# 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 for the WILLIAM AND GRACE CARPENTER TRUST, KAREN J. MCDOWELL, ANNA K. STEP, MARTIN HICKEY, CAROLYN H. RUSSELL TRUSTEE for the JOHN X. RUSSELL TRUST, CAROLYN H. RUSSELL TRUSTEE for the CAROLYN H. RUSSELL TRUST, SHARON HILL, MILTON FOWLER, CHRISTINA SARAHS, JOHN CHAPMAN, GREGORY COURVILLE, JACOB

UNPUBLISHED
November 17, 2016

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

CHARLES VISSER, WALTER JOHN ZEMKE, JEFFREY PETERSON, CAROL PETERSON, VIVA ANN FINE, ANTHONY MORRIS, 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.

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

PER CURIAM.

In this challenge raised by a lakefront property owner possessing land adjacent to a right-of-way for the benefit of backlot owners, the circuit court declared that the backlot owners had an easement and enjoyed the right to use that easement for various and sundry riparian purposes. Plaintiffs appeal, contending that the backlot owners failed to establish a prescriptive easement

and even if they had established an interest, it should have been limited to foot traffic. As the backlot owners' interest was declared by a default judgment against the owner of the burdened property, plaintiffs' continued challenge to the easement's existence can lead to no relief. Moreover, we discern no error in the court's description of the easement's scope. Accordingly, we affirm.

## I. BACKGROUND

This case involves two subdivisions on land originally owned and platted by Samuel and Rosalita Groomes. "Groomes' Sub-Division" includes 29 lots fronting on Whitmore Lake and backing up to a public highway. "Groomes Subdivision Number One" was platted a decade later. It is divided into 79 lots, numbered 30 through 108, with several owners possessing numerous lots. It is situated on the opposite side of the public highway. In common parlance, its residents are backlot owners. In 1933, Samuel and Rosalita Groomes created an easement across the eastern 10 feet of lot 6 in Groomes' Sub-Division. They described the easement as "a right of way . . . to be used only for foot passage to and from the Lake in connection with other lot owners and occupants of lots in said Groomes Subdivision." This easement was granted to their son Harry and his wife Rosa.

In the early days, most of the lots in Groomes' Sub-Division and Groomes Subdivision Number One were owned by Groomes family members. Possibly as a result of this internal family dealing, there is little to no documentation of the interests passed. Some but not all of the current owners have a reference in their deeds to the right-of-way and others claim oral representations were made at the time of sale. However, several Groomes family members (great- and great-great-grandchildren of Samuel and Rosalita Groomes) and unrelated current and past residents in Groomes Subdivision Number One were deposed and described that the backlot owners had always used the right-of-way across lot 6 in the lakefront subdivision. Someone erected privacy fences along both sides of the easement. The backlot owners kept the right-of-way mowed and passable. They constructed a dock from the end of the right-of-way, from which they swam, fished and boated. They moored boats along the dock in the summer. In the summer, the backlot owners also stored small boats, lawn chairs, and fishing equipment along the fence. In the winter, they removed the dock and leaned it against the fence for storage.

At some point, plaintiffs Michael Shaw and Jeannette Thai purchased lots 7 and 8 in Groomes' Sub-Division, bordering the easement. They became disgruntled with the backlot owners' moored boats crossing over the property line and garbage left on their property. Plaintiffs also alleged difficulty in using their own dock and boat hoist based on the intrusion of the backlot owners' boats. Shaw and Thai filed suit against the owners and occupiers of Groomes Subdivision Number One, seeking a declaratory judgment and injunction regarding the scope of use allowed on the right-of-way and to stop the backlot owners' trespass onto their property. The backlot owners filed a countercomplaint to quiet title in the easement based on the easement language included in several of their deeds. In the alternative, they sought a prescriptive easement.

The backlot owners named the owner of lot 6 in Groomes' Sub-Division, Brent DeLaBarre, as a third-party defendant. On June 24, 2014, DeLaBarre entered a consent judgment with the backlot owners and was dismissed from the case with prejudice. DeLaBarre

admitted ownership of lot 6 in Groomes' Sub-Division but noted that he received only *part* of the lot, excluding that portion of the lot subject to the easement. DeLaBarre described: "The Property is northeast and *adjacent to* a 10 foot easement or right of way, as it has been called ("Easement") . . . ." (Emphasis added.) DeLaBarre agreed that "[t]he Easement was created and used for the benefit of the owners of lots in **Groomes Subdivision Number One**. . . ." DeLaBarre also consented to and agreed not to interfere with the use of the easement for "access to and from Whitmore Lake, maintaining of a dock, mooring of boats, swimming, bathing, picnicking, storage, and other riparian type recreation activities."

Following the discovery that DeLaBarre did not own the land burdened by the easement, the parties investigated and learned that the 10-foot strip of land burdened by the easement remained titled to Samuel and Rosalita Groomes. The deed was never physically transferred to and filed by the Groomes' heirs. Accordingly, on September 24, 2014, plaintiffs filed a second amended complaint adding the "unknown heirs and devisees of Samuel Groomes and Rosalita Groomes" as defendants. Despite that several of Samuel and Rosalita's descendants were deposed in this matter, none came forward to declare himself or herself an heir and successor-in-interest to the subject property. Ultimately, the circuit court was left in an unenviable position: it was asked by a neighboring landowner and the alleged beneficiaries of an easement to determine the existence and scope of an easement with no way to identify and question the owner of the burdened land.

Plaintiffs and the backlot owners eventually filed competing motions to summarily resolve the case. The backlot owners' request included a motion to enter a default judgment against the unknown heirs of Samuel and Rosalita Groomes, who had failed to respond to the action.

On July 23, 2015, the circuit court entered a default judgment against "the unknown heirs and devisees of Samuel and Rosalita Groomes," "owners of the eastern 10 feet of lot 6 of Groomes Subdivision." This parcel, ruled the court, would thereafter be "burdened by an easement in favor of the lot owners of Groomes Subdivision Number One." This easement, declared the court, was taken by prescription and included the right to access the lake, use the dock, moor boats, swim and "recreation," storage, and "[o]ther riparian rights and activities attendant to the above uses."

The court then entered a final judgment denying plaintiffs' summary disposition motion and granting the motion of the backlot owners. The judgment declared that the backlot owners were the beneficiaries of the easement across property owned by the Groomes' unknown heirs. The court reiterated the uses to which the easement could be put. It also ordered the backlot owners to create "an association of lot owners . . . for purposes of managing use of the Easement and for any other lawful purpose."

Plaintiffs now challenge the circuit court's declaration of a prescriptive easement and creation of a homeowners association. The backlot owners retort that plaintiffs lack standing as they have no interest in the burdened parcel and that the challenge is moot as a declaration has been entered against the fee-simple owners of the parcel burdened by the easement.

## II. ANALYSIS

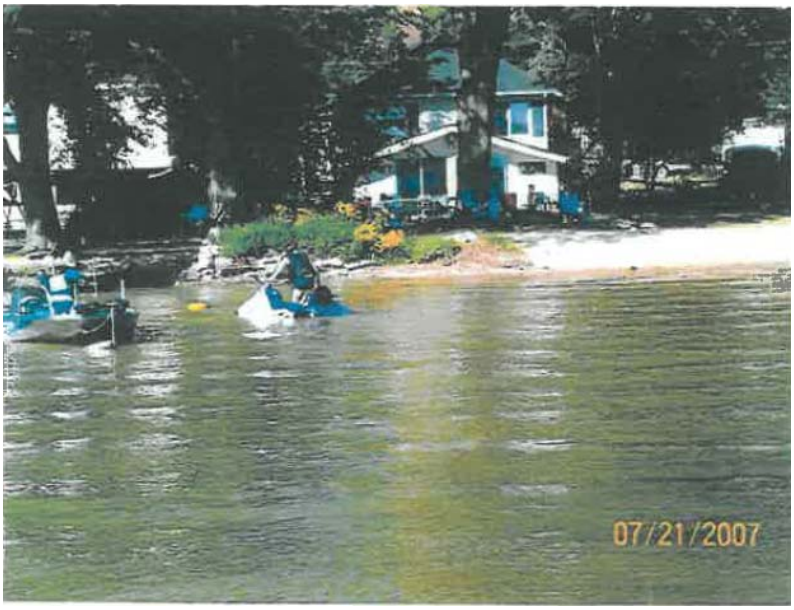
We begin by addressing the backlot owners' challenge to plaintiffs' appeal on mootness grounds. We do so because "[w]hether a case is moot is a threshold issue that a court addresses before it reaches the substantive issues of the case itself." *People v Richmond*, 486 Mich 29, 35; 782 NW2d 187 (2010). "As a general rule, an appellate court will not decide moot issues," *BP 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998), and exercise our discretion to review moot issues only if they "are of public significance and are likely to recur in the future and yet evade judicial review." *Morales v Mich Parole Bd*, 260 Mich App 29, 32; 676 NW2d 221 (2003).

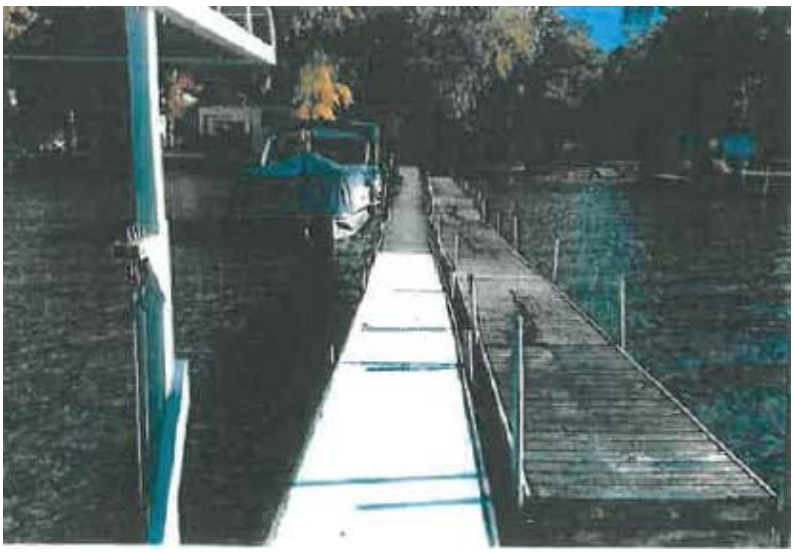
"An issue is deemed moot when an event occurs that renders it impossible for a reviewing court to grant relief." *BP 7*, 231 Mich App at 359. As posited by the backlot owners, such an event occurred in this case in relation to plaintiffs' attempt to determine the existence and scope of the easement. Specifically, the backlot owners discovered that the owners of the land burdened by the easement were the unknown heirs of long-deceased owners of record. The parties amended their pleadings to include the unknown heirs and devisees of Samuel and Rosalita Groomes as defendants. They served notice on these unknown heirs through posting and publication. Despite that several of the Groomes' descendants were well-aware of these proceedings, no one responded or filed an appearance as an heir and owner of the property. Accordingly, the circuit court entered a default judgment declaring that the backlot owners possessed an easement across the property and defining the scope of the easement based on the allegations made by the backlot owners that went unanswered by the Groomes' unknown heirs and devisees. The property rights of those interested in the parcel—the backlot owners and the owners of the underlying property—were legally declared and the circuit court could grant plaintiffs no different relief. The existence of the easement was decided against the owner of the burdened property; that cannot be destroyed by a neighbor.[1] Accordingly, it would be improper to reconsider on appeal whether the elements of a prescriptive easement were established.

However, this case is equitable in nature, *Mulcahy v Verhines*, 276 Mich App 693, 699; 742 NW2d 393 (2007), and it is unjust to allow the backlot owners to dictate the scope of the easement without any appellate objection, especially in light of the impact their use has on the neighboring lakefront lots. There is evidence of record from which the court could determine the scope of the easement acquired by the backlot owners. The parties presented the original easement passed from Samuel and Rosalita to Harry and Rosa for "foot passage" to the lake. Several Groomes descendants and current and past backlot owners were deposed and described the historic use of the 10-foot-wide right of way to construct a dock and moor and even rent out

[1] We do not read the 1933 easement from Samuel and Rosalita Groomes to Harry and Rosa Groomes as giving an interest in the burdened property to other lakefront property owners, such as plaintiffs. Those who own property along the shore have no need of a lake access easement. Rather, the document used inarticulate language to convey an easement to backlot owners for riparian rights such as those enjoyed by the lakefront property owners. And the default judgment did define the rights and duties of the parties with an interest in the subject parcel.

boats. And the parties presented pictures, including the following, to establish the current use of this land.





The scope and extent of an easement is a question of fact that must be considered and decided by the trial court in the first instance. *Morse v Colitti*, ___ Mich App ___; ___ NW2d ___ (Docket No. 328212, issued October 18, 2016), slip op at 6, citing *Henkle v Goldenson*, 263 Mich 140, 143; 248 NW 574 (1933). The question is very fact specific:

> As a general rule, one who has an easement by prescription has the privilege to do such acts as are necessary to make effective the enjoyment of the easement, unless the burden upon the servient tenement is thereby unreasonably increased. The question is largely a matter of what is reasonable under the circumstances. Since the scope of the dominant owner's privilege is so largely a function of the circumstances, opposite conclusions on varying sets of facts are to be expected. [*Mumrow v Riddle*, 67 Mich App 693, 699; 242 NW2d 489 (1976).]

Our review of the lower court's decision is for clear error. *Wiggins v City of Burton*, 291 Mich App 532, 550; 805 NW2d 517 (2011).[2]

Here, the court considered the evidence presented by all sides, including plaintiffs, at the July 23, 2015 summary disposition and default judgment hearing. The court made findings of fact on the record regarding the historic use of the easement and determined the scope based on the evidence. Obviously factfinding is not permitted at the summary disposition phase of a civil proceeding. However, this case was equitable in nature and required equitable remedies. Such cases must be heard and decided by the trial court, not a jury. See *Abner A Wolf, Inc v Walch*, 385 Mich 253, 258-261; 188 NW2d 544 (1971). Plaintiffs have pointed to no additional evidence they would have presented had this matter proceeded to a bench trial. Accordingly, we discern no prejudice from the circuit court proceeding in this manner.

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[2] A person "bears the burden to demonstrate entitlement to a prescriptive easement by clear and cogent evidence." *Matthews v Dep't of Natural Resources*, 288 Mich App 23, 37; 792 NW2d 40 (2010). This heightened standard does not apply to a determination of the easement's scope.

Moreover, the circuit court did not commit clear error. "A decision is clearly erroneous where, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Kitchen v Kitchen*, 465 Mich 654, 661-662; 641 NW2d 245 (2002). More than adequate evidence supported that the backlot owners had historically used the easement for "access to and from Whitmore Lake," "use of a dock," "swimming and recreation," "storage," and other riparian rights and activities attendant" to those uses. According to the witnesses who were deposed, this extensive use has been going on since at least 1950. Activity on the easement was less in some years, such as when the neighborhood population was mostly elderly, and in some seasons the dock did not make it into the water. But for the most part, the backlot residents used the easement to access the lake, installed and maintained a seasonal dock, swam and fished from the dock and shore, and stored items within the easement boundaries.

We are not unsympathetic to plaintiffs' plight. This easement is very small for such traffic. Apparently, plaintiffs abandoned their trespass claim below. In the future, if the backlot owners moor their boats across plaintiffs' property line or allow their litter to travel, plaintiffs could raise a trespass complaint. The pictures presented into evidence reveal storage uses that could attract pests. If that occurs, plaintiffs may have an action for nuisance. But plaintiffs cannot preclude the use of the easement by backlot residents whose interest is decades old.

We affirm.

/s/ Amy Ronayne Krause
/s/ Elizabeth L. Gleicher