involved was an access easement only—that is, it could be used for travel to and from the lake, but could not be used to for dockage, permanent boat mooring, sunbathing, etc. The backlot owners appealed to the Michigan Court of Appeals.

The Michigan Court of Appeals reversed the decision of the trial court. It is important to note, however, that the Court of Appeals did not rule in favor of the backlot owners or hold that the backlot owners were entitled to dockage or boat mooring rights on the easement. Rather, the Court of Appeals returned the case to the trial court with the instruction that the trial court determine whether the language of the easement (and the original intent behind the easement) evidences a right of dockage and boat moorage for the backlot owners. The Court of Appeals indicated that the trial court was wrong to rule in favor of the riparian property owners at an early stage in the case and before a trial (i.e., a "summary disposition"), and held that given the somewhat ambiguous wording of the easement, the matter should have proceeded to a full trial.

The Court of Appeals discussed the seemingly inconsistent nature of past rulings regarding lake access easements in general. In perhaps the key case in Michigan regarding

the rights of riparian property owners, the Michigan Supreme Court in Thompson v Enz, 379 Mich 667, 686 (1967), stated that:

> We hold that riparian rights are not alienable, severable, divisible, or assignable apart from the land which includes therein, or is bounded, by a natural water course. While riparian rights may not be conveyed or reserved—nor do they exist by virtue of being bounded by an artificial water course—easements, licenses, and the like for a right-of-way for access to a water course do exist and oft times are granted to nonriparian owners.

But what does that mean? Legal experts have been confused since the Thompson v Enz decision in 1967—does that decision mean that lake access easements could not be lawfully created or are there limits on the rights that can be accorded backlot owners pursuant to lake access easements?[1] Since 1967, Michigan appellant courts have made it pretty clear that lake access easements in general can be created, even though some people have felt that such decisions are inconsistent with Thompson v Enz. Based upon the decision in Little and the other Michigan case law to date, it appears likely that riparian property owners can create easements in favor of one or more backlots with certain rights of dockage, boat moorage, sunbathing, etc., but only if the language of the easement expressly and clearly grants such rights. Left unanswered, however, is the issue of which rights normally associated only with riparian ownership can be granted to backlot owners via easement, even with express language. For example, could a riparian property owner lawfully grant the owners of one or more backlots what amounts to almost full riparian rights if the easement language expressly grants full rights of dockage, multiple boat moorage, shore stations, sunbathing, etc.? Or will the Michigan courts ultimately hold that lake easements (regardless of the granting language) can only lawfully grant certain limited usage rights to backlot owners? Or, is the only limit on the ability of a riparian property owner to grant

easement rights the "reasonableness" doctrine? The Little Case does not answer these questions.

Happily, the facts in the Little Case can be distinguished from the overwhelming majority of lake access easement cases in Michigan. Most lake access easements simply contain access or travel language--for example, most easements are typically granted for "ingress and egress," "access to the lake," or an "easement" or "right-of-way." In my opinion, the Michigan courts have made it clear that where such language is utilized, the easement involved is to be utilized only for travel or access purposes and that dockage, permanent boat moorage, sunbathing, picnicking, lounging, etc., is forbidden.[2] *See* Delaney v Pond, 350 Mich 685 (1957), Thies v Howland, 424 Mich 282 (1985); Hoisington v Parkes, (Unpublished Michigan Court of Appeals decision dated March 12, 1999 — Michigan Court of Appeals Case No. 204515); Trustdorf v Benson, (Unpublished Michigan Court of Appeals decision dated December 21, 1989 — Michigan Court of Appeals Case No. 103109); Miller v Petersen, (Unpublished Michigan Court of Appeals decision dated December 27, 1989 — Michigan Court of Appeals Case No. 111358).

The easement language in the Little Case might be deemed to be a lake easement "plus." In the Little Case, the document which created the easement used not only access or travel language, but also had express language which also gave the backlot owners the "use of the riparian rights to Pine Lake." That additional language makes it a debatable point whether or not dockage, boat mooring, and sunbathing rights were also included with the easement.

Both the Michigan Court of Appeals in the Little Case and some advocates for backlot owners have cited Cabal v Kent County Road Commission, 72 Mich App 532 (1976), for the proposition that even an easement with simple lake access language can accord backlot owners the right to dockage and permanent boat moorage. I respectfully assert that they may be mistaken. In Cabal, the Michigan Court of Appeals did permit backlot owners to maintain docks (together with two boats per lot) on a simple lake access easement, but interestingly enough, also prohibited backlot owners from lounging, sunbathing or picnicking on the easement. Quite simply, it appears that Cabal is an aberration and was probably wrongfully decided. Furthermore, it seemingly contradicts the Michigan Supreme Court's decision in Delaney v Pond, 350 Mich 685 (1957). As everyone knows, a Michigan Supreme Court decision (i.e., Delaney) "trumps" a conflicting Michigan Court of Appeals decision (i.e., Cabal). In Cabal, the Michigan Court of Appeals stated that "the right of [the easement holders] to maintain docks is reasonably appurtenant to their easement to enjoy boating in the lake." Cabal at 536. That statement contradicts the central holdings in Delaney, wherein the Michigan Supreme Court stated as follows:

> It does not follow that the [easement holders] have the right to sun bathe on the defendants' property, for it cannot be said that sun bathing is a use of the adjacent waters, nor can it be said that permanent mooring a boat is included in the right to fish and boat. Obviously, plaintiffs have the right to use the easement for the purpose of carrying their boats to the waters of the river and lake, but they cannot store them permanently on the easement way, nor attach them to stakes driven into the land.

Delaney at 687-88 (emphasis added).

Even if one assumes that Cabal was correctly decided, it should not have widespread application to other lake access easement cases, due to the unusual factual situation involved. The easement in Cabal was unusual. The case involved many lots located across

the street from a long access strip of land adjacent to Big Crooked Lake. The entire long strip of land located between the lake and the road was subject to an easement in favor of the lots across the road. By the time of the court challenge, most of the lot owners had utilized a portion of the strip of land across the street from their house or cottage for many years for boat mooring, dockage, etc. Each lot owner had a significant amount of frontage to utilize. This might be a prime example of the old adage, "hard cases make bad law."[3]

The hope of attorneys who represent riparians is that trial courts in the future will not misread or misconstrue the Little Case. That is, where a lake access easement contains only access or travel language, hopefully judges will continue to summarily hold (without the need for an extensive trial) that activities such as dockage, permanent boat mooring, sunbathing and lounging are prohibited. Only in cases where the access easement contains additional language indicating that something more than an access easement is intended should the courts refuse to address the issue summarily and require a full-blown trial. Whether or not this will occur, remains to be seen. It is possible that the Little Case will muddy the waters (pardon the pun), such that trial judges will feel the need to have full-blown (and expensive) trials to determine the meaning of easement language, even in "pure" access or travel easement cases. Should that happen, it would be a pity, since I believe that a careful reading of the prior case law makes it clear that where simple access or travel language is used in an easement, it should normally be held as a matter of law that dockage, permanent boat moorage, and sunbathing activities are not permitted.

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[1] Even though the Michigan courts have held that lake access easements can be created in general, there are other potential constraints upon their creation. For example, many municipal zoning ordinances preclude or

severely restrict the ability to create new lake access easements. Additionally, the creation of new lake access easements can be challenged by area riparian property owners pursuant to the riparian/reasonable use doctrine.

[2] Where simple access or travel language is used, there seems to be something akin to a presumption that the easement rights do not include dockage, permanent boat mooring, sunbathing, etc. To inquire into the original intent of the creator of the easement (which is always a risky proposition) where simple access language is used in an easement could go beyond the "four corners" of the easement document, violate the Michigan Statute of Frauds, and interject unpredictability and uncertainty into real estate documents.

[3] Unfortunately, it appears that the Michigan Court of Appeals in the Little Case (as well as some trial courts) may have accepted the false premise that a lake easement without dockage and boat mooring rights would be worthless and would greatly diminish the value of the benefited backlots. Luckily, the appellate courts in Delaney, Thies, Miller, Trustdorf and Hoisington have recognized that fallacy. A lake access easement without dockage and permanent boat mooring rights still accords a backlot owner a considerable number of rights and opportunities to enjoy the lake, including access to the lake, swimming, fishing, ice fishing and skating, temporarily anchoring boats, temporarily pulling up boats onto the shore, etc. Easement holders are not riparian property owners (they also pay less for their lots, pay lower property taxes and have a much smaller lakefront area to use) and many believe that they should not have rights of dockage and permanent boat moorage unless the easement language expressly grants such rights on its face. Otherwise, what benefit is there to being a riparian (including the headaches of paying more for the property, paying higher real property taxes, having to maintain a large lakefront area, etc.) if easement holders can have what amounts to virtually full riparian privileges based on some "divining" of implied dockage and boat moorage rights even though that is not what the easement document says?