

IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No. DA 24-0231

DAVID L. MURPHY PROPERTIES, LLC, and JOHN SCHAFFER,

Plaintiffs and Appellants,

v.

PAINTED ROCKS CLIFF, LLC, and LAKE COUNTY, a political subdivision of
the State of Montana, by and through the LAKE COUNTY BOARD OF
COMMISSIONERS: BILL BARRON, GALE DECKER and STEVE STANLEY,Defendants and Appellees.

APPELLANTS' REPLY BRIEF

On Appeal from the Montana Twentieth Judicial District Court, Lake County,
Cause No. DV-2022-143
the Honorable John Larson Presiding

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ARGUMENT

David L. Murphy Properties, LLC's ("Murphy Properties") and John Schaffer's historical access to the cove should have been considered and preserved by Lake County. The cove lies on both sides of the boundary between property owned by Murphy Properties and Painted Rocks Cliff, LLC ("Painted Rocks"). Painted Rocks should not have been allowed to impede this access with its maximally sized dock on its Flathead Lake property. The Lakeshore Protection Act (the "Act") required consideration of Painted Rocks' dock's impacts on navigation and other lawful recreation. John's ski boat access of the cove is both navigation and lawful recreation. Both the County and Painted Rocks are trying to ignore Murphy Properties' parcel's lake frontage within the cove. Additionally, Murphy Properties has acquired a prescriptive right to cross that portion of Painted Rocks' property by John's use of his boat.

Appellants will reply to points raised in the Briefs of the Appellees below, starting with Lake County. The Lake County section will focus on the Act, while the Painted Rocks section will focus on the prescriptive easement. Appellants do not reply to every point of contention raised by Appellees and do not intend a lack of reply as a concession that any point is well taken. Many issues are adequately briefed already.

I. REPLY TO LAKE COUNTY

Lake County's brief rests primarily on two issues, notice pleading standards and the definition of navigation. Neither gets to the real issue with Lake County's actions here, but they are addressed in turn below.

Murphy Properties and John pled sufficient facts to put Lake County on notice of the basis for their claim. As was addressed at the District Court, Montana courts still use a notice pleading standard, and the required facts are pled sufficiently to put Lake County on notice of what the claim is, regardless of what definition of "navigation" is used. John used to be able to get his boat in and out of the cove, but the permitting and construction of Painted Rocks' dock prevents that. Lake County did not consider Murphy Properties' rights as an adjacent property owner before it issued Painted Rocks' permit. The real issue in this appeal is not the adequacy of pleading, but the scope of Murphy Properties' rights as a neighboring landowner to continue historical access to a particular portion of its lake frontage. Put another way, does lake frontage within a cove have some lesser value or attendant rights of use than other lake frontage? If all lake frontage is to be treated the same, then Lake County should have considered the cove, regardless of how navigation is defined.

The lack of a definition of navigation does not excuse Lake County's failure to consider and protect Appellants' use of the cove. Much of Lake County's focus

on the definition of navigation is an overcomplication of an otherwise simple issue — John used to be able to get his boat in and out of the cove to access Murphy Properties’ lake frontage, but now he cannot because Painted Rocks built a huge dock.

Lake County could have defined “navigation” in its Lakeshore Protection Regulations, but did not. This Court can use a commonly understood definition of navigation to decide this issue. Navigation in the context of this case is getting around on the water in a boat. The commonly used definition is sufficient when the issue is that John used to be able to get his ski boat in and out of the cove under its own power, but now has to jump in the water and drag it. The reason John has to jump in the water is Painted Rocks’ dock, not submerged rocks as suggested by Lake County at pages 3, 12, and 13 of its Answer Brief. The rocks were in their current location long before the dock was built. Complaint, ¶ 15, Ex. D (Apdx. 1E). Lake County’s lengthy treatment of navigation is a distraction from the real issue here, which is Lake County’s refusal to consider the use of the cove at all.

Lake County cannot make the definition of navigation a moving target when its own regulations require the consideration of, “...the navigational rights and safety of neighboring property owners and recreational users of the lake...” Lake County Lakeshore Protection Regulations, § 5-3(P)(1)(a). Painted Rocks’ MSJ Br., Ex. 19 (Apdx. 2B). The regulations also state that, “Docks, wharves and piers

have a high potential to interfere with public navigation and public recreation. The property owner has a riparian right to lake access; the public has a right to navigation and recreation on public waters.” *Id.* at § 5-3(A)(1)(c). These provisions for navigational rights in Lake County’s regulations have to mean something. It makes sense for that something to be an adjacent property owners’ longtime access to lake frontage, even if that lake frontage is in a cove only accessible when the lake is at full pool.

Plainly, Lake County did not consider the use of the cove when it granted Painted Rocks’ permit. The interplay of the boundary line between Painted Rocks’ property and Murphy Properties’ property in the cove presents a unique circumstance in the context of a dock on Painted Rocks’ parcel, but this could have been balanced if the County had considered Murphy Properties’ historical use of the cove access. Lake County’s excessive treatment of the definition of navigation is a deflection from that shortcoming. There is no legal justification to subordinate the rights attendant to Murphy Properties’ lake frontage in the cove to its other lake frontage. The District Court’s order granting Lake County’s motion to dismiss should be reversed.

II. REPLY TO PAINTED ROCKS

John and Murphy Properties will address statements by Painted Rocks recharacterizing Murphy Properties' position on several points, and then address substantive arguments related to the claim for prescriptive easement.

Painted Rocks' brief provides an excellent overview of the public trust easement over the waters of this state. But contrary to Painted Rocks' assertion, Appellants do not argue that the public trust easement does not apply to lakes. Appellants argue that the nature and extent of the public trust easement on lakes is not as well defined as it is for rivers and streams, given that the statutes and cases cited have all specifically been limited to rivers and streams. This case is less about the public's right to use lakes than it is about balancing the rights of two adjacent property owners to access a lake from their own frontage. In other words, does the public trust easement mandate that Murphy Properties has no right to continue its historic use of the cove which is on the boundary between Murphy Properties and Painted Rocks?

Murphy Properties is not asking for straight line access to the cove. Murphy Properties is asking for access to the cove which allows John to get his 18' ski boat in and out of the cove without John having to jump in the water to reposition the boat, consistent with historical use. This is not a matter of convenience in the use of the public trust easement but a matter of the scope of historical use across

Painted Rocks’ property between the low and high water marks of the lake. The scope of this historical use is broader than the scope of the public trust easement. Painted Rocks hyperbolically calls John’s boat a “large” boat throughout its brief, but for scale, consider that three of John’s 18’ ski boats end to end are still not as long as Painted Rocks’ 60’ dock is wide. The incredulity is not limited to the size of John’s boat.

Painted Rocks twists a letter sent by Randy Ogle to Murphy Properties (demanding the John move his own small dock because it encroached across the boundary line in the cove) as evidence of permissive use to defeat the prescriptive easement claimed by Murphy Properties. The demand letter, and the fact that the dock was called an encroachment in that letter, are evidence that the use was not permissive and, moreover, was open and notorious. The letter is evidence of acquiescence in Murphy Properties’ historical use, entry into and egress from the cove, by Painted Rocks’ predecessor in title. In spite of this, the location of the dock is immaterial to the claimed easement. The claimed easement is to get in and out of the cove, not to tie the boat up at any particular spot in the cove.

The scope of Murphy Properties’ historic use beyond the water is not a new argument raised for the first time on appeal. The facts supporting that argument were not established through counsel’s oral argument, either. These facts were offered as undisputed facts by Painted Rocks in its own summary judgment brief.

Painted Rocks devoted paragraphs 22 and 23 of its statement of undisputed facts to what it called dredging activities. Painted Rocks' MSJ Br., 5-6 (Apdx. 2B).

Painted Rocks wanted to make John and his family look like scofflaws and now Painted Rocks does not like the turn of legal judo having those facts thrown back in its face on the historical use of the easement. Painted Rocks also ignores that the scope of historical use disclosed in discovery, which is pasted into page 4 of Appellants' Opening Brief, did include maintenance and cleaning done on foot when the lake is low.

“Distinct use” is also not a new argument, as claimed by Painted Rocks. Painted Rocks' Ans. Br. at 29. Painted Rocks did not cite to *Cummings v. Canton*, the case which discusses distinct use, until its summary judgment reply, so it is hard to imagine when John and Murphy Properties were supposed to address arguments on issues presented by the holding in that case if not during summary judgment oral argument. Appellants' Complaint made clear that the historic use claimed is in conjunction with Murphy Properties' lake frontage in the cove, which is obviously distinct from the public without using the magic word, “distinct.”

There are only two property owners with lake frontage in the cove, Murphy Properties and Painted Rocks, so obviously Murphy Properties' use is distinct from the public and unique to Murphy Properties by virtue of its ownership of property

with lake frontage in the cove. The easement claimed is in conjunction with the use of, and appurtenant to, the Murphy Properties parcel.

Painted Rocks gives a lot of weight to the right to exclude Murphy Properties from the surface of the lake, in consideration of the public trust easement entitling the public to use the surface waters of the lake for recreational purposes. But the fact is, Murphy Properties is now, with Painted Rocks' dock, excluded from the very use to which Murphy Properties claims entitlement. This is a distinguishing fact from the holding in *Cummings*, which involved an abandoned public road instead of a portion of privately owned lakebed which is impressed only with a public trust easement. *Cummings v. Canton*, 244 Mont. 132, 796 P.2d 574 (1990). The public's rights to pass on a public road are not the same as the public's rights to pass over the surface of a lake. Clearly, the Act allows the imposition of an improvement on the surface of a lake which restricts the public from using some portion of a lake. There is no analog for a road. A property owner cannot build an improvement which impedes passage along a road.

If Painted Rocks has the ability to exclude John from taking his boat in and out of the cove by the existence of its dock now, then Painted Rocks and its predecessor in title had that exclusionary right before, but chose not to exercise that right. The statement in *Cummings v. Canton*, that, "The open and public nature of the road forestalls its use from being adverse or exclusive," is not

applicable here, because the relevant portion of the lake is now blocked.

Cummings, at 136, 796 P.2d at 576. Before Painted Rocks came along and built its dock, Murphy Properties had come to rely upon their passage over that area of the lakebed, which is between the low and high water marks and therefore Painted Rocks' private property, for access to and enjoyment of Flathead Lake. Moreover, as is evidenced by Randy Ogle's letter, this use by Murphy Properties was well known.

Murphy Properties use was beyond the scope and intensity of the general public's use of public waters. Painted Rocks' position contradicts itself in the same way that the District Court's orders finding no right to recreational use in the context of the claim against Lake County and a right to recreational use in the context of the claim against Painted Rocks. If Painted Rocks has the ability to exclude now, it had that ability before, and the holding in *Cummings v. Canton* is inapplicable.

The holding in *Schmid v. Pastor* is more applicable to this case than *Cummings v. Canton*. Painted Rocks mistakenly argues that the holding in *Schmid* was limited to recreational use as an extension of residential use, but this Court identified separate residential and recreational rights for separate parcels. Painted Rocks is ignoring the statement that, "...this recreational use occurred on separately divided parcels, creating a clearly discrete historical use of those particular lots

apart from the [residential] use of Lot 14 and establishing a separate, and narrower, prescriptive easement.” *Schmid v. Pastor*, 2009 MT 280, ¶21, 352 Mont. 178, 216 P.3d 192. The union of residential and recreational uses provided heightened notice of the recreational use. The right to recreational use is not dependent on a concurrent residential use. Murphy Properties did not use the lake for residential access, John can drive his pickup to his uncle’s old cabin, but the recreational use of the lake in conjunction with the residential use of Murphy Properties’ land goes to the openness and notoriety of the claimed easement as distinct from the uses made by the general public. John was not a passing recreationalist. That repeated use by the same people going from and coming back to the same single spot on the lake is what provided Painted Rocks and its predecessors in title with heightened notice of the claimed recreational use. This use is exclusive of other uses Painted Rocks or its predecessors in title would have wanted to put their property to, such as the building of a 60’ wide dock across the approach to the cove. The point of *Schmid* is that a recreational use by a neighbor can form the basis of a prescriptive easement for recreational purposes because the dominant estate’s use was sufficient to put the servient estate on notice of the use. This is contrasted with claims for prescriptive easements by passing recreationalists. Notably, John withdrew his claim for a prescriptive easement in gross. The only easement at issue in this case is in favor of Murphy Properties as an appurtenance to Murphy Properties’ parcel.

The easement is claimed in favor of an adjacent parcel of land, not by a passing recreationalist.

CONCLUSION

The District Court should be reversed. Lake County's arguments about the definition of navigation are a cover for the fact that Lake County simply did not consider the rights John and Murphy Properties have to use Murphy Properties' parcel. Painted Rocks' arguments about exclusivity in the context of the public trust easement fail in the face of the fact that Painted Rocks is right now excluding Murphy Properties from its historical use.

DATED this 27th day of September, 2024.

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CERTIFICATE OF COMPLIANCE

I certify that this brief is formatted with double line spacing and a proportionately spaced Times New Roman typeface in 14-point font and contains **2,600** words as calculated by my Microsoft Word application (excluding Tables of Contents and Authorities, and Certificates of Service and Compliance).



Michael P. Talia

CERTIFICATE OF SERVICE

I, Michael Peter Talia, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 09-27-2024:

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