

STATE OF MICHIGAN

IN THE 26TH JUDICIAL CIRCUIT COURT FOR THE COUNTY OF ALCONA

JOAN M. GLASS,

Plaintiff/Counter-Defendant,

CASE NO. 01-10713-CH(K)
HON JOHN F. KOWALSKI

-vs-

RICHARD A. GOECKEL and
KATHLEEN D. GOECKEL,

Defendants/Counter-Plaintiffs.

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A TRUE COPY
[Signature]
ALCONA COUNTY CLERK
FEB 05 2007

DEFENDANTS MOTION FOR SUMMARY DISPOSITION

NOW COME Richard A. Goeckel and Kathleen D. Goeckel, his wife, Defendants, Counter-Plaintiffs herein, hereinafter referred to as "Defendants" and hereby move this Honorable Court for the entry of Summary Judgment dismissing Count II and Count III of Plaintiffs First Amended Complaint. In support hereof, Defendants relate unto this Honorable Court as follows:

OVER VIEW

In 1967 Plaintiff purchased property across the highway from Lake Huron from Henry W. Prince and his wife who, at the time, owned the property on the lakeside of the highway too. The conveyance to plaintiff included ... "an easement for ingress and egress to Lake Huron over the North 15 feet..." of the lake front lot to which Defendants ultimately succeeded.

Thereafter on the 20th day of May, 1974, Mr. and Mrs. Prince sold the lake front property to Defendants predecessor in title, Agnes Kushmaul and her late husband, Donald on a land contract "...excepting and reserving unto sellers, their heirs and assigns, forever, an easement for ingress and egress to Lake Huron over the North 15 feet...." On September 22nd, 1987, the estate of Henry W. Prince, by Leonard Pollard Sr. and James H Cook, Co-Personal Representatives gave Agnes Kushmaul, as survivor of her deceased husband, a deed in satisfaction of the land contract which, again excepted and reserved the easement for ingress and egress to Lake Huron.

On the 2nd day of August 1997 Agnes Kushmaul sold Defendants, Richard and Kathleen Goeckel the North part of her lakeside property which included the 15-foot right of way for ingress and egress to Lake Huron.

During the 23 years Defendants predecessor in title, Mrs. Kushmaul, owned the property Plaintiff rarely used the easement. When she or her family did, it was in conformity with the grant of easement for access to Lake Huron. On one occasion when the Plaintiff attempted to use the easement beyond its strict terms as an easement to Lake Huron, Mrs. Kushmaul complained to her grantor, Mr. Prince, who on that occasion verified to Mrs. Kushmaul and the Plaintiff that the easement was strictly for access to Lake Huron.

Plaintiff now seeks to expand her rights in the use of the easement to include lounging and sun bathing on Defendants beach and walking long Defendants beach. However, the purpose of the easement is perfectly clear and unambiguous: to provide an easement for ingress and egress to Lake Huron and nothing more.

IN SUPPORT OF Defendants Motion for Summary Disposition your Defendants relate the following concerning Counts II and III of Plaintiffs complaint.

Motion for Summary Disposition as to County II of Plaintiffs First Amended Complaint

Prescriptive Easement

Your aforesaid Defendants move this Honorable Court for the entry of Summary Judgment dismissing Count II of Plaintiffs First Amended Complaint concerning a prescriptive easement which evidently supports the requested relief set forth in paragraph A and paragraph B of the requests for relief in Plaintiffs First Amended Complaint based upon MCR2.116 (C) (8) and (10) for the reason that as to the amount of damages, there is no genuine issue as to any material fact and your moving party is entitled to judgment or partial summary judgment as a matter of law.

In the relief requested by Plaintiff in paragraphs B and C of Plaintiffs First Amended Complaint, Plaintiff requests the Court to adjudge and decree that Plaintiff has a prescriptive

easement for the use of said easement "by the Plaintiff, her family and guests for beach activity including sunbathing and lounging".

By means of this allegation the Plaintiff acknowledges that the express language establishing the easement in her deed does not give her and her guests the right to engage in beach activities including sunbathing and lounging and therefore said right can only be established by prescription. This acknowledgement by the Plaintiff is consistent with well-established law. *Forge v Smith*, 458 Mich. 198, 580 NW2d 876 (1998) citing *Troff v Boeve* 354 Mich 593, 93 NW2d 311 (1958) noted that

...in order to create an express easement, there must be language in the writing manifesting a clear intent to create a servitude. Any ambiguities are resolved in favor of the use of the land free of easements.

The burden of proving the existence of an easement by prescription is upon the party claiming it. *Stewart v Hunt*, 303 Mich 161, 5 NW2d 737 (1942)

Prescriptive rights are acquired in the same general way as title to land by adverse possession *Dummer v United States Gypsum Co*, 153 Mich 622, 117 NW 317 (1908). The standard of proof applicable to claims for adverse possession is "clear and cogent evidence", not just proof by a preponderance of the evidence. *Walters v Snyder*, 225 Mich App 219, 570 NW2d 301 (1997). A person must show by clear and cogent proof, possession that is actual, visible, open, notorious, exclusive, hostile and under claim of right and continuous and uninterrupted for the statutory period of 15 years. E.g., *Burns v Foster*, 348 Mich 8, 81 NW2d 386 (1957).

Plaintiff must show by clear and cogent evidence that her use of the easement for lounging and sunbathing was exclusive and hostile to the possession of the owner. Possession of property of a character that is concurrent or mutual with that of the titleholder is never exclusive so as to support a claim of adverse possession. *Aalsburg v Cashion*, 384 Mich 236, 180 NW2d 792 (1970); *Hamilton v Weber*, 339 Mich 31, 62 NW2d 646 (1954).

The possession must also be continuous. There must be such continuity of possession "as [would] furnish a cause of action for every day during the whole period required to perfect title." *Doctor v Turner*, 251 Mich 175, 186 - 187, 231 NW 115, 119 (1930) (quoting 2 CJ *Adverse Possession* Sec.64 (1915)). In that case the court also said that "occasional trespasses or acts of ownership do not constitute such continuous possession as will ripen in to a title by adverse possession, although extending over the statutory period." 251 Mich at 187. 231 NW at 119. Also see *Ennis v Stanley* 346 Mich 296, 78 NW2d 114 (1956).

Plaintiff testified in her deposition held the 12th day of September, 2001, as follows:

Q. What does the deed provide for?

A. Ingress and egress.

Q. And aren't you in fact trying to do more than that, picnic on the beach, lounge on the beach?

A. Don't use the work picnic. I have a kitchen, I've never brought sandwiches, beer or pop to the beach. That to me is picnic. Laying on the beach is laying on the beach. When you come out of the water - - I never had my children in the water without my being there, ever, and I am not using it more and I'm not trying to do anything other than what I've been doing for 34 years without a problem.

Q. Which is what specifically, then? Not picnicking evidently, is that correct?

A. Not picnicking, no.

Q. Then what have you been doing?

A. Laying on the beach when I'm not in the water or lying there and reading. I take a swim, I get out of the water, I lay down, I read.

Q. And that's all you want to be able to do, is that correct?

A. Yes. What else is there to do?

Mr. BABCOCK: I have no further questions.

Based upon the foregoing, broadest use that Plaintiff asserts with respect to prescriptive rights exceeding the strict language of the easement providing for ingress and egress to Lake Huron is lying on the beach and reading in association with her ingress and egress to Lake Huron for swimming. It is respectfully submitted that that activity does not constitute such exclusive continuous hostile use as would ripen in to an easement by prescription.

Based upon the foregoing, your Defendants are entitled to partial summary judgment dismissing Count II of Plaintiffs Complaint, or at the very least, limiting Plaintiffs activities to lying on the beach as it is associated with her swimming activities.

Motion for Summary Disposition as to Count III of Plaintiffs First Amended Complaint

Interference with Plaintiffs Right to Navigate and Walk Along Lake Huron Shore

Your Defendants move for the entry of summary judgment dismissing Count III of Plaintiffs First Amended Complaint in pursuance of MCR2.116 (C) (8) and (9). In support hereof, it is respectfully represented unto this Honorable Court as follows:

Plaintiff asserts that she has the right to navigate and walk across those portions of the Defendants property along the shore of Lake Huron lying below and lakeward of the natural high water mark based upon "federal and state statutory and common law" and "local custom and

practice" too! She seeks relief from obstruction or interference by Plaintiff which evidently supports the request for the relief set forth in paragraph D and E of her First Amended Complaint.

Plaintiff's statements of the law as set forth in Count III of Plaintiffs First Amended Complaint are inaccurate. This subject is addressed completely by *Michigan Real Property Law, 2nd Edition* and leaves no doubt as to the status of law which the Plaintiff has erroneously characterized. In Section 3.5, *Water-Related Rights*, John G. Cameron, Jr., the author, relates, in substance, the following.

Under Michigan law, an owner of land bordering one of the Great Lakes owns title to the waterline of the lake as opposed to owning the bottomland of lakes. *Hall v Wantz*, 336 Mich 112, 57 NW2d 462 (1953); *Hilt v Weber*, 252 Mich 198, 233 NW159 (1930) (7-2 decision); *Nedtweg v Wallace*, 237 Mich 14, 211 NW 64 *aff'd on rehearing*, 237 Mich 14, 211 NW 647 (1927); *Ainsworth v Munoskong hunting and Fishing Club*, 159 Mich 61, 123 NW 802 (1909); *Lincoln v Davis* 53 Mich 375, 19 NW 103 (1884).

In response to an inquiry concerning the same issue of trespass and control over the shores of Lake Huron, the Michigan attorney general concluded in a well-reasoned opinion that

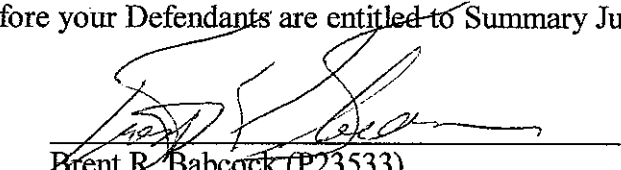
1. A riparian owner at all times owns the upland to the ordinary high-water mark and may exercise control thereto, by virtue of the rights stemming from the federal patent.
2. The ordinary high-water mark is set for all the Great Lakes by the Great Lakes Submerged Lands Act, and when the water recedes below the ordinary high-water mark, the riparian owner has control over the exposed area but may not place any permanent structures or do any dredging or filling on this land with out a permit from the DNR.
3. The public may not use the beach whether it extends to the ordinary high-water mark or to the low-water mark. The public, however, has the right of passage in any area adjacent to reparian land covered by water.

1977-1978 OAG No. 5,327, at 518 (July 6, 1978)

Although it is possible to acquire riparian rights in land bordering on *inland lakes* by adverse possession, in *Hanson v Way Estate*, 25 Mich. App 469, 181 NW2d 537 (1970), it was held that the State of Michigan cannot be divested of its ownership of the Great Lakes by such possession.

Based upon the foregoing, the Plaintiff cannot prevail on her assertions in her Count III since they have no basis in law and therefore your Defendants are entitled to Summary Judgment dismissing this count.

Date: 02-04-02


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