

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

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JAMES R. HOLTON,

Plaintiff/Counter-Defendant-  
Appellee,

v

SHARON BONE,

Defendant/Counter-Plaintiff-  
Appellant.

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UNPUBLISHED

December 27, 2007

No. 272113

Oakland Circuit Court

LC No. 2003-050009-CH

Before: Murphy, P.J., and Smolenski and Schuette, JJ.

PER CURIAM.

In this real property dispute, defendant appeals as of right from the trial court's order requiring defendant to remove a culvert from an earthen dam on her property.<sup>1</sup> On appeal, defendant challenges the trial court's authority to grant plaintiff equitable relief based on the theory that plaintiff had a prescriptive right to have the water level on his property artificially maintained by the earthen dam on defendant's property. Because we conclude that the trial court properly exercised its equitable power to grant plaintiff relief, we affirm.

**I. Basic Facts and Procedural History**

The facts of this case are largely not in dispute. Plaintiff owns land directly south of defendant's parcel. Plaintiff's parcel encompasses the south end of a significant area of wetlands that spans the full width of defendant's parcel and continues to the parcel immediately north of defendant's land. Plaintiff's parcel also contains a pond. The entire wetland area drains from west to the east through defendant's parcel. An earthen dam on defendant's property controls the level of the water in the wetlands area.

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<sup>1</sup> Defendant also filed a counter-claim against plaintiff for tortious interference with a contract. However, the trial court found in favor of plaintiff on this claim and defendant has not appealed this part of the trial court's opinion and order.

Defendant's parcel also contains an agricultural field immediately to the east of the wetlands. However, defendant does not have direct road access to the field. In approximately 2003, defendant began to build an access road from the road bordering her property on the west to the field. She decided to build the road through the southernmost end of the wetlands on her property, which area was immediately north of plaintiff's pond. Defendant also had a culvert installed in the earthen dam.

Plaintiff sued defendant for injunctive relief. Plaintiff claimed that defendant's installation of the culvert wrongfully lowered the water level of the entire wetlands area, including the wetlands on his property and his pond. Plaintiff asked the trial court to order the removal of the road and culvert. The case proceeded to a bench trial.

At trial, Junior Clark testified that, at one time, he and his father owned all of the land at issue. Clark stated that the west end of the land was once one contiguous wetland. He further testified that in 1952 he built the earthen dam at issue to create a pond and raise the water level to hard ground to keep his cattle from walking through mud. Clark also said that he had a portion of the wetland, which is now on plaintiff's property, dredged to create a pond. The soil from the dredging was placed immediately north of the dredged area. However, Clark said that the water level is normally fairly high and the strip of land created by the dredged soil is not exposed. Rather, at high water level, the wetlands resemble more of a lake. Clark stated that the pond was created to control runoff and was used to water his cattle. Clark also testified that the earthen dam did not contain a culvert. Clark stated that he sold defendant's parcel to her predecessor in interest in 1968 and sold plaintiff's parcel to plaintiff in 1997. Clark said he continued to visit and use the land sold to plaintiff up until 1997.

At trial, defendant focused her defense on evidence that the dam already contained a culvert, which was not functioning properly, long before she began to build her access road. Defendant claimed that she merely replaced the culvert and restored the dam to proper functioning. Plaintiff argued that defendant deliberately placed the culvert in the dam to reduce the water levels in the wetlands and, thereby, facilitate the construction of her access road.

The trial court determined that defendant's testimony and evidence concerning the culvert were not credible. Instead, the trial court concluded that the earthen dam never had a culvert and that defendant installed the present culvert in order to provide access to the east end of her property at lower cost. Further, the trial court determined that plaintiff "has a right to enjoyment of the water as it existed for the many years prior to his purchase of the property and until such time as Defendant interrupted that enjoyment by installing the culvert." Based on these findings and conclusion, the trial court ordered defendant to remove the culvert.

This appeal followed.

## II. Failure to Plead Prescriptive Easement

Defendant first argues that the trial court was without the authority to grant plaintiff injunctive relief based on the theory that plaintiff had a prescriptive right to the maintenance of certain water level on his property. Defendant contends that the trial court lacked this authority because plaintiff never pleaded prescriptive easement and did not amend his complaint to include

a claim of prescriptive easement. Likewise, the parties did not expressly or impliedly consent to the trial of this theory. We disagree.

A trial court does not have the authority to grant relief based on a claim that was never pleaded. See *Peoples Savings Bank v Stoddard*, 359 Mich 297, 325; 102 NW2d 777 (1960) and *City of Bronson v American States Ins Co*, 215 Mich App 612, 619; 546 NW2d 702 (1996). However, under MCR 2.111(B)(1), the “only requirements for stating a cause of action is a presentation of factual allegations that would reasonably inform defendants of the ‘nature of the claims’ against which defendants are called on to defend.” *Smith v Stolberg*, 231 Mich App 256, 260-261; 586 NW2d 103 (1998).

In the present case, plaintiff did not identify any particular theory in his complaint. Instead, plaintiff indicated that his complaint was for injunctive relief and stated the factual bases in support of his request for an injunction. In his factual allegations, plaintiff clearly indicated that he believed that defendant was wrongfully making improvements to her property that lowered the level of water on his land. Specifically, plaintiff alleged that the installation of the culvert in the earthen dam damaged his property and “converted” his pond and wetland. On a fair reading of the complaint, it is apparent that plaintiff was arguing that he had the right to use the dam on defendant’s property to maintain the water level on his property. *Smith, supra* at 260-261. Thus, plaintiff’s complaint placed defendant on notice that plaintiff claimed the right to an easement over defendant’s property. See *Mich Dep’t Natural Resources v Carmody-Lahti Real Estate, Inc*, 472 Mich 359, 378; 699 NW2d 272 (2005) (noting that an easement is the right to use the land burdened by the easement). Further, it is also clear that plaintiff asked the court to exercise its equitable powers to grant him relief. Indeed, plaintiff requested both the equitable relief of an injunction and “other relief that may be just and proper.” “The shape of relief in equity is not of necessity controlled by the prayer, but is formed by the court according to the germane conditions and equities existing at the time decree is made.” *Advance Dry Wall Co v Wolfe-Gilchrist, Inc*, 14 Mich App 706, 712; 165 NW2d 906 (1968). Consequently, defendant was on notice that the trial court would sit in equity to determine whether plaintiff had the right to compel defendant to refrain from altering the earthen dam in a way that reduced the level of the water on plaintiff’s property.

The trial court did not err in considering whether plaintiff had an easement over defendant’s property.

### III. Failure of Proofs

Defendant next argues that the trial court erred in granting relief, because plaintiff failed to present evidence that plaintiff’s use of the dam was hostile and failed to present evidence that he detrimentally relied on the level of the water. We disagree with both contentions.

The extent of a party’s rights under an easement is a question of fact that this Court reviews for clear error. *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 40; 700 NW2d 364 (2005). However, a trial court’s dispositional rulings on equitable matters are reviewed de novo. *Id.*

Although defendant claims that the trial court granted relief based on a determination that plaintiff had a prescriptive easement over defendant’s property, the trial court did not specifically

justify its determination on that basis. Instead, the trial court merely stated that plaintiff had the right to the “enjoyment of the water as it existed for the many years prior to his purchase of the property and until such time as Defendant interrupted that enjoyment by installing the culvert.” However, the trial court’s citation of *Mathewson v Hoffman*, 77 Mich 420; 43 NW 879 (1889), suggests that the trial court may have concluded that plaintiff had acquired a prescriptive right to have the level of water maintained by defendant’s dam. Because *Mathewson* involved a diversion of a stream rather than the maintenance of water level, it is not directly applicable to the facts of this case. Nevertheless, we conclude on de novo review, that the trial court correctly determined that plaintiff had an equitable right to have the dam maintained in such a way that it did not lower the level of the water on his land.

Generally, the owners of land overflowed by waters as a result of the existence of a dam have no right to require the dam owner to maintain the dam for their benefit. *Goodrich v McMillan*, 217 Mich 630, 634; 187 NW 368 (1922). However, an owner of land overflowed by water can establish a right to the continued flooding of lands. See *Stidham v Algonquin Lake Community Ass’n*, 133 Mich App 94, 99; 348 NW2d 46 (1984) (noting that a land owner may acquire a prescriptive right to the maintenance of an artificial water level). A plaintiff may also establish an easement by implied reservation. *Schmidt v Eger*, 94 Mich App 728, 733; 289 NW2d 851 (1980). In order to establish an easement by implication, three elements must be shown: “(1) that during the unity of title an apparently permanent and obvious servitude was imposed on one part of an estate in favor of another, (2) continuity, and (3) that the easement is reasonably necessary for the fair enjoyment of the property it benefits.” *Id.* at 731.

In the present case, Clark’s testimony established that he built the dam at the time when his family owned all the property at issue. Clark stated that the purpose of the dam was to raise the level of the water to hard ground, control runoff on the property and create the pond that was dredged on the land that would eventually be conveyed to plaintiff. Clark testified that the pond was intended to be permanent. This evidence clearly established two servitudes: (1) a servitude on the lands flooded by the erection of the dam in favor of the land on which the dam is located and (2) a servitude on the land occupied by the dam for the maintenance of sufficient water for the pond in favor of the land now owned by plaintiff. *Id.* Further, given the nature of the land, it is readily apparent that the dam is necessary to maintain the water in the pond and wetlands and, therefore, that any change in the dam that permits water to leave the wetlands will adversely affect the level of water in the wetlands and pond. Indeed, the trial court specifically found that defendant placed the culvert to lower the level of the water in the wetlands. Hence, there was evidence sufficient to support the conclusion that the servitude was readily apparent to a purchaser when Clark severed the parcels. *Id.* at 736-737. Finally, Clark testified that the pond was created to control runoff and was used to water his cattle. In addition, plaintiff testified that he purchased the land in part because of the pond and that he used the pond and wetlands for recreation. Plaintiff further stated that, before the drop in water level, he could boat and canoe the pond and wetlands. Consequently, there was evidence from which the trial court could conclude that the artificially high water level was reasonably necessary to the enjoyment of plaintiff’s property. *Id.* at 735. Therefore, under the facts of this case, the trial court did not err in concluding that plaintiff had a right to the continued maintenance of an artificially high water level.

The trial court properly exercised its equitable power to grant plaintiff relief under the facts of this case.

Affirmed.

/s/ William B. Murphy  
/s/ Michael R. Smolenski  
/s/ Bill Schuette