STATE OF MICHIGAN

COURT OF APPEALS

JANET HOPE KEISER,

Plaintiff/Counter-Defendant/Appellant/Cross-Appellee,

v

CHESTER FEISTER, ELISE FEISTER, KATHLEEN WEXLER, JAMES BUSCH, DONNA BUSCH, STEVEN G. VAN TASSEL, TERESA HARKENRIDER, JOHN HARKENRIDER, THOMAS BENO, MONICA BENO, DAVID BODE, ALYCE BODE, MARY ANNE SCHUDEL, ROBERT SMITH, CAROL SMITH and DAVID C. GRIFFIN,

Defendants/Counter-Plaintiffs/Appellees/Cross-Appellants,

and

MARY SWILLEY, MARCELLA SWILLEY, ROBERT HOELTER, PATRICIA HOELTER, THERESA VANTASSEL, LAURIE McCAULEY-VANTASSEL, LAURIE V. VANTASSSEL-McGRATH, VINCENT A. VANTASSEL, GEORGE KAUP, BEVERLY KAUP, REED HAWKINS, LORRAINE HAWKINS, BILL HUTSON, BETTY HUTSON, DOUGLAS MONROE, LINDA MONROE, LARRY THOMPSON, ELIZABETH THOMPSON, ERIC NEUMAN, CHRISTOPHER NEUMAN, TERRY DENNIS, BRENDA DENNIS, DALE TAVERNIER, MICHAEL TAVERNIER, JULIE EVANS, SUSAN SANDS (TRUST), CAROLYN KRULL, GARY VANHEUKELUM, PHYLLIS VANHEUKELUM, SHAWN KASSERMAN, DAWN KASSERMAN, ST. JOSEPH COUNTY

UNPUBLISHED
March 2, 2010

No. 282531
St. Joseph Circuit Court
LC No. 06-000837-CH

ROAD COMMISSION, JEFFREY GENOVESE, SANDRA GENOVESE, CHRISTOPHER KARNEY, JACK HACKNEY, BARBARA HACKNEY, and DONNA HETTMANSPERGER,

Defendants.

Before: Wilder, P.J., and Meter and Servitto, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's final judgment in this dispute over the use of certain parcels of real property. The final judgment was in favor of certain defendants (defendants who are appellees and cross-appellants in this appeal).[1] We affirm in part and vacate in part.

In this case, defendants are seeking prescriptive easements over land known as the "unplatted waterfront property." That property is located to the south and west of another piece of property that is known as "lot one." Lot one is a lot in a platted subdivision known as the Schellhous Subdivision. It is undisputed that plaintiff owns lot one, but it is disputed whether plaintiff owns the unplatted waterfront property.

The unplatted waterfront property lies between lot one and Corey Lake. Corey Lake is to the west of lot one, and lot one lies at the westernmost point of the subdivision. It is undisputed (and also reflected in the plat for the Schellhous Subdivision), that lot one does not touch the shoreline of Corey Lake, to its west.

The creator of the subdivision was Ellis Schellhous. Schellhous owned the land that became the subdivision, but he did not own the unplatted waterfront property.

After the plat for the subdivision was approved and recorded in 1954, sales of lots began almost immediately and continued through the 1960s and into the 1970s. Most of the deeds for these lots, although not all of them, contained specific language granting to the lot purchasers ingress and egress over lot one to and from Corey Lake.

The deeds to defendants for lots within the subdivision began in 1964, and continued into the 2000s. So, some defendants have owned lots within the subdivision for decades, while others have owned their lots for shorter time periods.

In 1991, plaintiff executed a land contract with her parents for the purchase of the land located to the south and east of lot one (a different piece of property from the unplatted

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[1] These defendants include appellees and cross-appellants in this appeal and will be identified as "defendants" throughout this opinion.

waterfront property, which, again, is to the south and west of lot one). Plaintiff testified at trial that the home or cottage on that land, to the south and east of lot one, has been in her family for generations. Plaintiff purchased it from her parents, who in the more distant past had purchased it from their parents. A few years later, in 1995, plaintiff purchased lot one (and several other lots) from Frances Spahn, who is not a party to this case. In 2001, after the land contract was in existence for ten years, plaintiff's mother gave her a deed for the land to the south and east of lot one. The property description for this land does not include the unplatted waterfront property at issue here.

In July 2006, shortly before this litigation began, the conservator for Harmon Dudd (a non-party who was a predecessor-in-interest to plaintiff) quitclaim deeded to plaintiff the unplatted waterfront property. Also in July 2006, Frances Spahn quitclaim deeded to plaintiff the same unplatted waterfront property.

After defendants allegedly increased the intensity of their use of the unplatted waterfront property by installing a dock, plaintiff filed this action in August 2006. Plaintiff named as defendants all lot owners in the subdivision; plaintiff claimed to be the littoral or riparian owner of lot one; and plaintiff argued that what is now called the unplatted waterfront property was merely "appurtenant subsurface land," i.e., appurtenant to (or part of) lot one.

It is undisputed that plaintiff's home or cottage is located on the land to the south and east of lot one. However, there is a boathouse on lot one, and the complaint acknowledged the existence of the express easements over lot one, giving the other lot owners rights of ingress and egress over lot one to and from Corey Lake.

The complaint alleged that in May 2006, the Smiths, who are defendants in this case and recent purchasers of their lot in the subdivision, installed a 70-foot dock plus a boatlift and a boat on the unplatted waterfront property. The complaint alleged that other neighbors then moored boats on the Smiths' dock, and that the dock and boats drew noisy crowds. The complaint requested an injunction limiting uses by the lot owners in the subdivision to ingress and egress only.

Defendants filed a counterclaim, which included a claim for prescriptive rights. Counter-plaintiffs alleged that since the subdivision was approved, they and their predecessors in title used lot one as well as the unplatted waterfront property to swim, picnic, erect piers and moor boats.

Plaintiff filed a motion for summary disposition under MCR 2.116(C)(8) and (10), instead of an answer to the counterclaim. Plaintiff argued that (1) her neighbors who are owners of lots in the subdivision received only access rights under the express easements; (2) the claims of easement by implication lacked merit, because defendants could not demonstrate necessity; and (3) the claims of easement by prescription also lacked merit because no defendant could establish the requisite time period of use (15 years), and because there was no evidence of open, notorious, or adverse activities, because their use was permissive.

Defendants responded by arguing that they had acquired traditional prescriptive easements. Defendants also argued that they were entitled to prescriptive easements on the basis that the intent of the proprietor who established the subdivision (Schellhous) to create broader

easements was not properly memorialized in the deeds. Finally, defendants argued that they were entitled to implied easements.

The trial court denied plaintiff's motion for summary disposition, but counter-defendant (i.e., plaintiff) then failed to answer the counterclaim. Some time later, two days before trial, because of counter-defendant's failure to answer the counterclaim, counter-plaintiffs (defendants) delivered an application for a default to the court clerk, who declined to enter it, because of instructions to that effect from the trial court judge. The following day, prompted by the effort to obtain a default against her, counter-defendant filed an answer to the counterclaim.

The parties then proceeded to a bench trial. Plaintiff testified that no lot owners in the subdivision used the unplatted waterfront property continuously for 15 years. After the close of plaintiff's proofs, defendants moved for involuntary dismissal, on the grounds that plaintiff had failed to prove her underlying ownership of the unplatted waterfront property. Plaintiff responded that she had established prima facie evidence of title, by presenting the 2006 quitclaim deeds. The trial court denied the motion.

On the other hand, defendants testified that they did use the unplatted waterfront property for activities, including boating, mooring boats, sitting, swimming, reading, walking, picnicking, and other uses, for many years. Some defendants and former lot owners in the subdivision testified that, when they bought their lots, they were told that they would have beach access, uses, or privileges.

Following the trial, and in its written[2] final judgment, the trial court held that plaintiff owns the underlying fee to the unplatted waterfront property, subject to a prescriptive easement in defendants' favor. The judgment stated that plaintiff's ownership was superior to the rights of all other lot owners, but was subject to the easement in defendants' favor, to use the unplatted waterfront property for boat docking, boat storage, and other uses. The trial court specified the permitted uses defendants could make of that property: one 70-foot long, 4-foot wide dock, placed no earlier than May 1st, and removed no later than September 30th, and that can be stored on the unplatted land; one raft or swimming platform, moored in the waters of the unplatted land, and also limited to the period from May 1st to September 30th, and that can be stored on the unplatted land; use of the unplatted land between 5:30 a.m. and 11:30 p.m.; one fire pit; up to two picnic tables permanently kept on the land; other tables, chairs, lounges, beach equipment or grills, temporarily brought onto the land; and no overnight camping. Plaintiff filed objections to the judgment, but the trial court upheld its ruling.

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[2] After defendants rested, the trial court made oral findings of fact. Although a court generally speaks only through its written orders, MCR 2.602(A)(1), we note the oral findings of fact for illustrative purposes only. The trial court found that Schellhous did not own the unplatted waterfront property, which used to have a road on it; that defendants' uses of the unplatted waterfront property were continuous and hostile (not permissive), and began early-on, and that a dock was there every year from the very early years; and that defendants' adverse uses of the unplatted waterfront property lasted for 15 years, both before plaintiff's acquisition of lot one and after.

Plaintiff argues, first of all, that the trial court erred in denying her motion for summary disposition. We disagree.

We review summary disposition rulings de novo. *Ligon v City of Detroit*, 276 Mich App 120, 124; 739 NW2d 900 (2007). A motion for summary disposition under subrule (C)(8) tests the legal sufficiency of the pleadings, *Johnson-McIntosh v City of Detroit*, 266 Mich App 318, 322; 701 NW2d 179 (2005), and the pleadings are considered alone, without consideration of evidence, MCR 2.116(G)(5). So, where the parties rely on documentary evidence, appellate courts instead proceed under the standards of review applicable to a motion made under subrule (C)(10). *The Healing Place at North Oakland Med Ctr v Allstate Ins Co*, 277 Mich App 51, 55; 744 NW2d 174 (2007).

A motion made under MCR 2.116(C)(10) tests the factual support for a claim, and should be granted when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *The Healing Place*, *supra*, 277 Mich App at 56. When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rely on mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Id*. But, such evidence is only considered to the extent that it is admissible. MCR 2.116(G)(5). A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds could differ. *The Healing Place*, *supra*, 277 Mich App at 56.

Plaintiff first argues that Schellhous did not own the unplatted waterfront property, and therefore could not convey express easements to defendants to allow them to use that property. At the summary disposition stage, plaintiff did not raise this point, and so it is unpreserved under this issue. This Court is not required to consider unpreserved issues. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 509-510; 741 NW2d 539 (2007). This Court may overlook preservation requirements if the failure to consider the issue would result in manifest injustice; if consideration is necessary for a proper determination of the case; or if the issue involves a question of law, and the facts necessary for its resolution have been presented. *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 377; 761 NW2d 353, 362 (2008). We do not find any of these exceptions to be applicable. However, even if we were to overlook the preservation requirements, the fact that Schellhous lacked title to the unplatted waterfront property does not render the express easements void, as plaintiff argues, because the express easements only burden lot one, which Schellhous undisputedly owned.

Plaintiff also argues that under *Dyball v Lennox*, 260 Mich App 698; 680 NW2d 522 (2003), the trial court was required to grant her summary disposition motion. We disagree.

In *Dyball*, there was a reservation of an easement for access to Lake Fenton. *Dyball*, *supra*, 260 Mich App at 699. Riparian owners of a servient estate (the estate burdened by the easement) brought an action against back-lot owners of dominant estates (estates benefited by the easement), for a declaration that the scope of the express easement was restricted to ingress and egress for access to the lake. See *id*. at 700. The plaintiffs also sought an injunction barring a dock, or the storage of boating equipment on the easement, and to permit the use of the easement premises for recreational purposes. *Id*. at 700-701. Both sides filed motions for summary disposition. *Id*. at 701. The trial court granted summary disposition to the back-lot owners (defendants, owners of the dominant estates), allowing ingress, egress, and maintenance

of one dock. *Id*. at 702-703. In an appeal by the riparian owners (the plaintiffs), this Court reversed, and held that (1) the trial court could not consider evidence extrinsic to the express easement (in other words, an unambiguous easement must be enforced as written, and the trial court cannot inquire into the circumstances surrounding its creation); and (2) the reservation of the express easement did not give rise to the riparian or littoral right to erect or maintain a dock near the water's edge, and the right to permanently moor a boat at the end of the easement was not within the plain language of the reservation. *Id*. at 703-709.

Dyball is distinguishable. It did not involve a claim of an easement by prescription; decades of use of the access area; the common, investment-backed understandings of the buyers, that they were purchasing rights to use the beach; or questions of fact (or mixed questions of law and fact), as existed here. Accordingly, *Dyball* does not indicate that here, the trial court erred in denying plaintiff's motion for summary disposition.

Next, plaintiff argues that the trial court clearly erred in finding that defendants acquired a prescriptive easement over the unplatted waterfront property. We agree.

The parties agree that the extent of parties' rights under easements is a question of fact, reviewed for clear error. *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 40; 700 NW2d 364 (2005). Factual findings from a bench trial are reviewed for clear error, and conclusions of law are reviewed de novo. *Ligon, supra*, 276 Mich App at 124. An action for a prescriptive easement is equitable in nature. *Mulcahy v Verhines*, 276 Mich App 693, 698; 742 NW2d 393 (2007). A trial court's holding in an equitable action is reviewed de novo. *Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 117; 662 NW2d 387 (2003).

A prescriptive easement is an easement obtained by adverse possession. See *Dummer v US Gypsum Co*, 153 Mich 622, 633; 117 NW 317 (1908). A use giving rise to a prescriptive easement "is not more than an unopposed, continuous trespass for fifteen years." *McDonald v Sargent*, 308 Mich 341, 341-345; 13 NW2d 843 (1944). To establish adverse possession, the person claiming it must show that her possession was actual, visible, open, notorious, exclusive, hostile, under cover of claim or right, and continuous and uninterrupted for the statutory period of 15 years. *West Michigan Dock & Market Corp v Lakeland Investments*, 210 Mich App 505, 511; 534 NW2d 212 (1995). An easement by prescription requires similar elements, except exclusivity. *Id*.; see also *Plymouth Canton Community Crier, Inc v Prose*, 242 Mich App 676, 679; 619 NW2d 725 (2000). Tacking, or adding one owner's years of use onto the years of use of a predecessor owner, is permitted to achieve the requisite 15 years. *Killips v Mannisto*, 244 Mich App 256, 259; 624 NW2d 224 (2001). Tacking requires privity of estate, which can be shown either by (1) proof that the tacker had a description of the disputed acreage in her deed; or (2) proof that an actual transfer or conveyance of possession of the disputed acreage by parol statements was made, at the time of the conveyance. *Id*.

Here, the trial court's judgment is based on the notion that it would be an impossible burden for each defendant to have to establish, individually, his or her activities on the property for 15 years. Instead, defendants and the trial court believed that the neighborhood could collectively use the unplatted waterfront property, to establish the prerequisites for prescriptive easements. Michigan law has never approved such "collective tacking," and it would be, in our view, a substantial change in the law. Tacking has specific requirements, and defendants cannot

tack onto one another's uses, because there is no privity of estate between them. *Killips*, *supra*, 244 Mich App at 259.

Prescriptive easements are based on common-law doctrines, and can therefore be changed by courts. However, they are also an outgrowth of the statute of limitations for real actions. See *Adams v Adams*, 276 Mich App 704; 742 NW2d 399 (2007). So, such a substantial change in the law, as to approve of collective tacking, should be left to our Supreme Court, which has authority to modify case law, see *Boyd v WG Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993), overruled on other grounds *Karaczewski v Farbman Stein & Co*, 478 Mich 28; 732 NW2d 56 (2007), or to the Legislature, which has lawmaking authority.

In the absence of collective tacking, each defendant is left to his or her own individual uses, and to support such uses by proofs, but in none of defendant's individual cases was the use shown at trial to be continuous and uninterrupted for the necessary period. Rather, the testimony was ambiguous and to the extent that it showed actual uses (as opposed to what defendants were told they could do when they purchased their individual lots), it merely showed sporadic uses by the individual defendants, not continuous uses for any particular and specified period of 15 consecutive years. That degree of evidentiary support is not sufficient. See *Plymouth Canton Community Crier, Inc, supra*, 242 Mich App at 679. Accordingly, defendants failed to support their individual and separate claims for easements by prescription.

For the foregoing reasons, we hold that the trial court clearly erred in holding that defendants established the requisite elements for a traditional prescriptive easement. Next, we consider defendants' alternative basis for their claim to a prescriptive easement.

Defendants argue that they are entitled to a second type of prescriptive easement. They argue that a prescriptive easement may exist by operation of law, because the intent of the plat proprietor, with respect to access by back-lot owners to Corey Lake for the use of the unplatted waterfront property, was not properly memorialized, but the parties acted as if the grant of such use had been properly created. We disagree.

In *Plymouth Canton Community Crier, Inc*, this Court relied on the Restatement of Property, 3d, Servitudes, and held that a use that is made pursuant to the terms of an intended, but imperfectly created servitude can establish a prescriptive easement, when all the other requirements for such an easement are met. *Plymouth Canton Community Crier, Inc*, *supra*, 242 Mich App at 684-687. The Restatement of Property, 3d, Servitudes, provides as follows:

> A prescriptive use of land that meets the requirements set forth in § 2.17 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. [1 Restatement Property, 3d, Servitudes, § 2.16, pp. 221-222 (emphasis added).]

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 if the other requirements of § 2.17 are met. In this second situation, prescription performs a title-curing function. [1 Restatement Property, 3d, Servitudes, § 2.16, comment a, p. 222.]

Similarly, in *Cook v Grand River Hydroelectric Power Co, Inc*, 131 Mich App 821, 826; 346 NW2d 881 (1984), this Court stated that "if a claimant has obtained a conveyance of an easement which is ineffective, his use of the subservient estate, made on the assumption that the conveyance was legally effective, is adverse and not made in subordination to the owner of the burdened estate."

Here, Schellhous clearly intended to allow lot owners within the subdivision to have access to Corey Lake. Regardless, he could only grant ingress and egress over lot one, because he did not own the unplatted waterfront property.[3] Plus, even if this Court could find that this second type of express easement applies, it would only establish rights in defendants to use the unplatted waterfront property *for ingress and egress*. Accordingly, this second type of prescriptive easement could not establish that defendants have rights to use the unplatted waterfront property for the uses permitted by the trial court.

For the foregoing reasons, the trial court clearly erred in finding that defendants established prescriptive easements. We vacate that portion of the judgment.[4]

Plaintiff also argues that the trial court erred in determining that the scope of the prescriptive easement extended to the uses set forth in the final judgment. Because we find that defendants did not prove the elements necessary for prescriptive easements, this issue is moot. *Mettler Walloon LLC v Melrose Twp*, 281 Mich App 184, 221; 761 NW2d 293 (2008).

Defendants present several alternative bases for affirming the trial court's judgment. First, defendants argue that they acquired rights to use the unplatted waterfront property by

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[3] The parties agree, on appeal, that Schellhous did not own the unplatted waterfront property. And normally, a person cannot convey more interest in an article of property than he or she owns. *Pellerito v Weber*, 22 Mich App 242, 245; 177 NW2d 236 (1970). If Schellhous did not own the unplatted waterfront property, he could not grant an express easement over it.

[4] We note that, in her complaint, plaintiff moved for damages in trespass and nuisance resulting from defendants' use of lot one beyond their express easement for ingress and egress over lot one to Corey Lake. However, plaintiff does not make this argument on appeal or request remand for the trial court's consideration of damages. Therefore, it is abandoned. *Steward v Panek*, 251 Mich App 546, 558; 652 NW2d 232 (2002).

acquiescence or estoppel. We disagree. Acquiescence and estoppel are equitable doctrines, and decisions regarding equitable claims, defenses, doctrines and issues are reviewed de novo, although this Court reviews the circuit court's findings of fact for clear error. See *Dyball, supra,* 260 Mich App at 703, and *Sackett v Atyeo*, 217 Mich App 676, 680; 552 NW2d 536 (1996).

"The doctrine of acquiescence provides that where adjoining property owners acquiesce to a boundary line for at least fifteen years, that line becomes the actual boundary line." *Killips, supra,* 244 Mich App at 260. The doctrine of acquiescence arises in the context of border disputes. *Geneja v Ritter*, 132 Mich App 206, 210; 347 NW2d 207 (1984).[5] The doctrine is comprised of three distinct theories: "(1) acquiescence for the statutory period; (2) acquiescence following a dispute and agreement; and (3) acquiescence arising from intention to deed to a marked boundary." *Sackett, supra,* 217 Mich App at 681.

Defendants rely on *Killips* in which the plaintiffs claimed a right to use a driveway that was titled to the defendant. The trial court held they were entitled to do so, under easement by prescription and acquiescence theories. This Court affirmed, finding that plaintiffs acquired the property by acquiescence. *Killips, supra,* 244 Mich App at 261.

Aquiescence is inapplicable in this case where the property owners do not dispute an adjoining boundary line like the parties in *Killips*, but instead dispute the uses allowed under express easements and whether riparian uses for a separate piece of unplatted land were acquired by prescriptive easement. Consequently, we decline to extend *Killips* to the facts in this case, and we reject acquiescence as an alternative ground for affirmance.

Defendants' brief fails to argue the issue of estoppel. Therefore, it is abandoned. *Steward v Panek*, 251 Mich App 546, 558; 652 NW2d 232 (2002).

Defendants also argue that the record developed at trial supports a finding that they obtained an implied easement, permitting them to engage in riparian uses of the unplatted waterfront property. We disagree. An implied easement is an equitable remedy. *Cadwallader v Scovanner*, 896 NE2d 748, 760 (Ohio App, 2008).[6] So, a decision on such a claim or remedy is

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[5] Under the "acquiescence for the statutory period" theory of acquiescence, a boundary line becomes fixed when abutting landowners acquiesce to the boundary for the statutory period of 15 years. *Jackson v Deemar*, 373 Mich 22, 26; 127 NW2d 856 (1964); see also MCL 600.5801(4). As our Supreme Court stated, "[a] boundary line, long treated and acquiesced in as the true line, ought not to be disturbed on new surveys, 15 years' recognition and acquiescence being ample for purpose of establishing the boundary." *Walters v Union Nat'l Bank of Marquette*, 314 Mich 699, 706; 23 NW2d 184 (1946). "[A] claim of acquiescence to a boundary line based upon the statutory period . . . requires merely a showing that the parties acquiesced in the line and treated the line as the boundary for the statutory period, despite whether there was a bona fide controversy regarding the boundary." *Walters v Snyder*, 225 Mich App 219, 224; 570 NW2d 301 (1997).

[6] This Court is not bound by foreign authority, on questions of Michigan law, but it may find it persuasive. *Mettler Walloon LLC, supra,* 281 Mich App 221 n 6.

reviewed de novo, while findings of fact in a bench trial are reviewed for clear error. See *Sackett, supra*, 217 Mich App at 680.

The trial court did not rule on the implied easement claim. Therefore, it is unpreserved. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). We are not required to decide unpreserved issues, *Coates, supra*, 276 Mich App at 509-510, but again, we may overlook preservation requirements if the failure to consider the issue would result in manifest injustice; if consideration is necessary for a proper determination of the case; or if the issue involves a question of law and the facts necessary for its resolution have been presented, *Johnson Family Ltd Partnership, supra*, 281 Mich App at 377. We do not find any of these exceptions to be applicable to this issue.

Defendants also argue that the trial court's judgment should be affirmed because plaintiff's claims are barred by the doctrine of latches. Here again, the trial court did not rule on the issue of latches, so it is an unpreserved issue. *Coates, supra*, 276 Mich App at 509-510. We decline to review it.

On cross-appeal, counter-plaintiffs argue that the trial court erred in denying entry of a default against counter-defendant (plaintiff), after counter-defendant's failure to answer the counterclaim. We disagree.

This Court uses the abuse of discretion standard to review a trial court's action in response to a party's request to have a default entered against another party. See *ISB Sales Co v Dave's Cakes*, 258 Mich App 520; 672 NW2d 181 (2003). Questions of law, such as the proper interpretation of a court rule, are reviewed de novo. *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 456; 733 NW2d 766 (2006).

MCL 2.603 states, in relevant part: "If a party against whom a judgment or affirmative relief is sought has *failed to plead or otherwise defend* as provided in these rules, and that fact is made to appear by affidavit or otherwise, the clerk must enter the default of that party." (Emphasis added.) Here, plaintiff did not fail to "otherwise defend" against the counterclaim. *Marposs Corp v Autocam Corp*, 183 Mich App 166, 169-170; 454 NW2d 194 (1990) (holding that where the defendant filed a motion for summary disposition of the plaintiff's complaint, but never answered the complaint, the trial court abused its discretion when it determined that the clerk's entry of a default against the defendant was proper). Accordingly, the trial court here did not abuse its discretion in denying the application for a default.

Cross-appellants also argue that the trial court erred in holding that plaintiff established that she had title to the unplatted waterfront property. We agree.

Whether a party has the underlying title to a parcel of property is a mixed question of law and fact. *Jersey Shore Trust Co v Owosso Savings Bank*, 223 Mich 513, 521; 194 NW 588 (1923) ("ownership when challenged is always a mixed question of law and fact"). Following a bench trial, factual findings are reviewed for clear error, and conclusions of law are reviewed de novo. *Ligon, supra*, 276 Mich App at 124.

Cross-appellants argue that the two 2006 quitclaim deeds to plaintiff, for the unplatted waterfront property, conveyed nothing to plaintiff, because there is no evidence that plaintiff's grantors had any property interest in the unplatted waterfront property. We agree.

Normally, a person cannot convey more interest in an article of property than he or she owns. *Pellerito v Weber*, 22 Mich App 242, 245; 177 NW2d 236 (1970). Specifically, a grantee under a quitclaim deed acquires only the right and title that her grantor had at the time the deed was executed, and nothing more. *Richards v Tibaldi*, 272 Mich App 522, 539; 726 NW2d 770 (2006). So, the grantors in the two 2006 quitclaim deeds could not convey a greater property interest than they, themselves, had. *Pellerito, supra*, 22 Mich App at 245; *Richards, supra*, 272 Mich App at 539. Therefore, in order for plaintiff to show that she received title to the unplatted waterfront property, by way of the two 2006 quitclaim deeds, she had to show that her grantors had title.

The grantors to plaintiff in the first 2006 quit-claim deed were, in the Dudd deed, Harmon Dudd, John Dudd, Sr., and Joan Dudd, as the sole heirs and successors of Lillian Dudd, deceased. Thus, their title was dependent on the title owned by Lillian Dudd. However, none of the dozens of deeds in evidence indicates that Lillian Dudd owned the unplatted waterfront property.

In the other 2006 quitclaim deed, the grantor was Frances Spahn. We agree with cross-appellants that, while the evidence included a number of deeds to or from Frances Spahn, they were all for lots within the subdivision. Accordingly, they did not convey rights to the unplatted waterfront property.

Also, plaintiff admits in her brief on appeal that when Schellhous created the subdivision, he was not the owner of the unplatted waterfront property. Thus, no grantee in Schellhous's chain could be the owner of the unplatted waterfront property and plaintiff did not place in evidence any chain of title, leading to her, from anyone other than Schellhous.

In response to defendants' argument, plaintiff argues that, by operation of law, the abandonment and vacation of the road on the unplatted waterfront property, made lot one riparian. Plaintiff argues that, when the road over the unplatted waterfront property was abandoned or vacated, title to the unplatted waterfront property merged with title to lot one, or went to the owner of lot one. Plaintiff quotes the following passage from Michigan law: "*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 [for the right-of-way]." *Thies v Holland*, 424 Mich 282, 293; 380 NW2d 463 (1985) (emphasis added). We disagree.

Plaintiff failed to present evidence that the road along the unplatted waterfront property was vacated. Furthermore, plaintiff cites no authority that, where a road is merely abandoned, the underlying title goes to the owner of an adjacent platted lot. This Court is not obligated to search for authority to accept or reject a party's position. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). Finally, the "contrary indication" mentioned in *Thies* is present here. The plat dedication states that certain lots on the east side of the subdivision extend to the water's edge of Mud Lake and are riparian. The plat dedication is silent regarding whether lot one, on the west side of the subdivision and near Corey Lake, is riparian. Thus, the plattor

apparently knew that he could make lot one riparian, but he declined to do so. Because the plat dedication indicates that the plattor did not intend that lot one would extend all the way to the water, subject to an easement, plaintiff's argument fails. *Thies, supra*, 424 Mich at 293.

Plaintiff argues that her 2006 quitclaim deeds were prima facie evidence of title, which shifted the burden to defendants to establish that she did not have title. We disagree.

Aside from foreign authorities, which are not binding,[7] plaintiff relies on *Mercer v Stephens*, 185 Mich 290, 291-292; 151 NW 1032 (1915). *Mercer* holds that the plaintiff in that case, the holder of a quitclaim deed given to plaintiff from one who had been judicially determined to be the daughter and sole heir of the last owner in the regular chain of title, was entitled prima facie to sue to redeem the property from a tax sale. *Id*.

Mercer is distinguishable. Plaintiff is not the grantee of one who had been adjudged the sole heir of the last owner in a regular chain of title. Plaintiff is the grantee, under her quitclaim deeds, of persons who had no apparent interest or title to the unplatted waterfront property.

In addition, plaintiff's foreign authority is not supportive, even as interpreted by her. For the last decision plaintiff cites, *Nations v Barnett*, 345 SW2d 368 (Ark, 1961), plaintiff summarizes the holding as "recognizing that a plaintiff's quitclaim deed establishes title and that it is the defendant's burden to establish superior title." Obviously, the context in that case is a dispute over who had superior title, i.e., who owns the property in question. Where the defendant claims title, and the plaintiff presents a quitclaim deed, the defendant, to establish her own title, must carry her burden of establishing title. That is not the situation in the case at bar. Defendants have never sought title to the unplatted waterfront property; rather, they have always sought rights to continue what they characterize as their historical uses of it. Thus, plaintiff's principle, that she has established prima facie title to the underlying unplatted waterfront property, and that the burden then shifts to defendants to disprove her title, is rejected as applied to the particular facts and claims here presented.

Plaintiff failed to prove her claim to quiet title to the unplatted waterfront property. The trial court clearly erred in concluding, as a mixed question of law and fact, that plaintiff had title to that property.[8] We therefore vacate that portion of the judgment.

In sum, the trial court correctly denied plaintiff's motion for summary disposition; clearly erred in finding that defendants established prescriptive easements; did not abuse its discretion in denying counter-plaintiffs' application for a default; and clearly erred in finding that plaintiff established that she has title to the unplatted waterfront property.

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[7] On questions of Michigan law, this Court is not bound by foreign authority, though it may find it persuasive. *Mettler Walloon LLC, supra*, 281 Mich App at 221 n 6.

[8] We acknowledge that this holding leaves a cloud on the title to the unplatted waterfront property. However, given the record before us the issue of title to the unplatted waterfront property is not ripe for appellate resolution.

Affirmed in part and vacated in part. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Kurtis T. Wilder
/s/ Patrick M. Meter
/s/ Deborah A. Servitto