

Two Interesting Recent Michigan Court of Appeals Decisions Regarding Riparian Issues

By Clifford H. Bloom, Esq.
Bloom Slugget, PC
Grand Rapids, Michigan
www.BloomSlugget.com



There are generally four levels of courts in Michigan. The lowest level is the district court, which handles civil lawsuits under a certain dollar amount, most landlord/tenant matters and lesser criminal offenses. The general trial courts are the circuit and probate courts. The next level is the Michigan Court of Appeals. Finally, the highest appellate court is the Michigan Supreme Court.

The Michigan Court of Appeals issues two different types of decisions or opinions – published and unpublished opinions. Published opinions are binding precedent throughout Michigan. Unpublished opinions are not precedent and only bind the parties to the lawsuit. However, some unpublished opinions can be persuasive and can predict how the Court of Appeals might address the same or a similar issue in future cases.

On May 23, 2017, the Michigan Court of Appeals issued its unpublished opinion in *McEwan v Guthrie* (Case No. 331845; 2017 WL 2262882). That case involved a platted private road end at Patterson Lake in Livingston County, Michigan. For the first major issue in the case, the Court of Appeals held that the dedication language (“to the use of the lot owners”) was unambiguous and does not allow permanent or seasonal boat mooring, docking or storage at the road end. Given the lack of ambiguity in the dedication language, the Court of Appeals held that the trial court committed error when it allowed evidence of historical usage to determine the meaning of the plat dedication. However, the Court of Appeals agreed with the trial court that the backlot property owners could install one dock for day use only. All of these holdings by the Michigan Court of Appeals in *McEwan* are consistent with past precedent.

With regard to the second major issue in *McEwan v Guthrie*, a split of opinion has emerged between different panels of the Michigan Court of Appeals. In *McEwan*, the Court of Appeals held that although permanent or seasonal boat moorage was not allowed in the first instance pursuant to the plat dedication easement, the backlot owners had expanded their usage rights to the road end easement to include permanent or seasonal boat moorage given that those activities had occurred for much longer than 15 years (i.e., since approximately the 1940s), the statute of limitations for establishing a prescriptive easement. However, in other opinions, the Michigan Court of Appeals has held that usage rights for an express easement generally cannot be

expanded by prescription. See *O’Neill, et al. v. Moses, et al.*, unpublished opinion per curiam of the Court of Appeals (decided on October 25, 2016; Case Nos. 329227, 329475, 330527 and 330529; 2016 WL 6269360); *O’Brien v Hicks*, unpublished opinion per curiam of the Court of Appeals, entered November 20, 2012 (Docket No. 307332); and *Chauvette v Owczarek*, unpublished opinion per curiam of the Court of Appeals, entered October 26, 2006 (Docket No. 262473). It will be interesting to observe how the Court of Appeals eventually resolves those conflicting decisions.

On May 23, 2017, the Michigan Court of Appeals decided a groundwater extraction case. In the unpublished decision in *Kowalchuk v City of Jackson* (Case No. 330463; 2017 WL 2262876), the adjoining or nearby property owners sued the City of Jackson regarding groundwater extraction via wells for the city’s water system. The property owners asserted that the right to groundwater is exclusive as to the owner of the land’s surface above the aquifer. The Michigan Court of Appeals disagreed. The Court of Appeals held that Michigan does not recognize the rule of some other states that the owner of the surface of the ground has exclusive ownership of the groundwater below. Accordingly, Michigan has rejected the rule of “absolute ownership” developed under English common law. However, with regard to groundwater extraction, Michigan law does not apply the traditional reasonable use test. Instead, Michigan law regarding groundwater use applies a “reasonable use balancing test.” Pursuant to the reasonable use balancing test, a court must look at six different factors as follows:

1. The purpose of the use.
2. The suitability of the use to the location.
3. The extent and amount of the harm.
4. The benefits of use.
5. The necessity of the amount and manner of the water use.
6. Any other factor that may bear on the reasonableness of the use.

This court decision is consistent with the earlier appellate decision in *Michigan Citizens for Water Conservation v Nestlé Waters North America, Inc.*, 269 Mich App 25; 709 NW 2d 174 (2005); affirmed in part and reversed in part, 479 Mich 280 (2007), which involved the extraction of spring water from the ground for Nestlé’s bottled water products. *R*