STATE OF MICHIGAN

COURT OF APPEALS

JOHN GUIDOBONO II REVOCABLE TRUST AGREEMENT, by its Trustee, JOHN GUIDOBONO, II, Plaintiff/Cross Defendant-Appellant,	UNPUBLISHED October 20, 2015
v	No. 322253 Livingston Circuit Court
SANDRA JONES, Defendant/Cross Plaintiff-Appellee.	LC No. 13-027511-CH

Before: M. J. KELLY, P.J., and MURRAY and SHAPIRO, JJ.

PER CURIAM.

This case involves a lakefront property dispute that has been addressed by this Court on two prior occasions.[1] Plaintiff John Guidobono II Revocable Trust Agreement, through its trustee, John Guidobono II, appeals by right the trial court's order granting defendant summary disposition. We affirm.

The record indicates that plaintiff's predecessor-in-interest executed a land contract in 1970, granting defendant "an easement across their property, in order to give purchaser right of access to and use of Woodland Lake." Plaintiff argues that the unambiguous granting language creates only ingress and egress rights to the lake, and therefore, defendant's current use as if defendant enjoys riparian rights is outside the scope of the easement.

As we previously recognized in one of the prior appeals,

[1] *John Guidobono, II, Revocable Trust Agreement v Sandra Jones*, unpublished per curiam opinion of the Court of Appeals, issued January 24, 2013 (Docket No. 308855); *Guidobono Revocable Trust Agreement v Jones*, unpublished per curiam opinion of the Court of Appeals, issued June 24, 2010 (Docket No. 290589), judgment vacated in part, lv den in part 488 Mich 989 (2010) (*Jones I*).

> [w]here the language of a legal instrument is plain and unambiguous, it is to be enforced as written and no further inquiry is permitted. If the text of the easement is ambiguous, extrinsic evidence may be considered by the trial court in order to determine the scope of the easement. [*Jones I*, unpub op at 2, quoting *Little v Kin*, 468 Mich 699, 700; 664 NW2d 749 (2003).]

Acknowledging established precedent, we noted that granting the right to access a lake does not create riparian rights and concluded that "the word 'use' in the easement did not create ambiguity." *Jones I*, unpub op at 2, citing *Delaney v Pond*, 350 Mich 685, 686-687; 86 NW2d 816 (1957) and *Dyball v Lennox*, 260 Mich App 698, 699-709; 680 NW2d 522 (2003).

The fact that the text of the easement is unambiguous does not, however, preclude the creation of a prescriptive easement. See *Taylor v Taylor*, 310 Mich 541, 545; 17 NW2d 745 (1945) (stating that if "there is an ambiguity, *or if the deeds fail to express the obvious intention of the parties*, the courts will try to arrive at the intention of the parties. . . .") (emphasis added). Indeed, a prescriptive easement is "based upon the legal fiction of a lost grant," *Tolksdorf v Griffith*, 464 Mich 1, 4 n 2; 626 NW2d 163 (2001), but its purpose remains to effectuate the intent of the parties, *Outhwaite v Foote*, 240 Mich 327, 331-332; 215 NW 331 (1927).

Generally, a prescriptive easement "arises from an open, notorious, continuous and adverse use across the land of another for a period of 15 years." *Cook v Grand River Hydroelectric Power Co, Inc*, 131 Mich App 821, 826; 346 NW2d 881 (1984); see also MCL 600.5801(4). Further, an "adverse" or "prescriptive use" may be established by either of the following:

> "(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." [*Plymouth Canton Cmty Crier, Inc v Prose*, 242 Mich App 676, 684; 619 NW2d 725 (2000), quoting the Restatement of Property, Servitudes, 3d, § 2.16 (emphasis added by *Prose* Court).]

Under the first prong, the "permissive use of property, regardless of the length of the use, will not result in an easement by prescription." *West Mich Dock & Market Corp v Lakeland Investments*, 210 Mich App 505, 511; 534 NW2d 212 (1995). Nevertheless, establishing an "intended but imperfect express easement" under the second prong is sufficient to meet the adverse-use element of a prescriptive easement. *Mulcahy v Verhines*, 276 Mich App 693, 702; 742 NW2d 393 (2007), citing *Prose*, 242 Mich App at 684-687.

In this case, the issue is whether defendant's use of the property stems from the "terms of an intended but imperfectly created servitude." *Prose*, 242 Mich App at 684 (citation and internal quotation marks omitted). Because all parties agree that there is a valid written easement, plaintiff argues that this type of prescriptive easement, i.e., an "imperfect servitude," cannot be created without expanding the express terms of the easement.

However, in *Prose* "[t]he area in question was subject to an express easement agreement, but [the] defendants asserted that the express easement did not include [the] plaintiffs' loading or unloading activities." *Id.* at 678. Notwithstanding the existence of a valid written easement, *Prose* considered "additional evidence showing that loading and unloading was performed within the easement area pursuant to the mistaken belief that the 1971 express easement permitted such activity." *Id*. at 684. In short, *Prose* held that the "imperfectly executed easement did not fully articulate the parties' intent," and because the evidence showed that the use of the land in question "occurred under the mistaken belief that the express easement permitted this activity," an imperfect servitude had been created. *Id*. at 686-687.

Based on *Prose*, the trial court did not err in concluding that defendant possessed a prescriptive easement validating defendant's use of the property. Indeed, plaintiff does not argue that there is a question of fact regarding whether defendant exceeded the scope of the easement. Rather, the issue raised on appeal relates to whether the trial court erred by not limiting the scope of the easement to ingress and egress rights based only on the text of the easement, to which we have answered that it did not. There is no reason to doubt the trial court's finding that defendant "has continuously since the 1970s used the easement to erect and maintain a dock, park vehicles and trailers, anchor/moor boats, use vehicles over the easement to access easement and to allow social guests to do the same." This is the same conclusion made by the trial court relative to the other family that used the same dock under the exact same easement language, a result which was upheld by both this Court and the Supreme Court. See *supra*, n 1 and *Guidobono v Jones*, 488 Mich 989 (2010). Accordingly, summary disposition was properly granted in favor of defendant.

Affirmed.

/s/ Michael J. Kelly
/s/ Christopher M. Murray
/s/ Douglas B. Shapiro