

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

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DEMPSEY GROSS and JOANN GROSS,

Plaintiffs-Appellees,

v

DICK MILLS,

Defendant-Appellant,

and

DIANE MILLS,

Defendant.

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UNPUBLISHED

September 28, 1999

No. 211776

Cass Circuit Court

LC No. 97-000551 CZ

Before: McDonald, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

In this action involving a dispute over defendants' use of a ten-foot-wide strip of land for lake access, defendant Dick Mills ("Mills") appeals as of right from an order granting summary disposition in favor of plaintiffs. We affirm.

I

In December 1992, in a previous lawsuit between the parties, the trial court determined that plaintiffs were the fee owners of certain real property fronting Garver Lake and defendants had an easement over the westerly ten feet of the property, "to be used for access to and from the waters of Garver Lake." In that earlier lawsuit, plaintiffs filed a counterclaim, requesting, among other things, that defendants be prohibited from maintaining a pier or docking boats on the easement property; however, the court did not address these matters in its decision from the bench. When asked if the court had neglected anything, plaintiffs' counsel noted that the requests in the counterclaim had not been addressed, i.e., that defendants be ordered to keep the easement in a neat and sightly fashion and be prohibited from maintaining a pier. The court responded:

They haven't been, and I guess the reason for that is I haven't had any proofs on it, number one. Number two, I intentionally neglected to mention anything about that because, on purpose I guess, I wanted to let the dust settle from this determination and also give the parties an opportunity to try and patch things up here and live harmoniously. Now that they have their legal rights defined I would hope that they would be able under those circumstances to continue to coexist and that they would reach some accommodation that would of course still allow [defendants] to enjoy their easement and to gain access to the lake, since it's pretty important to them, and in particular Mr. Mills who does a lot of fishing, and to give them an opportunity to try and reach some accommodation.

If between now and judgment entry you continue to have further problems, they're not able to do that and you need some direction from the Court as far as the specific judgment language is concerned, you can come back to the Court and I'll be happy to address that. I would hope that they would be able to somehow work that out on their [own] in terms of the specific uses that it would be put, that the easement would be put.

On February 8, 1993, the court entered a final order adjudging ownership of the property and dismissing with prejudice the complaint and countercomplaint. The order made no mention of riparian rights or defendants' rights to construct or maintain a pier on the ten-foot strip of land. That order was affirmed by this Court on February 15, 1995. However, the dispute between the parties was not put to rest because subsequently they disagreed about defendants' use of the easement.

## II

Plaintiffs filed the instant action on July 16, 1997, requesting a declaratory judgment determining that they own the riparian rights associated with the waterfront property and that defendants' use is limited to an easement for access to and from the lake and for enjoyment of the lake surface. Plaintiffs also sought a permanent injunction prohibiting defendants from constructing, installing or maintaining a dock or pier on the waterfront property; regularly anchoring or harboring boats there; altering the lake frontage and associated lake bottom area; or interfering with plaintiffs' use and enjoyment of their lake frontage and associated riparian rights.

After a series of motions and a hearing, the court determined that an evidentiary hearing was necessary to address whether plaintiffs' claim regarding the scope of the easement was barred by the doctrine of laches or whether defendants' existing use of the easement should continue under a theory of acquiescence or adverse possession.

Following the hearing, the court determined that neither acquiescence nor adverse possession applied in this case. First, because the dispute involved an easement, which is a permissive use, there was no basis for defendants' claim of adverse possession. Regardless, the claim failed because defendants did not establish the requisite fifteen-year period of continuous and uninterrupted use.

Further, the court found no acquiescence or agreement between the parties such that plaintiffs should be estopped from claiming that defendants' use was contrary to the easement.

The court noted that the scope of an easement is well defined under Michigan law and does not include riparian ownership rights, or the right to install a pier or permanently dock a boat. Rather, the easement holder has only the right to traverse the land to access a given lake. Because the deed language in this case did not afford defendants additional rights, plaintiffs were entitled to the requested declaratory and injunctive relief. The court granted summary disposition for plaintiffs under MCR 2.116(C)(I)(2), finding that there was no genuine issue of material fact and plaintiffs were entitled to judgment as a matter of law.

### III

On appeal, Mills contends that because the issue of defendants' right to erect a pier was raised and left undecided in the previous litigation, the doctrine of res judicata bars litigation of this issue in the current action. Res judicata requires that: (1) the prior action was decided on the merits; (2) the matter contested in the second case was resolved in the first; and (3) both actions involved the same parties or their privies. *Limbach v Oakland Co Rd Comm*, 226 Mich App 389, 395; 573 NW2d 336 (1997). Michigan has adopted the broad view of res judicata, which bars litigation in the second action of not only those claims actually litigated in the first action, but also claims arising out of the same transaction which the parties, exercising reasonable diligence, could have litigated but did not. *Sprague v Guhagiar*, 213 Mich App 310, 313; 539 NW2d 587 (1995).

Nevertheless, the doctrine of res judicata is not absolute and it should not be applied where it would work an injustice, such as where a party did not have a full and fair opportunity to litigate an issue in an earlier case. 46 Am Jur 2d, Judgments, § 521, pp 785-786. Further, "[t]he general rule is that a matter not decided, and not determined by the judgment, is not concluded, even though put at issue by the pleadings." 14 Michigan Law and Practice, Judgment, § 247, p 667; see also *Bacon v City of Detroit*, 282 Mich 150, 153; 275 NW 800 (1937).

Here, plaintiffs exercised reasonable diligence in their attempt to have the scope of the easement determined in the first lawsuit. They raised the matter in a counterclaim and again after the court ruled on title to the property. The trial court expressly declined to rule on this matter. Although the court offered to decide the issue should further problems arise before judgment was entered, apparently no problems arose during that time. Plaintiffs cannot be faulted for the failure to resolve the scope of the easement in the previous litigation. The action of the trial court prevented litigation of this issue. Under these circumstances, we hold that to impose the bar of res judicata would lead to an unjust result and, accordingly, we decline to apply it.

Moreover, a second proceeding is not barred by res judicata if the facts and circumstances have changed. *In re Hamlet (After Remand)*, 225 Mich App 505, 519; 571 NW2d 750 (1997). The facts and circumstances changed in this case, after entry of the original judgment. Apparently, at the time defendants installed the original pier, they believed they had fee title to the property. The court subsequently determined that defendants had only an easement and that plaintiffs held fee title to the

land. Plaintiff Dempsey Gross testified that after entry of that judgment, and particularly after the appeal to this Court, he cleaned up the property at issue and removed portions of the original walkway or pier installed by defendants. Subsequently, in 1997, defendants installed a section of replacement pier on the easement property, which prompted the current litigation. Thus, the need for further adjudication arose only because defendants asserted a postjudgment right to improve or replace the existing pier rather than merely use it.

#### IV

Next, Mills contends that because more than fifteen years have passed since defendants erected the pier, defendants have acquired a prescriptive easement, and plaintiffs are prohibited from bringing this action under MCL 600.5801; MSA 27A.5801, which establishes a fifteen-year period of limitations for the recovery of lands. MCL 600.5801(4); MSA 27A.5801(4). We disagree. “A prescriptive easement claimant must establish a use which is actual, open, notorious, continuous, and hostile for the statutory 15-year period. Mutual use of an area will not mature into a prescriptive easement until the mutuality has ended and the adverse and hostile use continues for the statutory period.” *Williamson v Crawford*, 108 Mich App 460, 464; 310 NW2d 419 (1981); see also *Wood v Denton*, 53 Mich App 435, 441; 219 NW2d 798 (1974).

In this case, defendants apparently installed a “makeshift walkway” and pier on the riparian land in 1982, believing that they had purchased the ten-foot strip of land.<sup>1</sup> Plaintiffs purchased their lakefront property in 1990. A dispute then arose as to ownership of the strip of land. When defendants filed the 1991 lawsuit, plaintiffs filed a counterclaim objecting to the pier. Once the court determined that defendants held merely an easement, their use of property was permissive as to the deeded easement. Defendants cannot establish the statutory period of continuous use of the land for purposes beyond the deeded easement after 1992 because after the lawsuit, plaintiffs began removing the original walkway and pier material. Further, when defendants attempted to install the new section of pier in 1997, plaintiffs filed the instant action. Defendants did not acquire a prescriptive easement entitling them to erect a pier.

#### V

Finally, Mills contends that even if defendants have merely an easement in the riparian land, it does not preclude a finding that defendants have a right to erect a pier or permanently anchor boats. Persons who own riparian land enjoy certain exclusive rights, including the right to erect and maintain docks along the owner’s shore and the right to permanently anchor boats off the owner’s shore. *Hess v West Bloomfield Twp*, 439 Mich 550, 561-562; 486 NW2d 628 (1992); *Thies v Howland*, 424 Mich 282, 288; 380 NW2d 463 (1985). Unless the language granting an easement evidences otherwise, an easement in riparian land generally affords only the right to use the surface of the water in a reasonable manner for such activities as boating, fishing and swimming. *Id.* at 288-289.

Riparian land is defined as land which includes or is bounded by a natural body of water. *Id.* at 287-288; *Dobie v Morrison*, 227 Mich App 536, 538; 575 NW2d 817 (1998). As the fee owners of the ten-foot strip of riparian land, plaintiffs have the exclusive right to erect a pier along their shore and

permanently anchor boats off their shore, unless the specific language granting defendants' easement evidences otherwise. The trial court concluded that the language in defendants' deed, i.e., "to be used for access to and from Garver Lake," granted an easement for the purpose of ingress and egress but not for the purpose of constructing a pier or the permanent anchoring of boats. This finding is not clearly erroneous because the deed language "does not evidence an intent to grant a right to construct docks, a right which normally is reserved to riparian owners." *Thies, supra* at 294; see *Dobie, supra* at 541 (the extent of a party's rights under an easement is a question of fact reviewed for clear error).

An easement holder's rights are defined by the terms of the easement agreement and must be confined to the purposes for which the easement was created. *Thies, supra* at 297. "A person entitled to the use of an easement cannot materially increase the burden upon the servient estate beyond what was originally contemplated." *Id.* Defendants' rights are limited to those determined by the trial court.

Affirmed.

/s/ Gary R. McDonald

/s/ Janet T. Neff

/s/ Michael R. Smolenski

<sup>1</sup> Defendants did not testify at the evidentiary hearing; however, defendant Diane Mills' son testified regarding defendants' installation of the walkway and pier.