STATE OF MICHIGAN

COURT OF APPEALS

SALLY KRANZ,

Plaintiff-Appellant,

and

BRETT STAMATS and AMY J. STAMATS,

Plaintiffs,

v

ROGER D. TERRILL and DARLENE G. TERRILL,

Defendants-Appellees.

UNPUBLISHED
August 6, 2015

No. 319287
Lenawee Circuit Court
LC No. 10-003817-CH

Before: M. J. KELLY, P.J., and WILDER and K. F. KELLY, JJ.

PER CURIAM.

Plaintiff[1] appeals as of right the trial court's opinion and order affirming its prior decision that defendants hold an express and prescriptive easement on plaintiff's property extending to the shoreline and into the adjacent lake, and granting defendants the right to use the lake, erect a dock, and moor watercraft to the dock in this declaratory judgment and easement dispute. On appeal, plaintiff argues that the trial court erred: (1) by ignoring the law of the case on remand when it found that defendants had an express easement that includes the right to build a dock and moor boats, despite the fact that this Court already found that the express easement was limited to access only, (2) by disregarding the Michigan Supreme Court's remand order to consider the affidavit of plaintiff's predecessor in interest and instead finding that the affidavit stated a

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[1] Plaintiffs Brett Stamats and Amy J. Stamats entered into a consent judgment with defendants before the first appeal of this case, and are not parties to this appeal. *Kranz v Terrill*, unpublished opinion per curiam of the Court of Appeals, issued September 20, 2012 (Docket No. 305198), p 1 n 1, vacated in part on other grounds 494 Mich 860 (2013). Accordingly, we will refer solely to plaintiff Sally Kranz as "plaintiff."

conclusion of law, and (3) in finding that defendants had proven the existence of a prescriptive easement by clear and cogent evidence where the record showed that defendants' use was permissive, and therefore, could never ripen into a prescriptive easement. We agree with each of these statements and therefore reverse.[2]

I. BASIC FACTS AND PROCEDURAL HISTORY

In 2010, plaintiff filed a complaint for declaratory judgment to determine the rights of the parties regarding an easement located on plaintiff's property on Round Lake (Lot 1). The Stamats own the neighboring waterfront lot (Lot 2). Defendants own a back lot (Lot A). Because of defendants' lack of direct access to the lake, defendants have a ten-foot-wide easement between plaintiff's and the Stamats' properties, spanning one edge of plaintiff's property, and ending at the water. Plaintiff alleged that the easement only gave defendants access rights and that they had exceeded those rights by maintaining a dock and mooring three watercraft.

In response, defendants alleged that they, and their predecessors in interest, have maintained and utilized a dock to which they have moored watercraft, extending from the easement on plaintiff's property, for over 15 years and in a manner establishing a prescriptive easement. Further, defendants alleged that this gave them riparian rights in the land bordering Round Lake.

Plaintiff moved for summary disposition, alleging that the easement was limited by its language and only provides access to Round Lake, with no mention of any rights to erect a dock or moor boats. Defendants had purchased their real property by warranty deed on January 7, 2000, from Rickey Lee Wobrock (Wobrock) and Debbie J. Wobrock. Wobrock averred that his use of a dock to moor boats at the end of the easement was done with the permission and consent of other property owners around the lake, and he never made any claim of adverse possession or prescriptive easement.

Defendants responded that plaintiff did not have standing to bring her lawsuit because her lot ended shortly before the high water mark of the lake, and therefore, she does not have her own riparian rights and could not complain about defendants' activities in the water. Defendants further argued that decades of continuous use by defendants and their predecessors in interest had established a prescriptive easement allowing them to build a dock and moor their boats to it.

The trial court entered a stipulation and order between the parties, agreeing that the trial court could decide the case based upon the parties' briefs, affidavits, and oral arguments already presented, without being required to make rulings on the parties' competing motions for

[2] In light of our conclusion that plaintiff is entitled to judgment as a matter of law, we decline to address plaintiff's last issue regarding whether the trial court followed the portion of this Court's prior opinion remanding the case to establish the rights and responsibilities of the parties regarding their relationship as fee holder and easement holders.

summary disposition.[3] In its opinion and order, the trial court found that defendants correctly argued that plaintiff does not have standing to bring this action because plaintiff is not a riparian owner. The trial court further found even if she did have standing, defendants proved the existence of a prescriptive easement granting them the right to erect a dock and moor their boats.

The trial court entered a consent judgment between the Stamats and defendants reflecting that defendants had an express and prescriptive easement, 10 feet in width, extending along the northwesterly side of plaintiff's property, including recreational use, such as erecting a dock and mooring watercraft. Plaintiff was barred from "trespassing" into the area of the 10-foot easement.

Plaintiff appealed. In an unpublished opinion, this Court first held that the trial court erred in finding that plaintiff's property did not abut the lake, and therefore, we held that plaintiff did have standing to challenge defendants' use of the easement. *Kranz*, unpub op at 3-4. Second, this Court affirmed the trial court's holding to the extent that it found that defendants acquired riparian rights by prescription. *Id.* at 4-8. This Court held that the express easement did not grant defendants riparian rights because the word "access" as used in the easement's phrase, "for access to Round Lake," could not be construed to mean riparian rights or that defendants had the right to install and maintain a dock. *Id.* at 6. However, this Court found that defendants had gained riparian rights by prescription, when defendants openly exercised hostile use of the easement by installing a dock and mooring boats. *Id.* at 7-8. Finally, this Court remanded the case to the lower court to develop a record and clarify its ruling regarding the parties' rights and responsibilities as fee and easement holders. *Id.* at 8.

Plaintiff filed an application for leave to appeal this Court's decision to the Michigan Supreme Court. In lieu of granting leave to appeal, the Michigan Supreme Court vacated the portions of this Court's opinion and the trial court's judgment "holding that defendants established a prescriptive easement to construct and maintain a dock at the terminus of the easement, and to moor boats to the dock." *Kranz v Terrill*, 494 Mich 860; 831 NW2d 238 (2013). The Supreme Court noted that the affidavit of Evelyn M. Hummon (formerly Evelyn Kummerle), plaintiff's immediate predecessor in interest, averred that defendants and defendants' predecessors in interest erected and used the dock with her permission and consent from 1990 until 2003. *Id.* Therefore, the Supreme Court remanded the case to the trial court "for further consideration in light of this affidavit and this Court's decision in *Fractional School Dist No 9 in Waterford and Pontiac Twps, Oakland Cty v Beardslee*, 248 Mich 112, 116[; 226 NW 867] (1929) (holding that a period of permissive occupancy cannot be tacked onto a period of hostile occupancy, to show adverse possession)." *Kranz*, 494 Mich at 860.

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[3] As this Court noted in its prior, unpublished opinion in this dispute, "it appears that the parties agreed to waive further proceedings in favor of a final resolution of all claims and defenses based on their submissions, without a decision on their cross-motions." *Kranz v Terrill*, unpublished opinion per curiam of the Court of Appeals, issued September 20, 2012 (Docket No. 305198), p 2, vacated in part on other grounds 494 Mich 860 (2013).

Once back in the trial court, plaintiff filed a motion for entry of judgment, arguing that the unvacated portions of this Court's opinion established that the express easement between the parties was for access only and did not include any riparian rights to erect a dock or moor boats. Plaintiff further noted that Michigan Supreme Court's order vacated the portion of this Court's prior opinion holding that defendants established a prescriptive easement to erect a dock or moor watercraft, and then remanded the case to the trial court for reconsideration of its prior decision.

Defendants responded that the Michigan Supreme Court order explicitly remanded the case to the trial court for "*further consideration*" of the dispute in light of Hummon's affidavit and the applicable case law, and therefore, entry of an order without further argument was improper.

At a September 16, 2013 hearing, the trial court stated that the Michigan Supreme Court order explicitly ordered "further consideration" of the case, and therefore, it must hold a hearing to comply with the Supreme Court's order. Plaintiff responded that the high burden of proof necessary to prove the existence of a prescriptive easement lay solely with defendants and the trial court had already decided the issue with a trial on the documents. Plaintiff further argued that, in light of the fact that the Hummon affidavit contradicted the permission issue, the Supreme Court's order effectively foreclosed the trial court from finding a prescriptive easement. The trial court then asked what would happen if it did not believe the Hummon affidavit, to which plaintiff's counsel responded that he did not believe the trial court had jurisdiction to do that in light of the fact that defendants did not appeal the procedure of the trial on the document. The trial court stated that the remand order required it to further consider the existence of the prescriptive easement in light of the Hummon affidavit and the proffered Supreme Court precedent, and to do so it would hold a hearing on the issue.

At a subsequent hearing, the trial court noted that the Supreme Court order required it to further consider the dispute in light of Hummon's affidavit claiming that any use of the easement to erect a dock and moor boats was done with permission and consent. The trial court noted that it had considered this affidavit at the time it made its original decision, and both then and on remand the trial court found that the affidavit simply states a legal conclusion, and the conclusion that the prior use of the easement to erect a dock and moor boats was done with Hummon's consent was insufficient to establish a fact in this case. The trial court stated that it found the affidavit to be no help "whatsoever," and affirmed its prior decision.

The trial court's opinion and order stated that it found that Hummon's affidavit simply stated a legal conclusion and provided "no facts upon which this Court can make a decision that the use of a dock or boat moorings on or at the easement were [sic] done with 'permission and consent.' " Therefore, the trial court affirmed its prior decision that defendants

> have an express and prescriptive easement ten feet in width extending from the terminus of the easement described as being ten feet in width from off and across the Northwesterly side of Lot 1, Plat of Shady Beach, according to the plat thereof as recorded in Liber 5 of Plats, Page(s) 32, Lenawee County Records, extending across any intervening land to the shoreline and extending therefrom out into Round Lake, and the right of use of said waters and subaqueous land including

> but not limited to the recreational use thereof, the right to erect a dock and to have use thereof, together with the right to moor watercraft thereto.

Plaintiff now appeals as of right.

II. LAW OF THE CASE

Plaintiff first contends that the trial court failed to follow the law of the case, to the extent that its order on remand held that defendants had an *express* easement to erect a dock and moor boats. We agree.

Determination of whether the law of the case applies is a question of law subject to de novo review. *KBD & Assoc, Inc v Great Lakes Foam Tech, Inc*, 295 Mich App 666, 679; 816 NW2d 464 (2012).

"The law of the case doctrine holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue." *KBD & Assoc, Inc*, 295 Mich App at 679. The law of the case applies only to legal questions decided -- implicitly or explicitly – by an appellate court in cases remanded to the trial court. *Kasben v Hoffman*, 278 Mich App 466, 470; 751 NW2d 520 (2008); *Kalamazoo v Dep't of Corrections*, 229 Mich App 132, 135; 580 NW2d 475 (1998).

> The law of the case doctrine's rationale is to maintain consistency and avoid reconsideration of matters once decided during the course of a single lawsuit; the doctrine does not limit an appellate court's power but, rather, is a discretionary rule of practice. A trial court fails to follow the law of the case when it revisits a matter on which this Court has already ruled. [*Schumacher*, 275 Mich App at 128.]

Under this doctrine, the decision of an appellate court is controlling at all subsequent stages of litigation, so long as it is unaffected by a higher court's opinion. *Duncan v State*, 300 Mich App 176, 188-189; 832 NW2d 761 (2013).

In the prior appeal, this Court held that

> the plain and unambiguous language of the express easement did not grant riparian rights to defendants and did not suggest that rights to install and maintain a dock or moor boats were within the scope of the express easement. Therefore, to the extent that the trial court concluded that the scope of defendants' express easement included riparian rights such holding is reversed. [*Kranz v Terrill*, unpublished opinion per curiam of the Court of Appeals, issued September 20, 2012 (Docket No. 305198), p 6.]

This Court continued to hold that defendants possessed a *prescriptive* easement granting them riparian rights, including the right to erect a dock and moor boats, by way of their open and notorious prescriptive uses for the statutorily required 15-year period. *Id.* at 6-8. The Supreme Court then vacated only the portion of this Court's opinion pertaining to defendants' prescriptive easement. *Kranz,* 494 Mich 860.

The portion of this Court's opinion holding that defendants did not possess any riparian rights pursuant to the express easement was unaffected by the Supreme Court's subsequent order vacating a portion of this Court's opinion and remains the law of the case. Therefore, to the extent that the trial court's opinion and order on remand implied or provided that defendants' riparian rights to erect a dock and moor boats were the result of the express easement between the parties, that portion of the opinion and order violated the law of the case. *Schumacher*, 275 Mich App at 128.

III. PROCEEDINGS ON REMAND

Plaintiff next contends that the trial court failed to follow the Michigan Supreme Court's remand order "for further consideration" of the case when it declined to give appropriate weight to Hummon's affidavit. We agree.

Again, "[w]hether a trial court followed an appellate court's ruling on remand is a question of law that this Court reviews de novo." *Schumacher*, 275 Mich App at 127. "It is the duty of the lower court or tribunal, on remand, to comply strictly with the mandate of the appellate court." *Rodriguez v Gen Motors Corp*, 204 Mich App 509, 514; 516 NW2d 105 (1994). "The power of the lower court on remand is to take such action as law and justice may require so long as it is not inconsistent with the judgment of the appellate court." *K & K Const, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 544; 705 NW2d 365 (2005) (internal quotation marks omitted).

In the trial court, the parties agreed to have the case tried by the documents on the record, which necessarily included Hummon's affidavit. However, in granting defendants summary disposition, the trial court did not specifically set forth the documentary evidence it considered nor how it weighed such evidence. Perhaps that is why the Supreme Court, in its remand order, noted:

> The affidavit of the plaintiff-appellant's predecessor in interest averred that from 1990 until 2003, when she and her husband sold Lot 1 to the plaintiff-appellant, "any use of a dock or boat moorings on or at the easement was done with our permission and consent." *We REMAND this case to the Lenawee Circuit Court for further consideration in light of this affidavit* and this Court's decision in *Fractional School Dist No 9 in Waterford and Pontiac Twps, Oakland Cty v Beardslee*, 248 Mich 112, 116[; 226 NW 867] (1929) (holding that a period of permissive occupancy cannot be tacked onto a period of hostile occupancy, to show adverse possession). [*Kranz*, 494 Mich at 860 (emphasis added).]

On remand, the trial court found Hummon's affidavit legally insufficient and refused to consider the averments therein:

> The Court finds that the Affiant, Evelyn M. [Hummon], through affidavit states, "any use of a dock or boat moorings on or at the easement was done with our permission and consent."
>
> The Court further finds that the Affidavit simply states a legal conclusion. The affidavit sets forth no facts upon which this Court can make a decision that

> the use of a dock or boat moorings on or at the easement were done with "permission and consent."
>
> That conclusion is up to the trier of fact, not the Affiant through Affidavit. This Court finds this Affidavit of little or no use in this Court's decision.

The trial court erred in concluding that Hummon's affidavit stated only legal conclusions. "An affidavit is defined as: A written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation." *People v Sloan*, 450 Mich 160, 177 n 8; 538 NW2d 380 (1995), overruled on other grounds *People v Hawkins*, 468 Mich 488 (2003) (internal quotation marks omitted); see also *Black's Law Dictionary* (9th ed) (an affidavit is "[a] voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths").

There is obviously a difference between a "statement of fact" and a "legal conclusion." *Black's Law Dictionary* (9th ed) provides the following definition for the term "statement of fact":

> A form of conduct that asserts or implies the existence or nonexistence of a fact. . . . The term includes not just a particular statement that a particular fact exists or has existed, but also an assertion that, although perhaps expressed as an opinion, implies the existence of some fact or facts that have led the assertor to hold the opinion in question.

Further, "legal conclusion" is defined as "[a] statement that expresses a legal duty or result but omits the facts creating or supporting the duty or result." *Id.*

In her affidavit, Hummon averred numerous facts regarding her ownership of plaintiff's property before selling it to plaintiff in 2003. The affidavit included the dates on which Hummon purchased and sold the property, the typical uses she and her husband had for the land, including the shore and bottomlands. Among these factual statements was Hummon's averment that she allowed others to erect a deck and moor boats at the end of the express easement by permission and consent. The trial court clearly erred in determining that this statement was a legal conclusion because it, alone, did not express "a legal duty or result." In other words, Hummon's statement provided that she *allowed* defendants and their predecessors in interest to erect a dock at the end of the easement. A legal conclusion, for example, might have provided that defendants were precluded from claiming that they acquired riparian rights through prescription because they could not prove hostile or adverse use. Hummon's affidavit, on the other hand, merely provides the factual underpinnings, i.e., that Hummon permitted defendants' predecessors in interest to erect a dock at the end of the easement, upon which the trial court could find that defendants had failed to establish hostile or adverse use of the easement property.

Because the trial court refused to consider the affidavit, it did not pass on the affiant's credibility. The trial court violated the Supreme Court's directive when it found that Hummon's affidavit stated a legal conclusion. According to the Supreme Court's order, the trial court was tasked to "further consider" the affidavit in making its decision. To "consider" means "1. to look

at carefully; examine 2. to think about in order to understand or decide; ponder [to consider a problem] 3. to keep in mind; take into account . . ." *Webster's New World Dictionary of the American Language* (2d Colledge Ed), p 303. As we discuss next, refusing to "further consider" the affidavit caused the trial court to err on the ultimate issue of whether there was a prescriptive easement allowing defendants to erect a dock and moor boats.[4]

IV. PRESCRIPTIVE EASEMENT

Plaintiff next contends that the trial court erred in finding that defendants met their burden of proving the existence of a prescriptive easement allowing them to erect a dock and moor boats. We agree.

The trial court's holding regarding the existence of a prescriptive easement is a legal question that is reviewed de novo. *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 40; 700 NW2d 364 (2005). The trial court's factual findings, including the scope of rights under an easement, are reviewed for clear error. *Wiggins v City of Burton*, 291 Mich App 532, 550; 805 NW2d 517 (2011). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed." *Reed Estate v Reed*, 293 Mich App 168, 173-174; 810 NW2d 284 (2011).

A prescriptive easement may arise in a manner similar to adverse possession, when a party's use of another person's property for an easement has been open, notorious, adverse or hostile, and continuous for a period of 15 years. *Matthews v Dep't of Natural Resources*, 288 Mich App 23, 37; 792 NW2d 40 (2010). Wobrock averred that the dock was placed at the end of the easement for the eight years he owned the property now owned by defendants, though its placement and use was the result of mutual agreement between four different property owners: Wobrock, Roy Brown, Tom Bourgeois, "[a]nd someone known as 'Brownie'." Thus, if defendants could tack Wobrock's use of the dock onto their alleged prescriptive use of the easement, they would have exceeded the 15-year statutory requirement. *Killips v Mannisto*, 244 Mich App 256, 259; 624 NW2d 224 (2001) ("A party may 'tack' on the possessory periods of predecessors in interest to achieve this fifteen-year period by showing privity of estate.").

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[4] As conceded by both attorneys at oral argument, we have before us the same evidence that was before the trial court, which consisted exclusively of documentary evidence. Thus, this is not a situation where we must defer to the trial court's "superior position to assess the credibility and the veracity of witnesses." *People v Tyner*, ___ Mich ___; 861 NW2d 622 (2015). The trial court did not have an "advantage of seeing the witnesses on the stand, of listening to their testimony, of noting the attitude of the jury to various matters that may arise during the trial" and was not in a "far better position than is an appellate court to pass on questions of possible prejudice, sympathy, and matters generally that occur in the course of a trial but which do not appear of record." *Id.*

The party claiming a prescriptive easement "bears the burden to demonstrate entitlement to a prescriptive easement by clear and cogent evidence." *Matthews,* 288 Mich App at 37. Defendants' evidence fell far short of this heavy burden.

Defendants' affidavit averred that when they purchased their property from Wobrock, their immediate predecessor in interest, he told them that the dock was theirs and their responsibility to install each season. Further, from 2000 to 2010, defendants claimed to have installed the dock and moored their boats to it without ever asking for, or being granted, permission by plaintiff. While defendants may have believed the dock was "theirs" such that they used the dock under color of right, their subjective belief, while inconsistent with the right of the true owner, is only one factor in determining whether the use was adverse or hostile. "Adverse or hostile use is use inconsistent with the right of the owner, *without permission* asked or given, use such as would entitle the owner to a cause of action against the intruder [for trespassing]." *Plymouth Canton Community Crier, Inc v Prose*, 242 Mich App 676, 681; 619 NW2d 725 (2000). "[P]ermissive use of property, regardless of the length of the use, will not result in an easement by prescription." *West Michigan Dock & Mkt Corp v Lakeland Investments*, 210 Mich App 505, 511; 534 NW2d 212 (1995).

Plaintiff provided Hummon's affidavit to the trial court, which stated that she had previously owned plaintiff's lot with her husband from June 19, 1990, until she sold it to plaintiff on April 25, 2003. Hummon averred that during the time of her ownership of the property, "any use of a dock or boat moorings on or at the easement was done with [hers and her husband's] permission and consent."

Analyzing Hummon's affidavit, along with Wobrock's affidavit, the trial court erred in finding that defendants established a prescriptive easement to erect a dock or moor boats. Wobrock's affidavit asserts that he made no representations to defendants regarding defendants' alleged rights to erect a dock or moor boats. Further, Wobrock asserted that his use of the dock was done with the consent of other owners who benefitted from the easement. In support of this assertion, Hummon averred that she permitted Wobrock and others to build a dock at the edge of the easement. These statements were uncontroverted in the lower court. [5] Thus, the use of the easement to erect a dock and moor boats at the end of the easement was permissive, at least during the period of Hummon's ownership, from 1990 until 2003. Such permissive use cannot be tacked on to subsequent hostile use, *Fractional School Dist No 9*, 248 Mich at 116, and therefore, the earliest date on which defendants could assert hostile or adverse use of the easement is April 25, 2003, when Hummon conveyed the servient estate to plaintiff. Plaintiff filed her declaratory judgment action in the trial court on July 28, 2010. Therefore, the longest time for which defendants could possibly have enlarged their easement rights in a hostile and

[5] Also uncontroverted were the averments in Michael O'Donnell's affidavit. O'Donnell was the Stamats' predecessor in interest. The dock also encroached on his property. He averred that the intrusion was by consent and permission "as all the users were friends and the dock was placed by mutual consent and agreement."

adverse manner, based on the evidence admitted below, was slightly more than seven years and the trial court clearly erred in finding that defendants had proved adverse or hostile use.

Reversed and remanded for entry of order. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Kirsten Frank Kelly

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Before: M. J. KELLY, P.J., and WILDER and K. F. KELLY, JJ.

M. J. KELLY, P.J. (*dissenting*).

I concur with the majority's analysis of the claim by plaintiff, Sally Kranz, concerning the law of the case doctrine; for the reasons stated by the majority, I would vacate the trial court's judgment to the extent that it might be read to provide that defendants, Roger D. Terrill and Darlene G. Terrill (collectively, the Terrills), had an express right to erect and use the dock at issue. However, I disagree with the majority's decision to reverse and remand for entry of a judgment in favor of Kranz. I do not believe that this Court has the authority to substitute its own findings for those of the trial court sitting as the finder-of-fact on the sole basis of a disagreement with the trial court's assessment of the weight and credibility to be afforded the evidence. Rather, where the evidence adduced at trial supports the trial court's findings, this Court must affirm—and we must do so even if we conclude that we would not have reached the same result had we been sitting as the finder-of-fact. Because a reasonable view of the evidence supports the trial court's findings, I would affirm the trial court's decision to reaffirm that portion of its original judgment granting a prescriptive right to erect and use a dock to the Terrills.

I. BASIC FACTS

Kranz owns property on Round Lake in Lenawee County, Michigan, which is commonly known as Lot 1 of the Shady Beach plat. The Stamats own Lot 2, which is immediately northwest of Lot 1 on the lake. Kranz' predecessor in interest owned Lot 1 along with four back lots that did not have access to the lake. Kranz' predecessor in interest conveyed the four back lots—including Lot A—with a ten-foot wide easement across the northwestern end of Lot 1 in order to provide those lots with lake access. The Terrills purchased Lot A in 2000. There is evidence that the previous owners of the four back lots mutually agreed to erect, maintain, and use a dock at the end of the easement over Lot 1 and did so for decades, which use the Terrills continued after they purchased Lot A.

In July 2010, Kranz and the Stamats sued the Terrills to stop them from maintaining a dock at the end of the easement. The Terrills then counter-sued Kranz for injunctive relief; specifically, they alleged that they and their predecessors in interest had established a prescriptive right to continue to maintain a dock at the end of the easement and moor boats. The primary issue for trial was whether the Terrills and their predecessor in interest's erection and use of the dock were with permission. The parties submitted documentary evidence and numerous affidavits in support of their respective positions and later stipulated that the trial court could try the claims on that record. The trial court found that the owners of the back lots had "continuously used the easement including the dock for more than fifteen years and that such use was open, notorious, and adverse." Accordingly, it determined that the Terrills had established a prescriptive right to maintain and use a dock at the end of the easement and entered a judgment to that effect.

In the prior appeal,[1] this Court stated that the record evidence supported the trial court's findings underlying its determination that the Terrills had established a prescriptive right to erect and maintain the dock and moor boats. The Court, therefore, affirmed the trial court's judgment granting the Terrills a prescriptive right to use the end of the easement to erect and maintain a dock and moor boats.

Kranz appealed to our Supreme Court and it vacated "those portions of the Court of Appeals and Lenawee Circuit Court judgments holding that the [Terrills] established a prescriptive easement to construct and maintain a dock at the terminus of the easement, and to moor boats to the dock." *Kranz v Terrill*, 494 Mich 860; 831 NW2d 238 (2013). The Court ordered a remand to the trial court "for further consideration" in light of an affidavit by Kranz' predecessor in interest, Evelyn M. Hummon. *Id.* In her affidavit, Hummon stated that any use of the dock by the back lot owners over the years that she owned Lot 1 was with her permission. Our Supreme Court instructed the trial court to reconsider its decision in light of Hummon's affidavit and case law establishing that use with permission is not hostile.

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[1] *Kranz v Terrill*, unpublished opinion per curiam of the Court of Appeals, issued September 20, 2012 (Docket No. 305198).

In November 2013, the trial court held a hearing to reconsider its decision as instructed by our Supreme Court. At the hearing, the trial court stated that, although it was not clear from its original opinion, it had considered the Hummon affidavit. It gave the affidavit no consideration, however, because the affiant merely stated a conclusion:

> The problem that I have with the affidavit is the fact that it simply states a conclusion. It says that the dock or boat moorings or the easement was done with our permission and consent. That in the Court's opinion is like saying I held it by adverse possession. If the – if the Terrills had filed an affidavit saying that we held it by adverse possession, that's all they said in their affidavit without averring facts to back that up, the Court would have given that no consideration.

The court explained that the absence of any facts to flesh out whether the back lot owners erected and maintained the dock with the affiant's permission made it impossible for the court to *believe* the affiant: "In this particular case simply saying that it was done with our permission and consent isn't sufficient for this Court to believe that that in fact is the case." Rather, the court stated, the affiant should have provided facts to flesh out the circumstances under which the affiant allegedly gave permission. By way of example, the court related, the affiant did not "say that each and every year that the people came to put their dock out they asked us if we could do it and we gave them our permission . . . ." In the absence of such factual statements, the trial court concluded that the affidavit provided almost no help in resolving the factual dispute. Because it found the affidavit incredible, even after further consideration, the trial court determined that it would "affirm" its prior decision. The trial court entered an opinion and order affirming "its prior decision that the [Terrills] have an express and prescriptive easement" as described in the original judgment on the same day.

II. ANALYSIS

On appeal, Kranz maintains that our Supreme Court required the trial court to find that Hummon's affidavit was credible and established that the Terrill's predecessor's use was permissive. "It is the duty of the lower court or tribunal, on remand, to comply strictly with the mandate of the appellate court." *Rodriguez v Gen Motors Corp*, 204 Mich App 509, 514; 516 NW2d 105 (1994). A trial court may only take such actions on remand as are consistent with the true intent and meaning of the appellate court's judgment. *Kasben v Hoffman*, 278 Mich App 466, 470; 751 NW2d 520 (2008).

Our Supreme Court did not determine that the trial court clearly erred in its findings; it vacated the trial court's judgment and remanded for "further consideration" of the evidence in light of Hummon's affidavit. *Kranz*, 494 Mich at 860. That is, for whatever reason, it asked the court to reconsider its findings and decision in light of a specific affidavit and case law, which is precisely what the trial court did. Nothing in the Supreme Court's remand order required the trial court to give particular weight to Hummon's averments. If the Supreme Court wished to direct the trial court to an ultimate conclusion on a particular issue, it could have done so. See, e.g., *Cole v Henry Ford Health Sys*, 497 Mich 881; 854 NW2d 717 (2014). The Supreme Court's directive was not ambiguous and only required the trial court to *consider* Hummon's affidavit before again making its findings and rendering its decision. The trial court sufficiently

complied with the Supreme Court's directive by providing a written opinion explaining its reasons for disregarding Hummon's affidavit.

Kranz also argued that the trial court erred when it determined that the Terrills established a prescriptive right to erect a dock and moor boats at the end of the easement. The burden of proving the existence of a prescriptive easement lies with the party claiming the easement. *Widmayer v Leonard*, 422 Mich 280, 290; 373 NW2d 538 (1985). However, once the party claiming the easement presents evidence that it had used the disputed land for the statutory period, the burden of producing evidence shifts to the other party to prove that its use was permissive. *Id.* At issue here is whether the Terrills established a prescriptive easement through open, notorious, adverse or hostile, and continuous use of the easement for a period of 15 years. *Matthews v Dep't of Natural Resources*, 288 Mich App 23, 37; 792 NW2d 40 (2010); MCL 600.5801(4). "Adverse or hostile use is use inconsistent with the right of the owner, without permission asked or given, use such as would entitle the owner to a cause of action against the intruder [for trespassing]." *Plymouth Canton Community Crier, Inc v Prose*, 242 Mich App 676, 681; 619 NW2d 725 (2000) (quotation marks and citations omitted, brackets in original). A permissive use of property, regardless of the length of time, will not result in an easement by prescription, *West Mich Dock & Market Corp v Lakeland Investments*, 210 Mich App 505, 511; 534 NW2d 212 (1995), and periods of permissive use cannot be tacked on to a period of hostile occupancy in order to establish a prescriptive easement, *Fractional School Dist No 9 in Waterford and Pontiac Twps, Oakland Cty v Beardslee*, 248 Mich 112, 116; 226 NW 867 (1929).

The Terrills averred that when they purchased their property from Rickey Lee Wobrock, their immediate predecessor in interest, he told them that the dock was theirs and that it was their responsibility to install it each season. Further, from 2000 to 2010, the Terrills claimed to have installed the dock and moored their boats to it without ever asking for permission. Thus, there was evidence to support a finding that the Terrills had used the easement and dock in a way that was hostile for 10 years. Because this was less than the statutory period, in order to prevail, the Terrills had to establish that Wobrock also used the dock in a manner that was hostile. See *Killips v Mannisto*, 244 Mich App 256, 259; 624 NW2d 224 (2001).

Wobrock averred that the dock was placed at the end of the easement for the eight years he owned the property, though its placement and use was the result of mutual agreement between four different property owners: Wobrock, Roy Brown, Tom Bourgeois, "[a]nd someone known as 'Brownie'." He also stated that he used the dock and moored boats to the dock. Moreover, although he did not specifically state that he used the dock under color of right and did not make a claim of adverse possession, there was ample evidence to support a finding that Wobrock's use was hostile. Wobrock averred that he placed and used the dock with the "mutual agreement" of the four users, who owned back lots and did not include Hummon or her husband or Kranz. In support of their claims, the Terrills submitted affidavits by Bourgeois and Brownie, among others.

Bourgeois averred that he purchased one of the back lots from his mother's estate in 2009 and was familiar with his mother's use of the easement since 1969. He stated that he and his mother before him used the dock on the belief that the dock was "our dock" and that they were "entitled to place and use this dock." He also averred that it was his belief that no one had the right to restrict his or his mother's use of the dock.

Aaron "Brownie" Brown averred that he purchased a back lot in 1966 and owned it until he sold it to the Stamats in 2006. Like Bourgeois, Brown averred that he used the dock under color of right and stated that he did not ask for permission from the owners of Lots 1 and 2; indeed, he stated that a prior owner of Lot 1 tried to give him "a hard time regarding the dock" and he responded that the "dock was ours."

When Wobrock's affidavit is considered in light of the other affidavits and especially those of the other back lot owners, the trial court could reasonably find that Wobrock's use of the dock was also done without permission. Wobrock never stated that he used the dock with the permission of the owner of the servient estate—Lot 1—he averred that he used the dock by mutual agreement with the other *back lot* owners. Two of those owners specifically averred that they used the dock by right and without permission. For that reason, Wobrock's affidavit could be read to be consistent with either Kranz' version of events or with that of the back lot owners. Examining the record as a whole and especially in light of Wobrock's apparent agreement with the other back lot owners, the trial court could find that Wobrock used the dock without permission and as a matter of perceived right.

On appeal, Kranz makes much of the fact that Hummon averred that "any use of a dock or boat moorings on or at the easement was done with our permission and consent." However, as the trial court aptly noted, this averment was not accompanied by specific facts that would shed light on what Hummon meant and did not establish a direct conflict with the averments by the other affiants. Moreover, even if there were a conflict, it bears emphasizing that the parties stipulated to allow the trial court to try the issue on the evidentiary submissions and affidavits. As such, the trial court had the authority to judge Hummon's credibility on the face of her averments and assign them whatever weight it chose—or no weight at all—in making its findings. *Widmayer*, 422 Mich at 290 (noting that it was for the finder of fact to "weigh the evidence submitted by the parties regarding adverse and permissive use").

It is also of no moment that the trial court may have mischaracterized Hummon's averment as a mere legal conclusion. Admittedly, one might plausibly infer from Hummon's averment that she intended it to be understood as a statement that she gave permission to anyone and everyone who used the dock, but one might also infer from this averment that she merely acquiesced—that is, gave unexpressed consent—to the use. As the finder of fact, the trial court was required to make the necessary inferences, resolve any conflicts in the evidence, and make a determination on the basis of its inferences and resolutions. *Id.*; MCR 2.613(C). And the trial court found Hummon's averment concerning her permission and consent to be unworthy of belief. Given that her version directly contradicted the averments by two back lot owners and did not include specific details that might clarify the circumstances surrounding her purported consent, the trial court was well within its rights to disregard her affidavit as self-serving and incredible. And this Court should not second-guess the trial court's assessment of the weight and credibility to be assigned to Hummon's averment. *Dep't of Community Health v Risch*, 274

Mich App 365, 375; 733 NW2d 403 (2007). On this record, I would conclude—as the previous panel of this Court already did—that there was sufficient evidence to support the trial court's findings and ultimate determination that the Terrills established a prescriptive right to use the dock and moor boats consistent with their prior practice. See *Fera v Village Plaza, Inc*, 396 Mich 639, 648; 242 NW2d 372 (1976) (stating that reviewing courts must uphold a judgment unless the factual record "is so clear that reasonable minds may not disagree").[2]

Finally, Kranz contends the trial court failed to follow the portion of this Court's prior opinion remanding the case to establish the rights and responsibilities of the parties regarding their relationship as fee holder and easement holders. In its prior opinion, this Court remanded the case "to the trial court for clarification of [Kranz'] rights and responsibilities as the fee owner and the [Terrills'] rights and responsibilities as the easement holders following any related proceedings deemed necessary."[3] The trial court's opinion and order after remand contains no such discussion and the Supreme Court's subsequent order only vacated the portion of that opinion pertaining to the discussion of prescriptive easements. *Kranz*, 494 Mich at 860. Because the trial court's opinion and order provides no clarification of the parties' rights, I would remand this case to the trial court for a determination of the parties' respective rights.

I would affirm in part, vacate in part, and remanded for further proceedings consistent with this opinion.

/s/ Michael J. Kelly

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[2] I do not agree that this Court may substitute its own findings for that of the trial court simply because the testimony at issue was in the form of affidavits. Had the parties relied on depositions that were read into the record, the trial court would similarly have had no special opportunity to judge credibility. Nevertheless, this Court would still treat the depositions as testimony made in open court. See *Scott v Angie's, Inc*, 153 Mich App 652, 661; 396 NW2d 429 (1986) (stating that testimony introduced at trial by deposition shall have the same force and weight as testimony in open court). Kranz stipulated to the method for trying the case and should not now be heard to argue that the trial court had no authority to disregard the affidavit.

[3] *Kranz*, slip op at 8.