STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL SHAW and JEANNETTE THAI,

Plaintiffs/Counter Defendants-Appellants,

v

LARRY PISKOROWSKI, MOLLY SCHOENBERG, ANASTASIA FEDEROVA, JAMES STEPHENS, DIANE STEPHENS, MICHAEL MCLEARON, JOHN TASIC, ALBERT CRIST, MICHAEL LAM, and WENDY LAM,

Defendants/Cross Defendants-Appellees,

and

ROBERT MCCAULEY, FEDERAL NATIONAL MORTGAGE ASSOCIATION, MICHAEL COGO, UNKNOWN HEIRS AND DEVISEES OF SAMUEL GROOMES, and UNKNOWN HEIRS AND DEVISEES OF ROSALITA GROOMES,

Defendants/Cross Defendants/Third Party Defendants-Appellees,

and

JOSEPH KURTH, TAMMIE KURTH, ELWOOD PETERSON, JANET JOHNSON, GRACE CARPENTER, TRUSTEE of the WILLIAM AND GRACE CARPENTER TRUST, KAREN J. MCDOWELL, ANNA K. STEP, MARTIN HICKEY, CAROLYN H. RUSSELL, TRUSTEE of the JOHN X. RUSSELL TRUST, CAROLYN H. RUSSELL, TRUSTEE of the CAROLYN H. RUSSELL TRUST, SHARON HILL, MILTON

UNPUBLISHED
November 17, 2016

No. 329027
Livingston Circuit Court
LC No. 13-027687-CZ

FOWLER, CHRISTINA SARAHS, JOHN CHAPMAN, GREGORY COURVILLE, JACOB CHARLES VISSER, WALTER JOHN ZEMKE, JEFFREY PETERSON, CAROL PETERSON, VIVA ANN FINE, ANTHONY MORRIS, and THE ANNIE M. WINTERS TRUST,

Defendants/Counter Plaintiffs/Cross Plaintiffs/Third Party Plaintiffs-Appellees,

and

UNKNOWN HEIRS AND DEVISEES OF HARRY M. GROOMES and UNKNOWN HEIRS AND DEVISEES OF ROSA K. GROOMES,

Defendants-Appellees,

and

EDWARD ALLEN, ELLEN ALLEN, MARSHA DENMAN, MICHAEL ROGERS, CAROL CRENSHAW, YOUSEF BAHREINY, RANDEL STEP, TOWNSHIP OF GREEN OAK, JEROME SZUKALA, and ANNA SZUKALA,

Defendants,

and

CAROL TAYLOR, JULIE HARDESTY, LARRY RUSH, PEGGY RUSH, and JOSEPH HARDESTY,

Defendants/Counter Plaintiffs/Cross Plaintiffs,

and

BRENT DELABARRE,

Third Party Defendant-Appellee.

Before: RONAYNE KRAUSE, P.J., and O'CONNELL and GLEICHER, JJ.

O'CONNELL, J. (*dissenting*).

I respectfully dissent.

At issue in this case is the trial court's order that allows 79 backlot owners to use a 10-foot strip of land to access Whitmore Lake in Livingston County. In my opinion, the trial court's order, which granted full riparian rights to the backlot owners as a collective to erect a dock, moor boats overnight, and use the land for access and storage, is unsupported by law. Even were it supported, such a grant would clearly overburden the 10-foot strip of land and create an unworkable situation for all concerned. One can only imagine the chaos created by mooring 79 boats at the end of a 10-foot easement.[1]

The trial court ordered that a 10-foot lake access right of way in the lakefront Groomes Subdivision, adjacent to plaintiffs' property, was subject to a prescriptive easement in favor of the residents of the inland Groomes Subdivision Number One (the backlot owners) for the activities previously described. The trial court's primary error was in finding a collective neighborhood prescriptive easement in favor of the backlot owners, rather than individual easements in favor of individual backlot owners. No caselaw supports such a blanket grant of an easement to an entire backlot subdivision. Accordingly, I would vacate the trial court's decision and remand for further proceedings.

I. LEGAL STANDARDS

This Court reviews de novo a trial court's ruling on an equitable matter. *Schumacher v Dep't of Natural Resources*, 275 Mich App 121, 130; 737 NW2d 782 (2007).

An easement is the right to use the land of another for a specified purpose. *Heydon v MediaOne*, 275 Mich App 267, 270; 739 NW2d 373 (2007). "The owner of an easement cannot displace the possessor or the owner of the land, but . . . has a qualified right to possession" to the extent necessary for enjoyment of the easement. *Terlecki v Stewart*, 278 Mich App 644, 660; 754 NW2d 899 (2008). "An easement may be created by express grant, by reservation or exception, or by covenant or agreement." *Rossow v Brentwood Farms Dev, Inc*, 251 Mich App 652, 661; 651 NW2d 458 (2002).

A claim for a prescriptive easement is similar to a claim for adverse possession except that the use does not have to be exclusive. *Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 118; 662 NW2d 387, 411 (2003). "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). The party claiming a prescriptive easement has the burden to demonstrate that the

[1] Particularly with no restrictions on the scope of the easement to prevent the easement from becoming overburdened with boats, garbage, party-goers, and the rodents that would eventually seek to feast on the resulting collection of garbage.

use of the property at issue meets the requirements for a prescriptive easement. *Plymouth Canton Community Crier, Inc*, 242 Mich App at 679.

In order to demonstrate that a party's open, notorious, and adverse use of another's land was for a continuous period of fifteen years, the party may "tack" together "possessory periods of predecessors in interest." *Killips v Mannisto*, 244 Mich App 256, 259; 624 NW2d 224 (2001). To demonstrate the privity of estate necessary to tack possessory periods, a party may, "(1) include[] a description of the disputed acreage in the deed, or (2) [there can be] an actual transfer or conveyance of possession of the disputed acreage by parol statements made at the time of conveyance. *Id*. (internal citations omitted). A party must demonstrate privity of estate with "clear and cogent evidence." *Id*. at 260.

III. APPLICATION

Plaintiffs argue that defendants did not demonstrate continuous use of the 10-foot right of way for the required fifteen-year period because the trial court did not consider each backlot owner individually. I agree.

Defendants provided depositions from eight residents or former residents of Groomes Subdivision Number One to demonstrate that some residents of Groomes Subdivision Number One had used the 10-foot access area on Groomes Subdivision Lot 6 for access to the lake for a variety of recreational uses since 1955.

W. John Zemke testified that his father's cottage in Groomes Subdivision Number One was completed in 1939 and he helped to build a boat dock for the right of way in the early 1950s. Zemke saw the dock in the right of way when he visited the cottage from 1955 to 1972 and when he lived in the subdivision from 1972 until 1992. Zemke's father kept boats at the dock on the right of way for his family and renters to use, and Zemke acquired his own sailboat in 1966 that he and his friends carried through the easement to the dock. Zemke recalled that his family and many of the backlot residents used the dock from 1972 to 1992.

Pat Groomes said that she lived in Groomes Subdivision Number One from 1961 to 1993 and rented homes in the subdivision. She reported that she, her family, and families from the neighborhood used the right of way for swimming and that there was a dock with boats anchored around it. She could not remember a time when there was not a dock at the right of way, and she stated that there was never an objection to using the right of way.

Jeff Groomes recalled boats at the dock in the right of way before 1966, and he said that anyone from Groomes Subdivision Number One was allowed to use the dock and right of way for boating. He personally used the area for swimming and boating from around 1969 until 1976. Nanette Groomes had lived in Groomes Subdivision since 1971 and believed that the backlot residents knew that it was the norm to have a dock and boats in the right of way area because that is what her predecessor in interest, Henry Groomes, told her family in 1970. She said that her family had owned property in the subdivision since 1969, that their renters always had boats and a dock in the right of way area, and that the tenants used the access path routinely throughout the 1970s and 1980s.

Jeffery Peterson said he owned several lots in Groomes Subdivision Number One, had lived there since 1985, and that his realtor represented that his property came with access to the lake. Peterson reported that there was a dock in the lake every year, he kept his boat by the dock, and that 15 to 20 of his neighbors consistently used the right of way area for boating or swimming.

Gregory Courville purchased a home in Groomes Subdivision Number One in 1994 and was told that he had lake access for swimming and boating in the seller's disclosure and by Nanette Groomes. Courville stated that he swims in the area and had moored watercraft at the dock from 1995 until 2001.

John Chapman had lived in Groomes Subdivision Number One since 2002, and he was told that his home included lake access. Chapman testified that the seller of his home told him that she had frequently gone swimming in the lake access area since 1998 and that there was a dock and boats for use in the right of way. He further testified that he and his neighbors remove or install the dock seasonally.

Christina Sarahs reported that she purchased property in Groomes Subdivision Number One in 2004 and learned from her realtor that she had lake access for boating. She said that the dock has been installed every year since she had arrived, and that she and her neighbors had utilized the right of way for her water craft and fishing.

As a result of this evidence testimony, the trial court granted a prescriptive easement to all defendants based on "a long history of use of the Groomes Parcel." I agree that there was evidence to support that the easement area had been used by some backlot owners openly, without permission, and continuously from around 1955 to the present day for at least swimming and boating.

However, the trial court granted the easement to all members of the Groomes Subdivision Number One when only a limited number of backlot owners presented evidence of continuous use. Neither the trial court nor defendants provided authority to grant a prescriptive easement to an entire group of people, other than the public at large, on the basis of aggregating the continuous use by select members of the group. To the contrary, caselaw holds that each individual backlot owner must establish an individual claim for a prescriptive easement.

In *Kempf v Ellixson*, 69 Mich App 339, 340-341; 244 NW2d 476 (1976), the Court considered, in part, a trial court's dismissal of backlot owners' claims for individual prescriptive easements to access lakeshore property on which they had constructed docks. The Court affirmed in part and remanded for further findings of fact because there were no specific findings for individual claims for prescriptive easements. *Id*. at 344. This case is analogous. In this case, there were no findings regarding the easement rights of individual backlot owners, but rather the trial court considered the subdivision's rights as a whole. This was improper.

I also find the reasoning of *Keiser v Feister*, unpublished opinion per curiam of the Court of Appeals, issued March 2, 2010 (Docket No. 282531) persuasive. In that case, this Court reversed a trial court's grant of a prescriptive easement to inland subdivision residents who had used a section of land to access a nearby lake for many years. *Id*. at 2-3. The Court found that

the trial court erred in employing "collective tacking" of use by various subdivision residents to demonstrate continuous use for the statutory period rather than considering individual claims for a prescriptive easement for each subdivision resident. *Id*. at 5-6. The Court reasoned:

> 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. [*Id*. at 6 (citation omitted).]

No authority has been given or located that provides neighborhood prescriptive easements where each party is not required to demonstrate individual prescriptive easements. 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). Approval of collective tacking is such a substantial change in the law that it 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 in part on other grounds by *Karaczewski v Farbman Stein & Co*, 478 Mich 28, 38-39 (2007), or to the Legislature, which has lawmaking authority.

In the absence of collective tacking, each defendant must establish his or her own individual uses and support such uses by proofs. In this case, at best, certain individual backlot owners provided evidence of specific recreational prescriptive easements. For the foregoing reasons, I conclude that the trial court clearly erred in holding that the backlot owners as a whole established the requisite elements for a traditional prescriptive easement. Thus, I would vacate the trial court's decision and remand so that the trial court can make findings about the requirements for each individual claim to a prescriptive easement on the right of way. The trial court's determination should also define the rights of those who were subject to the default judgment ordered in this case.[2]

Defendants also argue that, in this case, the trial court correctly found a prescriptive easement based on an imperfectly created servitude. Utilizing an imperfect servitude to characterize a claimant's use of property creates a prescriptive easement only where "all the other requirements for such an easement are met." *Mulcahy*, 276 Mich App at 699-700, citing

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[2] The majority's *ipse dixit* conclusion that a default judgement renders all issues in this case moot is unsupported by any statute or case law in the State of Michigan. At the judgement stage of a default, the trial court must still define the rights and obligations of each party. See *Wood v Detroit Auto Inter-Ins Exch*, 413 Mich 573, 583-584; 321 NW2d 653 (1982) (the defaulted party remains entitled to participate in the determination of damages). Any other resolution results in a miscarriage of justice.

Plymouth Canton Community Crier, Inc, 242 Mich App at 684-687. However, the trial court did not discuss imperfect servitudes in its opinion. Further, using an imperfect servitude to create a prescriptive easement only satisfies the requirement that the claimant's use of another's land was adverse or hostile, rather than addressing the requirement that the use was continuous, which was at issue in this case. See *Mulcahy*, 276 Mich App at 702.

Defendants also argue that plaintiffs lacked standing to file a declaratory action regarding the right of way because they did not own the property on which the easement was located. However, the 1933 grant of a "right of way ten (10) feet wide on the East side of lot number six (6) of Groomes Subdivision" to Harry and Rosa Groomes "for foot passage to and from the lake in common with other lot owners and occupants of lots in said Groomes Subdivision" gives plaintiffs an interest in the use of the easement. Thus, plaintiffs are "interested part[ies] seeking a declaratory judgment" regarding the easement and have standing. See MCR 2.605.

Finally, plaintiffs argue that the trial court did not have the authority to order the equitable remedy of forming a Groomes Subdivision Number One neighborhood association to manage the use of the right of way. Given my disposition of the first issue, I conclude that it would be premature to address this issue and I would decline to do so.

I would vacate the decision of the trial court and remand for proceedings consistent with this opinion.

/s/ Peter D. O'Connell