

**STATE OF MICHIGAN
IN THE SUPREME COURT**

JEFFREY S. MANIACI,
Plaintiff/Appellant,

Supreme Court Case No.: 158005
Court of Appeals Case No.: 333952
Circuit Court Case No.: 14-7559-CH

v.

THOMAS DIROFF, and
MANDY DIROFF,
Defendants/Appellees

and

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

PHILIP L. ELLISON (P74117)
OUTSIDE LEGAL COUNSEL PLC
Attorney for Appellant
PO Box 107
Hemlock, MI 48626
(989) 642-0055
(888) 398-7003 - fax
pellison@olcplc.com

ALEXANDER D. BOMMARITO (P62704)
BOMMARITO LAW OFFICES PLLC
Attorney for Siler Trust
PO Box 189 · Freeland, MI 48623
(989) 573-5300
(855) 573-5373 - fax
adb@freelandlaw.net

**APPELLANT JEFFREY S. MANIACI'S
SUPPLEMENTAL BRIEF**

TABLE OF CONTENTS

TABLE OF AUTHORITIESiii

STATEMENT OF QUESTION PRESENTED BY ORDER OF THE MICHIGAN
SUPREME COURT v

SUPPLEMENTAL BRIEF 1

FACTS / BACKGROUND 2

ARGUMENT 5

 I. Adjusting the grade/slope of the shoreline is incident and/or
 necessary to properly enjoy the express easement for the “launching
 of watercraft, including by boat trailer.” 5

 II. The lower courts undertook a misapplication of the *Blackhawk* test. 8

RELIEF REQUESTED 10

TABLE OF AUTHORITIES

CASES

Blackhawk Dev Corp v Village of Dexter,
473 Mich 33; 700 NW2d 364 (2005)..... *in passim*

Carlton v Warner
46 Mich App 60; 207 NW2d 465 (1973) 6

DMC v Int’l Transmission Co,
unpublished decision of the Court of Appeals,
issued Feb 19, 2008 (Docket No. 274450) 6-7

Harvey v Crane,
85 Mich 316; 48 NW 582 (1891)..... *in passim*

Maniaci v Diroff,
500 Mich 1057; 898 NW2d 585 (2017)..... 4

Maniaci v Diroff,
unpublished order of the Court of Appeals,
issued Aug 28, 2017 (Docket No. 333952)..... 4-5

Morse v Colitti,
317 Mich App 526; 896 NW2d 15 (2016) 6

Mumrow v Riddle,
67 Mich App 693; 242 NW2d 489 (1976) 6

Oregon ex rel State Land Bd v Corvallis Sand & Gravel Co
429 US 363 (1977) 2

Panhandle E Pipe Line Co v Musselman,
257 Mich App 477; 668 NW2d 418 (2003) 6

Unverzagt v Miller,
306 Mich 260; 10 NW2d 849 (1943)..... *in passim*

COURT RULES

MCR 7.305 10

SECONDARY SOURCES

How to Launch a Boat - CURT, <https://youtu.be/3p4NjxU9jds>
(last visited July 11, 2019) 1

How to Launch a Boat, <https://youtu.be/iHS4EfzD8ls>
(last visited July 11, 2019) 2-3

WEBSTER’S NEW WORLD COLLEGE DICTIONARY, 4th ed 2, 6

**STATEMENT OF QUESTION PRESENTED
BY ORDER OF THE MICHIGAN SUPREME COURT**

- I. Under Michigan law, the conveyance of an easement gives to the grantee all such rights as are “incident or necessary to the reasonable and proper enjoyment of the easement.”

QUESTION PRESENTED: Whether Appellant/Plaintiff Jeffrey Maniaci’s proposed alterations to Parcel B fall within the scope of the easement created by the 2015 consent judgment?

APPELLANT ANSWERS: Yes

AUTHORITY:

Blackhawk Dev Corp v Village of Dexter, 473 Mich 33; 700 NW2d 364 (2005)
Unverzagt v Miller, 306 Mich 260; 10 NW2d 849 (1943)
Harvey v Crane, 85 Mich 316; 48 NW 582 (1891)

SUPPLEMENTAL BRIEF

When an easement is granted by an owner (of what becomes the servient estate) to another, it is not necessary that the parties expressly agree on each and every technical detail. This is because in excess of one hundred years this Court has explained (and litigants have relied upon) that “the conveyance of an easement gives to the grantee all such rights as are incident or necessary to the reasonable and proper enjoyment of the easement.” *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 41; 700 NW2d 364 (2005); *Unverzagt v Miller*, 306 Mich 260, 265; 10 NW2d 849 (1943); *Harvey v Crane*, 85 Mich 316, 322; 48 NW 582 (1891). By a consent judgment, an express easement was created in favor of Appellant/Plaintiff Jeffrey S. Maniaci (and others) from then Defendants Thomas and Mandi Diroff “for the temporary *mooring* and *launching* of watercraft, *including by boat trailer*.” **Appendix #15a**. The resolution of the case expressly included the creation of such an easement right to authorize the launching of boats by backing up a trailer into the waters of Secord Lake to launch watercraft—

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.

Appendix #6a-7a. This concept of boat “launching” is well understood both commonly and within the boating community. See e.g. *How to Launch a Boat - CURT*, <https://youtu.be/3p4NjxU9jds> (last visited July 11, 2019). Appellant/Plaintiff Jeffrey S. Maniaci had for years prior used the end of private Vonda Lane for access and enjoyment of Secord Lake with his small recreational boat. It sloped gradually to the water’s edge. **Appendix #41a.** He wanted to be able to secure and continue that practice upon the case’s resolution, and he secured that right. However, that ended when the lower courts

abandoned the well-established *Blackhawk* standard. Property rights in the form of easements must be protected. Society's interest, including the ability for Appellant/Plaintiff Jeffrey S. Maniaci to secure a legally-valid settlement, must be able to rely on established precedent with regard to judicial precedents that exposit property rights. *Oregon ex rel State Land Bd v Corvallis Sand & Gravel Co*, 429 US 363, 381 (1977). This Court should keep Michigan's jurisprudence grounded within the *Blackhawk* standard for this case and the next one thousand cases hereafter.

FACTS / BACKGROUND

The facts of this case were clearly outlined in the *Application*. It suffices to say that the signed Consent Judgment provides, in pertinent part, that—

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.

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.

Appendix #15a. To "moor" a boat means "to hold (a ship, etc.) in place by cables or chains attached to a pier or special buoy." WEBSTER'S NEW WORLD COLLEGE DICTIONARY, 4th ed, p. 935. To launch a boat means "to cause to slide from the land into the water; set afloat." *Id.* at 811; see also *How to Launch a Boat*, <https://youtu.be/iHS4EfzD8Is> (last

visited July 11, 2019). The parties agreed this would specifically *include* being done *by a boat trailer*. This is further confirmed in the transcript wherein the Diroffs agreed—

The 20 foot opening [i.e. part of the easement] 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.

Appendix #6a, #7a. In exchange for this easement, the parties resolved the case via an entered consent judgment.

After entry of the issued Consent Judgment, Appellant/Plaintiff Maniaci sought to enjoy his newly re-established rights to “launch” his watercraft—a typical and normal sized recreational watercraft—down Vonda Lane, across Parcel B, and into the waters of Secord Lake. He started to go about altering the high slope of the area approaching Secord Lake to enable the expressed use of launching his boat. The parties’ quarrel remerged. As it stands today, it is impossible to enjoy and utilize the easement as it exists (and as at the time of the entry of the Consent Judgment). Appellant/Plaintiff Maniaci cannot launch a boat by trailer—the very thing that was promised, conveyed, and legally awarded to Appellant/Plaintiff Jeffrey S. Maniaci. Diroffs’ trial counsel concurred.

Appendix #130a. Photographs in record also confirm this undisputed fact.



Appendix #40a (available at <https://youtu.be/0F9aprNibO0>). Video also confirms the same. *Id.*

Rather than bullishly push forward, Appellant/Plaintiff Maniaci decided to seek a declaration that he had the lawful authority to simply alter/adjust the slope/grade of Parcel B to permit the safe launching of his boat by a trailer consistent with the Consent Judgment. As he explained (and went unchallenged), he “would like to be able to use the easement, as agreed upon, for the launching my boat but I will need to alter the property elevations to permit the actual launching into the water.” **Appendix #31a, ¶17**. The Circuit Court concluded, quite oddly, that changing the slope or grade (i.e. by leveling the shoreland to a less-steep grade) was not reasonably permitted but instead using “some huge piece of equipment to get his boat down the water’s edge” would not be prohibited. **Appendix #131a**. This makes little, if any, sense in light of the included language of the Consent Judgment authorizing a boat trailer but no language approving “some huge piece of equipment.” The trial court also rejected the proper application of the *Blackhawk* test to the circumstances. **Appendix #128a**. Instead of intrusively bringing in “huge equipment” (which would undoubtedly damage the land), all Appellant/Plaintiff Maniaci was seeking to do was level off the land near the shoreline to actually, safely, and easily launch his boat by boat trailer—as thousands of Michigan residents do throughout Michigan’s inland lakes and rivers. The declaration was denied. **Appendix #136a, ¶8**.

Appellant/Plaintiff Maniaci appealed. This Court remanded this case to the Court of Appeals as if on leave granted. *Maniaci v Diroff*, 500 Mich 1057; 898 NW2d 585 (2017). After remand, it was discovered that the Diroffs had sold their property. On motion, the Court of Appeals ordered the new owner’s addition as a party-appellee. See *Maniaci v*

Diroff, unpublished order of the Court of Appeals, issued Aug 28, 2017 (Docket No. 333952). As evidenced by the deeds, the Trust received the disputed property subject to all easements, reservations, and restrictions of record. **Appendix #42a-46a.**

On May 15, 2018, the Court of Appeals held that “[a]pplying the reasoning of *Blackhawk Dev Corp* to the present case, the trial court did not clearly err in finding that adjusting the grade of Parcel B is unnecessary for plaintiff’s reasonable use of the easement.” **Appendix #141a.** The panel correctly held that the easement “expressly permits launch of watercraft by boat trailer” but then discussed that watercraft was not defined “for purposes of the easement.” *Id.*¹ Thusly, according to the panel, “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.” *Id.* That makes even less sense than the Circuit Court’s analysis. See **Appendix #6a; Appendix #15a, ¶2.** In other words, the panel applied the *Blackhawk* test incorrectly. An *Application for Leave* followed. This Court ordered oral argument on the *Application*.

ARGUMENT

I. **Adjusting the grade/slope of the shoreline is incident and/or necessary to properly enjoy the express easement for the “launching of watercraft, including by boat trailer.”**

The relevant legal standard is simple: “the conveyance of an easement gives to the grantee all such rights as are incident or necessary to the reasonable and proper enjoyment of the easement.” *Blackhawk, supra*, at 41; see also *Harvey, supra*, at 322; *Unverzagt, supra*, at 265. This is because a “party who enjoys an easement is entitled to

¹ There was never a challenge in the trial court about the size of the small recreational boat being utilized by Appellant/Plaintiff Maniaci. It was something conjured from thin air by the Court of Appeals.

maintain it *so that it is capable of the use for which it was given*,” even if not expressly enumerated by the text of the easement. *Carlton v Warner*, 46 Mich App 60, 61; 207 NW2d 465 (1973). “The making of... 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).² In other words, this Court has confirmed that an easement holder can make improvements to the servient estate that are necessary “for the effective use of the easement” that do not “unreasonably burden” the servient estate even if not expressly stated in the four corners of the conveyance. *Blackhawk, supra*, at 41. The rights of an owner of an easement are “*paramount*” to those of the servient estate. *Id.*; see also *Harvey, supra* (same). Paramount, in turn, means “ranking higher than any other, as in power or importance.” WEBSTER’S NEW WORLD COLLEGE DICTIONARY, 4th ed, p. 1045.

The Consent Judgment undisputedly provides an express easement to Appellant/Plaintiff Maniaci for the “launching of watercraft, including by boat trailer.” **Appendix #15a, ¶2.** “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). In other words, “the extent of the easement is defined in the easement agreement and the grantee of an easement has all rights to the reasonable and necessary use of the right-of-way within the purpose of the easement.” *Panhandle E Pipe Line Co v Musselman*, 257 Mich App 477, 484; 668 NW2d 418 (2003) (emphasis added). Moreover, the same principles have been applied for easements created by court settlements. *DMC*

² The corollary is also true: the Diroffs (and now the Trust), as the fee owner, do not hold an “unrestricted veto power over the improvements sought to be made.” *Carlton, supra*, at 62.

v Int'l Transmission Co, unpublished decision of the Court of Appeals, issued Feb 19, 2008 (Docket No. 274450).

While this Court has directed this briefing should not be “mere restatements of the[] application papers, the discussion of *Unverzagt* and *Harvey* are squarely applicable and instructive. In *Unverzagt*, the owners of cottage properties in a summer report had an easement to use the roads, streets, and alleys owned by a private individual named Miller. However, Miller argued that outside merchants and tradesmen who deliver goods needed his permission because the easement did not *expressly* grant those merchants and tradesman usage right. (His argument was self-serving as he only gave permission for deliveries to be made by the store he owned.) This Court concluded that despite a lack of express grant to the merchants and tradesmen, it is an “unreasonable restriction on the right of the cottage owners to the use of the streets” because “the conveyance of an easement gives to the grantee all such rights as are incident or necessary to the reasonable and proper enjoyment of the easement.” In other words, the rights of the easement holders “must be measured and defined by the purpose and character of the easement.”

This Court’s decision in *Harvey* is similar. An easement owner had right to a private road and erected a fence within the boundary of the private road to help direct cattle. The owner of the servient estate tore down the fence claiming the fence was not *expressly* provided for in the private road easement. This Court rejected that conclusion and explained that conveyance of an easement gives the easement owner a right to unobstructed passage over the landowner’s land plus all rights incident to the necessary enjoyment of such right of passage. *Id.*, at 322. Despite not being within the plain

language of the easement itself, the Court concluded that construction of the fence was a right “incident” to the necessary enjoyment of passage. In other words, to enjoy the passage of cattle as contemplated by the easement, a slight alternation to the land in the form of a fence was needed to maintain and enjoy the easement in a matter capable for the use for which it was given, even if the word fence appeared nowhere in the easement.

As these 128-year-old and 76-year-old decisions aptly highlight, the law of easements has long confirmed that easements automatically and additionally embrace all rights as are incident or necessary to the reasonable and proper enjoyment; it is and has remained a constant in our State’s jurisprudence. It should remain such.

II. The lower courts undertook a misapplication of the *Blackhawk* test.

The Court of Appeals has undoubtedly misapplied the clearly established *Harvey* and *Blackhawk* legal standard—whether the proposed developments are necessary for the holder’s effective use of its easement and, 2.) if the developments are necessary, whether they unreasonably burden the servient estate. The Diroff Appellees conveyed Appellant/Plaintiff Maniaci an expressed easement right for launching and mooring of watercraft, *including by boat trailer*. In applying *Blackhawk*, that means they also granted “all such rights as are incident or necessary to the reasonable and proper enjoyment of” the right to actually launch watercraft. By the slope/grade of the land being currently too steep, the purpose of the easement is thwarted. **Appendix #130a** (“[Diroffs’ counsel] does seem to acknowledge, it would be very difficult to use this portion of the river, the land next to the river for purposes of boat launching the way it is.”). Moreover, the record is silent from the Diroffs as to how any adjustment to the grade/slope of the last few feet of the easement at the shoreline unreasonably burdens the servient estate—there is nothing

offered to show any harm would befall property, structures, or land in or over Lots B, 44 or 45 (all owned today by the Trust).

The classic 'law school' example of the *Blackhawk/Harvey/Unverzagt* legal standard is the driveway and the tree. The owner of Whiteacre grants a ten-foot driveway easement along the boundary of this land to his Neighbor. Neighbor, as an easement holder, wants to, undoubtedly, utilize the driveway but a large tree is right in the middle of the conveyed driveway's path. Unless the tree is removed, the use of the easement cannot occur. Yet, the easement granted by Whiteacre's owner is silent as to the tree. What result? Applying the *Blackhawk* test, the conveyance of an easement includes all such rights as are incident or necessary to the reasonable and proper enjoyment of the easement. Therefore, the easement conveys with it, by law, the right to remove the tree to reasonably and properly enjoy the driveway easement.

Just like the example of the driveway and the tree, this case involving mooring and launching of boats by boat trailer is one of those rare circumstances where the legal answer and common-sense answer are perfectly aligned. The ability to launch and moor a boat, by trailer, needs a small alteration by the simple leveling of dirt which would not affect or harm anyone or anything else. On this record, such is simple, incident, and necessary change is need to permit Appellant/Plaintiff Maniaci (and the others in the subdivision³) to have the reasonable and proper enjoyment of the right to actually launch a small boat, by a boat trailer, as expressly bargained for and conveyed by and within the Consent Judgment. Correction is needed for both Appellant/Plaintiff Jeffrey S. Maniaci

³ The Consent Judgment awards the right of mooring and launching watercraft to *everyone* within the Supervisor's Plat of Baker's Resort. **Appendix #15a, ¶2.**

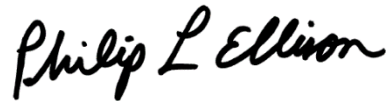
and others to enjoy bargained-for property rights and to ensure jurisprudential compliance with the clear standards announced in *Unverzagt*, *Blackhawk*, and *Harvey*.

RELIEF REQUESTED

WHEREFORE, in light of the plain language of the Consent Judgment and the incident or necessary test from *Harvey*, *Unverzagt*, and *Blackhawk*, this Court is requested reverse the Court of Appeals and the trial court, and remand with instructions to declare and confirm that Appellant/Plaintiff Maniaci (and the others in the subdivision) can, consistent with the Consent Judgment, adjust/regrade the land near the shore of Secord Lake to the extent necessary to reasonable allow the mooring and launching of watercraft by boat trailer. MCR 7.305(H)(1). Alternatively, the Court is requested to grant full leave to hear this important water-access legal issue. *Id.*

Date: July 12, 2019

RESPECTFULLY SUBMITTED:



OUTSIDE LEGAL COUNSEL PLC
BY PHILIP L. ELLISON (P74117)
Attorney for Appellant Maniaci
PO Box 107 · Hemlock, MI 48626
(989) 642-0055
(888) 398-7003 - fax
pellison@olcplc.com