

Order

Michigan Supreme Court
Lansing, Michigan

June 5, 2013

Robert P. Young, Jr.,
Chief Justice

146436

Michael F. Cavanagh
Stephen J. Markman
Mary Beth Kelly
Brian K. Zahra
Bridget M. McCormack
David F. Viviano,
Justices

SALLY J. KRANZ,
Plaintiff-Appellant,

and

BRETT STAMATS and AMY J. STAMATS,
Plaintiffs,

v

SC: 146436
COA: 305198
Lenawee CC: 10-003817-CH

ROGER D. TERRILL and DARLENE
G. TERRILL,
Defendants-Appellees.

On order of the Court, the application for leave to appeal the September 20, 2012 judgment of the Court of Appeals is considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we VACATE those portions of the Court of Appeals and Lenawee Circuit Court judgments holding that the defendants established a prescriptive easement to construct and maintain a dock at the terminus of the easement, and to moor boats to the dock. The affidavit of the plaintiff-appellant's predecessor in interest averred that from 1990 until 2003, when she and her husband sold Lot 1 to the plaintiff-appellant, "any use of a dock or boat moorings on or at the easement was done with our permission and consent." We REMAND this case to the Lenawee Circuit Court for further consideration in light of this affidavit and this Court's decision in *Fractional School Dist No 9 in Waterford and Pontiac Twps, Oakland Cty v Beardslee*, 248 Mich 112, 116 (1929) (holding that a period of permissive occupancy cannot be tacked onto a period of hostile occupancy, to show adverse possession).



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I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 5, 2013

Clerk

STATE OF MICHIGAN
COURT OF APPEALS

SALLY KRANZ,

Plaintiff-Appellant,

and

BRETT STAMATS and AMY J. STAMATS,

Plaintiffs,

v

ROGER D. TERRILL and DARLENE G.
TERRILL,

Defendants-Appellees.

UNPUBLISHED

September 20, 2012

No. 305198

Lenawee Circuit Court

LC No. 10-003817-CH

Before: CAVANAGH, P.J., and SAAD and DONOFRIO, JJ.

PER CURIAM.

Plaintiff, Sally Kranz, appeals as of right a judgment in defendants' favor in this easement dispute.¹ We affirm in part, reverse in part, and remand for clarification of the parties' rights and responsibilities following any related proceedings deemed necessary.

On July 28, 2010, plaintiff filed her complaint averring that defendants were back lot owners who enjoyed an easement located across her property providing them with access to Round Lake. However, plaintiff alleged, contrary to the plain language of the easement, defendants maintained a dock and moored their aluminum boat, 24-foot pontoon boat, and Jet Ski on the easement. Plaintiff requested that the trial court "determine the rights of the parties in relation to the easement, enjoin the Defendants from maintaining a dock or any boats upon the easement, enjoin the Defendants from encroaching on the bottomlands [] in the future, and provide such other equitable [sic] as may be suitable." Warranty deeds attached to the complaint

¹ Coplaintiffs, the Stamats, who own the front lot property next to plaintiff's that borders the easement, entered into a consent judgment with defendants and are not parties to this appeal; accordingly, we refer to Kranz as "plaintiff."

indicated that defendants purchased their property in 2000 and plaintiff purchased her property in 2003.

Subsequently, cross-motions for summary disposition were filed. Plaintiff argued that the express easement did not confer riparian rights and defendants could not establish that they acquired such rights by prescription. Although the dock existed for “a considerable period of time,” its installation and use was permissive. Plaintiff attached the affidavit of Ricky Lee Wobrock, defendants’ predecessor in title from 1992 to 2000. Wobrock stated that the dock “was placed and used by a mutual agreement” between him and three other property owners and he used it to moor his boats. However, Wobrock stated, when he sold the property to defendants he “made no representations regarding the right to erect or use the dock. The access to the lake as stated in the deed was the only rights of access conveyed” by him to defendants.

Defendants argued that plaintiff lacked standing to bring the lawsuit because “the plat clearly describes the land divided into the various lots by metes and bounds and clearly [her lot] does not touch the water.” Accordingly, plaintiff did not “own the land lying between the lot line and the water and, therefore, does not have riparian ownership and cannot be heard to complain about activities involving the dock and watercraft.” Defendants also argued that they acquired riparian rights either through their express easement or by prescription. That is, the word “access” in their express easement denoted riparian rights as evidenced by common understanding and practice over many years. In the alternative, they acquired riparian rights by prescription either because the express easement failed or because the dock and mooring of watercraft had been open, notorious, adverse or hostile, and continuous for well over 15 years. Defendants attached several documents to their motion, including affidavits from current and previous back lot owners who set forth their knowledge regarding the dock.

Plaintiff responded to defendants’ claims, arguing that her property is riparian and that the same “gap” that defendants referenced in the plat also exists with respect to defendants’ access easement. Leaving such “gaps” in the descriptions of plats on lakes was common in that era and did not reflect any intention to reserve the associated property along the water’s edge for anyone other than the adjoining lot owners. Plaintiff also argued that defendants were back lot owners who did not acquire riparian rights through the express easement or by prescription.

Thereafter, the trial court issued its written opinion which noted that “the parties have elected to have this Court decide this action based on the pleadings submitted and the oral argument presented to date.” Accordingly, it appears that the parties agreed to waive further proceedings in favor of a final resolution of all claims and defenses based on their submissions, without a decision on their cross-motions. With regard to the easement issue, the trial court held, in pertinent part:

[H]istorically the back lot owners have used and maintained a dock at the end of the easement. From the pleadings and attachments presented, the Court finds that one of the back lot owners was responsible for the installation and removal of the dock each year, but that all four back lot owners shared usage of it, including the mooring of boats for the summer boating season. This usage began in 1957 when the easement was granted by [Kranz’s] predecessor in title. It is important to note that at the time of the creation of the easement, [Kranz’s] predecessor in title,

Browers, owned [her lot] and all four of the back lots in question. It would appear that the intent of the original grantors was to include use of a dock in the usage scope of the easement.

Thus, the trial court concluded that, assuming plaintiff is a riparian owner, defendants and “their predecessors in title continuously used the easement including the dock for more than fifteen years and that such use was open, notorious, and adverse.” Accordingly, defendants established that a prescriptive easement existed, which included the dock and mooring of boats. Further, the trial court held that plaintiff did not establish standing as a riparian owner in light of the plat description which indicated that her property did not touch the water. However, the court concluded, even if plaintiff could prove standing, it would find in favor of defendants for the reasons stated.

The subsequent judgment entered included the following statement: “Upon the submission of the Parties’ Admissions of Facts, Affidavits, and Pleadings, as amended and supplemented, the submission of their Briefs, the Parties’ stipulation that the Court may decide the case based upon the Briefs, Affidavits, and oral Arguments, and the Court having conducted a view of the subject premises, and the Court being fully advised in the premises and having issued its written opinion” Consistent with the court’s written opinion, the judgment indicated that defendants had an express and prescriptive easement across Lot 1 that extended into Round Lake and included the rights to install and maintain a dock, as well as to moor boats to the dock. A consent judgment between the Stamats and defendants was also entered. This appeal by Kranz, only, followed.

Plaintiff first argues that the trial court erred in concluding that she lacked standing to challenge the use of the easement on the ground that her property is not riparian. We agree. Whether a party has standing to bring an action is a question of law that is subject to de novo review. *Groves v Dep’t of Corrections*, 295 Mich App 1, 4; 811 NW2d 563 (2011).²

In the trial court, defendants argued that plaintiff lacked standing to challenge their use of the easement because her property is not riparian. In support of their claim, defendants provided the plat map and argued that “the plat clearly describes the land divided into the various lots by metes and bounds and clearly [plaintiff’s lot] does not touch the water.” The trial court agreed with defendant, but we disagree.

While it is generally true that riparian rights are property rights that arise when land actually touches or includes a body of water, it appears here that plaintiff’s property is riparian.³

² Pursuant to the parties’ stipulation, the trial court fully decided this action, resolving all outstanding claims and defenses, and did not specifically decide their cross-motions for summary disposition; thus, plaintiff’s reliance on the standard of review for summary dismissal motions is inapposite.

³ Because the parties and lower court referred to “riparian” rights although the body of water at issue is a lake and, thus, littoral rights are at issue, we likewise will refer to those rights as “riparian.” See *Thies v Howland*, 424 Mich 282, 288 n 2; 380 NW2d 463 (1985).

See *Thies v Howland*, 424 Mich 282, 287-288; 380 NW2d 463 (1985). The plat map includes a relatively small strip of land that varies in width, existing between a straight-edge line and a wavy line. Defendants purport the straight-edge line to be the actual boundary line of the front lot owners' properties, including plaintiff's property. The back lots are not included on the plat map, only the front lots. There is no reference or designation on the plat map with regard to this strip of land. The same strip of land exists throughout the length of the platted front lot properties, but the strip of land is not uniform in width. Although the plat map indicates that "the streets and alleys as shown on said plat are hereby dedicated to the use of the public," this variably-sized strip of land does not appear to be either a street or an alley. And there is no indication of an intention to reserve ownership of the strip of land.

There is likewise no indication that this strip of land was intended to be a walkway. But even if it could be construed as a walkway of some sort, plaintiff's riparian rights would not necessarily be destroyed. In *Croucher v Wooster*, 271 Mich 337, 345; 260 NW 739 (1935), our Supreme Court held that a lot separated from the water by a highway that is contiguous to the water remains riparian land. And in *Thies*, 424 Mich at 290-293, the Court held that the owner of a lot separated from the water by a walkway along the edge of a body of water remained the owner of the land and, thus, had riparian rights. The Court held: "Unless a contrary intention appears, owners of land abutting any right of way which is contiguous to the water are presumed to own the fee in the entire way, subject to the easement. Since the owner's property is deemed to run to the water, it is riparian property." *Id.* at 293. Accordingly, actual contact with the water is not necessarily required for riparian rights to exist.

Further, there is no evidence that the strip of land or any portion of it was ever or could ever be conveyed to anyone else. See, e.g., *Hilt v Weber*, 252 Mich 198, 218; 233 NW 159 (1930). Defendants argued in the trial court that plaintiff's predecessors in title, the Kummerles, did not convey this strip of land to plaintiff and could not because the Kummerles' predecessors in title, the Roneys, did not convey to them this strip of land. This argument is misleading. The metes and bounds descriptions on all of these warranty deeds were the same. Defendants presented no evidence that this strip of land was ever or could ever be conveyed. Quoting *Hilt*, 252 Mich at 218, defendants argued in the trial court that the "interposition of a fee title between upland and water destroys riparian rights, or rather transfers them to the interposing owner;" however, defendants provided no evidence "of a fee title" or an "interposing owner."

In light of the evidence presented, we conclude that the strip of land in front of plaintiff's property was intended for the exclusive use of her property subject to the easement. It appears to us that the wavy lines likely represent the high water mark, essentially serving the purpose of meander lines and representing the border or edge of Round Lake at the time of the plat map. See *id.* at 201. Such lines do not establish boundaries. See *id.* at 204. Therefore, the trial court's conclusion that defendants proved plaintiff's property is not riparian was erroneous. It follows that the trial court's conclusion that plaintiff lacked standing to seek a declaratory judgment regarding defendants' use of the easement premised on this ground is reversed. See MCR 2.605; *Lansing Sch Educ Ass'n, MEA/NEA v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010).

Next, plaintiff argues that the trial court erroneously concluded that defendants acquired riparian rights either by the express easement or by prescription. We disagree.

This Court reviews de novo a trial court's ruling in a declaratory action. *Toll Northville Ltd v Northville Twp*, 480 Mich 6, 10; 743 NW2d 902 (2008). The trial court's holding regarding the existence of a prescriptive easement is reviewed de novo. *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 40; 700 NW2d 364 (2005). The trial court's factual findings, including the scope of rights under an easement, are reviewed for clear error. *Dobie v Morrison*, 227 Mich App 536, 541; 575 NW2d 817 (1998). "A finding is clearly erroneous where, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made." *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003).

It is undisputed that a ten-foot wide easement is located on plaintiff's property and has been in existence since 1957. At that time, plaintiff's predecessors in title, the Browsers, apparently owned several properties in the plat, as well as plaintiff's front lot property, known as Lot 1. When the Browsers conveyed one of their back lot properties, known as Lot B⁴ to the Zooks, they included an "easement over and across a strip of land" on the west side of Lot 1 "for access to the shore of Round Lake, and including the right to erect and maintain a dock on Round Lake at said point of access." Months later, the Browsers conveyed Lot A⁵, which is next to Lot B, to the Caulkins and such conveyance did not include an easement. However, about a month later, by quit claim deed, the Browsers conveyed to the Caulkins "a right of way" across Lot 1 with the "intention by this deed to grant unto grantees a right of way over and across said property for purposes of going to and from Round Lake."

Lot B – The Stamats' Back Lot Property

In 1965, the Zooks conveyed Lot B to the Thoms, including the easement over Lot 1 "for access to the shore of Round Lake, together with the right to erect and maintain a dock on Round Lake at said point of access." In 1980, the Thoms conveyed Lot B to the Browns, but the easement conveyed was set forth only as "an easement over and across" Lot 1 "for access to the Shore of Round Lake." The "right to erect and maintain a dock" language was not included, likely because the Browns also owned Lot 2, the front lot property now owned by the Stamats. In 1996, the Browns conveyed Lot 2 and Lot B to the O'Donnells, and the easement remained the same, i.e., limited to "access." In 2006, the O'Donnells conveyed Lot 2 and Lot B to the Stamats without change to the easement language.

Lot A – Defendants' Back Lot Property

There is no record evidence of the conveyance of Lot A from the Caulkins, however, at some time the Paukens owned the property. In 1992, the Paukens conveyed Lot A to the Wobrocks with an easement across Lot 1 "for access to Round Lake." In 2000, the Wobrocks conveyed Lot A to defendants with an easement, again, across Lot 1 "for access to Round Lake."

⁴ Lot B is next to defendants' back lot property and is now owned by the Stamats.

⁵ Lot A is now owned by defendants.

First, we address defendants' claim that their express easement granted them riparian rights. As discussed above, the easement granted was "for access to Round Lake." A party's easement rights are governed by the language in the granting instrument. *Blackhawk Dev Corp*, 473 Mich at 42. "Where the language of a legal instrument is plain and unambiguous, it is to be enforced as written and no further inquiry is permitted." *Little v Kin*, 468 Mich 699, 700; 664 NW2d 749 (2003). That is, the circumstances existing at the time the easement was granted may not be considered. *Id.*

Defendants argued that the word "access" is ambiguous; however, "access" cannot be construed to mean "riparian rights" or, more particularly, that defendants were granted the right to install and maintain a dock or to permanently moor boats at the end of the easement. In *Dyball v Lennox*, 260 Mich App 698, 706; 680 NW2d 522 (2004), this Court held that a "[r]eservation of a right of way for access does not give rise to riparian rights, but only a right of way." Other cases which have considered the issue have concluded that riparian rights are not included in easements granting only a right of "access." See *Thies*, 424 Mich at 296 n 10; *Delaney v Pond*, 350 Mich 685, 686-687; 86 NW2d 816 (1957).

Accordingly, the language used in granting the easement was plain and unambiguous. Therefore, the trial court's consideration of the circumstances existing at the time the easement was granted—that the Browers owned all four back lots and appeared to intend that the use of a dock be included in the scope of the easement—was erroneous. And the Browers clearly understood that use of the word "access" alone would not suffice to grant riparian rights as evidenced by their previous conveyance of an easement to the owners of Lot B which explicitly included "the right to erect and maintain a dock on Round Lake at said point of access."

In summary, the plain and unambiguous language of the express easement did not grant riparian rights to defendants and did not suggest that rights to install and maintain a dock or moor boats were within the scope of the express easement. Therefore, to the extent that the trial court concluded that the scope of defendants' express easement included riparian rights such holding is reversed.

In the alternative, defendants argued that they acquired riparian rights by prescription. A prescriptive easement may be acquired in two ways. First, a prescriptive easement can be established by a use that is made pursuant to the terms of an intended but imperfectly created servitude, when all the other requirements are met. *Plymouth Canton Community Crier, Inc v Prose*, 242 Mich App 676, 684; 619 NW2d 725 (2000), quoting 1 Restatement of Property, 3d, Servitudes, § 2.16, pp 221-222. Thus, when an express easement is treated as though it had been properly established for the prescriptive period, although it ultimately fails because of a defect, a prescriptive easement is established. *Prose*, 242 Mich at 684-685.

Here, there was no evidence that the original grantors of the express easement, the Browers, intended to convey riparian rights to the owners of Lot A. There is also no evidence of a defect in the express easement actually granted. To the contrary, with regard to Lot A, the easement was specifically characterized as a "right of way," while the easement granted to the owners of Lot B included "the right to erect and maintain a dock on Round Lake at said point of access." Thus, defendants' claim in this regard fails.

Second, a prescriptive easement may arise in a manner similar to adverse possession, when use of another's property has been open, notorious, adverse or hostile, and continuous for a period of 15 years. MCL 600.5801(4); *Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 118; 662 NW2d 387 (2003); *Prose*, 242 Mich App at 679. Adverse or hostile use is use inconsistent with the right of the owner and cannot be established if the use is permissive, regardless of the length of the use. *Id.* at 681 (citation omitted); *West Mich Dock & Market Corp v Lakeland Investments*, 210 Mich App 505, 511; 534 NW2d 212 (1995).

Defendants appeared to claim that their express easement was enlarged by prescription because they, and their predecessors in title, openly and notoriously maintained a dock and moored boats at the end of the easement, without permission and in a manner inconsistent with plaintiff's ownership rights, continuously for the prescriptive period of 15 years. Defendants provided their affidavit to the lower court in which they averred that their predecessor in title from 1992 to 2000, Ricky Lee Wobrock, had showed them the dock and described it "as our dock" before defendants purchased the property. And Wobrock gave defendant Roger Terrill "a container with the bolts for the dock and told Roger it was his responsibility to get the dock installed each season." Defendants also stated that the Wobrocks "sold this house to us with the representation that this property had lake/dock/boat rights across Lot 1, Shady Beach."

Plaintiff did not dispute that the subject dock had been in place since 1957, but claimed its use was permissive. In support of her claim, plaintiff provided the lower court with an affidavit from defendants' predecessor in title, Ricky Lee Wobrock, who averred that the dock was placed at the end of the easement by mutual agreement and consent between four different lot owners.⁶ Wobrock stated that he never made any claim of adverse possession or easement by prescription regarding the dock or mooring of boats and did not make representations to defendants regarding the same. Wobrock admitted, however, that he moored boats on the dock, including a pontoon boat.

It is clear from the record evidence that the dock and mooring of boats have existed in an open and notorious manner for many years. And the trial court's conclusion that this use was adverse or hostile was not erroneous. That is, the placement of the dock and mooring of boats are uses that have been inconsistent with plaintiff's property rights and were not permissive. See *Prose*, 242 Mich App at 681. Affiant Wobrock's "mutual agreement" with other property owners did not include plaintiff's predecessors in title to Lot 1; thus, his affidavit does not demonstrate that the uses were permissive during the time he owned defendants' property.

And the trial court's conclusion that defendants' prescriptive use was continuous for the required years was not erroneous. There is no dispute that defendants maintained the dock and moored watercraft to the dock since they acquired Lot A in 2000. Plaintiff did not file this

⁶ The four different owners named were Wobrock, Roy Brown, Tom Bourgeois, and "someone known as 'Brownie.'" Wobrock owned Lot A (a back lot), Brown owned Lot 2 and Lot B (a front and back lot), Bourgeois owned Lot D (a back lot), and 'Brownie' was Aaron Brown who owned a back lot with an easement right of way across Lot 1 "for access to the shore of Round Lake."

lawsuit until 2010. The prescriptive period is 15 years. Although defendants' prescriptive uses have only existed since 2000, they are entitled to prove continuity by tacking their years of prescriptive use with their predecessors in title, the Wobrocks, if privity of estate is demonstrated. See *Killips v Mannisto*, 244 Mich App 256, 259; 624 NW2d 224 (2001). Privity of estate can be shown by proof that an actual transfer or conveyance of the disputed property⁷ by parol statements was made at the time of the conveyance. *Id.* Here, there is undisputed evidence that Ricky Lee Wobrock showed defendants the dock, described it "as our dock," and gave defendant Roger Terrill "a container with the bolts for the dock," saying that it was his responsibility to install the dock each season. Accordingly, the trial court's conclusion that "the pleadings and exhibits submitted [] for consideration support the Defendant's [sic] position that they and their predecessors in title continuously used the easement including the dock for more than fifteen years and that such use was open, notorious, and adverse" is affirmed. Defendants established that their express easement was enlarged by prescription to include the riparian rights to install and maintain a dock, as well as to moor boats to that dock.

Next, plaintiff argues that the final judgment rendered by the trial court improperly limited her rights as the fee owner of the servient estate. Plaintiff is correct that a balance of rights and responsibilities exists between the fee owner and the easement holder. See *Harvey v Crane*, 85 Mich 316, 322; 48 NW 582 (1891); *Heydon v MediaOne of Southeast Mich, Inc*, 275 Mich App 267, 271; 739 NW2d 373 (2007); *Schadewald v Brule*, 225 Mich App 26, 35; 570 NW2d 788 (1997). However, in this case the lower court record was not sufficiently developed with regard to the proper balance of these rights and responsibilities. Accordingly, we remand this matter to the trial court for clarification of plaintiff's rights and responsibilities as the fee owner and defendants' rights and responsibilities as the easement holders following any related proceedings deemed necessary.

Affirmed in part, reversed in part, and remanded for clarification of the parties' rights and responsibilities following any related proceedings deemed necessary. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Henry William Saad
/s/ Pat M. Donofrio

⁷ Riparian rights are property. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 191; 521 NW2d 499 (1994).