REAL EVIDE

Special rules for real esta

By Lawrence R. Shoffner

There is an old English saying: He that has lands has quarrels.[1]

Disagreements over the ownership and use of land are common and sometimes bitter. Special procedures and forms of action have been created to deal with these disagreements.[2] Special evidence rules also have been created to address their unique problems, such as the fact that land outlasts witnesses. This article will examine some of the evidence rules designed to address these unique problems, as well as some general rules of particular importance to such disputes. The rules fall into three categories: hearsay exceptions, lay opinion regarding value, and presumptions.

Hearsay Exceptions

There are four hearsay exceptions of particular value to real estate disputes. They include exceptions for (1) statements in documents establishing or affecting an interest in property, (2) the contents of recorded documents establishing or affecting an interest in property, (3) reputation in the community regarding boundaries, and (4) statements in government reports concerning a landlord's failure to comply with an ordinance or statute. Together these four exceptions allow the admission of a wide range of evidence relating to real estate disputes.

Statements in documents establishing or affecting an interest in property

MRE 803(15) and FRE 803(15) establish a hearsay exception for statements contained in documents purporting to establish or affect an interest in property. This is an important and often overlooked rule. Once an appropriate foundation is established, this exception provides unique opportunities for both the preservation and presentation of evidence.

The rule itself establishes three foundational requirements. First, the document that contains the statements must purport to establish or affect an interest in property. Common examples that establish an interest are mortgages, deeds, and leases. Documents that affect an interest include closing statements, escrow instructions, the notations of transfer tax authorities, and even handwritten insurance inventories.[3] Together, those that establish or affect interest in property cover most, if not all, of the documents found in a traditional closing book, and many more. Second, the statements must be relevant to the purpose of the document.[4] Third, dealings with the property since the statements were made must be consistent with the statements.

In addition to these requirements, the Michigan Court of Appeals has imposed a reliability requirement on statements found in unrecorded documents.[5] Although 803(15) is not limited to recorded documents, statements in unrecorded documents may be excluded if the court feels they are unreliable, even though they may technically fall with the language of the rule. Statements in recorded documents meet this criterion because the circumstantial guaranties of reliability are generally provided by statute.[6]

Once a foundation is established, 803(15) can be used in a variety of ways. One option is using 803(15) to offer statements contained in documents made or obtained during due diligence, particularly where the information was related to a closing condition. Also, the amount of unpaid rent can be established in an eviction proceeding through the statements contained in the notice to quit. A creative way to preserve and present evidence is through the use of factual recitals. Recitals can be used to evidence a variety of facts, including the legal status of persons involved in the transaction, powers of attorney, the existence or resolution of a dispute, or anything else germane to the document.[7] Moreover, because of the importance of documentation in real estate transactions, factual recitals are considered strong evidence of the matters asserted.[8]

Remarkably, the opportunities created by 803(15) extend to witness affidavits. Although hearsay objections typically prevent the presentation of testimony by affidavit, this rule is modified in the real estate context. MCL 565.451a allows the recording of affidavits concerning a broad range of facts affecting interests in property. This statute can be a powerful tool when combined with 803(15). The following information can be incorporated into an affidavit and filed with the register of deeds:

- Knowledge regarding birth, age, sex, marital status, death, name, residence, identity, capacity, relationship, family history, heirship, homestead status, and service in the armed forces of parties named in deeds, wills, mortgages, and other instruments affecting real property
- Knowledge of the happening of any condition or event that may terminate an estate or interest in real property

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- Knowledge of registered surveyors with respect to the existence and location of monuments and physical boundaries, such as fences, streams, roads, and rights of way of real property, or reconciling conflicting and ambiguous descriptions in conveyances with descriptions in a regular chain of title
- Knowledge of facts incident to possession, or the actual, open, notorious, and adverse possession of real property
- Knowledge of the purchaser as to the terms and conditions upon which real property is to be held or disposed

Once this information is incorporated into the affidavit of a person competent to testify about such facts in open court and is filed with the register of deeds, the statements in the document fall within 803(15). These affidavits can be used to establish a prima facie case, present corroborative or noncontroversial evidence, or even to carry the burden of persuasion, all in a very cost-effective way. In summary, 803(15) provides a broad exception to the rule against hearsay for statements in documents establishing or affecting an interest in property. Recitals and affidavits can be of particular importance when a witness becomes unavailable before trial or when his or her attendance is simply cost-prohibitive.

Recorded documents affecting an interest in property

The certified copy of a recorded document can be used to prove the recorded document's contents, its execution, and its delivery. The hearsay exception established in MRE 803(14) and FRE 803(14) provides an important mechanism for the admission of evidence concerning recorded documents. It provides the technical link between the contents of the document that is physically located in the register of deeds's office and the evidence that is being offered to the court. Without this exception "the recording process would be reduced to a nullity."[9]

Reputation concerning boundaries

Property boundaries can be established through use of evidence concerning reputation within the community. The growing importance of the doctrine of acquiescence in boundary line disputes has enhanced the value of this type of evidence. MRE 803(20) and FRE 803 (20) provide a hearsay exception for evidence of the reputation in a community, arising before the controversy, on the boundaries of land within that community.

This exception does not, however, extend to all statements regarding boundaries. Rather, the party offering the testimony must show that it reflects the property's longstanding reputation or that the matter was of general interest to all members of the community.[10] Unlike MRE 405 and MRE 608, which have been modified to allow opinion evidence, MRE 803(20) and FRE 803(2) both require reputation testimony. This rule can be used in conjunction with 803(15) and MCL 565.451a to establish or preserve reputation evidence by affidavit.

Government reports concerning violations

A tenant can prove the landlord's violation of an ordinance or statute by offering the written report of a relevant government employee. In the appropriate circumstances, relevant employees could include building and health inspectors, policemen, and social workers. This hearsay exception is not found in the Michigan Rules of Evidence, but rather in the District Court Rule designed to effectuate eviction actions under Michigan's Summary Proceedings Statute. Unlike the general exceptions found in the MRE and FRE, this exception is designed solely to help tenants.

MCR 4.201(J)(3) provides that if the tenant claims that the landlord has failed to comply with an ordinance or statute, the court may admit an authenticated copy of any relevant government employee's report filed with a government agency. Objections to the report affect the weight given to it, not its admissibility. This District Court Rule extends beyond MRE 803(8), which provides a general exception for the admission of public records. Unlike MRE 803(8), this rule does not require the tenant to demonstrate that the matters were observed as a result of a duty imposed by law or that there was a duty to report. If a relevant government employee saw it and reported it, it's admissible.

Lay Opinion of Value

Michigan courts have given tenants and property owners broad latitude when it comes to testifying about the value of their real estate under MRE 701.[11] The importance of this testimony can be critical. Damage to real property is typically measured by the decrease in value caused by the breach. Without evidence of value, the plaintiff cannot establish a prima facie case. Although evidence of value should usually be presented through the testimony of a qualified real estate appraiser under MRE 702, these cases acknowledge two facts. First, that "alleged experts have no particular monopoly on knowledge" when it comes to the value of land.[12] Second, many litigants simply can not afford an expert witness and should not be precluded from establishing a prima facie case because of it.

This is not to say that admission is automatic. A minimal foundation is still required, though liberally met. The opinion of the Michigan Court of Appeals in *Grand Rapids v HB Terryberry Co* provides excellent guidance.[13] As the court explained, to render an opinion regarding value, the witness must establish familiarity with the property and any other comparable property used for the purpose of valuation. Once qualified, the witness may testify about value and the

method used to arrive at it. Any explanation of methodology or data goes to weight rather than admissibility. The admissibility of lay opinion testimony does not mean, obviously, that the witness will always carry the burden of persuasion. The opposing party still has the full range of cross-examination to expose errors in reasoning or to discredit an unrealistic opinion. In almost every case, the testimony of a disinterested appraiser skilled as an expert witness is preferable. Where the cost is prohibitive, however, lay opinion provides a basis to get the case before the finder of fact.

Presumptions

Evidentiary presumptions can play an important role in real property disputes. Generally, the plaintiff is required to carry both the burden of production and the burden of persuasion. There are instances, however, where the law alters this rule. Although there are many presumptions affecting real estate disputes,[14] this article will focus on two involving possession and use.

The presumption of prescriptive use

Where one party has used the property of another for a long period, the law will presume adversity, whether actual adversity can be established or not.[15] This presumption helps to establish a key element (hostile or adverse use) in claims of adverse possession or prescriptive easement. It is particularly valuable where all the potential witnesses have died, moved away, or simply don't want to get involved (which often leads to a state resembling amnesia).

The general rule for presumptions is set forth in MRE 301. Typically, a presumption imposes upon the party against whom it is directed the burden of going forward with evidence to rebut the presumption, but does not shift the burden of proof in the sense of the risk of nonpersuasion. The presumption of prescriptive use follows this general rule. Although it does not shift the burden of persuasion, it is still very useful. If the property owner against whom the prescriptive right is asserted fails to produce evidence that the use was permissive, the use will be deemed adverse. Moreover, even where the presumption is rebutted, an inference of adversity remains.[16]

The presumption of retaliation

The summary proceedings statute establishes a set of evidentiary presumptions relating to retaliatory eviction.[17] The statute prohibits the eviction of a tenant when the landlord is retaliating because the tenant has tried to secure or enforce certain rights.[18] These presumptions fall outside the general rule set forth in MRE 301 and actually shift the burden of persuasion, rather than solely the burden of production.

The statute sets forth a detailed list of protected actions, such as filing a complaint with the local building inspector. If the tenant establishes (a) that it undertook the protected action within 90 days of the commencement of the eviction proceeding and (b) that the action has not been rejected, dismissed, or otherwise resolved against the tenant, then a presumption arises that the termination was retaliatory.

Once the presumption is established, the landlord must prove by a preponderance of the evidence that the termination was not undertaken in retaliation. But, if the tenant undertook the protected action more than 90 days before the eviction was commenced or the action was resolved adversely to the tenant, a presumption arises against the defense. In such cases the tenant has the burden to establish its defense by a preponderance of the evidence.

These evidentiary presumptions can significantly affect eviction proceedings. They make it possible for the tenant to establish its defense at relatively little cost. Once the tenant presents evidence that it has taken the protected action within the applicable period, the burdens of production and persuasion shift to the landlord, and an evidentiary inference arises as well. This can be a difficult obstacle for the landlord to overcome, particularly when the tenant has also filed a jury demand.

Conclusion

The foregoing rules of evidence can have a significant impact on litigation. Familiarity with them can save time and money, and preserve critical evidence from the ravages of time. Although he that has lands has quarrels, he that has evidence wins them. ✦

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Footnotes

1. *Webster's Quotationary,* at 703 (Random House, 1st Ed, 1998).
2. See, e.g., MCL 600.2918 (wrongful ejectment); MCL 600.2919 (damage to land); MCL 600.2932 (actions to determine interests in land); MCL 600.5704 (eviction and forfeiture proceedings); and MCL 600.8302 (equitable jurisdiction in summary proceedings).
3. *US v Weinstock,* 863 F Supp 1529 (D Utah 1994).
4. *People v Burton,* 177 Mich App 358 (1989).
5. *Botsford Hosp v Citizens Ins,* 195 Mich App 127 (1992).
6. MCL 600.2907a; MCL 565.451b ("Any person who knowingly makes any false statement in an affidavit is guilty of perjury.")
7. See, *Botsford Hosp,* supra.
8. *Compton v Davies Oil Co,* 607 F Supp 1221 (D Wyo, 1985).
9. Advisory Committee's Note to FRE 803(14).
10. *Kent City Road Comm'n v Hunting,* 170 Mich App 222 (1988); *Ute Indian Tribe v State of Utah,* 521 F Supp 1072 (D Utah 1981), rev'd in part on other grounds, 716 F2d 1298 (CA 10, 1983) ("reputation in a *non-Indian* community as to *Indian* boundaries, rights, etc., is indeed a treacherous ground for decision").
11. *Lee v Lee,* 191 Mich App 73 (1991); *Michigan Mutual Ins Co v CNA Ins Cos,* 181 Mich App 376 (1989); *Central Ind Park Project,* 142 Mich App 675 (1985); *Grand Rapids v HB Terryberry Co,* 122 Mich App 750 (1983); *In re Brewster Street Housing Site,* 291 Mich 313 (1939).
12. *Grand Rapids,* supra, 755.
13. Id., 755–757.
14. See, e.g., *Nelson Drainage Dist v Filippis,* 174 Mich App 400 (1989) (presumption of necessity in condemnation action); *Weiler v Heuple,* 4 Mich App 654 (1966) (presumption that tenant in possession respects and recognizes rights of his cotenants); *Estate of Kappler,* 418 Mich 237 (1983) (presumption in favor of tenancies in common).
15. *Widmayer v Leonard,* 422 Mich 280 (1985); *Haab v Moorman,* 332 Mich 126 (1952); *Beechler v Byerly,* 302 Mich 79 (1942); *Berkey & Gay Furniture Co v Valley City Milling Co,* 194 Mich 234 (1916).
16. *Widmayer,* supra.
17. MCL 600.5720(2).
18. MCL 600.5720(1).