

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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RICHARD DOUGLAS and NANCY ZANG,

Plaintiffs-Appellants,

v

CHARLES THERRIAN, LUANN THERRIAN,  
KENNETH SCHELL, ROSEMARY SCHELL,  
and NEDRA STRASSER,

Defendants-Appellees.

UNPUBLISHED  
September 17, 2009

No. 282043  
Roscommon Circuit Court  
LC No. 06-725874-CH

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WALTER FREDERICK MCCOSKEY, Trustee of  
the WALTER FREDERICK MCCOSKEY  
TRUST,

Plaintiff-Appellant,

v

CHARLES THERRIAN, LUANN THERRIAN,  
KENNETH SCHELL, ROSEMARY SCHELL,  
and NEDRA STRASSER,

Defendants-Appellees.

No. 282044  
Roscommon Circuit Court  
LC No. 06-725928-CH

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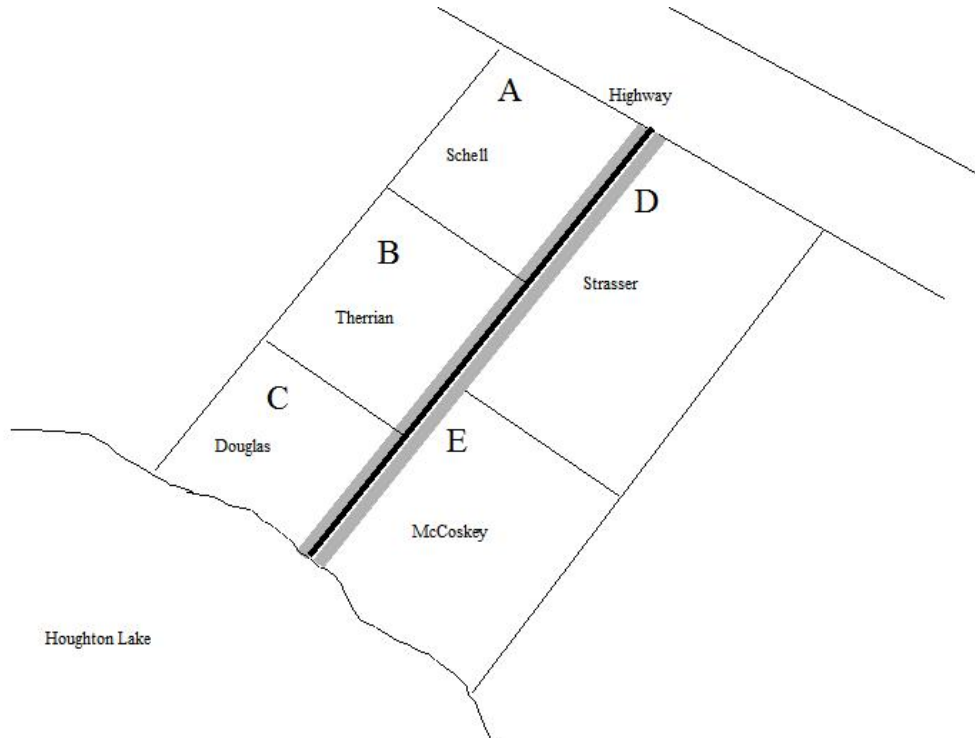
Before: Whitbeck, P.J., and O'Connell and Owens, JJ.

PER CURIAM.

In these consolidated cases, plaintiffs Richard Douglas, Nancy Zang, and Walter Frederick McCoskey, Trustee of the Walter Frederick McCoskey Trust, appeal as of right from the trial court's judgment delineating the scope of an easement burdening their properties. We conclude that the trial court reached the right result, but for the wrong reasons. Defendants, after using the community dock for somewhere between 24 and 40 years, obtained a prescriptive easement entitling them to access the lake, maintain a common dock, and moor watercraft. We therefore affirm.

## I. Basic Facts and Procedural History

The parties in this case are owners of five parcels of land that formerly made up George and Marjorie Gutowski's Northern Air Resort on Houghton Lake. Plaintiffs own parcels "C" and "E" with lake frontage, and defendants Charles and Luann Therrian, Kenneth and Rosemary Schell, and Nedra Strasser own parcels "A," "B," and "D," which do not have lake frontage. At issue is a 12-foot wide, purported easement strip down the middle of the five parcels, running from southwest to northeast between the highway and the lake. The following is a simplified, not-to-scale sketch, based on plaintiffs' trial exhibit 32, with the purported easement in gray:



The parties and the members of this panel agree that the applicable 1963 deed did not legally create the easement identified in Exhibit 32, reproduced above. This 1963 deed, which locates and describes the entire 12-foot wide easement, constituted a failed attempt by the Gutowskis to create the easement in question before dividing and selling their property.

When the original grantors divided the resort, they first conveyed to themselves by warranty deed the same property, but with an added restriction that

the following part of the land herein conveyed: [legal description of the 12-foot strip]; shall be forever reserved and restricted to the use of the owners or occupants of any part or parcel of the land herein conveyed, for the use as a private drive and lake access easement for passage between the County Road and Houghton Lake.

Each of the deeds conveying the individual parcels from the Gutowskis to the purchasers, and to subsequent purchasers, included the following language, restricting either the northwest six feet or the southeast six feet, depending on which side of the strip the parcel was located,

as a part of the adjacent half of a 12 foot private drive and lake access easement extending from the County Highway to the shore of Houghton Lake for the common use of the owner or occupants of the lands adjoining same. Subject to the restriction and reservation contained in [the Gutowski's warranty deed, quoted above].

In addition, each of the five parcels conveyed included a cabin and furnishings and a steel rowboat. The list of personal property was attached to the deed. The deeds make no mention of a dock or mooring. The resort's seasonal dock had been pulled from the water at the time of the first conveyances, which took place in the winter, and the dock pieces were stored on parcel "A." The five owners shared responsibility for placing, removing, and maintaining the seasonal dock for many years and, over time, the small rowboats (which presumably had been dragged in and out of the water with each use by the owners that used them) were no longer used. Instead, the owners brought in pontoons and powerboats, keeping them tied at the dock for the season.

Animosities began when the lake level rose and the waterfront properties experienced erosion and "backwash" of rotting weeds and other aquatic debris. Plaintiff McCoskey, the owner of parcel E, took steps to control erosion, including installing a concrete seawall. The seawall ran the length of his property, except for the six feet of shoreline burdened by the easement. A few years later, plaintiff Douglas built a similar seawall to protect his property, also stopping it at the six-foot line. This left the 12 feet of shoreline burdened by the easement unprotected; this portion of the shoreline not only continued to wash away, but this open area also caused the adjacent property to wash out despite the seawalls, and the seawall gap area tended to fill with rotting debris and dead aquatic weeds. Around this time, McCoskey built his own dock and asked that the community dock not be placed on his side of the easement. Douglas allowed the dock to be placed on his half of the easement and for boats to be docked on his side, but he disliked that his view of lake was obstructed by docked boats and boats on boat hoists that had been placed in the lake adjacent to the easement area. Douglas and McCoskey added a seawall to the easement area, but the steps to the water were not built correctly, and the backlot owners were unable to access the lake without putting in a dock or using McCoskey's steps, which he considered trespassing.

Eventually, plaintiffs sued for declaratory and injunctive relief concerning the scope of the allowable uses of the 12-foot-easement running from the highway to the lake. In their complaint, plaintiffs alleged that the original developers' intention, as evidenced by the plain language of the easement alone, was that the private drive access was limited to use of the easement for lake access for recreational swimming and use of the surface of the water. Therefore, plaintiffs alleged that defendants had "exceeded the scope of the easement referenced" in the deeds conveying the individual parcels to plaintiffs. Plaintiffs requested that the trial court enjoin non-temporary mooring and placing of boat hoists, docks, and anchors in the water, as well as sunbathing, lounging, recreation, and picnicking within in the easement, and require that existing structures be removed.

Defendants' answer asserted that the original grantors broke up an existing resort, selling each owner a cabin, a share of a community dock, and a boat, and thus those grantors clearly intended that seasonal mooring be a right of all five parcels. Defendants argued that the doctrine of merger would have invalidated any easement in the Gutowskis' purported deed to themselves; instead there was a prescriptive easement allowing all five properties lake access, a common dock, seasonal mooring, and access to the highway. Defendants requested that the trial court enjoin plaintiffs' interference with their use of the easement, "whether prescriptive or otherwise"; declare the rights of all owners regarding the scope of the easement, including use for utilities; and grant other "agreeable" equitable relief.

The trial court held a one-day bench trial, and, as the parties stated in their trial briefs and during trial, the issue before the court was to determine the scope of the easement. Defendants further argued in their trial brief that given the invalidity of the original grant, the court was left to review the easement language in each of the deeds conveying the parcels to the plaintiffs. And, according to defendants, "[t]hat language is ambiguous because it does not specify what 'common use' of all five (5) of the properties means. It follows that the Court must determine from circumstances existing when the easement was created what the scope of the easement is now and when the easement was created." Defendants asserted that the extrinsic evidence would show that all five properties were "granted an easement for the common dock and the mooring of one boat[.]" As they had alleged in their complaint, plaintiffs again contended that the easement language unambiguously granted only surface water rights to defendants. Plaintiffs also responded to defendants' allegation that there was a prescriptive easement allowing all five properties lake access. According to plaintiffs, all parties to the action had a right to mutual use of the easement and, therefore, one party could not establish a claim of prescriptive easement against the others and defendants' use of the easement could not be considered adverse for purposes of establishing a prescriptive easement. Plaintiffs contended that the pertinent language clearly created a mutual and reciprocal easement for ingress and egress.

In its opinion from the bench, the trial court initially found that the first deed, in which the Gutowskis purported to convey the entire resort to themselves with the easement imposed, was invalid under the doctrine of merger. But the trial court went on to find that the individual deeds nonetheless contained valid, restrictive language. Because each parcel was restricted from interfering with the others' use of the 12-foot strip, the trial court found the deeds created a negative, reciprocal easement. The trial court then determined that the language describing the scope of the easement was ambiguous. To resolve the ambiguity, the trial court said that it had to look at "the common use by the recipients of the original deeds" and "the actions of the parties most closely [sic] to the sale." Based on testimony that the original purchasers had installed and used a common dock for years with few problems, that plaintiffs recognized the easement when they put in seawalls by refraining from building within it, and the amounts that were originally paid for each of the lots, the trial court concluded that the scope of the easement was to provide not only access to the lake but also a common dock and seasonal boat docking, ruling, "[E]ach parcel has the right to put out a nonexclusive common dock and the placement of one boat within the easement."

The trial court later issued a written order of judgment that ordered that (1) the owners of lots A, B, C, D, and E would have the right to use the "easement which bisects the properties," (2) the common usage of the easement "shall specifically include the right to maintain one

common dock into the waters of Houghton Lake for the use of all 5 parcels and the individual right to moor one watercraft per parcel within the aforesaid 12' extension of said easement into the waters of Houghton Lake," and (3) the "back-lot Defendants shall not trespass on the Plaintiffs' property, not subject to the easement." The order of judgment further provided that it resolved the issues raised in the consolidated cases and closed both cases, subject to the continuing jurisdiction of the trial court. Plaintiffs now appeal.

## II. Analysis

### A. Parties' Positions on Appeal

Plaintiffs argue that the trial court erred in finding that the language of the easement "concerning the scope of allowable uses" was ambiguous. According to plaintiffs, the deeds clearly grant a "12 foot private drive and lake access easement," the purpose of which was limited to driving and lake access. Plaintiffs assert that under Michigan law, the plain language of the deeds precludes any use beyond that expressly stated in the deeds. Therefore, plaintiffs contend that non-temporary mooring and placing of boat hoists, docks, and anchors in the water, as well as sunbathing, lounging, recreation, and picnicking within the easement, should be enjoined.

Defendants argue that the scope of the easement is controlled by the historical use of the easement for the past 40 years and that they should be able to continue to use the dock in the same manner that they have used it for the past four decades. We agree with defendants. In our opinion, the defendants have clearly established all of the elements of a prescriptive easement.

### B. Standard Of Review

We review de novo a trial court's conclusions of law.<sup>1</sup> We review a trial court's factual findings, including the extent of a party's rights under an easement, for clear error.<sup>2</sup>

### C. Prescriptive Easement

We conclude that the trial court's order should be affirmed because a prescriptive easement exists that gives defendants the right to access the lake, maintain a dock, and moor a boat. "An easement by prescription results from use of another's property that is open, notorious, adverse, and continuous for a period of fifteen years." *Plymouth Canton Community Crier, Inc v Prose*, 242 Mich App 676, 679; 619 NW2d 725 (2000). In *Mulcahy v Verhines*, 276 Mich App 693, 700; 742 NW2d 393 (2007), this Court explained that a prescriptive easement can be established in one of two ways:

The Restatement of Property, 3d, Servitudes, [§ 2.16, pp 221-222] provides as follows:

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<sup>1</sup> *Schumacher v Dep't of Natural Resources*, 275 Mich App 121, 127; 737 NW2d 782 (2007).

<sup>2</sup> *Id.*

A prescriptive use of land . . . creates a servitude. A prescriptive use is either

(1) a use that is adverse to the owner of the land or the interest in land against which the servitude is claimed, or

(2) a use that is made pursuant to the terms of an intended but imperfectly created servitude, or the enjoyment of the benefit of an intended but imperfectly created servitude.

Comment a to § 2.16 of the Restatement of Property, 3d, Servitudes, provides, in relevant part:

In the second situation, people try to create a servitude but fail, initially because they do not fully articulate their intent or reduce their agreement to writing, or because they fail to comply with some other formal requirement imposed in the jurisdiction. If they proceed to act as though they have been successful in creating the servitude, and continue to do so for the prescriptive period, the servitude is created by prescription . . . . In this second situation, prescription performs a title-curing function. [Citations and emphasis omitted.]

In *Plymouth Canton, supra* at 684-687, this Court determined that a prescriptive easement was established when the plaintiffs used a delineated easement area to load and unload merchandise for more than 15 years pursuant to a mistaken belief, shared by both parties, that a 1971 express easement permitted this activity. This Court explained,

The available evidence reveals that in 1971 plaintiffs' predecessors and [defendants' predecessor] intended to execute an easement authorizing the loading and unloading of vehicles in the easement area, but that the imperfectly executed easement did not fully articulate the parties' intent to permit loading activities. Further evidence showed that the loading and unloading in this case occurred under the mistaken belief that the express easement permitted this activity. This evidence demonstrates "satisfactory proof of the existence and terms of the servitude and resolves any doubts as to the parties' intent that may have been created by their failure to [fully articulate their intent]." We find that the instant use made pursuant to a mistaken interpretation of the easement's scope constitutes prescriptive use. We therefore conclude that the trial court did not err in determining that plaintiffs established prescriptive use, and that, consequently, plaintiffs possessed a prescriptive easement for purposes of loading and unloading vehicles. [*Id.* at 686-687 (citations omitted).]

See also *Mulcahy, supra* at 701-702 (although the formal requirements for establishment of an easement were not met, creation of an easement was intended and plaintiffs' use of the property for the statutorily required period established a prescriptive easement).

In this case, defendants presented sufficient evidence to support a conclusion that a prescriptive easement existed. In particular, they presented sufficient evidence to permit a

conclusion that the Gutowskis, the original owners of all five parcels, intended to convey an easement to the back-lot owners that included not only the right to literally access the lake, but also the right to maintain a common dock and moor a boat at the lake end of the easement. Before the Gutowskis sold the property, they ran a vacation resort on the property and maintained the easement as a common access point to the lake. When they sold the property, they included a steel rowboat with the sale of each parcel, and they left possession of the common dock that was placed at the end of the easement each summer with the Schells, one of the back-lot owners, when they sold that parcel to the Schells. Further, the parties do not dispute that an easement for lake access existed or that the back-lot owners moored boats on the dock built on the easement for almost 40 years. The back-lot owners testified that the dock located on the easement was a “shared dock,” and that plaintiffs and defendants used the same dock to moor their boats for a number of years. In addition, Douglas stated in his brief before the trial court that “he never gave express permission to any back-lotter to moor boats or use that seasonal dock . . . .”

In light of this evidence, the trial court could reasonably conclude that the Gutowskis intended to create an easement that would give the back-lot owners the right to access the lake, maintain a common dock, and moor boats. Perhaps the Gutowskis failed to clearly articulate their intent in the written deeds transferring title to the original parcel owners and, thus, their attempts to create an express easement failed. Regardless, an easement permitting the back-lot owners to access the lake, maintain a common dock, and moor a boat still exists by prescription because the Gutowskis and the parties acted as if the easement had properly been created—the Gutowskis gave the back-lot owners boats and a dock to make use of their presumed rights to access the lake, maintain a common dock, and moor boats on the easement, and the back-lot owners made use of their presumed rights, without opposition from the owners of the parcels bordering the lake, for almost 40 years, much longer than the 15-year prescriptive period. Consequently, defendants have presented sufficient evidence to permit a determination that a prescriptive easement exists that gives the back-lot owners the right to access the lake, maintain a common dock, and moor a boat. The trial court did not err when it determined that an easement existed for these purposes, even though that easement arose by prescription.

We affirm the decision of the trial court, albeit for different reasons. We remand this case to the trial court for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Peter D. O’Connell

/s/ Donald S. Owens