

STATE OF MICHIGAN
IN THE SUPREME COURT

JEFFREY S. MANIACI,
Plaintiff/Appellant,

Supreme Court Case No.

Appeal No: 333952

v.

Lower Court No. 14-7559-CH

Honorable Thomas R. Evans

THOMAS DIROFF and MANDY DIROFF,

Defendants/Appellees

and

KENNETH G. SILER and TONYA L. SILER
REVOCABLE TRUST DATED APR 3, 2013,

Appellee.

_____ /

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_____ /

**ANSWER OF DEFENDANT/APPELLEE KENNETH G. SILER and TONYA L.
SILER REVOCABLE TRUST DATED APRIL 3, 2013 TO APPELLANT JEFFREY S.
MANIACI'S APPLICATION FOR LEAVE TO APPEAL**

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JURISDICTIONAL STATEMENT

Defendant/Appellee KENNETH G. SILER and TONYA L. SILER REVOCABLE TRUST DATED APR 3, 2013 concedes that pursuant to MCR 7.303, this Court has jurisdiction to consider this Application for Leave to Appeal. Defendant/Appellee denies that Plaintiff/Appellant has demonstrated the grounds for granting this Application for Leave to Appeal, as required by MCR 7.305(B).

COUNTER-STATEMENT OF QUESTION INVOLVED

- I. WHETHER THE GLADWIN COUNTY CIRCUIT COURT AND THE MICHIGAN COURT OF APPEALS PROPERLY INTERPRETED THE CONSENT JUDGMENT AND THE EASEMENT GRANTED THEREIN?

The Trial Court answered “yes”.

The Court of Appeals answered “yes”.

The Plaintiff/Appellant answers “no”.

Appellee SILER TRUST answers “yes”.

I. INTRODUCTION

The SILER TRUST was brought into this appeal on motion by Plaintiff/Appellant JEFFERY MANIACI as KENNETH and TONYA SILER purchased the property in question, inclusive of Parcel B adjacent to Vonda Lane on or about June 17, 2016, and subsequently transferred the property into their Trust on July 21, 2016. The SILERS essentially bought into the present lawsuit, without notice by the DIROFFS. The action involves the interpretation of the Consent Judgment entered into by Plaintiff/Appellant and the DIROFFS dated June 18, 2015, resolving their legal dispute, subsequent to placing a settlement on the record on April 28, 2015, the scheduled Trial date in the underlying Circuit Court action. In particular, the language within the Consent Judgment that is in dispute is the provision of an easement by the DIROFFS in favor of the lot owners of the Supervisor's Plat of Baker's Resort, including Mr. MANIACI as set forth within Paragraph 2 of the Consent Judgment. This easement is provided as follows:

. . . an appurtenant non-recreational easement for ingress and egress access to and from the Tittabawassee River (a/k/a Secord Lake) across Parcel B to and from Vonda Lane (hereinafter the "Easement"). The Easement shall hereafter run to and with each and every lot of the Supervisor's Plat of Baker's Resort, in perpetuity, for use by those within the Supervisor's Plat of Baker's Resort. The Easement may also be used for the temporary mooring and launching of watercraft, including by boat trailer, but may not be used for non-temporary mooring, docks and/or wharfs. (See June 18, 2015 Consent Judgment, at Paragraph 2, attached hereto as Exhibit 1)

Contrary to Plaintiff/Appellant's argument, the easement as currently situated allows for the placement of "watercraft" into the Tittabawassee River via boat trailer, and Plaintiff/Appellant's current attack seeks to revise the language within the Consent Judgment, which appears to have been hammered out at length and signed by the parties prior to its entry by the Court. It is the SILER TRUST's position that Plaintiff/Appellant should not be allowed to amend and expand the rights provided by the Easement contained within the Consent Judgment,

and his current Application for Leave to Appeal should be denied.

II. CHARACTER OF PROCEEDINGS

This action was filed on or about August 27, 2014. Following discovery and on the date of trial, the parties entered into an agreement to enter a Consent Judgment setting forth the terms of the settlement between the parties and defining the easement at issue in this matter. A copy of the Consent Judgment is attached hereto as Exhibit 1. After the Consent Judgment was entered by the Court on June 18, 2015, Plaintiff and the DIROFF Appellees continued to have issues regarding the road end easement, and the launching of watercraft therefrom. Plaintiff filed motions to hold the DIROFFS in contempt, which were ultimately denied by the Trial Court.

Thereafter, Plaintiff filed an Application for Leave to Appeal to the Court of Appeals, which was denied by Order dated November 23, 2016. This Court thereafter ordered the Court of Appeals to consider the MANIACI appeal as leave had been granted.

While the appeal was pending with the Michigan Court of Appeals, the SILER TRUST was added to the action on Motion by Plaintiff/Appellant, as KENNETH and TONYA SILER purchased the property in question, inclusive of Parcel B adjacent to Vonda Lane on or about June 17, 2016, and subsequently transferred the property into their Trust on July 21, 2016.

Following briefing and oral argument, the Court of Appeals issued its opinion dated May 15, 2018, affirming the Gladwin County Circuit Court's ruling on the scope and the extent of the easement contained within the Consent Judgment.

The Court of Appeals concluded:

Applying the reasoning of *Blackhawk Dev Corp* to the present case, the trial court here did not clearly err in finding that adjusting the grade of Parcel B is unnecessary for plaintiff's reasonable use of the easement. Here, the easement grant expressly permits launch of watercraft by boat trailer. The easement grant does not define watercraft for purposes of the easement. A canoe or kayak is a

‘watercraft’, as is a 30-foot power boat, or a 60-foot cabin cruiser. The term ‘watercraft’ for purposes of the easement must necessarily be limited by the topography of Parcel B and the size of the 20-foot easement. Similarly, the easement provides for the launching of watercraft ‘including by boat trailer’, implying that boats can be launched there by easement holders without the use of a trailer, presumably by carrying a canoe or a kayak from Vonda Lane down to the water’s edge to launch the boat into the water. The easement grant also does not specify in what way a trailer could be used, or that the boat trailer must have access to the water itself. As the trial court observed, some boats could be offloaded by backing a trailer near the water’s edge, while launching larger boats may necessitate a trailer used in conjunction with a ramp or other equipment. In order words, just because it is not feasible to back a boat trailer all the way to the water’s edge does not prevent the easement from being used to launch boats, including the use of a boat trailer, and plaintiff’s desire to back his boat trailer all the way to the water’s edge does not make it a requirement of effectively using the easement.

In addition, we note that the parties agree that the slope of Parcel B is unchanged from the time that the litigation began, and that neither the settlement agreement on the record nor the consent judgment suggests changing the slope of Parcel B. Because this issue presented itself for the first time long after entry of the consent judgment, we conclude that changing the slope of Parcel B was not contemplated by the parties and is outside the scope of the easement. Further, the consent judgment provides that ‘to the extent that any usage of the Easement creates damage to the surface of the Easement, the person(s) creating that damage shall be responsible for restoring the Easement to its pre-damaged state,’ suggesting that the parties intended that Parcel B remain in its existing condition.

See Unpublished Court of Appeals Opinion dated May 15, 2018 at page 5

III. IMPORTANT INSTRUMENTS RELEVANT TO THIS APPEAL

Plaintiff/Appellant is requesting this Court review the Gladwin County Circuit Court’s February 4, 2016 Order, denying Plaintiff’s Motion for Contempt, a copy attached hereto as Exhibit 2, as well as the Michigan Court of Appeals decision dated May 15, 2018, a copy attached as Exhibit 3.

IV. LEGAL ARGUMENT

I. WHETHER THE GLADWIN COUNTY CIRCUIT COURT AND THE MICHIGAN COURT OF APPEALS PROPERLY INTERPRETED THE CONSENT JUDGMENT AND THE EASEMENT GRANTED THEREIN?

The Trial Court answered “yes”.

The Court of Appeals answered “yes”.

The Plaintiff/Appellant answers “no”.

Appellee SILER TRUST answers “yes”.

The parties do not dispute that the easement provided within the Consent Judgment provides for ingress and egress to the Tittabawassee River, and for the launching of watercraft, including by boat trailer. The Plaintiff/Appellant argues that this necessarily includes the regrading of the slope of the waterway along Vonda Lane into the river, whereas the SILER TRUST’s position is that the clear and express language within the Consent Judgment does not provide for the regrading of the slope and, as such, this regrading was not bargained for by the parties.

A. STANDARD OF REVIEW AND APPLICABLE LAW

An agreement to settle a pending lawsuit is a contract and is to be governed by the legal principles applicable to the construction and interpretation of contracts. *Kloian v Domino’s Pizza, LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006) (*citations and quotation marks omitted*). Issues of contract interpretation are questions of law that this Court reviews de novo. See *Id.* A consent judgment is in the nature of a contract and is to be construed and applied as such. *Laffin v Laffin*, 280 Mich App 513, 517; 760 NW2d 738 (2008). If no reasonable person could dispute the meaning of ordinary and plain contract language, the Court must accept and enforce contractual language as written, unless the contract is contrary to law and public policy.

See *Id.*, at 517.

MCR 2.507(F) provides that a consent judgment is binding if it is made in open court. Generally, a party may only obtain relief from a consent judgment for mutual mistake, fraud, unconscionable advantage, or ignorance of a material term or the settlement agreement. *Plamondon v Plamondon*, 230 Mich App 54, 56; 583 NW2d 245 (1998).

B. DISCUSSION

As this Court is aware, Plaintiff/Appellant, within his Application for Leave to Appeal to this Court, must demonstrate the grounds for the application as provided in MCR 7.305(B). Those grounds pertinent to this action include: (1) the issue involves a substantial question about the validity of a legislative act; (2) the issue has significant public interest and the case is one by or against the state or one of its agencies or subdivisions or by or against an officer of the state or one of its agencies or subdivisions in the officer's official capacity; (3) the issue involves a legal principle of major significance to the state's jurisprudence; or (5) in an appeal of a decision of the Court of Appeals, (a) the decision is clearly erroneous and will cause material injustice, or (b) the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.

In his present application, Plaintiff/Appellant pays lip service to this requirement merely asserting that the Court of Appeals has essentially misapplied the standards set forth in *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 53; 700 NW2d 364 (2005). Based upon the Plaintiff/Appellant's failure to demonstrate the grounds for the Application for Leave to Appeal as required by MCR 7.305(B), this application should be denied.

Contrary to the MANIACI argument, the Michigan Court of Appeals correctly applied the *Blackhawk* test to the facts and circumstances presented herein.

The SILER TRUST Appellee's concede that the Consent Judgment would affect them as the subsequent property owners of disputed parcel. It is uncontested that the easement contained by the Consent Judgment provides a non-recreational easement for ingress and egress to the Tittabawassee River across Parcel B, owned by the Trust. The easement language is as follows:

. . . an appurtenant non-recreational easement for ingress and egress access to and from the Tittabawassee River (a/k/a Secord Lake) across Parcel B to and from Vonda Lane (hereinafter the "Easement"). The Easement shall hereafter run to and with each and every lot of the Supervisor's Plat of Baker's Resort, in perpetuity, for use by those within the Supervisor's Plat of Baker's Resort. The Easement may also be used for the temporary mooring and launching of watercraft, including by boat trailer, but may not be used for non-temporary mooring, docks and/or wharfs. (See June 18, 2015 Consent Judgment, at Paragraph 2, attached hereto as Exhibit 1)

The Appellant argues that it was clearly understood, and that it is necessary to regrade the slope along the Tittabawassee River through Parcel B, to allow for the launching of watercraft by boat trailer as the current slope is too steep to allow for this activity.¹ However, nowhere within the language of the Consent Judgment nor the settlement that was placed upon the record by the parties prior to the completion of the Consent Judgment, does the issue of regrading the slope mentioned whatsoever.

A review of the Consent Judgment, copy attached as Exhibit 1, reveals that there was no mention of regrading the slope from the end of Vonda Lane to the Tittabawassee River. Likewise, the transcript of the settlement the parties put upon the record on April 28, 2015 fails to address this issue in any form. (See April 28, 2015 Hearing transcript attached as Exhibit 4.) If regrading of the slope of the river bank was such an essential and understood term of the settlement agreement between Plaintiff and DIROFFs, one would think that this provision would

¹ Within Appellants' Brief, he seeks to improperly expand the record in providing demonstrative diagrams and photos which are not part of the record, and which do not accurately reflect the lay of the land so to speak of Parcel B.

have been mentioned in at least one of these sources.

As this Court is aware, once an easement is granted, it cannot be modified by either party unilaterally. See *Douglas v Jordan*, 232 Mich 283; 205 NW 52 (1925). This is exactly what Mr. MANIACI is attempting to do in the present action. It is likely that the regrading of the road end of Vonda Lane was an afterthought, which was not part of the original agreement between Plaintiff and the DIROFFs, and which Plaintiff is attempting to expand upon in these proceedings.

As the Court is also aware, a fundamental tenant of Michigan jurisprudence is that unambiguous contracts are not open to judicial construction and must be *enforced as written*. See *Rory v Continental Insurance Co*, 473 Mich 457 at 468; 703 NW2d 23 (2005) (*internal citations omitted, emphasis in original*). Courts enforce contracts according to their unambiguous terms because doing so respects the freedom of individuals freely to arrange their affairs via contract. The Michigan Supreme Court has previously noted that “[t]he general rule (of contracts) is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held and enforced in the courts.” See *Id*, citing *Terrien v Zwit*, 467 Mich 56, 71; 648 NW2d 602 (2002), quoting *Twin City Pipeline Co v Harding Glass Co*, 283 US 353, 356; 51 S. Ct. 476; 75 L. Ed. 1112 (1931).

Based upon these long-held legal principles, if it was the intent of the parties to allow for regrading of the road end into the Tittabawassee River to allow for larger boats to be launched via boat trailer, the language should have been included to specify these terms under the Consent Judgment. If Plaintiff sought to launch larger boats, however large is unknown, that language should have been bargained for and drafted within the agreement set forth within the Consent Judgment. The easement provides that it may be used for the temporary mooring and launching

of *watercraft*, including by boat trailer, which can be accomplished as the road end is currently situated, as addressed by the Court of Appeals in its decision.

Plaintiff admits that the road end, as it currently exists, was essentially the same prior to the filing of the lawsuit. See Plaintiff's Brief on Appeal at Page 4. Despite this fact, Plaintiff failed to include any regrading language within the Consent Judgment, despite now arguing that that was the central focus of the litigation before the Trial Court. The lack of any language regarding regrading the slope adjacent to the Tittabawassee River at the end of Vonda Lane, contradicts Plaintiff's argument that the provision of the easement allows him to maintain it. While this may be true, regrading the slope is not maintenance of the easement, but expansion of same. As noted by Plaintiff, "[t]he extent of the easement is defined in the easement agreement", citing *Panhandle E Pipeline Co v Musselman*, 257 Mich App 477, 484; 668 NW2d 418 (2003). In this case, the easement allows for the launching of watercraft, including by trailer. The Random House Dictionary, 2017, defines watercraft as: 1. skill in boating and water sports; 2. any boat or ship; 3. boats and ships collectively. The term "watercraft" was agreed to by the parties and placed within the Consent Judgment. As set forth above, if Plaintiff wanted the easement to provide for launching of a specific size or type of boat, he should have bargained for this with the DIROFF's regarding this language to be contained within the Consent Judgment. The Court can appreciate that numerous watercraft can be launched across the easement provided for allowing ingress and egress through Parcel B of the Defendants/Appellees' property, as the slope adjacent to the Tittabawassee River is currently situated. Allowing for regrading of the end of Vonda Lane expands the easement and should not be allowed.

Plaintiff/Appellant asserts that when a contract creates an easement, it is not necessary

that the parties expressly agree on each and every detail; the law can and does supply any missing details by construction, citing *Nichols v Seaks*, 296 Mich 154, 159; 295 NW 596 (1941). It is important for the Court to note that the *Nichols* case has nothing to do with easements, but dealt with a liquidated damages provision within a contract involving pension plans. The *Nichols* case is inapplicable to the current dispute.

Likewise, Plaintiff relies heavily upon *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 53; 700 NW2d 364 (2005) in his argument that the regrading of the slope along the Tittabawassee River in the present dispute should be allowed. At the outset, *Blackhawk* is distinguishable as it dealt with an easement given to a public municipality which allowed a developer to utilize portions of the easement, which were found to be outside of the rights provided with the easement by its grantor. Even by application of the *Blackhawk* test, the easement at issue should not be expanded as Plaintiff requests. As posited by Plaintiff, the first element of the *Blackhawk* test, whether the proposed developments are necessary for the holders' effective use of its easements, demonstrates that the modifications to the slope adjacent to the Tittabawassee River herein are not necessary.

It is the SILER Trust's position that one can launch a watercraft through this easement, even by boat trailer, as it currently exists. As set forth above, this is the language that the parties bargained for, prior to the SILER TRUST involvement in this matter, and the language should not be expanded upon as an afterthought by Mr. MANIACI. In the event that the Court found that these developments were necessary, the developments would violate the second element of the *Blackhawk* test, whether the use unreasonably burdens the servient estate. As the Court can appreciate, in the event that Plaintiff was allowed to alter the slope as he requests, both the volume and the size of boats being launched at the site would increase significantly, likely

causing serious damage to the property contained within the easement, as well as adjacent thereto. Allowing for the alteration of the grade at the end of Vonda Lane would violate the easement language set forth within paragraph 4 of the Consent Judgment that indicates that routine maintenance is the right and responsibility of the DIROFFs. However, to the extent that any usage of the easement creates damage to the surface to the easement, the person[s] creating the damage shall be responsible for restoring the easement to its pre-damaged state. See Consent Judgment at paragraph 4, attached hereto as Exhibit 1.

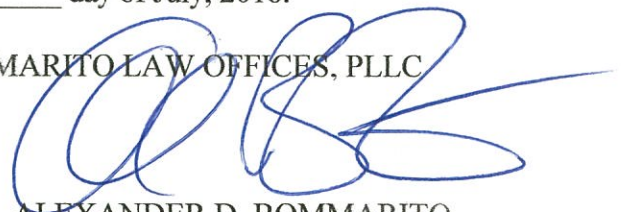
Such alteration may also cause the parties, not simply Plaintiff, to have issues with the Michigan Department of Environmental Quality by altering the slope of a naturally occurring navigable waterway. The language is clear and unambiguous in defining the easement provided by the DIROFF's to Mr. MANIACI, and to expand that easement as Plaintiff requests, would put an unreasonable burden through its expanded use, as well as increased maintenance of the easement by way of the expanded use.

REQUEST FOR RELIEF

Based upon the foregoing, Defendant/Appellant KENNETH G. SILER and TONYA L. SILER REVOCABLE TRUST DATED APRIL 3, 2013, respectfully request this Court deny Plaintiff/Appellant's Application for Leave to Appeal and assess costs and attorney fees wrongfully incurred in furtherance of this appeal.

Dated this 20th day of July, 2018.

BOMMARITO LAW OFFICES, PLLC



BY: ALEXANDER D. BOMMARITO
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TONYA L. SILER REVOCABLE TRUST DATED
APR 3, 2013

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EXHIBIT 1

STATE OF MICHIGAN
IN THE 55th CIRCUIT COURT FOR THE COUNTY OF GLADWIN

JEFFREY S. MANIACI,
Plaintiff/Counter-Defendant,

A TRUE COPY
55th CIRCUIT COURT

v

File No: 14-7559-CH
Hon. Thomas R. Evans

JUN 22 2015

THOMAS DIROFF and
MANDY DIROFF,
Defendants/Counter-Plaintiffs.

GLADWIN COUNTY CLERK
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CONSENT JUDGMENT

At a session of said Court
held on the 18th day of JUNE, 2015
in the Circuit Court for the County of Gladwin, State of Michigan

PRESENT: Honorable Thomas R. Evans
Circuit Court Judge

THIS HONORABLE COURT having convened on April 28, 2015 at 9:00 a.m. to
conduct a trial in this pending cause, the Court having been advised that the parties
herein have reached an agreement to consent to judgment, and the Court having
otherwise been fully advised in the premises;

NOW THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED AS
FOLLOWS:

1. Fee title to Parcel B, as hereinafter described, vests in
Defendant/Counter-Plaintiffs, Thomas B. Diroff and Mandy J. Diroff (hereinafter "Diroff").
Parcel B is more completely described as:

FILED

Part of the East 1/2 of the Northeast 1/4 of Section 35, T20N-R1E, Clement Township, Gladwin County, Michigan, described as: Commencing at the Northeast Corner of Lot 45 of the Supervisor's Plat of Baker's Resort, according to the recorded plat thereof, as recorded in Liber 6 of Plats, Page 29, of the Gladwin County, Michigan, public Records; thence N89E04'00"W, along the North line of said Lot 45 and also being the South line of Vonda Lane, 76.87 feet to contour line 755.8 feet (NAVD-88) and the Point of Beginning; thence continuing N89E04'00"W, along the extension of the South line of said Vonda Lane, 17.1 feet, more or less, to the water's edge of the Tittabawassee River; thence Northeasterly, along said water's edge, 52.2 feet, more or less, to the Westerly extension of the North line of Vonda Lane; thence N89E52'41"E, along the Westerly extension of the North line of Vonda Lane, 19.15 feet, more or less, to contour line 755.8 feet (NAVD-88); thence S18E24'08"W, along the estimated original contour line, 53.16 feet to the point of Beginning. Containing 0.02 acres, more or less, and being subject to any restrictions, reservations, easements, rights-of-way, and zoning or governmental regulations of record.

2. Notwithstanding, Diroff acknowledges or otherwise conveys in favor of the lot owners of the Supervisor's Plat of Baker's Resort (as recorded in Liber 6 of Plats, Page 29, Gladwin County Records), together with said lot owners' successors and assigns, an appurtenant non-recreational easement for ingress and egress access to and from the Tittabawassee River (a/k/a Secord Lake) across Parcel B to and from Vonda Lane (hereinafter the "Easement"). The Easement shall hereafter run to and with each and every lot of the Supervisor's Plat of Baker's Resort, in perpetuity, for use by those within the Supervisor's Plat of Baker's Resort. The Easement may also be used for the temporary mooring and launching of watercraft, including by boat trailer, but may not be used for non-temporary mooring, docks, and/or wharfs.

3. Diroff may maintain a split rail fence on the common boundary between Parcel B and the terminus point of Vonda Lane. The fence must contain a 20 feet opening in the middle of said fence to facilitate ingress and egress to and from the Tittabawassee River (a/k/a Secord Lake), specifically to accommodate the use of a boat trailer. The fence shall be reasonably constructed to maximize the view of the water.

4. Routine maintenance of the Easement will be both the right and the responsibility of Diroff. However, to the extent that any usage of the Easement creates damage to the surface of the Easement, the person(s) creating that damage shall be responsible for restoring the Easement to its pre-damaged state.

5. A fence owned by Diroff, which is currently located outside Lot 45 of the Supervisor's Plat of Baker's Resort, may be maintained in its current location until the fence is to be replaced. When said fence is replaced, it must be re-located back to the common boundary of Lot 45 and the southern edge of Vonda Lane.

6. On both the north and the south sides of Vonda Lane and Parcel B, there are ditches and those ditches serve from time-to-time to facilitate water drainage from the neighborhood. No party will be allowed to utilize those drains in any manner that would preclude reasonable drainage from those drains to the Tittabawassee River or otherwise cause blockage of those drains.

7. All necessary leave is hereby granted to permit this Consent Judgment to be recorded in the permanent records of the Gladwin County Register of Deeds.

8. Except as otherwise noted herein, every party herein waives all claims, asserted or not asserted, against every other party herein which exists known or unknown, as of April 28, 2015.

THIS JUDGMENT CONSTITUTES A FINAL ORDER AND RESOLVES ALL CLAIMS RAISED IN THE CASE AT BAR.

Dated: June 18, 2015

Philip L Ellison

08/18/2015

By: Philip L. Ellison (P74117)
Attorney for Plaintiff/Counter-Defendant

Dated: June 18, 2015

William L Carey

By: William L. Carey (P31602)
Attorney for Defendants/Counter-Plaintiffs

IT IS SO ORDERED.

Dated: June 18, 2015

Thomas R Evans

Hon. Thomas R. Evans (P38525)
Circuit Court Judge

EXHIBIT 2

STATE OF MICHIGAN
IN THE 55th CIRCUIT COURT FOR THE COUNTY OF GLADWIN

JEFFREY S. MANIACI,
Plaintiff/Counter-Defendant,

v

File No: 14-7559-CH A TRUE COPY
Hon. Thomas R. Evans 55th CIRCUIT COURT

THOMAS DIROFF and
MANDY DIROFF,
Defendants/Counter-Plaintiffs.

FEB -4 2016

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ORDER FOLLOWING HEARING HELD ON AUGUST 25, 2015

At a session of said Court held on the 25th day of August, 2015
in the Circuit Court for the County of Gladwin, State of Michigan

PRESENT: Honorable Thomas R. Evans, Circuit Court Judge

Before the Court on August 25, 2015 was Plaintiff's motion for entry of order of contempt of Court. Upon discussion of matters off the record within the Court's Chambers and hearing further arguments on the record, the Court orders as follows:

1. That the barriers shall be removed and the road opened by twelve noon on August 31, 2015; and
2. That each party shall bear its own costs and legal fees related to this motion.

IT IS SO ORDERED.

Date: 2/04/2016

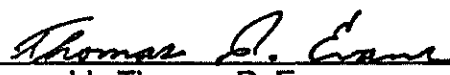

Honorable Thomas R. Evans
Circuit Court Judge

EXHIBIT 3

STATE OF MICHIGAN
COURT OF APPEALS

JEFFREY S. MANIACI,
Plaintiff-Appellant,

UNPUBLISHED
May 15, 2018

v

No. 333952
Gladwin Circuit Court
LC No. 14-007559-CH

THOMAS DIROFF and MANDY DIROFF,
Defendants-Appellees,

and

KENNETH G. SILER AND TONYA L. SILER
REVOCABLE TRUST,
Appellee.

Before: METER, P.J., and GADOLA and TUKEL, JJ.

PER CURIAM.

Plaintiff, Jeffrey S. Maniaci, appeals as on leave granted the trial court's post-judgment order denying his request to adjust the grade of waterfront property owned by appellee Kenneth G. Siler and Tonya L. Siler Revocable Trust (the Trust), in which plaintiff possesses an easement. We affirm.

I. FACTS

This case arises from a dispute involving a roughly rectangular strip of land, referred to as Parcel B, located on Secord Lake, which is part of the water system of the Tittabawassee River. Parcel B lies adjacent to the water's edge, and Vonda Lane is a public road that ends at Parcel B. The Trust owns Lot 45, which is adjacent to Parcel B. Plaintiff owns non-lakefront property in the same subdivision in which Lot 45 and Parcel B are located.

In 2014, plaintiff initiated this action before the trial court asserting the right to use Parcel B to access Secord Lake and the Tittabawassee River. At that time, Lot 45 was owned by

defendants, Thomas and Mandy Diroff (the Diroffs),¹ who filed a counterclaim asserting ownership of Parcel B. The parties thereafter agreed to entry of a consent judgment granting the Diroffs fee title to Parcel B, while granting plaintiff and the other property owners in the subdivision a nonrecreational easement over a 20-foot wide path across parcel B to access Secord Lake. At the time, the Diroffs had a fence along the boundary of Parcel B and Vonda Lane. The consent judgment provided that the fence could remain but the Diroffs would create a 20-foot wide opening in the fence to allow access to the lake over Parcel B. The parties' attorneys agreed on the record as follows:

The 20 foot opening is specifically provided so that if a party easement holder wishes to, as part of the rights of ingress and egress, to launch a watercraft at that location a 20 foot wide opening would accommodate a trailer and the reasonable backing up abilities of the operator.

In June 2015, the trial court entered the consent judgment which provided, in relevant part:

2. . . . Diroff acknowledges or otherwise conveys in favor of the lot owners of the Supervisor's Plat of Baker's Resort . . . together with said lot owners' successors and assigns, an appurtenant non-recreational easement for ingress and egress access to and from the Tittabawassee River (a/k/a Secord Lake), across Parcel B to and from Vonda Lane (hereinafter the "Easement"). The Easement shall hereafter run to and with each and every lot of the Supervisor's Plat of Baker's Resort, in perpetuity, for use by those within the Supervisor's Plat of Baker's Resort. The Easement may also be used for the temporary mooring and launching of watercraft, including by boat trailer, but may not be used for non-temporary mooring, docks, and/or wharfs.

3. Diroff may maintain a split rail fence on the common boundary between Parcel B and the terminus point of Vonda Lane. The fence must contain a 20 feet opening in the middle of said fence to facilitate ingress and egress to and from the Tittabawassee River (a/k/a Secord Lake), specifically to accommodate the use of a boat trailer. The fence shall be reasonably constructed to maximize the view of the water.

4. Routine maintenance of the Easement will be both the right and the responsibility of Diroff. However, to the extent that any usage of the Easement creates damage to the surface of the Easement, the person(s) creating that damage shall be responsible for restoring the Easement to its pre-damaged state.

Several weeks after the consent judgment was entered, plaintiff filed a motion for contempt alleging that the Diroffs had failed to remove the barriers from the easement. The trial

¹ The Diroffs have since sold their interest, which is currently owned by the Trust.

court declined to hold the Diroffs in contempt but ordered them to remove the barriers by August 31, 2015.

In April 2016, plaintiff again moved before the trial court to hold the Diroffs in contempt for failing to comply with the consent judgment by removing the barriers. Plaintiff also requested an order permitting him to alter the slope of Parcel B to enable him to launch a boat using a boat trailer. At the hearing on the motion, plaintiff conceded that the slope of the land was the same as it had been when the consent judgment was entered, but contended that it is virtually impossible to use a trailer to launch a boat from Parcel B given the steep incline of the bank. At the conclusion of the hearing on the motion, the trial court denied plaintiff's request to grade the easement. The trial court's order stated:

Plaintiff's request for a declaratory ruling that Plaintiff may adjust the grade/slope of the land on Parcel B to reasonably utilize the express easement (outlined in the Consent Judgment entered by this Court) for the launching of watercraft, including by boat trailer, is denied because having an easement granted to use an area as a boat launch does not convey with it the right to regrade or reslope the grade of land, as explained on the record.

On the record, the trial court reasoned that the consent judgment did not specify how a person could use a trailer to launch a boat, or that a trailer necessarily would be able to reach the water's edge. The trial court stated that plaintiff was permitted to use a trailer or other equipment to launch a boat, as long as plaintiff did so without changing the slope of the land. The trial court further denied plaintiff's request to hold defendants in contempt and for attorney fees.

This Court denied plaintiff's application for leave to appeal the trial court's post-judgment order.² In lieu of granting leave to appeal, our Supreme Court thereafter remanded the case to this Court for consideration as on leave granted.³

II. ANALYSIS

This case involves the question whether plaintiff's proposed alterations to Parcel B fall within the scope of plaintiff's easement. Plaintiff argues that the trial court erred by denying his request to grade Parcel B because, in its current condition, it is impossible for him to launch a boat with a boat trailer on Parcel B, which is a permitted use of the easement. We disagree.

Generally, the extent of a party's rights under an easement is a question of fact which this Court reviews for clear error. *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 40; 700 NW2d 364 (2005). A finding is clearly erroneous if, after reviewing the entire record, this Court is definitely and firmly convinced that the trial court made a mistake. *Augustine v Allstate Ins*

² *Maniaci v Diroff*, unpublished order of the Court of Appeals, entered November 23, 2016 (Docket No. 333952).

³ *Maniaci v Diroff*, 500 Mich 1057; 898 NW2d 585 (2017).

Co, 292 Mich App 408, 424; 807 NW2d 77 (2011). In addition, this Court reviews de novo the trial court's dispositional rulings on equitable matters related to easements. See *Blackhawk Dev Corp*, 473 Mich at 40.

The easement in this case was created by a consent judgment, which is the product of an agreement between the parties. See *Sylvania Silica Co v Berlin Twp*, 186 Mich App 73, 75; 463 NW2d 129 (1990). This Court interprets judgments entered by agreement of the parties in the same manner as contracts. *Gramer v Gramer*, 207 Mich App 123, 125; 523 NW2d 861 (1994). Although we apply contract principles to determine the scope of the easement created by the consent judgment, we consider the law related to easements to determine the scope of plaintiff's rights to enjoyment of the easement created by the consent judgment.

An easement is a limited right to use the land burdened by the easement, rather than a right to occupy and possess the land, and generally is limited to a specific purpose. *Schumacher v Dep't of Nat Resources*, 275 Mich App 121, 130; 737 NW2d 782 (2007), citing *Dep't of Nat Resources v Carmody-Lahti Real Estate, Inc*, 472 Mich 359, 378; 699 NW2d 272 (2005). The language of the instrument that granted the easement determines the scope of the easement holder's rights. See *Blackhawk Dev Corp*, 473 Mich at 42. "Where the rights of an easement are conveyed by grant, neither party can alter the easement without the other party's consent." *Id.* at 46.

The conveyance of an easement gives the easement holder "all such rights as are incident or necessary to the reasonable and proper enjoyment of the easement." *Id.* at 41-42 (quotation marks and citations omitted). The use exercised by the holder of the easement must be reasonably necessary "to the proper enjoyment of the easement, with as little burden as possible to the fee owner of the land." *Id.* at 42. An easement holder's rights are paramount to the rights of the fee owner, but only to the extent stated in the grant of the easement. *Id.* at 41. "The existence of an easement necessitates a thoughtful balancing of the grantor's property rights and the grantee's privilege to burden the grantor's estate." *Id.*

"A party who enjoys an easement is entitled to maintain it so that it is capable of the use for which it was given." *Morse v Colitti*, 317 Mich App 526, 545; 896 NW2d 15 (2016). "The making of repairs and improvements necessary to the effective enjoyment of an easement . . . is incidental to and part of the easement." *Mumrow v Riddle*, 67 Mich App 693, 700; 242 NW2d 489 (1976). Improvements, however, receive closer scrutiny than repairs. *Id.* In this case, Parcel B was steeply sloped and sandy at the time the easement was granted, and it is unlikely that a person at that time could have launched a watercraft by backing a boat trailer itself into the water. Grading the parcel to alter the slope sufficiently to launch a boat from a boat trailer, therefore, would constitute an improvement to the easement, not simply a repair.

In *Blackhawk Dev Corp*, our Supreme Court recognized that "[a] fundamental principle of easement law is that the easement holder . . . cannot 'make improvements to the servient estate if such improvements are unnecessary for the effective use of the easement or they unreasonably burden the servient tenement.'" *Blackhawk Dev Corp*, 473 Mich at 41, citing *Little v Kin*, 468 Mich 699, 701; 664 NW2d 749 (2003). The Court in *Blackhawk Dev Corp* stated:

From these principles evolves a two-step inquiry: whether the proposed developments are necessary for the [easement holder's] effective use of its easement and, if the developments are necessary, whether they unreasonably burden [the] servient estate. Of course, the need to answer the second question is obviated where the first question is answered in the negative. [*Id.* at 42 (citation omitted).]

Applying the reasoning of *Blackhawk Dev Corp* to the present case, the trial court here did not clearly err in finding that adjusting the grade of Parcel B is unnecessary for plaintiff's reasonable use of the easement. Here, the easement grant expressly permits launch of watercraft by boat trailer. The easement grant does not define watercraft for purposes of the easement. A canoe or kayak is a "watercraft," as is a 20-foot power boat, or a 60-foot cabin cruiser. The term "watercraft" for purposes of the easement must necessarily be limited by the topography of Parcel B and the size of the 20-foot easement. Similarly, the easement provides for the launching of watercraft "including by boat trailer," implying that boats can be launched there by easement holders without the use of a trailer, presumably by carrying a canoe or a kayak from Vonda Lane down to the water's edge to launch the boat into the water. The easement grant also does not specify in what way a trailer could be used, or that the boat trailer must have access to the water itself. As the trial court observed, some boats could be offloaded by backing a trailer near the water's edge, while launching larger boats may necessitate a trailer used in conjunction with a ramp or other equipment. In other words, just because it is not feasible to back a boat trailer all the way to the water's edge does not prevent the easement from being used to launch boats, including with the use of a boat trailer, and plaintiff's desire to back his boat trailer all the way to the water's edge does not make it a requirement of effectively using the easement.

In addition, we note that the parties agree that the slope of Parcel B is unchanged from the time that the litigation began, and that neither the settlement agreement on the record nor the consent judgment suggests changing the slope of Parcel B. Because this issue presented itself for the first time long after entry of the consent judgment, we conclude that changing the slope of Parcel B was not contemplated by the parties and is outside the scope of the easement. Further, the consent judgment provides that "to the extent that any usage of the Easement creates damage to the surface of the Easement, the person(s) creating that damage shall be responsible for restoring the Easement to its pre-damaged state," suggesting that the parties intended that Parcel B remain in its existing condition.

Because we are not definitely and firmly convinced that the trial court made a mistake when it found that improvement of the easement by regrading its slope was unnecessary to the effective use of the easement as granted, we affirm the trial court's order. We further conclude that because plaintiff has not established that the trial court erred by declining to hold defendants in contempt, remand for a determination of damages and attorney fees is not warranted.

Affirmed.

/s/ Patrick M. Meter
/s/ Michael F. Gadola
/s/ Jonathan Tukel

EXHIBIT 4

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STATE OF MICHIGAN
55TH JUDICIAL CIRCUIT COURT, GLADWIN COUNTY

JEFFREY S. MANIACI,

Plaintiff/Counter-Defendant,

v

File No. 14-7559-CH

THOMAS DIROFF and MANDY DIROFF,

Defendants/Counter-Plaintiffs,

SETTLEMENT

BEFORE THE HONORABLE THOMAS R. EVANS, CIRCUIT JUDGE
Gladwin, Michigan - Tuesday, April 28, 2015

APPEARANCES:

For the Plaintiff:

MR. PHILIP L. ELLISON (P74117)
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(989) 642-0055

For the Defendants:

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Attorney at Law
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(989) 348-5232

Recorded by Nicole Mishler - CEO 8195
Transcribed by Mandi S. Bergman - CER 4844
(989) 426-7451

Mandi S. Bergman
Certified Electronic Recorder
55th Judicial Circuit Court - Family Division
17th Judicial District Probate Court
Gladwin, Michigan

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WITNESSES:

PAGE

None

EXHIBITS:

IDENTIFIED

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Gladwin, Michigan

Tuesday, April 28, 2015 - 10:48 a.m.

COURT OFFICER CHERRY: All rise. Fifty-fifth Circuit Court for the County of Gladwin is now in session, the Honorable Thomas R. Evans presiding.

THE COURT: Good morning, you may be seated. Calling the case of Jeffrey Maniaci, et al versus Thomas Diroff and Mandy Diroff, et al, file number 14-7559-CH. Would counsel identify for the record please?

MR. ELLISON: Philip Ellison appearing on behalf of the plaintiff, your Honor.

MR. CAREY: Your Honor, William Carey appearing on behalf of the Diroffs who are here both as a defendant and a counter-plaintiff.

THE COURT: Thank you sir. Today is the date and time scheduled for a bench trial in this matter, but the attorneys have been working diligently with their respective clients throughout the morning and it's my understanding there's a settlement that the parties wish to place on the record?

MR. CAREY: Yes. It will be easier for me to do that with a demonstrative exhibit and I've asked my client to grab it for me.

THE COURT: Okay. Thank you.

MR. CAREY: So it'd just be that long of a delay.

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THE COURT: Thank you sir. And Mr. Maniaci, would you please stand and raise your right hand to be sworn?

CLERK MISHLER: Do you solemnly swear the testimony you're about to give will be the truth, the whole truth and nothing but the truth?

MR. MANIACI: Yes, I do.

THE COURT: Could you tell us your name sir?

MR. MANIACI: Jeffrey S. Maniaci.

THE COURT: You may be seated. And ma'am, would you please raise your right hand to be sworn?

CLERK MISHLER: Do you solemnly swear the testimony you're about to give will be the truth, the whole truth and nothing but the truth?

MS. DIROFF: Yes.

THE COURT: Could you tell us your name?

MS. DIROFF: Mandy Diroff.

THE COURT: You may be seated ma'am. And sir, would you please raise your right hand to be sworn?

CLERK MISHLER: Do you solemnly swear the testimony you're about to give will be the truth, the whole truth and nothing but the truth?

MR. DIROFF: Yes.

THE COURT: Could you tell us your name?

MR. DIROFF: Thomas Diroff.

1 THE COURT: You may be seated as well. You may
2 proceed Mr. Carey.

3 MR. CAREY: Thank you, your Honor. Your Honor,
4 this matter involves property located in the Supervisor's
5 Plat of Baker's Resort and this is a enlarged copy of the
6 plat.

7 In particular, your Honor, there's a portion of the
8 plat known as Vonda Lane that sits approximately between lots
9 45 and 46 in that same subdivision. And there is an
10 additional parcel that is the subject of this litigation that
11 lies between Vonda Lane and the water's edge of the
12 Tittabawassee River, and that parcel, your Honor, has been
13 described as Parcel B.

14 THE COURT: Parcel B?

15 MR. CAREY: Parcel B.

16 THE COURT: As in boy?

17 MR. CAREY: As in boy. Parcel B of course has a
18 meets and bounds description and that meets and bounds
19 description will be repeated in the consent judgment that we
20 will prepare for the Court.

21 THE COURT: Thank you sir.

22 MR. CAREY: Parcel B is going to be the subject of
23 a nonrecreational ingress and egress easement. Fee title to
24 Parcel B will vest in the counter-plaintiffs Diroff.
25 However, fee title will be subject to this nonrecreational

1 ingress and egress easement. The easement will be pertinent
2 and will run in perpetuity. The easement will be in favor of
3 the lot owners within the platt--Supervisor's Plat of Baker's
4 Resort.

5 With respect to that easement, routine maintenance
6 of the easement will be both the right and the responsibility
7 of the fee title holder Diroff. However, the--to the extent
8 that any allowed usage of the easement creates damage to the
9 surface of the easement the party creating that damage is
10 responsible for restoring the surface of the easement to its
11 current status quo.

12 At the junction of the east boundary of Vonda Lane
13 and the west boundary of Parcel B, which is a common line,
14 there will be a f--there is a fence and there will continue
15 to be a fence. The current fence is a wire type of
16 structure, the Diroff's contemplate replacing that wired
17 structure fence with a split rail fence at that common
18 boundary line. And that split rail fence will run north and
19 south across the width of Vonda Lane, which is approximately
20 50 feet plus or minus. But that fence will have a 20 foot
21 wide opening so as to allow the ingress and egress over
22 Parcel B.

23 The 20 foot opening is specifically provided so
24 that if a party easement holder wishes to, as part of the
25 rights of ingress and egress, to launch a watercraft at that

1 location a 20 foot wide opening would accommodate a trailer
2 and the reasonable backing up abilities of the operator.

3 There will not be, at the water's edge of Parcel B,
4 which would otherwise be the east boundary of Parcel B, there
5 will not be any nontemporary mooring of watercraft, nor will
6 there be any form of dock--of dock or wharf at that
7 location.

8 There is, your Honor, currently a north--and
9 east/west fence that is located approximately, but perhaps
10 not precisely, on the common boundary line between lot 45 and
11 platted Vonda Lane. If and when--I should say when that
12 fence is replaced, the Diroffs will locate it so that it is
13 on the boundary line between Vonda Lane and lot 45. It may
14 or it may not be there now. There is a disagreement over
15 that but the current fence may remain in its location. When
16 it is replaced it will be located at that common line.

17 There are, on both sides, the north and the south
18 side of Vonda Lane, there are ditches and those ditches serve
19 from time-to-time to facilitate drainage from the
20 neighborhood and no party will be allowed to utilize those
21 drains in any manner that would preclude reasonable drainage
22 from those drains to the Tittabawassee River--no blockage of
23 those drains.

24 If I could have just a moment to consult with my
25 client?

7

Mandi S. Bergman
Certified Electronic Recorder
55th Judicial Circuit Court - Family Division
17th Judicial District Probate Court
Gladwin, Michigan

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THE COURT: Sure.

MR. CAREY: We're satisfied that that sets forth the terms of the proposed consent judgment, your Honor.

THE COURT: And Mr. Ellison, is that your understanding of the settlement agreement as well?

MR. ELLISON: Mr. Carey, I think has accurately proffered the broad terms of the agreement here. I would just add one additional note just to clarify a point that he made and he is talking about the replacement fence on we call--what we're calling the north/south fence with the 20 foot gap, that that would be--he may have said it, I didn't catch it--it would be a split rail fence so that goal of this type of fence was that it would be the views of the area would re--remain reasonably open for purposes of ingress and egress on this.

MR. CAREY: To--

MR. ELLISON: Other--

MR. CAREY: Go ahead.

MR. ELLISON: I'm sorry. Other than that I think he's accurately put forth the broad strokes and it is the intention of the parties to reduce this with the assistance of counsel to a consent judgment for entry by this Court.

THE COURT: Is that correct Mr. Carey?

MR. CAREY: Yes, sir.

1 THE COURT: Do you wish to inquire of your clients
2 Diroff or not?

3 MR. CAREY: Yes, please.

4 THE COURT: You may proceed sir.

5 MR. CAREY: May I address them collectively?

6 THE COURT: Sure.

7 MR. CAREY: Mr. and Mrs. Diroff, have you said--
8 have you heard everything that I've placed on the record?

9 THE COURT: Ms. Diroff, would you please come
10 forward and have a seat at the table.

11 MR. CAREY: She's trying hard to avoid the front
12 row.

13 THE COURT: Thank you.

14 MR. CAREY: Mr. and Mrs. Diroff, have you heard the
15 terms of our agreement that I placed of record?

16 MS. DIROFF: Yes.

17 MR. DIROFF: Yes.

18 MR. CAREY: And did you hear Mr. Ellison, counsel
19 for plaintiff make the modification or make more specific
20 that consent agreement?

21 MR. DIROFF: Yes.

22 MS. DIROFF: Yes.

23 MR. CAREY: Do you agree with that which has been
24 placed of record?

25 MS. DIROFF: Yes.

1 MR. DIROFF: Yes.

2 MR. CAREY: And you'll sign a consent judgment to
3 that effect when prepared?

4 MS. DIROFF: Yes.

5 MR. DIROFF: Yes.

6 MR. CAREY: Thank you.

7 THE COURT: Thank you sir. And Mr. Ellison, did
8 you wish to inquire of your client?

9 MR. ELLISON: I do, your Honor. Cou--again, very
10 similar questions as Mr. Carey just proffered his client,
11 you've been here today working on a settlement negotiation
12 with the opposing parties regarding the issues in the Baker's
13 Resort, correct?

14 MR. MANIACI: Correct.

15 MR. ELLISON: And--and today you have reached a
16 settlement and have directed me to place the settlement on
17 the record today, correct?

18 MR. MANIACI: Correct.

19 MR. ELLISON: And the settlement that you heard Mr.
20 Carey recite and as well as I clarified slightly, represents
21 the broad strokes of the agreement that the--that you
22 intended to put on the record today and will agree to abide
23 by those terms?

24 MR. MANIACI: Yes.

25

1 MR. ELLISON: And if--when presented with a consent
2 judgment reflecting those terms, that you would sign the
3 consent judgment accordingly, correct?

4 MR. MANIACI: Yes.

5 MR. ELLISON: I'm satisfied, your Honor.

6 THE COURT: And sir, could you tell us your name
7 once again?

8 MR. MANIACI: Jeffrey S. Maniaci.

9 THE COURT: Thank you, sir. Well, very well then.
10 This will be reduced to a consent judgment, is that correct,
11 Mr. Carey?

12 MR. CAREY: Yes, your Honor, it is.

13 THE COURT: Will you be preparing that document?

14 MR. CAREY: I'll certainly make the first draft and
15 make it available to counsel for any corrections he sees
16 necessary.

17 THE COURT: All right. Mr. Maniaci and Mr. and Ms.
18 Diroff, I have no idea how this case would have turned out if
19 there had been a trial because I did not hear any of the
20 evidence. But I do know that the three of you, with the able
21 assistance of your lawyers, came up with a very, very
22 detailed agreement. And I think it's highly unlikely that
23 this Court would have come up with such a highly detailed
24 ruling. So, in other words, I'm just commenting, I think the
25 three of you took advantage of the opportunity that you had

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to tailor an agreement that really suited the needs of all three of you. And in that regard, you certainly were very ably assisted by experienced and very learned and zealous attorneys who gave you good advice. But I think it's a credit to the three of you that you were able to sit down together and reason together and reach an agreement that all three of you can live with even if you're, perhaps, not 100 percent satisfied. Because I think it's highly unlikely anybody would have been 100 percent satisfied with the decision of this Court either. So, good luck to all three of you. I'll sign the order or judgment on presentation. Good-good luck to all of you.

MR. CAREY: Thank you, your Honor.

UNIDENTIFIED SPEAKER: Thank you.

MR. ELLISON: Thank you, your Honor.

COURT OFFICER CHERRY: ALL RISE.

(At 11:02 a.m., proceedings concluded)

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STATE OF MICHIGAN)
)
COUNTY OF GLADWIN)

I certify that this transcript, consisting of 13 pages
is a complete, true, and correct transcript, to the best of my
ability, of the proceedings and testimony taken in this case on
Tuesday, April 28, 2015.

May 15, 2015

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