STATE OF MICHIGAN

COURT OF APPEALS

DENNIS J. CZERYBA, CAROL LORENZ, CHERYL GEHRINGER, KRISTIN MOHLER, JOHN CZERYBA, MICHAEL CZERYBA, FRANK GEHRINGER, TERRY AARDEMA, RUTH AARDEMA, ALFRED GREEN, PATRICIA GREEN, CHARLES LINDSEY and SHARON LINDSEY,

Plaintiffs-Counterdefendants-Appellees/Cross-Appellants,

v

ENZO MARZOLO, Trustee of the ENZO MARZOLO LIVING TRUST,

Defendant-Counterplaintiff-Appellant/Cross-Appellee.

UNPUBLISHED
November 2, 2004

No. 246955
Benzie Circuit Court
LC No. 00-005936-CH

DENNIS J. CZERYBA, CAROL LORENZ, CHERYL GEHRINGER, KRISTIN MOHLER, JOHN CZERYBA, MICHAEL CZERYBA, FRANK GEHRINGER, TERRY AARDEMA, RUTH AARDEMA, ALFRED GREEN, PATRICIA GREEN, CHARLES LINDSEY and SHARON LINDSEY,

Plaintiffs-Counterdefendants-Appellants,

v

ENZO MARZOLO, Trustee of the ENZO MARZOLO LIVING TRUST,

Defendant-Counterplaintiff-Appellee.

No. 247754
Benzie Circuit Court
LC No. 00-005936-CH

Before: Borrello, P.J., and Murray and Fort Hood, JJ.

PER CURIAM.

In Docket No. 246955, defendant appeals as of right the trial court's order and judgment in which the trial court held that plaintiffs had both an express and prescriptive easement over defendant's property. Plaintiffs cross-appeal as of right, arguing that the trial court erred in determining the scope of plaintiffs' easements. In Docket No. 247754, plaintiffs appeal as of right the trial court's order denying plaintiffs' motion for expenses under MCR 2.313(C). We affirm in part, and reverse in part.

This easement case involves real property located on and near Crystal Lake in Benzie County Michigan. The case arises over a dispute regarding the scope of an express easement granting plaintiffs "access" to Crystal Lake over defendant's property as well as the existence and scope of a prescriptive easement over the same portion of defendant's property. Defendant owns lot I, which is a riparian[1] lot on Crystal Lake. Crystal Lake borders defendant's lot from the north, and Mollineaux Road borders defendant's lot from the south. Plaintiffs are the owners of lots B, C, D, E, F and G. Plaintiffs' lots are non-riparian lots that are located immediately south of Mollineaux Road, across from defendant's property. At one time, Zella Stuart owned all of plaintiffs' lots. Over the years, after her husband died, Stuart conveyed lots B, C, D, E, F and G to plaintiffs or plaintiffs' predecessors in interest, who are all relatives of her deceased husband. Plaintiffs' deeds each contain an express easement. The express language of those easements is nearly identical and provides for "an easement and right-of-way 20 feet in width for use in common with the grantor and her assigns, for access from Mollineaux Road on the South to the beach and waters of Crystal Lake on the North over and across a roadway 20 ft. in width."

In November 1978, Stuart conveyed lot I to the Smiths. The deed clearly granted the Smiths "all riparian rights pertaining thereto." The Smiths sold lot I to defendant in October 1993. Defendant's deed also expressly granted defendant "full riparian rights." Defendant put up a "No Trespassing" sign in 1995 and put up a fence blocking plaintiffs' access to the easement in July 2000.

Thereafter, plaintiffs filed a complaint against defendant seeking a declaration that their express easements included riparian rights and that they had acquired a prescriptive easement over defendant's property and also seeking injunctive relief. The trial court, while observing that the express language of plaintiffs' easements did not grant plaintiffs riparian rights, nevertheless held that plaintiffs' express easements included the right of plaintiffs to maintain and use a dock

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[1] "Strictly speaking, land which includes or abuts a river is defined as riparian, while land which includes or abuts a lake is defined as littoral." *Thies v Holland*, 424 Mich 282, 288 n 2; 380 NW2d 463 (1985), citing *McCardel v Smolen*, 404 Mich 89, 93 n 3; 273 NW2d 3 (1978). Because the term "riparian" is often used to describe both riparian and littoral property, we will use the term riparian in this opinion.

and boatlifts, to drive motor vehicles, to moor boats, and to engage in traditional beach and water activities, such as sunbathing and picnics, as long as plaintiffs' uses were not unduly burdensome to the servient estate. The trial court further held that plaintiffs' use of the easement had included driving upon the easement, swimming on the beach, installing docks and boatlifts, and mooring boats and that such use had ripened into prescriptive easements over the established roadway on lot I in 1993. The trial court also granted injunctive relief, permanently enjoining defendants from parking on, blocking, or otherwise interfering with plaintiffs' use and enjoyment of the easement and permanently enjoining plaintiffs from trespassing on the portion of defendant's property that was not burdened by the easement.

The trial court opined that plaintiffs' use of defendant's property was limited to the placement of not more than one dock, not more than two boat hoists, and the mooring of not more than two boats. According to the trial court, any use exceeding this use would constitute an undue burden on defendant's property. The trial court also established some other limitations on plaintiffs' use of the easement which are not relevant to this appeal.

Docket No. 246955

Defendant argues that the trial court erred in interpreting the scope of plaintiffs' express easements too broadly and in considering extrinsic evidence in determining the scope of plaintiffs' express easements. We agree. The extent of a party's rights under an easement is a question of fact for the trial court, which this Court reviews for clear error. *Little v Kin*, 249 Mich App 502, 507; 644 NW2d 375 (2002) (*Little I*), aff'd, *Little v Kin*, 468 Mich 699; 664 NW2d 749 (2003) (*Little II*).

According to defendant, the trial court erred in interpreting the scope of plaintiffs' easements too broadly. Defendant contends that plaintiffs' easements' grant of mere "access" to Crystal Lake did not encompass the rights for plaintiffs to construct and maintain a dock and two boatlifts on the easement and moor two boats on the easement. We agree. Land which includes or is bounded by a natural watercourse is defined as riparian. *Thies*, *supra*, 287-288. Defendant, as an owner of riparian land, enjoys certain exclusive rights, including the right to erect and maintain docks along the shore and the right to anchor boats permanently off the shore. *Id.*, 288. Plaintiffs are nonriparian owners because their lots do not touch the shore of Crystal Lake. *Id.* Nonriparian owners and members of the public who gain access to a navigable waterbody have a right to use the surface of the water in a reasonable manner for such activities as boating, anchoring boats temporarily, fishing and swimming. *Id.*

The rights of an easement holder are "defined by the terms of the easement agreement." *Id.*, 297. The easements in this case plainly provide for "access . . . to the beach and waters of Crystal Lake." By interpreting plaintiffs' express easements granting "access" as permitting the maintenance of a dock and two boatlifts and the mooring of two boats, the trial court, in effect, concluded that the express easements in this case granted riparian rights to plaintiffs. The trial court's holding was erroneous. In *Dyball v Lennox*, 260 Mich App 698, 706; 680 NW2d 522 (2004), this Court held that a "[r]eservation of a right of way for *access* does not give rise to riparian rights, but only a right of way." (Emphasis added). In addition to *Dyball*, other Michigan cases have interpreted easements granting merely a right of "access" as not encompassing riparian rights. See *Thies, supra*; *Delaney v Pond*, 350 Mich 685; 86 NW2d 816 (1957).

Moreover, we reject plaintiffs' contention that the fact that the easements granted plaintiffs "an easement and right-of-way . . . *for use in common with the grantor*" (emphasis added) suggests that the easements granted rights to plaintiffs that were equal to or coextensive with the rights of the grantor. The language of the express easement plainly grants plaintiffs an easement for use in common with the grantor. It does not grant plaintiffs "riparian rights . . . for use in common with the grantor" or even "rights in common with the grantor." Michigan law allows an owner of riparian property to grant an easement that allows others to enjoy certain rights which are traditionally regarded as exclusively riparian. *Little I*, *supra*, 504-505. However, such a broad grant of rights did not occur in this case because the express language of the easements did not include riparian rights. The use of the phrase "for use in common with the grantor," without more explicit language evidencing an intent to grant plaintiffs riparian rights, is insufficient to grant riparian rights to plaintiffs. See *Dyball*, *supra*, 708. The plain and unambiguous language of the easements did not grant riparian rights to plaintiffs and did not suggest that the right to construct and maintain a dock or boatlifts or the right to permanently moor one or more boats was within the scope of the easements. *Id.*

Riparian landowners "enjoy certain exclusive rights." *Thies*, *supra*, 288. In the absence of clear and unambiguous language expressly granting plaintiffs riparian or littoral rights or expressly using words to indicate that the grantees' rights were to be identical to the grantor's, we conclude that the plain language of the easements did not encompass the right to maintain a dock and boatlifts and permanently moor boats on the easement, which are rights that are typically reserved to riparian owners. The mere granting of "access . . . to the beach and waters of Crystal Lake" was insufficient to grant plaintiffs the riparian rights that defendant, as the owner of the riparian land, enjoyed. *Dyball*, *supra*, 706. Therefore, the trial court erred in holding that the scope of plaintiffs' express easements encompassed riparian rights. Moreover, because the language of the express easements was plain and unambiguous, the trial court was prohibited from considering extrinsic evidence in determining the scope of the express easements. When the language of an easement is plain and unambiguous, the trial court may not consider extrinsic evidence to determine the scope of the easement. *Little II*, *supra*, 700; *Dyball*, *supra*, 704. Therefore, the trial court's consideration of extrinsic evidence in determining the scope of plaintiffs' express easements was erroneous.

In light of our conclusion that plaintiffs' express easements did not grant plaintiffs' riparian rights, we need not address plaintiffs' cross-appeal.

Defendant next argues that the trial court erred in holding that plaintiffs had acquired a prescriptive easement to drive over the burdened estate, maintain one dock and two boatlifts on the burdened estate, and moor two boats on the burdened estate. We disagree. This Court reviews de novo the trial court's holdings in equitable actions. *Gorte v Dep't of Transportation*, 202 Mich App 161, 165; 507 NW2d 797 (1993). In addition, this Court reviews the trial court's findings of fact for clear error. *Grand Rapids v Green*, 187 Mich App 131, 135-136; 466 NW2d 388 (1991).

An easement by prescription results from use of another's property that is open, notorious, adverse, and continuous for a period of fifteen years. MCL 600.5801; *Plymouth Canton Community Crier, Inc, v Prose*, 242 Mich App 676, 679; 619 NW2d 725 (2000). The burden is on the party claiming an easement by prescription to show by satisfactory proof that

the use of the defendant's property was of such a character and continued for such length of time as to ripen into an easement by prescription. *Id.*

On appeal, defendant challenges plaintiffs' establishment of the adverse or hostile use element necessary to establish a prescriptive easement. According to defendant, plaintiffs used defendant's property mutually and permissively with defendant and defendant's predecessors in interest, and such a use cannot ripen into a prescriptive easement when the use never became adverse and hostile. The term "hostile," as utilized in the law of adverse possession, is a term of art and does not imply ill will. *Id.*, 681. The claimant is not required to make express declarations of adverse intent during the prescriptive period. *Id.* Adverse or hostile use is use that is inconsistent with the right of the owner, without permission asked or given, which would entitle the owner to a cause of action against the intruder for trespassing. *Id.*

The trial court determined that plaintiffs' use of defendant's property ripened into a prescriptive easement in 1993. Defendant purchased lot I in October 1993. It is unclear from the trial court's holding whether the trial court determined that plaintiffs' prescriptive easement was established before defendant acquired lot I in 1993 or after defendant acquired lot I in 1993. In any event, the trial court, in holding that plaintiffs had acquired a prescriptive easement over defendant's property, did not elaborate on the adverse or hostile use element, stating on the record only that "the usage by the [plaintiffs'] families, the boats the docks that they put out, were open and hostile."

According to defendant, plaintiffs and defendant and defendant's predecessor in interest mutually used the easement, and plaintiffs used it with defendant's permission. Defendant is correct that mutual, permissive use of another's land does not constitute adverse use that may ripen into a prescriptive easement. *Id.*, 683. However, we conclude that plaintiffs' use of defendant's property both before and after defendant acquired title to lot I satisfies the hostile and adverse use element of a prescriptive easement. "[I]f 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." *Cook v Grand River Hydroelectric Power Co, Inc*, 131 Mich App 821, 826; 346 NW2d 881 (1984), citing 3 Powell, Real Property, § 413, pp 34-109—34-110. See also *Plymouth Canton Community Crier, Inc, supra*, 684-685 (for a discussion of the Restatement of Property, Servitudes, 3d, § 2.16, which recognizes that use under an invalid express easement may establish an easement by prescription and that such use satisfies the hostile or adverse use element or a prescriptive easement). In this case, for reasons explained above, plaintiffs' express easements were not effective in conveying riparian rights to plaintiffs; however, plaintiffs exercised their rights under the easements as if their easements contained an express grant of riparian rights, including the rights to maintain docks and boatlifts and the right to moor boats. Therefore, because plaintiffs used defendant's property as if their express easements conveyed riparian rights, plaintiffs' use of defendant's property satisfied the hostile or adverse use element necessary to establish a prescriptive easement. *Cook, supra*, 826.

Because defendant does not challenge the trial court's holding regarding the remaining elements of plaintiffs' prescriptive easement claim, the trial court did not err in holding that plaintiffs acquired an easement by prescription to maintain a dock and two boatlifts and to moor two boats on defendant's property. Furthermore, because the right to drive motor vehicles with boat trailers over the easement is necessary and reasonable to effect the enjoyment of the

easement, the trial court did not err in holding that plaintiffs' rights under the prescriptive easement also included that right. *Killips v Mannisto*, 244 Mich App 256, 261; 624 NW2d 224 (2001). The trial court did not err in holding that plaintiffs established the adverse or hostile element of a prescriptive easement and in determining the scope of plaintiffs' rights under the prescriptive easement.

Docket No. 247754

Plaintiffs argue that the trial court abused its discretion in denying plaintiffs' motion for expenses under MCR 2.313(C) based on defendant's failure to admit fifteen items in plaintiffs' requests for admissions. We disagree. We review a trial court's decision whether to impose discovery sanctions for denying a request to admit that which is proved at trial for an abuse of discretion. *Phinisee v Rogers*, 229 Mich App 547, 561-562; 582 NW2d 852 (1998); *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 456-458; 540 NW2d 696 (1995).

A party may request that another party admit the truth of a matter which "relates to statements or opinions of fact or the application of law to fact[.]" MCR 2.312(A). The purpose of MCR 2.312 is to limit areas of controversy and save time, energy, and expense that would be required to proffer proof of matters properly subject to admission. *Janczyk v Davis*, 125 Mich App 683, 692; 337 NW2d 272 (1983). If a party denies the truth of the matter as requested, and if the party requesting the admission later proves the truth of the matter, the requesting party may move for an order requiring the other party to pay the expenses incurred in making that proof, including attorney fees. MCR 2.313(C). "The court shall enter the order enter the order unless it finds that"

> (1) the request was held objectionable pursuant to MCR 2.312,
>
> (2) the admission sought was of no substantial importance,
>
> (3) the party failing to admit had reasonable ground to believe that he or she might prevail on the matter, or
>
> (4) there was other good reason for the failure to admit. [MCR 2.313(C).]

We hold that the trial court did not abuse its discretion in denying plaintiffs' motion for expenses under MCR 2.313(C). At the outset, we note that "unless a matter is completely free of controversy, it is not likely that a formal request for admissions will prove successful." *Greenspan v Rehberg*, 56 Mich App 310, 328; 224 NW2d 67 (1974). We further note that sanctions are not required if defendant had reasonable ground to believe that he would prevail on the matter. MCR 2.313(C)(3). Finally, we observe that the fact that a matter was proved at trial does not alone establish that the denial of a request for admission as to that matter was unreasonable. *Richardson*, *supra*, 457.

Nine of the fifteen requests for admissions attempted to elicit admissions from defendant regarding the elements of a prescriptive easement. These requests for admissions were improper because requests seeking admission of an element of a claim "is not a proper subject for admission[.]" *Richardson*, *supra*, 457-458. One of the requests for admissions essentially sought defendant's admission that Zella Stuart intended to grant plaintiffs riparian rights in their

express easements. Because plaintiffs' easements did not explicitly grant plaintiffs riparian rights, defendant had a reasonable ground to believe that he might prevail at trial on the issue of the scope of plaintiffs' rights under the express easement. MCR 2.313(C)(3).

As for the remaining requests for admissions, we conclude that defendant's failure to admit was not unreasonable in the sense that defendant should be liable for plaintiffs' costs in proving their claims at trial. The matters about which plaintiffs sought admissions were not completely free of controversy, *Greenspan*, *supra*, 328, and defendant had reasonable ground to believe that he might prevail on the matters. MCR 2.313(C)(3). We find that the trial court did not abuse its discretion in denying plaintiffs' request for expenses under MCR 2.313(C).

Conclusion

In sum, in Docket No. 246955, we hold that the trial court erred in interpreting plaintiffs' express easements as encompassing riparian rights when the plain and unambiguous language of the easements did not provide for such rights. In addition, because the language of the easements was not ambiguous, the trial court also erred in considering extrinsic evidence in determining the scope of those easements. The trial court did not err however, in holding that plaintiffs acquired a prescriptive easement to use defendant's property that did include riparian rights. In Docket No. 247754, we hold that the trial court did not abuse its discretion in denying plaintiffs' request for expenses under MCR 2.313(C).

Affirmed in part, and reversed in part. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Christopher M. Murray
/s/ Karen M. Fort Hood