STATE OF MICHIGAN COURT OF APPEALS

BLANCHE HUDSON and PAT FOSTER,
Plaintiffs,

v.

JOHN C. KLEUESSENDORF and JOHN T. BENSON,
Defendants.

_____/

COA: 344482 & 327878
File No. 13-52422-NZ
Hon. Kevin Cronin
Circuit Court Judge
48th Judicial Circuit

_____/

Blanche Hudson and Pat Foster
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MOTION FOR PEREMPTORY REVERSAL
ORAL ARGUMENT REQUESTED

Plaintiffs now move for peremptory reversal under MCR 7.211(C)(4) and MCR 2.613(A). Claimants have two issues within the jurisdiction of this court that support our motion for reversal.

First, the trial court issued an **(A)**[1] order on May 24, 2018 denying our motion to compel defendants to comply with a subpoena served on them Oct. 5, 2017. The subpoena seeks normal discovery information: who is the party paying for all the delays, distractions, and

[1] Each attachment a bold letter and possibly a number in the upper right hand corner of the document. This designation is placed before the document in the motion to ease the Courts referencing of the information.

attempts to complicate a straightforward trespass action. Defendants' attorney's affidavit in support of his motion for costs and sanctions showed 34 entries for *"client's representative."* Two of those entries show that this third party was both authorizing the actions of the law firm and were concerned about the costs:

(U5) "July 10, 2014 – Email to client representative re: authority to depose excavator."

(U6) **"**Aug. 13, 2014 – Telephone conference with client representative to discuss methods to reduce costs and still be ready to file Motion for Summary Disposition."

"The authorities are clear that the privilege extends essentially only to the substance of matters communicated to an attorney in professional confidence. Thus the identity of a client, or the fact that a given individual has become a client are matters which an attorney normally may not refuse to disclose, even though the fact of having retained counsel may be used as evidence against the client." *Colton v. United States*, 306 F2d 633, 637 cert den 371 U.S. 951, 1962.

Second, the trial court failed to deal with plaintiffs' prescriptive rights, which is clear error and may show bias. In either case it is grounds for a new hearing. Defendants placed a fence in the physical private road known as Mallard Street. Since 1982, Plaintiff Foster has used the physical road, and since 1993, Plaintiff Hudson has used the physical road on which defendants placed their fence, openly, continuously, and adversely. As a result, Plaintiffs have an easement by prescription in the physical roadway, and defendants are trespassing on plaintiffs' easement. For the same reasons Plaintiffs have an easement by prescription in the physical roadway, they have a prescriptive flowage easement, which was blocked when defendants filled a ditch and placed a blockage 8" from the outlet of Plaintiff Hudson's culvert under her driveway. This ditch had existed since at least 1982 when Plaintiff Foster purchased his property.

Blanche Hudson's **(E)** Affidavits of Merits filed in accordance with Judge Cronin's **(V)** motion for "exhibits," and never objected to by the defendants, states:

(E2) "Affiant attests as a fact that the physical road in which the defendants have placed a wooden fence has been a gravel roadway since at least 1993, when I first started living there. The fence has been placed in what had been my driveway and an improved roadway used since at least 1993.

Affiant attests that the drainage ditch that was intentionally blocked by the defendants and called 'landscaping' was there in 1993 when I first came there, and there had always been a drainage ditch coming down from the east side of Blue Goose Avenue and turning the corner at Mallard Street and extending easterly across my property, under my driveway through a drain tile, and onto what is now the defendants property to the wetlands at the end of Mallard Street."

The developers of the Recreation Development Subdivision No. 1 plat are defendants' predecessors in interest. In 1999, when the defendants predecessor in interest filed a **(Z)** land division application with Ganges Township to separate the defendants' property from other unplatted land owned by them. To facilitate the land division, the defendants' predecessor in interest had a survey performed. This **(Z3)** survey prepared by Nederveld, Inc. shows that the aggregate material of the road extended onto defendants' parcel by a foot to a foot and half. Plaintiffs' expert witness, a licensed Michigan surveyor, surveyed defendants property line on Mallard Street, and under **(P)** deposition was questioned if their fence was in the road-right-of-way answered: **(P3)** *"The fence is right on the line, plat line."* Defendants placed their fence in the aggregate material that is shown on their property by the 1999 survey. Defendants' predecessor in interest took no action to remove the roadway encroachment. All the lot owners in Recreation Development Subdivision No. 1 used the physical road shown in the 1999 survey since the road was first laid out in the 1960's.

"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 NW2d 725 (2000), citing MCL 600.5801 and *Goodall v Whitefish Hunting Club*, 208 Mich App 642, 645; 528 NW2d 221 (1995). "… when the passway has been used for something like a half century, it is unnecessary to show by positive testimony that the use was claimed as a matter of right, but that after such use[] the burden is on the plaintiff to show that the use was only permissive. *Marlette Auto Wash, LLC v Van Dyke SC Props, LLC*, 501 Mich 195 (2018) quoting *Berkey & Gay Furniture Co v Valley City Milling Co*, 194 Mich 242; 160 NW 648 (1916).

The burden of proof is on the defendants, not the plaintiffs to show that our use was just permissive. Our filings of affidavits of merits, depositions of Rex Felker and Jack Shephard, plus the owners' association contracting with Mr. Felker show that defendants clearly took away plaintiffs prescriptive rights by placing a fence on the physical road and blocking the flow of water across their property.

"A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim." *Smith v Globe Life Ins Co,* 460 Mich. 446, 454; 597 N.W.2d 28 (1999). "It requires a trial court to consider affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion." *Quinto v Cross & Peters Co*, 451 Mich. 358, 362; 547 N.W.2d 314 (1996).

Defendants argue that no ditch ever existed prior to the a road and drain contractor, Rex Felker who had cleaned the original ditches, and resurfaced the road in the fall of 2008 finishing in early 2009. Defendants purchased their property over a year after the work was performed in 2010, yet defendants' expert witness used a hearsay statement made by the defendants that no drainage ditch ever existed

prior to 2008, Brent D. DeRose, PE an engineer with Nederveld, Inc. prepared the report based upon the defendants' statement:

(W2) *"3) A rough ditch was dug with a backhoe on the south side of Mallard Drive in 2009."*

The trial court then falsely quotes Plaintiff Foster in his **(L)** order for summary disposition in order to support defendants' hearsay statement that expert witness, Brent D. DeRose relied on to produce the report claiming plaintiffs suffered no damage from defendants' actions:

(L4) "Plaintiffs lacked legal authority to modify the ditch. To the extent that any change to the flow of water has occurred as a result of Defendants' actions, such changes have only had the effect of restoring the natural flow of water as it existed prior to work performed by Mr. Felker in 2008 or 2009 when, according to the March 26, 2015 Affidavit of Plaintiff Foster, he hired Mr. Felker to enlarge, improve or clean out the ditch on Defendants' property."

The **(T3)** March 26, 2015 **(T)** Affidavit of Plaintiff Foster actually states **(T2)**:

"In the 2008 – 09 period of time, the private streets known as Blue Goose Avenue and Mallard Street were having problems with storm water drainage. After a meeting of owners, we hired Rex Felker to access the problem and come up with a solution."

"Hearsay is inadmissible, unless it is subject to a hearsay exception. MRE 802" *Lombardo v Lombardo*, 202 Mich.App. 151, 154; 507 N.W.2d 788 (1993). The defendants produced no exceptions.

As shown above, the reversible error is so manifest that an immediate reversal of the judgment and order appealed from should be granted without formal argument or submission under MCR 7.211(C)(4).

RELIEF SOUGHT

Plaintiff/Appellants request that this honorable court to issue an Order recognizing our easements by prescription, remand the case to the lower court for trial or settlement regarding damages. Plaintiff also requests an order approving our motion to compel discovery, and an order vacating Judge Kengis' order for costs and sanctions.

_____ _____
Pat Foster, Plaintiff/Appellant Date

_____ _____
Blanche Hudson, Plaintiff/Appellant Date