

ATTORNEY WRITES

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“Are Artificial Lakes in Michigan Real?”

On March 23, 2010, the Michigan Court of Appeals issued an opinion that should be troubling for every lakefront property owner on any artificial lake in Michigan. The opinion was issued in the case of *Persell v Wertz*, ___ Mich App ___ (2010). Given that the decision is “published,” it is binding precedent throughout Michigan. Accordingly, it will represent the likely permanent rule in Michigan regarding this matter unless it is reversed by the Michigan Supreme Court.

Although *Persell* involved a pond under five acres in size, the Court of Appeals used broad *obiter dictum* to indicate that properties that front on any artificial lake in the state of Michigan cannot be riparian. Or, put another way, the Court stated that lakes that are artificially created (presumably, by dam, excavation, or otherwise) are not subject to the normal riparian rights analysis. In the *Persell* case, that meant that each of the two owners of the nonriparian pond at issue could only use the surface of the pond over their respective properties. Accordingly, since neither party had riparian rights to use the entire surface of the pond, it was within the legal right of one of the property owners to stretch a fence along the common boundary line across the waters of the pond and to keep the other property owner off of the surface of the pond lying above the lands of the objecting property owner.

It is one thing for the Court of Appeals to blanketly state that lakes that have been artificially created in Michigan do not have riparian rights. It is another to ascertain specifically what that means for those lakes and how it will work in practice. The decision by the Court of Appeals leaves a vacuum with regard to lakefront property owner rights on artificial lakes. If the rights they have as waterfront property owners are not riparian, what rights do they have? For example, does *Persell v Wertz* mean that anyone on an artificial lake can cordon off their “portion” of the lake with fencing or walls out in the water? Does a lakefront landowner on an artificial lake still own to the center of the lake (similar to a riparian property owner), or is that well-established case law now defunct as to artificial lakes? A riparian property owner has the right to utilize the lake involved for dockage, swimming, boating, fishing, ice fishing, and drawing water out for the riparian’s lawn. Does a landowner with frontage on an artificial lake have some, any, or none of those rights pursuant to *Persell v Wertz*? Once again, this may be an example of an appellate court making broad pronouncements without carefully thinking through the consequences of the court’s decision for many property owners throughout the state. The law of unintended consequences will likely loom large with regard to this case.

And, of course, as is all too typical with appellate court decisions that make sweeping pronouncements which will affect large numbers of people, the Michigan Court of Appeals did not define what it meant by an “artificial lake.” Is an artificial lake one that did not exist at all prior to

dredging or mining (such as a lake created by a sand and gravel extraction process) or before a dam was installed (for example, a small wetland, creek, or other wet area was increased dramatically in size by the installation of a dam)? What if a small natural lake existed initially which was enhanced by dredging, a dam, or an augmentation well—is the enhanced or enlarged lake still considered an “artificial lake” for purposes of the Court of Appeals’ pronouncements that riparian rights do not attach?

If one or both parties in *Persell v Wertz* petition the Michigan Supreme Court to hear a further appeal of the case and the Court agrees to take the case, it is possible that the Supreme Court could reverse the portion of the Court of Appeals’ decision that blanketly states that artificial lakes cannot have riparian rights. As of the date of this column, neither party has appealed the decision to the Michigan Supreme Court. Now, any appeal would be difficult to pursue because it would involve requesting approval of a delayed application for leave to appeal from the Michigan Supreme Court. If such a delayed application is filed, and the Michigan Supreme Court agrees to hear the case, one or more parties could submit *amicus curiae* briefs in support of the proposition that artificial lakes (as opposed to small ponds) do have riparian rights.

It is possible that future Michigan appellate courts could find that a given artificial lake has “morphed” into a natural lake for purposes of riparian rights based upon the passing of the 15-year general Michigan real estate statute of limitations. That is, if the property owners around an artificial lake have treated the lake akin to a natural lake with riparian rights for 15 years or more, a court could potentially deem the lake to be “natural” for purposes of riparian status, such that the property owners with lake frontage would be deemed to be riparians. However, that is simply an educated legal guess.

Some scholars may assert that the broad language in the Court of Appeals’ decision in *Persell* indicating that artificial lakes cannot have riparian rights is mere *dicta* and is not binding precedent, as the body of water in *Persell v Wertz* was clearly a small pond. However, that would likely be of little comfort to the tens of thousands of property owners in Michigan who own lakefront lots on large artificial lakes—that language by the Michigan Court of Appeals could effectively give such property owners limited lake usage rights.

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Random Musings

No, I did not age prematurely since the last issue. Many people have indicated that I really should replace my high school picture on the header to these columns with a current photograph. Now that I have replaced the photograph, that should suffice for the next two decades!

The annual Michigan Lake & Stream Associations, Inc. convention held during the last week in April was a great success. The 2011 convention will be in Bay City. These annual events are very worthwhile and enjoyable gatherings. Every riparian (or at least several members of each lake association) should plan to attend the 2011 annual convention in late April of 2011.