ATTORNEY WRITES

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No Good Deed Goes Unpunished!

In my prior columns and articles, I have discussed the Michigan common law doctrines of prescriptive easement and adverse possession. These are sometimes referred to by laypeople as "squatter's rights." Adverse possession involves a property owner actively possessing and controlling a portion of the land of the adjoining landowner for 15 years or more and the claiming party (the "claimant") obtains title to that land via court action after the 15 years has passed. A prescriptive easement claim is similar to an adverse possession claim, but a successful claimant only obtains a permanent easement because while the land of the neighbor was used extensively (often, for travel) for 15 years or more, the claimant did not possess and control the land exclusively.

The burden of proof is on the claimant to prove all the elements of a prescriptive easement or adverse possession claim in court. First and foremost, the use of the property of another must be adverse or "hostile." That does not mean that the claimant must use the adjoining or nearby property in a mean, nasty, or ornery way. Rather, for a use to be adverse or hostile means that such use is contrary to the property rights of the true owner of the underlying land. An adverse possession or prescriptive easement claimant must also prove in court that his or her use was continuous for 15 years or more (uninterrupted), done in a very highly visible fashion, and was without the permission or consent of the true property owner.

Adverse use for 15 years or more will not ripen into a permanent prescriptive easement or title via adverse possession unless the claimant files and pursues a lawsuit successfully. Amazingly, if an adjoining or nearby property owner obtains a permanent easement or title to a chunk of land owned by someone else via prescriptive easement or adverse possession, the winning party need not pay the owner of the underlying land any compensation for the loss of their property right. That strikes many people as odd and unfair.

Perhaps the most difficult aspect of the prescriptive easement or adverse possession doctrines for nonlawyers to understand is that where the underlying property owner can prove that he or she gave the claimant permission to use the disputed property, there can be no prescriptive easement or adverse possession claim. Remember, a claimant can prevail under those doctrines if and only if the use by the claimant was adverse, hostile, and without the permission or consent of the true landowner.

Unfortunately, permission or consent by the underlying property owner can usually only be proven where there is a written letter or agreement giving consent or permission or there is strong evidence that express oral permission or consent was given by the owner of the underlying property. Implicit permission or use by a friend without the express granting of permission or consent (whether oral or written) is generally insufficient to defeat a prescriptive easement or adverse possession claim.

Prescriptive easement claims are often used by backlot property owners to either gain lake access easements across the property of a riparian landowner or to expand the scope of usage rights for an existing lake access easement. For example, suppose that Bill Smith owns a lakefront lot (Lot 1) on Bass Lake. Sue Jones owns a nonlakefront or backlot (Lot 2) across the street and behind Lot 1. Lot 2 has the benefit of a long-existing recorded 10-foot-wide easement

across Lot 1 to Bass Lake. The document that created the lake access easement in favor of Lot 2 states that it is an "easement for ingress and egress to Bass Lake." Longstanding Michigan appellate case law has interpreted those types of easements as allowing beneficiaries use of the easement for travel purposes only (for example, walking to and from the lake, swimming, ice fishing in the winter, hand-carrying a canoe to and from the lake—but not storing it—and similar activities). Such easements normally cannot be used for dockage, permanent boat moorage, lounging, sunbathing, a swim raft, or similar uses or activities. See *Delaney v Pond*, 350 Mich 685 (1957); *Dyball v Lennox*, 260 Mich App 698 (2003); *Hoisington v Parkes*, unpublished Michigan Court of Appeals decision issued March 12, 1999; 1999 WL 33454008 (Docket No. 204515).

If Sue Jones places a dock and boat at the end of the easement at the lake and Bill Smith files a lawsuit, Bill Smith will almost always win in court because the type of lake access easement involved normally cannot be used for dockage or permanent boat moorage. However, in many cases, someone in Sue Jones's situation will claim that she (and her predecessors as to Lot 2) maintained a dock and permanent boat moorage at the end of the easement for more than 15 years, and as such, has a permanent prescriptive easement to continue such use. And, in many cases, Sue Jones will prevail if the evidence in court demonstrates all of the elements of a prescriptive easement (uninterrupted use for in excess of 15 years, lack of permission, a highly visible use, etc.).

Even if Bill Smith can prove in court that he was a friend of Sue Jones, that they socialized frequently and that, as a result, she had "implicit permission" to put a dock and boat at the end of the easement, that frequently will not be enough to defeat a prescriptive easement of

the type asserted by Sue Jones. Only express written or oral permission can defeat the prescriptive easement claim.

Hundreds of riparian property owners throughout the state have reacted with disgust and incredulity when it later turns out that their neighborly attitude in allowing a backlot property owner to maintain a dock and boat(s) on an easement (where such uses would normally not be permitted) has resulted in a betrayal by the backlot property owner that is ultimately sanctioned by the courts. Many riparian owners now wish that they had known the law of prescriptive easement years ago, that they had granted express permission to an ungrateful backlot property owner via certified mail or that they had required the backlot property owner to remove the dock, boats, and other offending items from the easement before 15 or more years had passed. Hence, the applicability of the old saying, "no good deed goes unpunished."

Unfortunately, lawsuits prompted by the prescriptive easement doctrine often resemble more of a game than a serious real property dispute, although the consequences may be very serious. In addition, more than one riparian property owner has been appalled to find out that backlot property owners or their neighbors sometimes misrepresent in court what has occurred in the past at the easement, or are grossly mistaken in their recollections.

What is a riparian property owner to do? If the neighbor of a riparian property owner is using or encroaching onto the riparian property owner's property, or a lake access easement exists that one or more backlot property owners are misusing, the riparian property owner should act <u>immediately</u> to either have the encroachment removed (or have the improper uses on the easement cease) or enter into a written agreement with the offending party indicating that consent and permission have been granted and can be withdrawn by the riparian property owner at any time by the appropriate written notice. Is simply sending a letter to the offending party

granting immediate consent or permission sufficient? Probably, although the case law is not entirely clear on that point. All in all, a written agreement signed by both parties is preferable. If a letter is used, it should be sent certified mail with a return receipt. Furthermore, all owners of the offending backlot or adjoining property should sign the agreement or the letter mail receipt.

Won't proposing a written agreement to a friend who is an adjoining property owner or backlot owner ruin the friendship? Not if done properly. The riparian property owner can explain that he or she has no problem with their friend continuing to use the property at issue, but that the riparian landowner's attorney has indicated that they really must enter into that type of agreement in order for the use to continue so that no future claim will occur, particularly after the friend sells the adjoining lot or backlot.

For more information about prescriptive easements and adverse possession, please also see my earlier article in the February, 2003 issue of *The Michigan Riparian* Magazine.