STATE OF MICHIGAN

IN THE 34th CIRCUIT COURT FOR THE COUNTY OF ROSCOMMON

LEONARD ASTEMBORSKI and DEBORAH ASTEMBORSKI, husband and wife, Plaintiffs, vs. CHERYL MANETTA and MELISSA SCOTT, CO-SUCCESSOR TRUSTEES OF THE LYLE D. SCOTT AGREEMENT OF TRUST DATED 10/13/04, and THE YVONNE ELAINE SCOTT AGREEMENT OF TRUST DATED 10/13/04 and JON E. UNRUH and BONNIE A. UNRUH, husband and wife, and their heirs, successors, administrators and assigns, Defendants.	Case No.: 15-722743-CH

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ORDER OF THE COURT

**At a session of said court held at the Courthouse,
In the County of Roscommon,
This 14th day of November, 2019.**

PRESENT: HONORABLE ROBERT W. BENNETT
CIRCUIT COURT JUDGE

FACTS

On July 25 – 27, 2019, a bench trial was heard in the above captioned matter. This matter was initially commenced by Robert and MaryAnn Russom on November 16, 2015 seeking declaratory relief and damages for trespass and nuisance regarding two express easements that run across their riparian property terminating at Higgins Lake. The named Defendants herein use said easements for recreational purposes which includes seasonal picnicking, sunbathing, swimming, dockage, boat mooring, and dock storage in the winter months. Plaintiffs' claim that the above described uses of the 20 foot wide easement that provides access to Higgins Lake exceeds its scope and therefore, should be barred. They also request that the court award them damages for the over use of the easement, which they claim constitutes trespass and a nuisance. The Astemborski's substituted in for the Russom's and filed a first amended complaint on September 15, 2016, bringing forth the same issues and prayers for relief as the Russom's.

The Defendants filed an answer and an amended answer, asserting certain affirmative defenses related to the scope of the easement. It was the Defendants' contention that the express easement afforded them the right to put in a dock, moor boats, erect boat hoists, sunbathe/picnic, and store the dock on the upland of the easement. In addition, the Defendants filed a counter-complaint seeking quiet title regarding their use of the easement and in the alternative a count for prescriptive easement for said uses and/or a claim for imperfect servitude regarding the express grant of the easement.

The court granted a partial summary disposition on November 6, 2017 as to the scope of the dedication of the easement. The court found that there was no genuine issue of material fact regarding the express easement created by Harry Groak in Liber 196, Page 64 and Liber 198 Page 715, Roscommon County Records. The court found that the dedication language in the easement was clear and unambiguous and provided access to and from Higgins Lake but did not include the right to erect or install a seasonal dock, the use of boat hoists or boat mooring, sunbathing or lounging or allow for the storage of the dock in the winter months. As such, the court granted count one of Plaintiffs' complaint as well as dismissing Defendants' counter-complaint claim for quiet title for boat mooring, dock storage and other rights relative to the easement existing on Plaintiffs' property. Therefore, the bench trial held in this matter addresses only the remaining claims of Plaintiffs' and Defendants' complaint and counter-complaint. Those remaining claims are damages for trespass and nuisance on behalf of the Plaintiffs and prescriptive easement and/or imperfect servitude on behalf of the Defendants.

The court found the following facts, which were introduced at said trial through witness testimony and exhibits. As set forth in Plaintiffs' trial brief and closing argument, Harry M. Groak and Margaret I. Groak owned lake front property on Higgins Lake. They acquired the property in 1956. In addition to their lake front home, the Groaks' used the property as a resort with rental cabins on the uplands portion of the property. As part of this historical use, the Groaks' would put out a red and white dock into Higgins Lake which moored three row boats for use by the renters of the cabins. This dock was not put out were the easement was soon to be located, but rather right out in the middle of the Groak lake front property. Renters of the cabins could use the red

and white dock and row boats as well as the beach area within the Groak property. Renters were allowed to swim, sunbath, lounge, picnic, boat and fish utilizing the dock and the three row boats the Groaks' provided. Ultimately, the Groaks' decided to sub-divide their property and sell off the upland cabins as separate parcels. In so doing, the Groaks' created two easements; the first easement allowed the newly created back lot owners to travel across the Groak property to access the newly created 20 foot wide easement that then ran down the Groak property to Higgins Lake. It is this 20 foot wide easement that Plaintiffs and Defendants are largely arguing about today.

The first back lotters to arrive on the scene were Howard and Mabel Diehl. They bought one of the Groak cabins on November 5, 1964. Next to arrive was Lyle and Yvonne Scott, who purchased the other cabin on June 7, 1965. Defendants' prescriptive easement and imperfect servitude theories start with both of them and of course includes the accompanying uses of the 20 foot wide easement created by the Groaks.

During the trial, Ron Mills testified. He is the grandson of Harry Groak. Mr. Mills testified that a dock at the terminus of the easement (easement dock) did not appear until after Mr. Groak passed away in the early 1970's. Mr. Mills testified that both the Diehls and the Scotts had boats moored at the dock, but he did not think those boats appeared until he was in high school, which would put the time frame of mooring to be in the late 1970's. Mr. Mills testified that the red and white dock that the Groaks traditionally put out since the rental days was still being put out into Higgins Lake in front of the Groak house along with the three row boats. He testified that this dock and the three row boats were stored during the winter months on the location of the easement. Mr. Mills was just a child when all of this initial dock activity took place. The court

found that although Mr. Mills was present at this time and that he was being truthful, it was the court's impression that Mr. Mills was basically guessing as to time frames when it came to the initial uses of the easement and the easement dock. Based upon Mr. Mills' testimony the first dock appeared on the easement around 1971 to 1975 and boat mooring first occurred in the late 1970's (around 1977). Mr. Mills was not aware of any permission the Groaks' may have provided for the dock to be used at the easement.

Pam Mills, Ron's sister, testified as well. She, like her brother, struggled with dates. It was her recollection that a dock wasn't put out on the easement until sometime in the 1980's. However, she testified that both the Diehls and the Scotts put out an easement dock and moored boats at that dock. Ms. Mills' testimony was contradicted not only by her brother's testimony but by photograph exhibits that were introduced at trial. This evidence established that an easement dock and boat mooring took place in the early to mid-1970's and not the 1980's. Again, the court does not feel that Ms. Mills was being untruthful, but rather her memories of these events were from when she was a child. Ms. Mills also testified that by the time the Russom's arrived on the scene as riparian owners (buying the Groak property in 1980); they would store their boat during the winter months on the easement. Again, Ms. Mills was not aware of the Groaks providing permission to the Diehls or Scotts regarding the installation or use of the easement dock or the mooring of boats thereon.

Susan Schlicker testified at trial. Mrs. Schlicker is the daughter of Howard Diehl. She testified that her father anchored a sail boat out in Higgins Lake in front of the easement location before a dock was installed and that at times this sail boat would be pulled up onto the shore portion of the easement for storage when not in use. She

testified that this use of the easement occurred immediately upon her parent's purchase of the property in 1964-1965. She corroborated Mr. Mills' testimony that an easement dock was not put out on the easement until after Mr. Groak died in the early 1970's. Once that dock was put in, both her father and the Scotts would moor boats at that dock. She testified that hoists did not appear at the easement dock until 1985 or so. She further testified that this easement dock and boat mooring took place every year thereafter. Interestingly, Mrs. Schlicker testified that her father, Howard Diehl, was very careful about his family's use of the easement, in that he directed that no towels or other summer beach equipment be left out on the easement because as she put it, her father would say, "We don't own that property." She also remembers her father asking the Russoms (this would have been after September 10, 1980 when they bought their lake front property) if it was still okay for him (Mr. Diehl) to put out the easement dock. If Mrs. Schlicker's testimony is accurate (and the court has no reason to think otherwise), boats were moored (without a dock) at the easement as early as 1964-1965 and a dock first appeared on the easement in the early 1970's. Further, that this easement use continued unabated from that date forward to at least the date her father sold the property in 1993. The only expansion of this use occurred in the mid-1980's when boat hoists first appeared at the easement. It is also important to note, that Mrs. Schlicker had no recollection of Harry Groak or Harry's son, Elwyn Groak (who took over ownership of his father's interest on or about March 18, 1970), telling her father where the easement dock could be put in on the easement at Higgins Lake or whether they provided permission to her father to put that dock in at all.

Brad Scott testified at the trial. He is the son of Lyle and Yvonne Scott who purchased the second back lot from the Groaks in 1965. He testified that as kids, he and his family would access Higgins Lake via the easement to swim and play in the lake. He would assist with the installation of the red and white dock owned by the Groaks. Mr. Scott also testified that the easement dock was first put in at the easement in 1971 or 1972. This is consistent with the time frame testified to by the other witnesses (except Pam Mills). He testified that his dad and Mr. Diehl would put in the easement dock and that the dock was co-owned by the two of them. He remembers that the Diehls' moored a fishing boat at this dock starting in 1971-1972. He also testified that his family moored a boat at this dock as well. This easement dock was installed in the middle of the 20 foot wide easement every summer and it was stored during the winter months on the easement by the tree located down by the beach. Mr. Scott has no memory of the Groaks (either Harry or Elwyn) telling his father or Mr. Diehl where this dock had to be installed or otherwise giving permission for the installation of this dock and its accompanying use. Mr. Scott identified himself in a photograph on the easement dock in 1973 – he was 18 years old the time (Exhibit B). Mr. Scott testified that since 1971, this easement dock (or its replacement) has been put out in the same location on the easement to the present day. Interestingly, Mr. Scott also identified his parent's boat and a boat hoist at the easement dock dating back to around 1977 (Exhibit C), which contradicts Mrs. Schlicker's testimony about boat hoists not appearing at the easement until the mid-1980's.

Like the other witnesses, Mr. Scott is not aware of the Groaks or the Russoms giving his father permission to put in the easement dock or moor boats. Further, he is not aware of his father ever providing authority to Mr. Diehl for Mr. Diehl to speak on behalf

of his family or make decisions or enter into agreements on his family's behalf as it relates to the easement dock and its use.

Cheryl Manetta testified at trial. She is the daughter of Lyle and Yvonne Scott. She testified that the easement dock made its first appearance in 1970-1971. She also testified that this dock was stored on the easement by the trees down by the beach every winter. Mrs. Manetta testified that the first boat moored at this dock was Mr. Diehl's fishing boat. Eventually, when she became an adult, she moored a boat at this dock as well. Mrs. Manetta has no recollection of Harry or Elwyn Groak ever giving her parents permission to install the easement dock or provide permission for the mooring of boats at that dock. Further, she is not aware nor ever heard the Russoms provide permission for said easement uses either. In addition, she is not aware of either the Groaks or the Russoms placing limitations on her and her family's use of the easement or easement dock.

Melissa Scott testified at the trial. She is married to Brad Scott, Lyle and Yvonne Scott's son. She started visiting the Higgins Lake property in 1998. She testified from that date to the present, an easement dock has been installed on the easement and that boats and boat hoists have been used at said dock. Further, that since she has been in the family, the dock has been stored on the easement in the same location next to the trees.

Bonnie Unruh testified at the trial. She is Carl and Lucy Scott's daughter. Her parents bought one of the back lots from Linda Cauzillo in 2001. Linda Cauzillo purchased the cabin from Howard and Mabel Diehl in 1993. Because her family, Lyle and Yvonne Scott are her aunt and uncle and they owned one of the back-lot cabins since 1965, she has been coming up to the area since she was a baby in 1965. As a child she

remembers the easement dock placed out in Higgins Lake. She also remembers boats moored to that dock. She remembers specifically her brother Brad's speed boat being moored at the dock. She remembers that the easement dock was put out in the lake every summer in her childhood. After her parents bought their property in 2001, she has been to the cabin every year. Since 2001, she has helped with the installation of the dock and testified that the use of the dock and easement today is the same as the use was from when she was a child. She purchased her parents cabin in 2007 and she owns it to this day. Since that time, she has moored a pontoon boat at the easement dock, along with two waver runners (her daughter keeps a wave runner moored at this dock as well). She remembers her mother, Lucy Scott, telling her when she bought the property, that she has a right to use the easement with a dock, boat mooring and storage. She testified that she would not have purchased the property in 2007 if it did not include these rights. Like every other witness that testified at the trial (with the exception of the Russoms and Mrs. Schlicker) she is unaware of any agreement made between the Russoms and Howard Diehl pertaining to permission being given for the use of the easement dock, boat mooring, and dock storage.

Lucy Scott testified at the trial. She and her husband Carl purchased their property in 2001 from Linda Cauzillo. Bonnie Unruh is her daughter. Prior to purchasing her property, she used to use the easement to access Higgins Lake. She remembers a dock being used at the easement going back to 1970-1971. It is her recollection that the first boat moored on the easement dock was Lyle Scotts' row boat back in the early 1970's. She recalls that during that time period (early 1970's) that the back-lot owners (Diehls and Scotts) would use the easement to access the lake for

swimming, sunbathing, use of the dock and boat mooring. She further testified that both Lyle Scott and Linda Cauzillo told her that the easement dock and boat mooring rights were included with ownership of the back-lot cabin. Based upon this knowledge and the lack of anything to contradict it from the Russoms or anyone else, she never thought she needed permission to use the easement or to put out a dock or moor boats within the easement extending out into Higgins Lake. She has no knowledge of Linda Cauzillo ever having to seek permission from the Groaks or their heirs or from the Russoms about the historical easement uses. Further, Mrs. Scott testified that the Russoms never talked to her about her uses of the easement or that she used the easement with their permission and their permission only. In addition, when she sold her lot to her daughter, Bonnie Unruh, she intended to transfer all of the easement rights as she understood them to be and which she had acquired from Linda Cauzillo. Mrs. Scott was not aware of any deal made between the Russoms and Howard Diehl regarding permissive use of the easement. And, importantly, the Russoms never made any such use deal or spoke to her or her husband about permission to use the easement since they purchased the property in 2001.

Mr. and Mrs. Russom testified at trial too (deposition testimony). The Russoms acquired the lake front property on September 10, 1980. They tore down the old Groak home and built their retirement home in its place. Mrs. Russom testified that shortly after they purchased the property in 1980, her husband had a conversation with Howard Diehl. She indicated that Mr. Diehl asked her husband whether "we" can keep "our" boats down on the easement dock. She testified that her husband gave him permission to do that. Mr. Russom testified that Mr. Diehl invited him over to his house and they (there is no mention that Mrs. Russom was present during this conversation as she testified) sat down

and Mr. Diehl said, "you know we're putting boats and stuff out there." I said "yeah, I know." Mr. Diehl then said, "is it all right with you?" And then Mr. Russom said, "fine, it works". At which point Mr. Diehl then said, "how about you putting your boat back on my property here?" Mr. Russom than said "it works for me Howard". Mr. and Mrs. Russom testified that they never spoke about this agreement with Lyle or Yvonne Scott. Mr. Russom testified that it was his impression that Mr. Diehl had the authority to act as the agent on behalf of Lyle and Yvonne Scott regarding this agreement. Based upon this agreement, the Russoms testified that they continued to allow the Diehls and Scotts to put out the dock, moor boats and store the dock on the uplands of the easement. Mr. Russom further testified that in 2001 he spoke to Carl and Lucy Scott (purchasers from Linda Cauzillo) and that he told them about the agreement allowing him to store his boat up behind their cabin and they told him that that was fine. However, about one month later they changed their minds and thus, he moved his boat from that location. Based upon the record, it appears the Russoms never told anyone else about the agreement reached between themselves and Howard Diehl. And, based upon Mr. Russoms' testimony the court is unable to determine whether he actually told Carl and Lucy Scott about the whole agreement made with Howard Diehl pertaining to permissive use of the easement or whether he merely talked to them about storing his boat up behind their cabin.

Mr. and Mrs. Astemborski testified at the trial as well. They bought the property from the Russoms in 2016. The lawsuit was already pending when they purchased the property and they were aware of the lawsuit. They also testified that when they purchased the property, the easement was being used by the Defendants' and that that use included a dock, boat mooring, sunbathing and etc., and dock storage. Mrs. Astemborski

testified that she thinks the Defendants trespass on her property when they haul the boat hoists down the first easement to the 20 foot wide lake easement because that first easement is too narrow to fit a hoist. Also, she feels that their boats are moored in such a way on the easement dock as to extend beyond the 20 foot wide easement and onto her property in the lake. Mrs. Astemborski admits she has not proof to substantiate that claim. The Astemborski's had the easements surveyed in 2017, which cost them $450.00 (Plaintiff Exhibit 65). She testified that some of her survey stakes have been removed by one or more of the Defendants. Mrs. Astemborski testified that the storage of the dock on the easement causes erosion damage to her property and that she therefore requests that this storage stop. Mrs. Astemborski testified that she wants money damages for the Defendant's dock storage erosion damage, trespass, and nuisance that their use of the easement causes. She is requesting $100.00 per day damages for the storage of the dock on the easement (i.e. on her property). This figure is based upon other dock storage costs in the area. Mr. Astemborski testified that he is requesting costs incurred in this action and attorney fees in the amount of $22,000.00 (as of trial).

Other individuals testified at the trial, but the court finds their testimony to be redundant, unhelpful with regard to the issues at hand, or merely supplemental of exhibits that were admitted during the trial. However, based upon all of the evidence introduced at trial, the court cannot find any support for the proposition that Harry Groak or his son Elwyn Groak provided permission to either the Diehls or the Scotts regarding their use of the easement for swimming and sunbathing on the easement or for the use of a dock and boat mooring on the easement. The only evidence offered regarding permissive use of the easement comes from the Russoms and potentially Mr. Diehl's daughter, Mrs.

Schlicker. The court finds that this permissive use was oral and that it was provided only to Howard Diehl. The court did hear testimony from Mr. Mills regarding Elwyn Groak telling the Diehls and Scotts where to put the easement dock within the 20 foot easement way back in the 1970's, but this testimony did not establish that Elwyn Groak actually gave this direction or that if this direction was in fact given that it was given with the intention of providing permission for the use of said dock. It is just as likely that if this dock placement direction occurred, that Elwyn Groak provided it just to make sure the dock was installed within the 20 foot easement and nothing more.

LAW/ANALYSIS

The issues presented to the court at trial in this matter relate to prescriptive easement, imperfect servitude, permissive use, trespass and nuisance. As indicated above, the court has already ruled in Plaintiffs' favor with regard to the scope of the dedication of the express grant in the easement. As such, it has already been determined that the express grant of the easement did not include the right of the Defendants to put out a dock, moor boats, store the dock off season, sunbathe and/or picnic.

PRESCRIPTIVE EASEMENT

A prescriptive easement is acquired through use of another's property in an open, notorious, adverse, and continuous manner for 15 years. *Plymouth Canton Community Crier v Prose*, 242 Mich App 676, 679 (2000). Claims of prescriptive easements are also decided under the clear and cogent standard of proof. *Killips v Mannisto*, 244 Mich App 256 (2001). Clear and cogent evidence is more than a preponderance of the evidence and is akin to clear and convincing evidence. *McQueen v Black*, 168 Mich App 641, 645

(1988). In other words, clear and cogent evidence requires that a party clearly establish the fact with little doubt left in the mind of the trier of fact as to proper resolution of the issue. *Id.*

The clear and cogent burden of proof rests upon the Defendants in this case. Once the Defendants' prove the prescriptive use in excess of the prescriptive period for at least 15 years, a presumption of a grant arises, and the owner of the relevant estate must show that the use was merely permissive. *Berkey & Gay Furniture Co v Valley City Milling Co*, 194 Mich 234 (1916); *Reed v Soltys*, 106 Mich App 341 (1981). This is especially important in the case of long-established uses, since witnesses can be difficult to find. *Widmayer v Leonard*, 422 Mich 280 (1985), addressed the shifting burden element in prescriptive easement cases. In that case, the alleged prescriptive easement use had occurred for 50 years. The Supreme Court said:

> The problem in the case at bar results from the imprecise use of the phrase "burden of proof." There are two aspects of burden of proof – the "burden of persuasion" and the "burden of going forward with the evidence." The latter burden may shift several times during the trial, but the burden of persuasion generally remains with the plaintiff.
>
> The burden of proving a prescriptive easement remained throughout trial with Plaintiffs (the person claiming the easement). Once plaintiffs presented evidence that they had used the disputed land for over fifty years, the burden of producing evidence shifted to defendants to establish that plaintiffs' use was permissive....
>
> [T]he burden assigned to a party against whom a presumption is asserted is the "burden of going forward with the evidence" and not the "burden of proof". *Id.* at 290-291

Of further importance to the facts of the case at hand, the adverse use in question may be established if none of the true owners ever gave permission because they thought the claimant had a right to use the land. *Ashley v Waite*, 33 Mich App 420 (1971). In

other words, this mistaken belief does not render the use any less adverse. Also, an owner's permission, before or during the prescriptive period, will, even if given orally, turn a potential prescriptive easement into a license, since it destroys the adverse nature of the use. *Banach v Lawera*, 330 Mich 436 (1951). And, because such permission would be in the nature of a license, it may be revoked at any time. But continued use after revocation of the license would be adverse, and prescription could result. *Beecher v Byerly*, 302 Mich 79 (1942); *First Nat'l Bank v Vande Brooks*, 204 Mich 164 (1918). Further, since conveyance of land by a licensor automatically operates as a revocation of the license, a land purchaser should be careful to remove, or give permission to, all strangers using the land, since a purchaser must inquire about the character and extent of use of the land he or she is purchasing by a stranger who has received the former owner's permission to use the land. *Sallan Jewelry Co v Bird*, 240 Mich 346 (1927).

Looking at the facts of this case, the court finds, as indicated above, that Harry Groak created two easements across his property to provide the back lots he created with access to Higgins Lake. These easements were created on or about 1964. Howard and Mabel Diehl bought the first back-lot cabin in 1964. Lyle and Yvonne Scott bought the other back-lot cabin in 1965. That before and after these easements were created, Mr. Groak would put out a red and white dock in front of his main lake front house for his family and the folks using or owning the cabins to use and all did use that dock. Piecing together the testimony of the various witnesses, the court finds that the Diehls and the Scotts first put in a dock at the lake access easement starting in 1970-1971. The only witness that contradicted this conclusion is Pam Mills, who testified the easement dock did not appear until the 1980's. Based upon the testimony of Ron Mills, Susan Schlicker,

Brad Scott, Cheryl Manetta, Bonnie Unruh, and Lucy Scott, as well as the photographs admitted as exhibits, it is established that the easement dock was first put in and used starting in 1970-1971. Further, the court finds based upon this same testimony and evidence that boats were used and moored at the easement dock when the dock was first installed in 1970-1971. The first boats moored were Mr. Diehl's sailboat that was launched from the easement and moored in the water for periods of time and/or stored on the shore within the easement and Mr. Diehl's fishing boat which was moored at the dock. In addition, the Scotts moored a boat at the dock as well, starting in 1971-1972. There is a photograph that dates back to this time period showing the dock and boat mooring, circa 1973. These same witnesses also testified that the dock was stored on the easement in the winter months and put out every year thereafter which has continued to the present day. Eventually, other family members would also moor boats at this dock (Brad Scott's speed boat for instance). Also, by the late 1970's or early 1980's, boat hoists appeared at the easement dock as well. These hoists have been used ever since that time to the present day. Contemporaneous with this dock use, both the Diehls and the Scotts used the easement for sunbathing. picnicking and summer water activities.

Based upon all of this evidence, the court concludes that the Groak lake access easement was used in a manner that exceeded the dedication language of ingress/egress to include; dockage, dock storage, mooring of boats, swimming, sunbathing, picnicking, and other water-based activities since 1971. These uses were open, notorious, adverse, and continuous for at least 15 years. Setting aside the questions of tacking and permission for the moment, these uses vested in a prescriptive easement in 1986.

Further, the court finds that these same uses have continued all the way to the date this lawsuit was initiated in 2015 - which has been 44 years.

Based upon the above, the court finds that Defendant Scotts have proven a case for prescriptive easement. Lyle and Yvonne Scott bought their property in 1965 and used the easement since that purchase for more than access to Higgins Lake. They used the easement for, swimming, sunbathing, and picnicking since 1965. They used the easement for dockage, boat mooring, and dock storage since 1971. Their uses vested into a prescriptive easement in 1986. These prescriptive easement rights passed onto any and all assigns (i.e. their trusts in 2005) and these rights continue to exist to this day. Further, Plaintiffs have failed to rebut this prescriptive easement presumption. The court cannot find that the Groaks provided a license to the Scotts for these uses or that the Russoms did either, for the reasons that will be explained below.

As such, as it relates to the Scotts, the court finds there is a presumption in favor of the prescriptive easement and the burden shifts to the Plaintiffs to rebut that presumption. The Plaintiffs' attempt to rebut this presumption in two ways; first that Harry Groak or his son, Elwyn Groak, granted permission to both the Diehls and Scotts regarding their use of the easement and second, that the Russoms granted permission to them both in 1980, when they purchased the Groak riparian property.

There was no evidence presented at the trial that either Groak (or any of their heirs for that matter) ever granted either the Diehls or the Scotts with permission to use the easement as they did. There was some testimony that Elwyn Groak may have directed the Diehls/Scotts on where they should put the easement dock within the 20 foot wide easement. The implication the Plaintiffs' attempt to draw from this testimony is

that this "direction" indicates control of the easement and indicates permission to use a dock on the easement as given by Elwyn Groak. The court is not persuaded by this argument. No witness actually heard either Harry Groak or Elwyn Groak give the Diehls/Scotts permission to use the easement as they did. No written evidence of this permission was provided. The court is not able to conclude anything more from the testimony about Elwyn Groak giving direction on dock placement other than if Elwyn did in fact direct where the easement dock was to be installed back in the early 1970's, that he did so to ensure that the dock was located within the easement boundary and nothing more. To conclude otherwise would be an exercise in conjecture.

The Plaintiffs did present evidence that the Russoms provided permission for the easement use in 1980 when they purchased the property however. Defendants argue that the Russoms are not credible witnesses because of the issue regarding the sale disclosure form they drafted when they were attempting to sell their property in 2015. Defendants argue that the Russoms were not honest in this real estate disclosure form and further that they were not honest to a potential buyer of their property pertaining to the extent and nature of the lawsuit they filed regarding the easement. The court understands the Defendants' point in this regard, but finds the Russoms to be credible. Nevertheless, there are several problems presented in light of the Russom testimony. First, it is clear from their testimony that they only gave permission to use the easement for dockage, boat mooring, and boat storage to Howard Diehl. There is no evidence that this permission, as given by the Russoms to Howard Diehl, pertained to uses of the easement outside of dockage, boat mooring, and dock storage. In other words, there is no evidence that the Russom permission extended to or included swimming, sunbathing or picnicking

on the easement. The Second problem is that this permission was never given to anyone else who has or had an interest in the easement; it was not given to Lyle or Yvonne Scott, Linda Cauzillo, Lucy and Carl Scott, or to the Unruhs. This permission was only given one time to Howard Diehl in the early 1980's. Now, to be clear, Mr. Russom testified that he talked to Carl and Lucy Scott about the permission and the storage of his boat on their property, but Lucy Scott contradicted this testimony by denying that any such discussion was ever held (at least about permission to use the easement). The third problem is this permission was oral; it was never put into writing or made part of the record with the Roscommon County Register of Deeds.

As indicated above, permission to use an easement in a certain manner is a license. *Banach v Lawera*, 330 Mich 436 (1951). A license grants permission to do something on the land of the licensor without granting any permanent interest in the realty. *McCastle v Scanlon*, 337 Mich 122 (1953). Licenses are revocable at the will of the licensor, even if supported by consideration and even if the licensee spends money in reliance upon the license. *Id.* The distinction between easements and licenses is that an easement constitutes an interest in land, but a license does not. *Forge v Smith*, 458 Mich 198 (1998). It is because of this distinction between licenses and easements that in creating a license the formalities that are necessary when creating an easement (i.e. putting it in writing) does not apply. *Evans v Holloway Sand & Gravel, Inc*, 106 Mich App 70 (1981). Interests in land (i.e. easements) however, must comply with the requirements of the Statute of Frauds (another formality licenses do not need to contend with). A license is a permission to do some act or series of acts on the land of the licensor without having any permanent interest in it. It is founded on **personal**

confidence and therefore **not assignable**. *Morrill v Mackman*, 24 Mich 279 (1872). Where nothing beyond a mere license is contemplated, and no interest in the land is proposed to be created, the Statute of Frauds has no application and the observance of no formality is important in making this distinction. *Id.* Further, "where something beyond a mere temporary use of the land is promised; where the promise apparently is not founded on **personal confidence**, but has reference to the ownership and occupancy of the others land, and is made to facilitate the use of those lands in a particular manner and for an indefinite period, and where the right to revoke at any time would be inconsistent with the evident purposes of the permission; wherever, and in the short, the purpose has been to give an interest in the land, there may be a license, but there will also be something more than license...." *Id.* (emphasis added). In other words, although permission may be a license, it may also be an interest in the land. As such, one needs to look at the formalities underlying the creation of the license, its intended length of operation, the intended purpose of the license and how all of this relates to the real property involved.

The court draws heavily upon this analysis and the reasoning outlined in *Morrill* when looking at the evidence presented in this case. If the Russoms gave permission to Mr. Diehl, that permission was a license. Further, that permission was founded upon a **personal confidence** between the Russoms and Mr. Diehl. Under Michigan law, that permission is not assignable by either the Russoms or Mr. Diehl. Further, there is no evidence before the court that this permission was for a definite period of time – in other words, it was indefinite. To complicate matters even more, the Plaintiffs argue that this permission tacks from the Diehls to their successor in title, Ms. Cauzillo in 1993, then

tacks again to Carl and Lucy Scott, when they bought the property from her in 2001, and then yet again when the Unruhs bought the property in 2007.

To say the least, there are several problems with the Plaintiffs case regarding the Russom and Diehl license. First of all, there was no direct evidence that Howard Diehl had the right or authority to speak for or on behalf of Lyle or Yvonne Scott. Mr. Diehl did not testify. Lyle and Yvonne Scott did not testify. None of the witnesses that testified indicated that Mr. Diehl was an agent of the Scotts or otherwise had the authority to act on their behalf and enter into arrangements concerning their potential property rights. Mr. Russom testified the Mr. Diehl was "kind of the spokesman" (R. Russom Tr., P 25) and that Mr. Diehl was speaking on their behalf (meaning the Scotts). Mrs. Russom testified that Mr. Diehl was "the big brother and the spokesperson" (M. Russom Tr. P 16). That might have been the Russoms' impression, but that does not make it so, especially when someone is giving away property rights. Mr. Diehl was not the Scott's power of attorney and there is nothing in the record to suggest he had any similar authority. Based on the evidence, the court is not convinced and nor can it find that the permission granted to Mr. Diehl by the Russoms extended to Lyle and Yvonne Scott. As the court noted in the *Morrill* case, licenses are based on **personal confidence** between the licensor and licensee. To be binding both the licensor and licensee need to know and understand what is being promised in the license. It is not enough that only some parties to the license know what the promises are that potentially affect them. It is not enough that only some of the parties to the license were present when the promise was made. To drive this point home, there was no evidence introduced at the trail that showed or even tended to show that Mr. Diehl explained the terms of the license to the Scotts. One

would have to assume that at some point in time this discussion took place, but the court cannot deal in assumptions. In short, there is no evidence to suggest that the Scotts even knew about the permission the Russoms gave to Howard Diehl. Based upon these facts, the court cannot bind the Scotts to the permission agreement that the Russoms made with Howard Diehl and Howard Diehl alone. Therefore, this permission applies only to Howard Diehl and at best Mabel Diehl, his wife.

The second problem with Plaintiffs' argument concerning this license is that Plaintiffs suggest this license tacks from Howard Diehl to his successor in title, Linda Cauzillo in1993 when she bought the property and then tacks again to her successor in title, Carl and Lucy Scott in 2001 and then tacks again to the Unruhs when they purchased the property in 2007. Plaintiffs offer no support for this proposition. While it is true that the cases cited by the Plaintiffs in their closing statement indicate that conveyances by the licensor revokes the license and not a conveyance by the licensee, thus the conveyance from Diehl to Cauzillo and the conveyance from Cauzillo to Carl and Lucy Scott did not necessarily revoke this license, the court nevertheless cannot adopt Plaintiffs' position. First, as indicated above, for a license to be valid, the promise must be made from the licensor to the licensee. Here, that was not done because the Russoms never gave permission or promised anything to Linda Cauzillo in 1993 nor to Carl and Lucy Scott in 2001 or the Unruhs in 2007. There was no personal confidence as it related to any of them. As such, there was no license as it related to Cauzillo, Scott or Unruh.

However, beyond that problem, to suggest as Plaintiffs do that the 1980 permission tacks from one licensee to the next as they buy and sell their interest in the

land suggests that this license is not a license at all but rather an interest in land that in fact runs with the land. "Neither a written license that evidences a promised duration nor the oral conveyance of an intended permanent interest in land is an irrevocable license. Instead the grantor of such an intended interest, in effect, orally conveyed an easement." Restatement 3rd, Property, section 1.2(4) and *Kitchen v Kitchen*, 465 Mich 654 (2002). This conclusion is further supported by *Sweeney v Hillsdale Co. Bd. Of Rd. Comm.*, 293 Mich 624 (1940), which held because licenses are personal property, they may not be sold or transferred.

The up-shot of all of this taken together, is that a license is a personal promise from the licensor to the licensee and if the license is open ended or indefinite and it contemplates survival from one licensee to another through multiple conveyances of real property, it is really not a license at all but rather an easement (i.e. an interest in land). As such, that interest in land needs to comply with the Statute of Frauds requirement that it be put into writing. In the case at bar, the oral promise was made one time in 1980 to Howard Diehl. Since that time Mr. Diehl's property has changed hands three times. The court cannot find that this 21 year old oral promise survived all three conveyances without ever being renewed to any of the successive purchasers. On this point, the Plaintiffs' offer no legal support to indicate how or why the court's reasoning is wrong. The permission granted was intended to act as an interest in land and as such, it is subject to the requirements of the Statute of Frauds. This finding by the court is of course consistent with why there is a Statute of Frauds to begin with – so that people can have notice of certain conditions relating to or affecting the use of real property.

When the license is revoked, the continued use of the property by the former licensee can ripen into a prescriptive easement. *Fletcher Oil Co v Bay City*, 346 Mich 411 (1956). In the case at hand, the promise made from the Russoms to Howard Diehl expired (or became unenforceable because of the Statute of Frauds) upon conveyance to Linda Cauzillo in 1993. The uncontested testimony is that as it relates to the Cauzillo property, her uses of the easement included swimming, sunbathing, picnicking, dockage, boat mooring, and dock storage just like everybody else's use of the easement. Those uses continued unabated for the next 22 years (1993 to 2015) when this lawsuit was filed.

However, neither Ms. Cauzillo or Carl and Lucy Scott owned their respective interests long enough for the prescriptive uses to vest (i.e. 15 years). As such, for Defendant Unruh to succeed in their claim for prescriptive easement, they must tack the uses from Cauzillo through the Scotts and onto themselves. In prescriptive easement cases, tacking is allowed in one of the following three ways: (1) including a description of the disputed acreage or use in the deed, (2) an actual transfer or conveyance of possession of the disputed acreage or uses by parol statements made at the time of conveyance, or (3) when predecessors and successors are so intimately acquainted that neither is required, known as the *Matthews doctrine* (*Matthews v Natural Resources Dep't*, 288 Mich App 23 (2010).

The evidence introduced at trial shows that when Carl and Lucy Scott purchased their property in 2001, Ms. Cauzillo told Mrs. Scott, by parol statements, that the dock and its summer/winter usages were included with the purchase. This evidence supports tacking in this matter as an actual transfer of possession was made and parol statements supported the uses of the easement as being conveyed along with that property. Lucy

Scott testified that prior to her purchase of the back-lot in question, she, as a family member of Lyle and Yvonne Scott, would use the easement to access Higgins Lake and swim, sunbathe, as well as to use the dock. She also testified that both Lyle Scott and Linda Cauzillo specifically told her that her back-lot interest included use of the easement for swimming, sunbathing, dockage, mooring of boats and dock storage. She testified that it was her intent when she purchased the property in 2001, to acquire those rights as well. In addition, when she ultimately sold her interest (the Trust's interest) to her daughter, Defendant Bonnie Unruh, it was her intent to convey all of those easement rights as well.

Bonnie Unruh's testimony corroborated this point. She testified that when she bought the property from her mother's trust in 2007, it was her understanding from speaking with her mother that she acquired all the easement use rights upon conveyance to her. Bonnie further testified that she would not have purchased the property if the easement use rights did not come along as part of the conveyance.

The court finds that the *Matthews doctrine* applies as it pertains to the conveyances from Carl and Lucy Scott to their respective trusts in 2001 as well as to the conveyance from the trusts to Bonnie and John Unruh in 2007. It is uncontested that Carl and Lucy Scott are intimately related to each other as well as being intimately related to their daughter, Bonnie Unruh. As such, tacking is allowed under Michigan law as it pertains to those conveyances.

Based upon the above findings of fact and law, the court concludes that Unruhs have proven the necessary elements of prescriptive easement as to their real property and the use of the easement created by Harry Groak. Ms. Cauzillo used the easement for

swimming, sunbathing, picnicking, dockage, boat mooring and dock storage. Further, Carl Lucy Scott continued these very same uses (this is true despite testimony that the Scotts did not have a boat because other members of their family used the easement for mooring purposes) right up through their sale of the their property to the Unruhs in 2007. Likewise, the Unruhs continue this same use of the easement to the present day. The Unruhs' have established by tacking a prescriptive easement for a period of 21 years and Plaintiffs have failed, for the reasons stated above, to rebut that presumption. As such, the Plaintiffs' have failed to meet their burden of proof relating to permission.

The court also finds that the prescriptive easement rights of swimming, sunbathing, picnicking, dockage, boat mooring, and dock storage was vested in Lyle and Yvonne Scott in 1986. As indicated above, the court found no evidence to suggest they were granted a license for such uses by the Groaks in the early 1970's or the Russoms in 1980. Plaintiffs' have failed to rebut this prescriptive easement presumption.

IMPERFECT SERVITUDE

Defendants also make a claim for imperfect servitude regarding the easement to Higgins Lake. A prescriptive easement can be established where an express easement failed through some defect and was treated as if it had been properly established. An imperfect servitude claim must be proven by clear and convincing evidence, in other words, the evidence must be strong enough to cause you to have a clear and firm belief that the proposition is true. The Defendants' have failed to establish a claim of imperfect servitude. The court previously ruled that the express easement created by Harry Groak was clear and unambiguous on its face. That easement only granted ingress and egress to

Higgins Lake. The easement's dedication language did not mention or define any other uses. Further, there was no evidence introduced at trial to show that Mr. Groak meant something other than what he put in that easement. Mr. Groak installed a red and white dock in Higgins Lake in front his house. Before he subdivided his property, he allowed renters from the cabins to use this dock and the three row boats he would moor there. The testimony is clear that after Mr. Groak subdivided his lot, he continued to allow the back-lotters who purchased the cabins to use this dock. However, the testimony is also clear that the back-lotters did not install the easement dock until 1971-1972. There was no testimony as to what Mr. Groak thought about the use of this dock or the boat mooring that took place at this dock on the easement. There was some testimony that the dock didn't even appear at the easement until after Mr. Groak died. Based upon the record as it is in this case, there is nothing to suggest that Mr. Groak intended to create something more than he did with the very precise language he used in his express easement. There is no evidence of a defect in the easement dedication or that Mr. Groak sanctioned the uses that developed on the easement over the years, most of which took place after he died. At the same time however, there is no evidence to suggest that Mr. Groak objected to these uses either – there simply is not enough evidence on this issue for the court to conclude one way or the other on this point. As such, Defendants' claim for imperfect servitude is dismissed.

In light of the court's rulings, Plaintiffs' claims for trespass and nuisance are dismissed for the reason that Defendants' have a vested interest in the easement by prescriptive easement and therefore, Plaintiffs' have failed to state a valid claim for trespass and nuisance.

THEREFORE, IT IS SO ORDERED.

Dated: November 14, 2019

Robert W. Bennett P-44262
Circuit Court Judge