

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

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STEVEN R. FULFER,

Plaintiff/Counter Defendant/Third-  
Party Defendant/Appellant/Cross-  
Appellee,

v

KURT KAESERMANN,

Defendant/Counter Plaintiff/Third-  
Party Plaintiff/Appellee/Cross-  
Appellant,

and

KATHRYN SABLICH KAESERMANN and  
RUTH SABLICH,

Third-Party  
Plaintiffs/Appellees/Cross-  
Appellants,

v

JO ANNE M. TODZY,

Third-Party  
Defendant/Appellant/Cross-  
Appellee.

UNPUBLISHED  
November 5, 2009

No. 284518  
Iron Circuit Court  
LC No. 06-003524-CZ

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Before: Hoekstra, P.J., and Bandstra and Servitto, JJ.

PER CURIAM.

Appellants Steven Fulfer and Jo Anne Todzy appeal as of right the trial court's judgment that third-party plaintiff Ruth Sablich had a valid right of first refusal to a one-acre parcel owned by Todzy. Appellees Kurt Kaesermann and Kathryn Sablich Kaesermann appeal the trial court's judgment on their claim for trespass damages against Fulfer. We affirm in part, reverse in part, vacate in part, and remand for further proceedings.

## I. Basic Facts

On August 8, 1974, Gunnard and Edith Flodine conveyed, by warranty deed, Government Lot 4, with the exception of a one-acre parcel on which a cabin sat (the cabin acre), to Joseph and Ruth Sablich.<sup>1</sup> The deed granted the Sabliches a right of first refusal. It stated: “Further granting to the parties of the second part the first right of refusal in the event of sale of said cabin and one acre of land.”

In January 1976, the Flodines conveyed the cabin acre to themselves as tenants by the entirety. The warranty deed was “subject to terms and conditions contained in a Deed dated 8-8-74 to [the Sabliches.]” Five years later, in 1981, the Flodines conveyed the cabin acre to Todzy, their daughter, by a quitclaim deed. The deed, which reserved a life estate in the cabin acre for the Flodines, was “subject to terms and conditions contained in a deed dated 8-8-74 to [the Sabliches.]” Gunnard Flodine died in February 1986. Edith Flodine died in April 2000.

In July 1991, Ruth Sablich conveyed Government Lot 4 to Kathryn Sablich Kaesermann, her niece, and Kurt Kaesermann (the Kaesermanns).<sup>2</sup>

In addition to the cabin acre, Todzy owned three 40-acre lots near Government Lot 4. In the mid-1980s, she permitted Fulfer to hunt on these lots. She also allowed Fulfer to use the cabin acre. In the following years, Fulfer put a new roof on the cabin, put in a “sand point,” and installed a new outhouse. Fulfer also made improvements to a road that ran across Government Lot 4 and installed a dock on a lake in the government lot. In May 2001, Todzy sold her three government lots to Fulfer. Both Todzy and Fulfer testified that Fulfer did not buy the cabin acre.

Following a bench trial, the trial court held that Ruth Sablich had a valid right of first refusal and that Todzy was bound by it. It found that the circumstantial evidence showed that Todzy sold the cabin acre to Fulfer in 2001 for \$6,600 and that the sale was in violation of Ruth Sablich’s first right of refusal. The trial court ordered Todzy, upon receiving \$6,600, to convey the cabin acre to Ruth Sablich. Finally, it awarded the Kaesermanns \$800 in damages for loss of trees and Fulfer’s use of lakefront property.

## II. Standard of Review

Following a bench trial, we review a trial court’s conclusions of law de novo and its findings of fact for clear error. *Ligon v Detroit*, 276 Mich App 120, 124; 739 NW2d 900 (2007). Clear error exists if we are left with a definite and firm conviction that a mistake has been made. *DeGeorge v Warheit*, 276 Mich App 587, 591; 741 NW2d 384 (2007). We must give deference to the trial court’s ability to judge the credibility of the witnesses. *Ambs v Kalamazoo Co Rd Comm*, 255 Mich App 637, 652; 662 NW2d 424 (2003).

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<sup>1</sup> Government Lot 4 is a 40-acre parcel in Iron County. Gunnard Flodine had received the property in 1947.

<sup>2</sup> Joseph Sablich died sometime before 1991. In a pre-trial order, the trial court held that Ruth Sablich had not assigned her right of first refusal to the Kaesermanns.

### III. The Right of First Refusal

On appeal, Fulfer and Todzy argue that the trial court erred in holding that Ruth Sablich had a valid right of first refusal. Specifically, they claim that because the 1974 warranty deed conveying Government Lot 4 to the Sabliches contained no language that the Sabliches' right of first refusal would extend beyond the life of Gunnard Flodine, the Sabliches' right of first refusal terminated in 1986 when Gunnard Flodine died.

A right of first refusal must contain a definite time for performance. *Randolph v Reisig*, 272 Mich App 331, 336; 727 NW2d 388 (2006); *Brauer v Hobbs*, 151 Mich App 769, 777; 391 NW2d 482 (1986). However, a right of first refusal is not void merely because it lacks a specific time for performance. *Randolph, supra* at 336-337. Rather, the right "will [be] construe[d] . . . for a reasonable period of time, and, thus, [the right is] valid only for a reasonable period." *Id.* at 337 (quotation omitted). *Id.* Unless there is clear evidence of a contrary intent, a right of first refusal will be limited to the lives of the parties. *Id.*

The 1974 warranty deed that granted the Sabliches the right of first refusal to the cabin acre did not contain a definite time for performance. Accordingly, the right was valid for only a reasonable period of time. *Id.* There is no clear evidence in the 1974 warranty deed that the Sabliches' right of first refusal was not limited to the lives of the Flodines and the Sabliches. Indeed, there is no language in the deed suggesting that the parties to the deed intended that the right of first refusal would continue to exist after Gunnard and Edith Flodine died. Accordingly, the Sabliches' right of first refusal was limited to the lives of the parties. In other words, upon either the deaths of Gunnard and Edith Flodine or of Joseph and Ruth Sablich, the right of first refusal would terminate.

The time of performance for the right of first refusal was not extended by either the 1976 warranty deed, in which the Flodines conveyed the cabin acre to themselves as tenants by the entirety, or by the 1981 quitclaim deed, in which the Flodines conveyed the cabin acre to Todzy. Although the 1976 and the 1981 conveyances were subject to the "terms and conditions" of the 1974 deed, neither conveyance enlarged the scope of the Sabliches' right of first refusal. Thus, while the Flodines, as tenants by the entirety, and Todzy could not sell the cabin acre without first offering it to the Sabliches, this condition and the Sabliches' right to purchase the cabin acre were still limited to the lives of the Flodines and the Sabliches. When the Flodines died, the right of first refusal terminated.

Gunnard Flodine died in 1986, and Edith Flodine passed away in 2000. Thus, at the very latest, the Sabliches' right of first refusal terminated in 2000. Accordingly, the trial court erred in holding that, at the time of trial or even in 2001, Ruth Sablich had a valid right of first refusal to the cabin acre.

### III. Sale of the Cabin Acre

Fulfer and Todzy also argue that the trial court clearly erred in finding that Todzy sold the cabin acre to Fulfer in 2001, when she sold him three nearby government lots. Because Ruth Sablich did not have a valid right of first refusal in 2001, it was unnecessary for the trial court to determine whether Todzy sold Fulfer the cabin acre. Accordingly, we vacate the trial court's finding that Todzy sold Fulfer the cabin acre.

When the Flodines conveyed Government Lot 4 to the Sabliches, they reserved to themselves the “right of ingress and egress thereto over the existing road” to the cabin acre. At trial, there was conflicting testimony concerning the location of “the existing road.” In their written closing arguments, the parties requested the trial court to make a finding regarding the road’s location. The trial court, because it ordered Todzy to convey the cabin acre to Sablich, did not make a finding concerning the location of the road. We, therefore, remand for a determination of the location of “the existing road” identified in the 1974 deed.

#### IV. Trespass Damages

On cross-appeal, the Kaesermanns argue that the trial court erred in only awarding them \$800 in damages for their trespass claim against Fulfer. According to the Kaesermanns, the evidence at trial clearly established that they were entitled to \$2,800 to \$5,000 for the loss of trees, treble damages under MCL 600.2919, and \$60,000 for the loss of use of the lakefront property. We disagree.

The trial court found that the damages for the trespass claim were “speculative at best” and that “[o]nly a slight amount of trespass was knowing.” We cannot conclude that these findings were clearly erroneous. There was conflicting testimony regarding whether Fulfer cut down any trees that were not on the cabin acre. Fulfer denied that any trees were damaged when he used a bulldozer to fill in the hole that Kurt Kaesermann dug, and he specifically denied cutting down any trees that grew outside the cabin acre. Regarding the lakefront property, Fulfer testified that, when he first began using the cabin acre, a path existed from the cabin acre to the lake and that Todzy told him that her father, Gunnard Flodine, would never have given up access to the lake. Based on Fulfer’s testimony, we are not left with a definite and firm conviction that the trial court made a mistake in only awarding the Kaesermanns \$800 in damages.

Affirmed in part, reversed in part, vacated in part, and remanded for proceedings not inconsistent with this opinion. We do not retain jurisdiction. Plaintiff and third-party defendant, being the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ Joel P. Hoekstra  
/s/ Richard A. Bandstra  
/s/ Deborah A. Servitto