

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

ROBERT S. MOSKALIK, JUDY K. MOSKALIK,  
and DOLORES ROYER,

Plaintiffs-Appellees,

v

CRAIG W. F. HILSINGER,

Defendant,

and

ELLIOTT HILSINGER,

Defendant-Appellant.

---

UNPUBLISHED  
June 21, 2005

No. 251388  
Branch Circuit Court  
LC No. 00-000136-CH

DARLA SMITH, MICHAEL STAHL, MANDY  
STAHL, GLENN S. SHELBURNE, and SHERRY  
SHELBURNE,

Plaintiffs-Appellees,

v

CRAIG W. F. HILSINGER,

Defendant,

and

ELLIOTT HILSINGER,

Defendant-Appellant.

---

No. 251389  
Branch Circuit Court  
LC No. 00-003207-CH

Before: Hoekstra, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

In these consolidated cases, defendant Elliot Hilsinger appeals as of right from the trial court's orders enforcing a 1957 consent judgment against defendant's predecessors in interest and declaring that plaintiffs hold private prescriptive easements over a strip of land adjacent to defendant's lakefront cottage.<sup>1</sup> We reverse and remand.

## I. Facts

This matter arises from defendant's attempt to block public access to a strip of land on the north side of his cottage fronting Coldwater Lake, which his neighbors and members of the general public had long used for lake access and general recreation. Defendant's predecessors in interest had earlier attempted to reserve a portion of this lake access to themselves, which prompted the Township of Ovid to file suit in 1956. In that action, the township maintained that the disputed parcel was once a road end serving as a public access to the waters of Coldwater Lake. Defendant's predecessors denied that any such road ran to the lake since their having acquired the property, or that the strip in question had been maintained as a public access at any time during the previous forty years. Defendant's predecessors further asserted that they had maintained the grounds of the disputed parcel and "claim[ed] ownership to the Section line." That litigation ended in 1957 with a consent judgment, under which defendant's predecessors agreed to move an offending fence and to refrain from otherwise interfering with the right of the "public" to use the "highway" north of their property.

Defendant acquired title to the property in 1981 and in 1999 moved a fence, which had until that time separated the undisputed portion of defendant's property and the disputed strip, to what he regarded as the true northern border of his property. In doing so, defendant enclosed almost the entire lake access strip. Plaintiffs subsequently brought these actions, asserting prescriptive easement rights over the disputed strip, as well as standing to enforce the 1957 consent decree.

Following a bench trial, the court decreed that plaintiffs had established private prescriptive easements over the disputed strip, bringing full riparian rights. The court further held that the 1957 consent judgment controlled the instant actions through the doctrine of res judicata, and that the Smith, Stahl, and Shelburne plaintiffs had standing to enforce that judgment "as residents of Ovid Township, . . . and as parties affected by acts of the Defendants."<sup>2</sup> After also declaring that this was not an action to quiet title, the court permanently enjoined defendant from obstructing plaintiffs' use of the disputed strip for access to the lake or any other riparian purpose.

---

<sup>1</sup> Because defendant Craig Hilsinger had earlier conveyed his interest in the subject property, including his potential interest in the disputed strip, to defendant Elliott Hilsinger, the former was dismissed as a party. Defendant Elliott Hilsinger is thus the only defendant involved in this appeal. Accordingly, unqualified references to "defendant" in this opinion will refer to Elliott Hilsinger exclusively.

<sup>2</sup> The court impliedly extended this reasoning to the remaining plaintiffs, having decreed in connection with them that defendant was bound by the 1957 order.

On appeal, defendant argues that the trial court erred in concluding that the 1957 judgment governs the instant actions through the doctrine of res judicata, and in declaring that plaintiffs have acquired private easement rights in the disputed parcel.

## II. Res Judicata and Standing

This Court reviews a trial court's application of res judicata de novo, as a question of law. *Wayne Co v Detroit*, 233 Mich App 275, 277; 590 NW2d 619 (1998). Whether a party has standing to bring an action likewise involves a question of law reviewed de novo on appeal. *In re KH*, 469 Mich 621, 627-628; 677 NW2d 800 (2004). However, a trial court's factual findings with respect to these legal questions are reviewed for clear error. See *LaFond v Rumler*, 226 Mich App 447, 450; 574 NW2d 40 (1997).

“Under the doctrine of res judicata, ‘a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action.’” *Wayne Co, supra*, quoting Black's Law Dictionary (6th ed, 1990), p 1305. “The doctrine operates where the earlier and subsequent actions involve the same parties or their privies, the matters of dispute could or should have been resolved in the earlier adjudication, and the earlier controversy was decided on its merits.” *Wayne Co, supra*.

Defendant argues that the trial court erred in finding identity of parties and issues, and in recognizing plaintiffs' standing to sue for enforcement of the 1957 consent decree. We agree.

### A. Identity of Parties

Privity is defined as “mutual or successive relationships to the same right of property, or such an identification of interest of one person with another as to represent the same legal right.” Black's Law Dictionary, *supra* at 1199. Accordingly, “the executor is in privity with the testator, the heir with the ancestor, the assignee with the assignor, the donee with the donor, and the lessee with the lessor.” *Id.*, citing *Litchfield v Crane*, 123 US 549; 8 S Ct 210; 31 L Ed 199 (1887). Not included in this list is constituent and politician, or member of the general public and governmental entity. Privity demands a closer relationship than obtains between a governmental entity and the general public. See, e.g., *Harrison v Director of Dep't of Corrections*, 194 Mich App 446, 458-459; 487 NW2d 799 (1992).

“In connection with the doctrine of res judicata,” a person has privity “who, after the commencement of the action, has acquired an interest in the subject matter affected by the judgment through or under one of the parties, as by inheritance, succession, purchase or assignment.” Black's Law Dictionary, *supra* at 1200. In this case, Ovid Township in 1956 asserted general rights on behalf of anyone who might desire access to Coldwater Lake. The instant plaintiffs, then, did not acquire their interests in enforcement of the 1957 consent decree through any acquisition of property rights, but instead simply join the rest of humanity as beneficiaries of the township's advocacy in the late 1950s. Consequently, the trial court erred in regarding plaintiffs as parties in privity with Ovid Township for purposes of declaring that plaintiffs were entitled to enforce the 1957 consent decree through the doctrine of res judicata.

### B. Identity of Issues

The trial court also erred in regarding the earlier and present cases as having identical issues for purposes of declaring that the 1957 consent decree governed the present case through the doctrine of res judicata. Indeed, where evidence that establishes the existence of rights to a road contiguous to a lake is not the same as that which determines the existence of riparian rights, an earlier adjudication concerning the former is not res judicata in connection with a subsequent action to determine the latter. *Sheridan Drive Ass'n v Woodlawn Backproperty Owners Ass'n*, 29 Mich App 64, 68-69; 185 NW2d 107 (1970). In this case, although there is considerable overlapping in the subject matter of the former and present cases, there are significant differences. The 1957 judgment arguably enjoins defendant (as a privy of his predecessors' interest in the land) from "interfering with the right of the public to use the highway lying North of the Defendants' property . . . , for ingress or egress to Coldwater Lake." However, there is no mention of general riparian rights, which are broader than the mere right to ingress and egress and which the trial court included for plaintiffs in the instant case. See, e.g., *Dyball v Lennox*, 260 Mich App 98; 680 NW2d 522 (2004).

Moreover, the general public cannot acquire prescriptive rights to private property for recreational purposes. *Comstock v Wheelock*, 63 Mich App 195, 199; 234 NW2d 448 (1975). "[E]stablishment of public recreation rights by prescription requires at a minimum governmental action to facilitate and control recreational use." *Kempf v Ellixson*, 69 Mich App 339, 343-344; 244 NW2d 476 (1976). Defendant testified that he never saw the pertinent township or road commission exercise any dominion or control over the disputed parcel. The Ovid Township supervisor similarly testified that, in response to plaintiff Smith's complaint about a deteriorating seawall on the disputed parcel, she informed Smith that the parcel "never was noted as Ovid Township Access," and thus that it was not the township's responsibility to repair the seawall.

The evidence concerning the existence of public rights in the disputed strip in 1957 says nothing about whether the municipality later abandoned such rights, either by extinguishing a public easement through the discontinuation of activities that establish and maintain such a thing, or by abandoning a public road to which the public had access rights only because it was public property or located on land subject to a public easement.

Because resolution of these questions was neither necessary nor possible in the earlier action, the trial court erred in regarding the earlier and present cases as having identical issues for purposes of declaring that the 1957 consent decree governed the present case through the doctrine of res judicata.

### C. Standing

"[P]ublic rights actions must be brought by public officials vested with such responsibility." *Gyarmati v Bielfield*, 245 Mich App 602, 605; 629 NW2d 93 (2001), quoting *Comstock, supra* at 202. In this case, the plaintiffs who testified conceded that they regarded the disputed parcel as a public access, and that they asserted no greater rights than those of the general public. Because private parties asserting public rights are asserting no greater rights than those of the general public, such private parties lack standing to assert such rights. *Comstock, supra* at 203. Rather, because public rights actions must be brought by public officials, it is such officials, and not their constituents, who have the prerogative to maintain or abandon, intentionally or otherwise, public rights in a lake access. Accordingly, the trial court erred in recognizing the standing of plaintiffs to assert rights in connection with the 1957 consent decree.

### III. Private Prescriptive Easements

Defendant argues that the trial court erred in finding the existence of several private easements without determining the owner of the servient estate, and that the evidence did not support the conclusion that certain plaintiffs satisfied the elements for continuous usage. We agree that the court erred in failing to determine the owner of the fee in question, and in concluding that the evidence showed that the Shelburne and Stahl plaintiffs satisfied the continuous-usage element necessary for establishment of a private prescriptive easement.

“[E]quitable issues are reviewed de novo, although the findings of fact supporting the decision are reviewed for clear error. However, the granting of injunctive relief is within the sound discretion of the trial court . . . .” *Cipri v Bellingham Frozen Foods, Inc*, 235 Mich App 1, 9; 596 NW2d 620 (1999) (internal quotation marks and citations omitted).

#### A. Owner of the Fee

“An easement is a right to use the land *of another* for a specific purpose.” *Killips v Mannisto*, 244 Mich App 256, 258-259; 624 NW2d 224 (2001) (emphasis added). It therefore follows that a judicial action proclaiming the existence of an easement must include a determination, or acknowledgement if the matter is not in dispute, of the owner of the land subject to the easement. Here, however, both the 1957 consent judgment and the opinions below are vague with respect to ownership of the disputed strip. None unequivocally declares the location of the northern boundary of defendant’s property. Again, before arriving at the 1957 consent decree, the Township of Ovid maintained that the disputed strip was a continuation of a public highway to the lake’s edge, which defendant’s predecessors in interest disputed. The earlier judgment seems to presuppose the township’s view, describing the disputed parcel as “the highway lying North of the Defendants[’] property.” But regarding the land as a highway does not resolve the question of ownership. “Unless a contrary intent appears, owners of land abutting a street are presumed to own the fee in the street to the center, subject to the easement.” *Thies v Howland*, 424 Mich 282, 291; 380 NW2d 463 (1985); see also *Eyde Bros Development Co v Eaton Co Drain Comm’r*, 427 Mich 271, 282; 398 NW2d 297 (1986). Even recognizing the disputed parcel as a highway, then, leaves open the question whether the land is or was fully owned by the township or other governmental entity, or whether it existed as an easement over land owned by defendant’s predecessors, with reversionary interests then retained by defendant.

In the instant case, defendant introduced a deed reflecting a 1958 transaction according to which defendant’s predecessors in interest acquired title to “[a]ll interest in and to all land lying . . . north” of a certain line, thus apparently covering the disputed strip. However, there was no evidence to indicate that the conveyors were indeed the true owners of the disputed strip. Moreover, because the deed purports to cover all land north of a line, specifying no northern boundary, it appears to prove too much—as if the conveyance extended defendant’s northern boundary indefinitely. The trial court, in its statements from the bench, observed the lack of substantiation in the title of the putative conveyor of the 1958 deed in the course of concluding that “[t]he Defendants . . . have no greater authority . . . than the Plaintiffs to assert ownership” of the disputed strip.

However, the written opinions below do not plainly state that defendant was never the owner of the disputed parcel. They provide that defendant may erect a fence, but “in the same

location of the prior fence, which was previously *perceived* as the North boundary of Defendants Hilsingers' property" (emphasis added), thus leaving unanswered the question of defendant's actual northern boundary. The orders further reiterate that "Defendants have no greater authority than Plaintiffs to assert ownership over the above-described easement property," which implies that defendant is not the owner at all, but merely has rights as a member of the general public, or joins plaintiffs in having prescriptive easement rights. Had the court intended to recognize defendant as owner of the disputed strip, subject to plaintiffs' easements, then it would have recognized some rights on defendant's part superior to those of plaintiffs, such as the right to reversion in connection with any future abandonment by the township of public rights, or by plaintiffs of their easements. The court's statements, then, taken as a whole, indicate that the court found that defendant owned no part of the fee in controversy.

The trial court thus declared the existence of private easements for plaintiffs without identifying against whom those easements exist, finding that defendant was not the owner of the disputed parcel while showing no resultant concern for the true owner's lack of participation in the case. "[P]ersons having such interests in the subject matter of an action that their presence in the action is essential to permit the court to render complete relief must be made parties and aligned as plaintiffs or defendants in accordance with their respective interests." MCR 2.205(A). In this case, to decide the question of a public access, pursuant either to general public ownership and dedication of a roadway, or a public easement, it was necessary to join Ovid Township as a party, to determine at least whether it had maintained or abandoned any such public access since establishing it in the 1957 consent decree. To decide the question of private easement, ownership of the disputed parcel should have been unambiguously determined, whether in defendant, some other private party, or Ovid Township or other governmental unit.

As things stand, the judgments below are invalid for declaring the existence of private easements while failing to identify the owner of the servient estate and declaring that the only participant in the case who did claim ownership was not the owner. In other words, the trial court erred in declining to treat this case as an action to quiet title, where title to the disputed parcel needed to be ascertained in order to determine the rights and responsibilities of the parties.

#### B. Hostile and Continuous Usage

"An easement by prescription arises from a use of the servient estate that is open, notorious, adverse, and continuous for a period of fifteen years." *Killips, supra* at 258-259. The analysis for establishing a prescriptive easement differs from that for establishing adverse possession mainly in that the former does not require exclusivity while the latter does. *West Michigan Dock & Market Corp v Lakeland Investments*, 210 Mich App 505, 511; 534 NW2d 212 (1995).

In this case, the lack of a determination of the true owner of the disputed strip renders it technically impossible to adjudge whether any uses of that strip were hostile for the prescribed period. In particular, if the fee is in fact owned by a governmental unit that dedicated the fee to public use, and has since demonstrated no contrary intention, then general recreational uses of the land are not hostile to the interests of the owner. However, should the determination of defendant's northern boundary on remand show that boundary to encompass any part of the disputed parcel, the recreational uses to which plaintiffs have put the land may indeed prove the

element of hostility and continuous usage. In light of that possibility, we will consider the evidence of plaintiffs' usage histories as they relate to such possible interest on defendant's part.

### 1. Hostile Usage

"Hostile," for purposes of acquiring prescriptive rights, refers only to non-permissive use of the land that is inconsistent with the rights of the owner, such as would "entitle the owner to a cause of action against the intruder." *Mumrow v Riddle*, 67 Mich App 693, 698; 242 NW2d 489 (1976), citing 25 Am Jur 2d, Easements and Licenses, § 51, pp 460-461.

Defendant testified that his neighbors used the disputed strip with his permission, granted in the interests of community goodwill. However, no plaintiff testified to having ever sought or received permission, while there was abundant testimony to the contrary. Because the trial court was not obliged to believe defendant's protestations of having granted permission, and there is no dispute that there has been widespread public use of the disputed strip, the trial court had a sound basis for regarding the public presence on the disputed strip as hostile to defendant's claim of ownership.

In reaching this conclusion, we reject defendant's assertion that because plaintiffs asserted that they used the strip with the understanding—mistaken in defendant's view—that it was a public access maintained by the municipality, their activities on the land could not have been hostile. Although a party who intends to exercise dominion only to the actual property line but fails to do so cannot establish adverse possession beyond that intention, a party intending to hold to a specific, recognizable boundary can establish adverse possession consistent with that intention. *Gorte v Dep't of Transportation*, 202 Mich App 161, 170; 507 NW2d 797 (1993). In other words, an adverse possession claim is not defeated by a claimant's mistaken belief that he or she was respecting a specific line believed to constitute the actual boundary. See *Connelly v Buckingham*, 136 Mich App 462, 470; 357 NW2d 70 (1984).

In this case, assuming for present purposes that the land belonged to defendant but that plaintiffs used it under the mistaken impression that it was a municipally provided public access, the evidence is nonetheless uncontroverted that the fence that had long separated defendant's residential area from the disputed strip was regarded as the boundary of a public right-of-way. Because plaintiffs used the land while respecting what was understood to be a specific boundary, their usage was hostile for purposes of establishing prescriptive rights, any mistaken understanding that it was a public lake access notwithstanding.

### 2. Continuous Usage

Defendant concedes that the Moskalik plaintiffs "arguably have established this element," and that plaintiff Royer "[l]ikewise . . . arguably met this burden of proof" on this element. These admissions, coupled with defendant's failure to point to any evidence or authority in assertion of contrary conclusions, constitute abandonment of any challenges to the trial court's conclusion that those plaintiffs satisfied the continuous-usage requirement for a prescriptive easement. See *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998). However, concerning plaintiff Smith, defendant correctly points out that she owned her nearby parcel for only ten years before defendant blocked her access to the disputed strip with a fence in

1999, and that she thus must rely on her predecessor in interest to establish the requisite fifteen years of hostile land usage.

“A party may ‘tack’ on the possessory periods of predecessors in interest to achieve this fifteen-year period by showing privity of estate.” *Killips, supra* at 259. “This privity may be shown in one of two ways, by (1) including a description of the disputed acreage in the deed, or (2) an actual transfer or conveyance of possession of the disputed acreage by parol statements made at the time of conveyance.” *Id.* (citations omitted).

In this case, there is no evidence that any document of conveyance, for Smith or any other plaintiff, included a description of easement rights to the disputed parcel. However, Smith’s predecessors in interest provided testimony indicating that the occupants of Smith’s land had freely used the disputed area for decades and that they had indeed mentioned rights to the lake access as one of Smith’s inducements to buy. This evidence afforded the trial court a sound basis for concluding that Smith, through tacking in connection with her predecessors in interest, satisfied the continuous-use element for a prescriptive easement.

However, the Stahls and the Shelburnes offered no testimony at all. That they had lived in the area for over fifteen years is not at issue, and while it may be logical to presume that they, along with the rest of the general public wishing access to Coldwater Lake, would have used the disputed strip, no such mere presumption is sufficient to establish private easement rights.

One witness, when asked about the Shelburnes’ use of the disputed parcel, replied that “they still have their trailer there and their addition. And they come down a few times during the summer and use that. They go out there swimming and fishing and things.” This falls short of providing an evidentiary basis for establishing that the Shelburnes had earned private prescriptive rights through fifteen years of usage hostile to the interests of defendant. For these reasons, the trial court erred in declaring that the Shelburnes had such rights.

The record likewise fails to disclose any significant description of the Stahls’ usage of the disputed strip. But aside from this evidentiary deficiency, indications from the Stahls’ attorney suggest that they lacked standing to claim a private easement at all.

Counsel reported that the Stahls “sold their interest in the property,” and did so “in a fashion that would include presentation being made that successors in title, based upon an existing Court Order, would have access to the lake across the defined right-of-way.” Taking counsel’s representations at face value, we note that the Stahls both sold their property, thus abandoning any continuing interest in a private easement appurtenant, and informed their buyers that they were acquiring with the property use of the disputed parcel, thus indicating that the Stahls intended to maintain no such private easement as one in gross. It is thus the Stahls’ successors in interest, not themselves, who have an interest in the outcome of this case. Although the Stahls’ history of activity on the disputed strip would bear on the question of their successors’ prescriptive rights, such rights nonetheless remain those of the successors, who have standing to assert the existence of a private easement on the disputed parcel stemming from ownership of a nearby lot. Counsel’s concessions should have put the Stahls out of court. Consequently, the trial court erred in declaring that the Stahls had private prescriptive rights to the disputed parcel.

#### IV. Conclusion

The trial court erred in invoking the doctrine of res judicata, because the parties and issues involved in the 1957 litigation and the instant case are substantially different, and because plaintiffs, as private individuals, did not have standing to assert public rights earlier established by the Township of Ovid. The court further erred in declaring the existence of private easements to the disputed strip without determining the owner of the fee against whom those easements were won. The court additionally erred in finding that the Shelburne and Stahl plaintiffs had acquired private easement rights despite a dearth of evidence of their particular histories of usage of the disputed parcel, an error compounded in the case of the Stahls because they had alienated their interests and thus lacked standing to claim prescriptive rights.

For these reasons, we reverse the judgments below and remand this case to the trial court with instructions to determine unambiguously the northern boundary of defendant's property and the owner or owners of the fee in question, and to resolve again the questions of public or private rights according to those facts and the applicable principles of law, ensuring also that all necessary parties are participating.

Reversed and remanded. We do not retain jurisdiction.

/s/ Joel P. Hoekstra

/s/ Kathleen Jansen

/s/ Kirsten Frank Kelly