# Prescription Means Without Consent

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Most riparians in Michigan have heard of "squatters rights". The correct legal phrase is "adverse possession". In Michigan, if a landowner uses a portion of the adjoining parcel extensively, without permission and consistently for over 15 years, the encroaching landowner can often obtain title to the land involved via a county circuit court action based on adverse possession. However, the possessing landowner's use of the adjoining property must be exclusive; that is, the land in dispute cannot also be used during the 15-year time period by the actual owner of the property or anyone else. That is called the "exclusivity" requirement for adverse possession.

Obtaining a permanent "prescriptive easement" or "easement by prescription" in Michigan is similar to adverse possession. The difference is, however, for a prescriptive easement, the beneficiary's use of the property at issue need not be exclusive and the land involved is often jointly used with the true landowner (and potentially others). To prevail on a claim of prescriptive easement in Michigan, a landowner must show that he or she has used the adjoining property for over 15 years without the permission of the true landowner. Again, a prescriptive easement cannot be obtained without a successful circuit court lawsuit.

Adverse possession almost always involves the active use and possession of a property, rather than mere travel or access. A prescriptive easement almost always involves obtaining access via travel to a landlocked property, a lake or stream or other property.

Surprisingly, the prevailing party on an adverse possession or prescriptive easement claim need not pay the losing landowner any money for the acquired property interest.

I have authored several prior articles for *The Michigan Riparian* magazine regarding adverse possession and prescriptive easements. However, a recent unpublished Michigan Court of Appeals case nicely summarizes many of the issues relating to prescriptive easements. In *Lamkin v Hartmeier*, decided on September 17, 2019, Case No. 326986 (2019 WL 4455094), landowners had long accessed their properties through a private road in an adjoining plat. Normally, the landlocked property owners would not have the right to use the private road because it was located in a different plat and was limited to use by the property owners within that plat. Nevertheless, since the landlocked landowners had used the private road (or private easement) for many decades, they were awarded a permanent prescriptive easement. With regard to prescriptive easements in general, the Court of Appeals noted:

> "A prescriptive easement is generally limited in scope by the manner in which it was acquired and the previous enjoyment." *Heydon v. MediaOne*, 275 Mich. App. 267, 271; 739 N.W.2d 373 (2007) (quotation omitted). The holder of a prescriptive easement is not altogether precluded from increasing the burden on a servient tenement where "necessary to make effective the enjoyment of the easement." *Mumrow v. Riddle*, 67 Mich. App. 693, 699; 242 N.W.2d 489 (1976). Thus, the owner of an easement may perform incidental repairs or improvements, subject to a balancing between the necessity of those repairs or improvements and the reasonableness of any increased burden upon the servient tenement. Id. at 699-700. Ultimately, "the scope of the privilege is determined largely by what is reasonable under the circumstances." Heydon, 275 Mich. App. at 271. "The owner of an easement cannot materially increase the burden of the easement or impose a new and additional burden on the servient estate." Id. at 275.
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> A prescriptive easement is essentially indistinguishable from adverse possession, other than the requirement of exclusivity. *Matthews v. Dep't. of Natural Resources*, 288 Mich. App. 23, 37; 792 N.W.2d 40 (2010). "An easement by prescription results from use of another's property that is open, notorious, adverse, and continuous for a period of fifteen years." *Plymouth Canton Community Crier, Inc. v. Prose,* 242 Mich. App. 676, 679; 619 N.W.2d 725 (2000). Adverse, or hostile, use does not require ill will, but rather a claim to a nonexistent right or a nonpermissive use that would give rise to an action for trespass. Id. at 681. Use can be "continuous" without being literally uninterrupted so long as that use is "in keeping with the nature and character of the right claimed." *Dyer v. Thurston*, 32 Mich. App. 341, 344; 188 N.W.2d 633 (1971). As discussed, the fifteen-year period need not be satisfied by a single owner, and successive owners who are in privity with each other may "tack" their periods of

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adverse use together. *Siegel v. Renkiwicz Estate*, 373 Mich. 421, 425; 129 N.W.2d 876 (1964). The party claiming a prescriptive easement must prove entitlement by clear and cogent evidence. Matthews, 288 Mich. App. at 37. The "clear and cogent evidence" standard calls for "more than a preponderance of evidence, approaching the level of proof beyond a reasonable doubt." *McQueen v. Black,* 168 Mich. App. 641, 645 n. 2; 425 N.W.2d 203 (1988). Slip opinion at pp. 5-6.

In order to obtain title to property via adverse possession or an easement via prescription, the property of another must be used consistently for 15 years or longer. If someone claiming adverse possession or an easement by prescription has not owned the land benefited for at least 15 consecutive years, they can sometimes add or "tack" the number of years of use by the prior possessing landowner to total 15 years or longer. For example, if the current owner of Parcel A uses a driveway across Parcel B for seven years and there is no recorded access easement, the use of Parcel B for access to Parcel A by the prior owner of Parcel A for eight years can often be added on to the seven years of the current owner of Parcel A, for a total of 15 years.

Sometimes, even if the current property owner has not accrued 15 years of use of an adjoining property, the actions of a prior owner of the benefited parcel can be used without tacking. All that is required is a 15-year block of time for consistent usage at some past point in time. So, assume that the prior owner of Parcel 1 used a driveway across Parcel 2 without the benefit of an easement and did so during the years from 1950 to 1970. That was over 15 consecutive years. Also assume that every subsequent owner of Parcel 1 since 1970 has only owned the parcel for five years or less. Although those subsequent owners could "tack" or add their usage to total more than 15 years, they need not do so. The prescriptive easement actually came into effect in 1965 for the benefit of Parcel 1 when the owner of Parcel 1 accrued at least 15 years of usage (1950-1965). Any later owner of Parcel 1 after 1965 could go to court at any time and obtain or "verify" a prescriptive easement due to the 15-year increment from 1950 through 1965. The Lamkin Court recognized that as follows:

Our Supreme Court held that, in order to establish a valid claim to a prescriptive easement, a claimant need not demonstrate privity of estate with a predecessor in interest if the claimant can demonstrate that a predecessor had perfected a prescriptive easement over the course of the fifteen-year statutory period. Marlette, 501 Mich. at 203-204. Specifically, "[w]hen a prescriptive easement vests with the claimant's predecessors in interest, the easement is appurtenant and transfers to subsequent owners in the property's chain of title without the need for the subsequent owner to establish privity of estate." Id. Thus, once a prescriptive easement vests, it runs with the land with no further action necessary. The predecessor in interest need not have taken legal action to assert a claim over the prescriptive easement in order for the easement to vest. Id. at 209. Accordingly, although not stated in so many words, Marlette held that a prescriptive easement vested and subsequently ran with the land following B & J Investment's open, notorious, uninterrupted, and hostile use of the parking lot for at least fifteen years.

On remand, defendants misconstrue Marlette as obviating the need for privity altogether. Marlette held nothing of the sort. Rather, Marlette explained that privity is no longer required for an easement to run with the land after the easement has vested. It so happened that in Marlette, the requisite fifteen-year period for adverse possession was satisfied by a single party. However, Marlette expressly acknowledged that "[i]f 'no single period' of adverse use amounts to the fifteen-year statutory period, a party claiming a prescriptive interest may tack the possessory periods of their predecessors in interest 'to aggregate the 15-year period of prescription' if the claimant can show privity of estate." Marlette, 501 Mich. at 203. The unambiguous significance of Marlette is that a prescriptive easement vests immediately and automatically upon satisfaction of the statutory requirements by either a single property owner, or a succession of property owners in privity with each other. Then, and only then, is any need for privity obviated. This is not a novel holding: a prescriptive easement that has

**"A prescriptive easement cannot be obtained without a successful circuit court lawsuit."**

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already vested has always been deemed to run with the land, even where parcels are later subdivided. See von *Meding v. Strahl*, 319 Mich. 598, 611; 30 N.W.2d 363 (1948).

Therefore, we conclude that our Supreme Court's order for us to consider "whether each defendant established a prescriptive easement in light of Marlette" implicitly instructs that any individual defendant may satisfy the statutory requirements in one of three ways: (1) personally; (2) by tacking the defendant's own use to the use of a predecessor or predecessors in privity; or (3) by showing that any prior owner of their property, or any chain of owners in privity with each other, had satisfied the statutory requirements at any time in the past. Slip opinion at pp. 4-5.

The Michigan Supreme Court in *Marlette Auto Wash, LLC v VanDyke SC Properties, LLC,* 501 Mich 192 (2018), held that a prescriptive easement arises when a 15-year time period runs, even if a different and later owner of the benefitted parcel does not commence court action to "perfect" (i.e. prove) and confirm the prescriptive easement until years later. The *Marlette* Court noted:

The Court of Appeals' alternative rationale for rejecting plaintiff's claim is equally without merit. Quoting *Gorte v. Dep't of Transp.*, 202 Mich.App. 161, 507 N.W.2d 797 (1993), the Court of Appeals held that the person claiming a prescriptive easement must "act on the purported acquired right" because " 'the expiration of the period of limitation terminates the title of those who slept on their rights and vests title in the party claiming adverse possession.' " Marlette, unpub. op. at 3, quoting Gorte, 202 Mich.App. at 168, 507 N.W.2d 797. In the Court of Appeals' view, plaintiff's claim failed because "[i]t is undisputed that no previous owner of the car wash asserted a claim of prescriptive easement with regard to defendant's property." Id. (emphasis added).

It is not clear why the Court of Appeals believes a prior property owner must have previously asserted a prescriptive easement claim in order for a prescriptive easement to vest, because, if a prior property owner had successfully asserted a prescriptive easement claim, marketable title of record as a result of the previous judicial decree would already exist for the property, and the current property owner would have no reason to file a lawsuit seeking to establish record title to the property by prescriptive easement. See *Escher v. Bender*, 338 Mich. 1, 8, 61 N.W.2d 143 (1953). Moreover, nothing in Gorte requires that a prior property owner assert a legal claim in order for a prescriptive easement to vest.

In Gorte, the defendant argued that the plaintiffs' title to the land did not vest upon the expiration of the period of limitations but, instead, plaintiffs' possession of the property simply gave the plaintiffs the ability "to raise the expiration of the period of limitation as a defense to defendant's assertion of title." Gorte, 202 Mich.App. at 168, 507 N.W.2d 797. The Gorte panel concluded:

Contrary to defendant's arguments, however, Michigan courts have followed the general rule that the expiration of the period of limitation terminates the title of those who slept on their rights and vests title in the party claiming adverse possession. Thus, assuming all other elements have been established, one gains title by adverse possession when the period of limitation expires, not when an action regarding the title to the property is brought. [Id. at 168-169, 507 N.W.2d 797 (citations omitted).]

Therefore, that portion of Gorte quoted by the Court of Appeals simply describes the general effect of an adverse-possession claim, assuming that all the other elements have been established. It does not stand for the proposition that a party must file a legal claim for title to vest by adverse possession. The final sentence of the quoted Gorte language specifically provides otherwise:

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one gains title by adverse possession when the period of limitations expires, not when an action regarding the title to the property is brought. Furthermore, as this Court has explained, an adverse possessor acquires legal title to property when the statutory period ends, but that title is neither recorded nor marketable until the property interest is established by judicial decree:

This Court has long recognized the common law doctrine of adverse possession, which the Legislature has since codified. To establish adverse possession, the party claiming it must show "clear and cogent proof of possession that is actual, visible, open, notorious, exclusive, continuous and uninterrupted for the statutory period of 15 years, hostile and under cover of claim of right." After the statutory period ends, the record owner's title is extinguished and the adverse possessor acquires "legal title" to the property. Acquisition of title in this manner includes "the right to defend the possession and to protect the property against the trespass of all others." However, the title acquired by adverse possession is neither record title nor marketable title until the adverse possessor files a lawsuit and obtains a judicial decree. Thus, until an adverse possessor obtains the necessary judicial decree, there is no record of the adverse possessor's ownership interest to verify whether the possessor actually satisfied the elements of adverse possession. [Beach, 489 Mich. at 106-107, 802 N.W.2d 1 (emphasis added; citations omitted).]

In urging the correctness of the Court of Appeals opinion, defendant argues that, if this Court does not require a prior property owner to take legal action to claim a prescriptive easement, the law would recognize the existence of "secret" easements not apparent to the purchaser of the servient estate. Defendant, having enjoyed the beneficial use of the parking lot access to the car wash, certainly has no legitimate argument that the claimed easement was in any way "secret." Moreover, in order for plaintiff to successfully establish a prescriptive easement, plaintiff must show clear and cogent proof of possession that is actual, continuous, open, notorious, hostile, and uninterrupted for the relevant statutory period. " 'The possession must be so open, visible, and notorious as to raise the presumption of notice to the world that the right of the true owner is invaded intentionally, and with the purpose to assert a claim of title adversely to his, so that if the true owner remains in ignorance it is his own fault.' " *Ennis v. Stanley*, 346 Mich. 296, 301, 78 N.W.2d 114 (1956), quoting *McVannel v. Pure Oil Co.*, 262 Mich. 518, 525-526, 247 N.W. 735 (1933) (emphasis added). See also *Doctor v. Turner*, 251 Mich. 175, 186, 231 N.W. 115 (1930). 501 Mich 192, 208-211 (footnote omitted).

Prescriptive easements can be used not only to establish permanent access via private roads and pedestrian access easements, but also with regard to easements to lakes and other bodies of water, drainage easements, utility easements, septic tank easements, fence easements and even parking easements. It is also possible that the limitations contained in certain express easements can sometimes be expanded by prescriptive acts.

One of the confusing aspects of adverse possession and easements by prescription is the requirement that any use during the 15-year time period involved must be without the permission or consent of the true landowner. If the encroaching property owner was given permission or consent to use the land by the true landowner (whether in writing or orally), an

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adverse possession or prescriptive easement claim will fail. Many lay people believe that this is exactly backwards; that is, someone should be able to obtain adverse possession or an easement by prescription only where they have consent but not if they lack permission. The "lack of permission" requirement for adverse possession and an easement by prescription is based on the fiction that the interloping landowner is acting as if they own the property in dispute and that after 15 years, the fiction should become reality.

Another interesting recent unpublished Michigan Court of Appeals case involving prescriptive easements was *Watch v. The Gregory S. Gilmore Trust*, decided on October 8, 2019; Case No. 344775; 2019 WL 5061222. The Court in that case noted the general requirements for a prescriptive easement as follows:

> "A prescriptive easement results from open, notorious, adverse, and continuous use of another's property for a period of 15 years." *Matthews*, 288 Mich App at 37. The continuity need not be strictly literal, but rather must only be consistent with "the nature and character of the right claimed" and "the nature of the use to which its enjoyment may be applied." *von Meding v Strahl*, 319 Mich 598, 613-614; 30 NW2d 363 (1948) (quotation omitted). If all of the elements are otherwise satisfied, a prescriptive easement is created and vests immediately upon crossing the fifteen-year threshold, not when an action regarding title is brought. Matthews, 288 Mich App at 36-37; *Marlette Auto Wash, LLC v. Van Dyke SC Properties, LLC*, 501 Mich 192, 196; 912 NW2d 161 (2018). Successive owners may "tack" their periods of adverse use for the purpose of satisfying the fifteen-year requirement, if those successive owners are in privity. Marlette, 501 Mich at 203. Once the easement is established, it runs with the land to subsequent owners, irrespective of their privity. *Id*. at 196, 206. Slip Opinion at pp. 3 – 4.

In addition, the *Watch* case stands for several other propositions regarding prescriptive easements:

A. A prescriptive easement is generally limited in scope, intensity and size by the manner in which it was acquired and the previous use. In other words, the beneficiary of a prescriptive easement cannot materially increase the burden of it upon the underlying property.

B. Casual or sporadic use of a property cannot ripen into a prescriptive easement.

C. Once a prescriptive easement is obtained, it is difficult to abandon. Mere non-use does not extinguish a prescriptive easement.

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For more information regarding adverse possession and easements by prescription, please see the following earlier articles from this magazine:

1. *Adverse Possession and Prescriptive Easements (Spring, 2016)*
2. *Limits on Prescriptive Easements and Private Roads (Winter, 2014)*
3. *New Limitations on Prescriptive Easement Claims (Winter, 2013)*