

ATTORNEY WRITES

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NEW MICHIGAN APPELLATE CASES

Since the beginning of this year, the Michigan Court of Appeals has issued two pro-riparian opinions of particular interest. Both decisions involve “unpublished” decisions. Although not technically binding on Michigan trial courts, unpublished decisions of the Michigan Court of Appeals often constitute the only pronouncement of a Michigan appellate court in a given area and are frequently persuasive to trial court judges.

Under the common law in Michigan, the use of surface bodies of water such as lakes, rivers, and streams is subject to the “reasonable use” or “riparian rights” doctrine. Stated succinctly, a riparian property owner (or a member of the public, for that matter) cannot utilize the shoreline, bottomlands, or waters of a water body in such a way that it would unreasonably interfere with the reasonable use thereof by one or more other riparian property owners. This is akin to the old adage that your right to swing your fist ends where my nose begins. In many townships, cities, and villages in Michigan, riparians have not had to resort to this common law right in court, since many of those municipalities have adopted ordinances which regulate funneling, lake access, docks, boat mooring, and similar structures and uses. Nevertheless, if a particular municipality refuses to enforce such an ordinance or lacks these types of ordinances, the reasonable use or riparian rights doctrine can potentially be utilized in court by a riparian to combat such problems as unusually long docks, a new funnel development, a swim raft which is a hazard to navigation, or a problem marina.

There are potentially two problems associated with the reasonable use/riparian rights doctrine. First, lawsuits based on this common law right can be very expensive and divisive. Second, although supposedly the reasonableness standard is a so-called “objective” test (such that an unbiased judge should theoretically be able to discover or ascertain an objective truth), the decision by a given judge as to what is reasonable often constitutes a crapshoot. For example, while one judge might decide that permitting a new development with only 50 feet of frontage on a lake to give lake access and dockage rights to 100 new nonriparian or off-lake lots is reasonable, another judge in a different situation could hold that giving five new lots access through a common area with 500 feet of lake frontage is unreasonable.

Dowling v Lerner (unpublished Michigan Court of Appeals decision dated January 12, 2006, Case No. 255882), involved an application of the reasonable use/riparian rights doctrine. In this case, the defendants' lakefront lot long had a dock which was approximately 60 feet in length and was generally placed parallel to plaintiffs' dock. Defendants then extended their dock (from approximately 60 feet up to 115 feet) and changed the angle of their dock. Plaintiffs (the adjoining riparian property owners) filed a lawsuit claiming that the neighbors' altered dock violated the plaintiffs' riparian rights and also extended over the bottomlands of the plaintiffs. The trial court (and the Michigan Court of Appeals) agreed that the length and angle of the new dock was unreasonable. It was also unnecessary to reach the issue of whether defendants' dock illegally trespassed on plaintiffs' bottomlands, since under the court order, the dock would have to be returned to its original location and angle.

Also under the common law, the Michigan appellate courts have long held that for most easements, road ends at lakes, perpendicular walkways at lakes, and similar lake access devices, boat mooring, private dockage, sunbathing, lounging, and similar sedentary activities are prohibited. See *Dyball v Lennox*, 260 Mich App 698 (2003). Of course, there are a few exceptions to this general "bright line" rule (for example, where an easement expressly states that boat mooring and dockage can occur, or where a public road end is involved, the courts normally allow one dock at the public road end but not for permanent boat mooring). In *Ward v Barron Precision Instruments, LLC* (unpublished Michigan Court of Appeals decision dated January 19, 2006, Case No. 263616), the trial court was confronted with a situation involving a dedication that states that an easement is for the private use of the lot owners. The trial court ruled that backlots could use the easement for a dock and boats. The Court of Appeals disagreed with the trial court's assertion that the dedicated property constituted a "riparian property" and held that it was an access easement only (*i.e.*, there was no right to utilize a dock or to permanently moor or anchor boats).

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The Michigan Court of Appeals also recently issued what could be the final appellate decision in the saga of *Little v Kin* (unpublished Michigan Court of Appeals decision dated March 23, 2006, Case No. 257781). In 2003, the Michigan Supreme Court in *Little v Kin*, 468 Mich 699 (2003), held that a fairly high burden attaches to any backlot owner who is trying to assert dockage or boat mooring rights for an easement. The case was remanded back to the trial court (since the easement language was deemed ambiguous) to determine what the easement language really means. The original easement language was somewhat unusual and stated "for access to and use of the riparian rights to Pine Lake." Had the easement used only access language, the trial court would have disallowed dockage or boat mooring. However, the trial court held that the additional phrase "and use of the riparian rights" meant that the backlot had the right to maintain a dock and moor boats. That interpretation was upheld this past March by the Michigan Court of Appeals. Fortunately, this Court of Appeals decision is relatively narrow and should have little effective precedential value in future cases due to the

unusual (and explicit) language contained in the easement grant and the relatively large easement area for use by only one or two backlots.