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Lawmakers, realtors launch effort to preserve riparian rights

Bradley: Court decision threatens thousands along hundreds of flowages



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Investigative Reporter

Conservative lawmakers in the state Legislature and a group spearheaded by the Wisconsin Realtors Association (WRA) have launched an effort to preserve what they say is an endangered right of pier placement on the state's flowages, after a Supreme Court ruling denied such rights to property owners in 2018.

The legislation, which is cosponsored by state Sen. Tom Tiffany (R-Minocqua) and Rep. Mary Felzkowski (R-Irma), would guarantee that the owner of land abutting a navigable waterway is presumed to be a riparian owner and is entitled to exercise all rights afforded to a riparian owner unless those rights are specifically prohibited by the deed to the land. The bill has been referred to committee.

The legislative effort follows a state Supreme Court decision that denied property owners the ability to place a pier over navigable waters abutting their land on a man-made flowage because the land beneath the water was owned by a neighboring property owner.

Critics of the decision, including dissenting Supreme Court justice Rebecca Bradley, says the court majority obliterated more than century of common law when it determined that a fee simple interest in land submerged by navigable water cancels riparian rights.

The legislation, which is authored by Rep. Rob Stafsholt (R-New Richmond) and Sen. Patrick Testin (R-Stevens Point), is also backed by the Wisconsin Homeowners Alliance, an issues-advocacy group funded by the WRA. The alliance has begun a radio, mail, video, and digital ad campaign urging lawmakers to "protect our piers."

The alliance says the recent court decision could put countless waterfront property owners in jeopardy of losing their piers, because someone else may own the ground under the water; it contends the legislation would protect all waterfront property owners by preserving their right to build piers and docks from their land adjacent to the water.

The case

In the case, *Movrich v. Lobermeier*, decided in January 2018, David and Diane Lobermeier opposed the asserted right of Jerome and Gail Movrich to place a pier and to access the Sailor Creek Flowage in Price County directly from their shoreline property, which abutted the water.

The Lobermeiers themselves did not own any upland property along the banks of the waterbody, but they did own the portion of the flowage waterbed where the Movrich property met the water. The crux of the issue, the court stated, was whether the Lobermeiers could exclude the Movriches from erecting and maintaining a pier by virtue of owning only a portion of the flowage bed.

As the court documented, the Sailor Creek Flowage is a 201-acre, man-made lake located near Fifield, a flowage created by a dam placed on Sailor Creek in 1941.

"At that time, a Deed of Flowage Rights was executed by Margaret Hussmann, who granted the town of Fifield 'the perpetual rights, privilege and easement to submerge, flood and/or raise the ground water elevation' of the underlying property," the decision stated.

Over time, the court continued, the property subjected to the flowage easement was transferred to various people, including to brothers David and Robert Lobermeier in 2000, while other property eventually became the Sailor Creek Flowage subdivision, where the Movriches purchased property in 2006.

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Please select one:

- All of them. The mayor and the entire Common Council.
- I would recall the council but keep the mayor.
- I would recall the mayor but keep the council.

As the court also observed, the issue that has now become one of statewide concern began as a family squabble.

"David Lobermeier and Gail Movrich are brother and sister," the decision stated. "For a number of years the families existed in harmony, each making use of a pier on the Movrich property to moor their boats, and from which they swam and fished."

That all changed about 2011 or 2012, the majority observed, when the families had a falling out, and the Lobermeiers began to assert that they had exclusive rights to the waterbed at issue. Specifically, according to the court decision, the Lobermeiers contended that the presence of navigable water over their property did not affect their basic property rights, including the right to prohibit the Movriches from installing a pier into or over the portion of the waterbed of the flowage that the Lobermeiers owned.

What's more, the Lobermeiers asserted that the Movriches could access the Sailor Creek Flowage only from a public access point and not from their own property.

The Movriches countered that the Lobermeiers' ownership was qualified by and subservient to their asserted riparian rights and to the Wisconsin public trust doctrine.

Both the circuit court and the state court of appeals had sided with the Movriches on both counts. But, while the Supreme Court majority sided with the Movriches on the question of access, it determined that their riparian rights did not include building a pier on the navigable waters above the Lobermeiers' land.

Riparian rights vs. property rights

There were various issues to be examined, the court majority determined.

The first was, did the Movriches have riparian rights, which, when combined with their rights under the public trust doctrine, overcame the Lobermeiers' private property rights, giving them the ability to place a pier on or over the Lobermeiers' property?

The majority's answer was no.

"(W)e conclude that while Movriches' property borders the flowage, they are not entitled to those riparian rights that are incidental to property ownership along a naturally occurring body of water where the lakebed is held in trust by the state," the majority found. "Rather, any rights Movriches may enjoy in regard to the man-made body of water created by the flowage easement must be consistent with Lobermeiers' property rights or the flowage easement's creation of a navigable body of water."

Because a pier placement was inconsistent with the Lobermeiers' fee simple title interest and did not arise from the flowage easement that supports only public rights in navigable waters, the Movriches' private property rights were not sufficient to place a pier into or over the waterbed of the flowage without the Lobermeiers' permission, the court determined.

In deciding the case, the court considered just what constitutes riparian rights in the state's case law, which they found may include "special rights to make use of water in a waterway adjoining (an) owner's property," as well as a "bundle of rights" that may be conferred upon a property owner by virtue of his or her contiguity to a navigable body of water.

Critically, the court found that, while in Wisconsin there is a presumption that owning property abutting a natural body of water confers certain riparian rights, there is no such presumption in the case of a man-made body of water located wholly on the property of a single owner.

"However, Wisconsin common law also establishes that riparian rights, including rights to use the land beneath a body of water, are severable from basic property rights if the deed in question makes that severability clear," the decision stated.

On a man-made body of water located wholly on the property of a single owner, the court majority stated, "all of the incidents of ownership are vested in the owner of the land" to convey as he or she expresses in conveyances.

Court: Public Trust doctrine limits property rights

In addition, the court found, the public trust doctrine does not convey private property rights.

"Rather, for at least a century, we have recognized the public trust doctrine as a limit on riparian rights," the court held. "Wisconsin common law has established that the right to place structures for access to navigable water is 'qualified, subordinate, and subject to the paramount interest of the state and the paramount rights of the public in navigable waters.'"

And that is true even where the bed is privately held, as long as the body of water is public, navigable, and created by use of public waters, the court found.

In this case, the majority observed, the Lobermeiers were fee simple owners of the submerged land.

"Among other rights, an owner in fee simple enjoys a basic right to exclude," the decision stated. "It is undisputed that were this contest between two upland property owners, any encroachment by one onto the property of the other would be trespass."

In addition, the decision continued, the Lobermeiers' property interests were subject to certain protections, as were the public's interests in navigable water.

- Everyone but alderman Emmer, as he was just appointed.
- Frederickson, Sauer, Holt, Rossing and Larson.
- Rog, Kirby and Kelly.

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"Therefore, unless riparian rights or the public trust doctrine modify those rights, Movriches may not interfere with the property rights of Lobermeiers," the decision stated.

And they did not modify those rights, the majority concluded.

"As we have explained, the public trust doctrine does not convey private property rights," the decision stated. "Rather, it establishes rights of use of navigable waters that are held in trust for all members of the public."

Citing a string of court cases, the majority concluded that the Movriches' reasoning completely ignored the property rights of the Lobermeiers, including their right to exclude.

But, the majority stated, the Movriches also argued that they had the expectation that their property would include riparian rights, specifically the right to install a pier, because it was marketed and sold as a "waterfront lot," and that at the time of purchase many of the properties on the flowage maintained "open and obvious" piers.

"Second, they claim they purchased this lot specifically because it was a shoreline property, and for a period of years thereafter they made use of the flowage by fishing, using a pier to moor their boat, swimming, and kayaking," the decision observed.

While those arguments may have had merit if the Movriches had purchased their property from the Lobermeiers or if they had obtained an easement or license from the Lobermeiers, neither of those events occurred, the court held.

"Furthermore, their arguments ignore (case law's) clear directive that 'one who acquires land abutting a stream or body of water may acquire no more than is conveyed by his deed,'" the decision stated. "When Movriches took title to their land, the legal description on their deed made no reference to riparian rights. Meanwhile, the surveyor's certificate clearly indicated that their property extended only 'to the shoreline' of the flowage. Although they claim they purchased the lot with the intention of maintaining a pier, they did not purchase their lot from Lobermeiers, and their deed describes no legal right, title, or interest in the flowage waterbed."

On the other hand, the court did conclude that the public trust doctrine, when combined with the shoreline location of the Movriches' property, did allow the Movriches to access and exit the flowage waters directly from their abutting property, as long as they were using the flowage waters for purposes consistent with the public trust doctrine.

"(W)e conclude that the public trust doctrine conveys no private property rights, regardless of the presence of navigable water," the court concluded. "In a flowage easement such as is at issue here, title to the property under the flowage may remain with the owner. While the public trust doctrine provides a right to use the flowage waters for recreational purposes, that right is held in trust equally for all. Furthermore, although the Lobermeiers' property rights are modified to the extent that the public may use the flowage waters for recreational purposes, no private property right to construct a pier arises from the public trust doctrine."

Bradley's dissent

In her dissent, justice Rebecca Bradley agreed with the majority that the Movriches had a right to access, but she also believed they had a riparian right to place a pier, and that the court's decision would do much harm.

"Riparian rights in Wisconsin are sacred," Bradley wrote. "For many, waterfront property in Wisconsin provides more than merely a place to live - it affords a lifestyle. The proverbial cottage 'up north' offers the opportunity for fishing off the pier in the morning, waterskiing with children or grandchildren in the afternoon, and an early evening ride on the pontoon boat with friends and neighbors. None of this is possible absent riparian rights."

Traditionally, Bradley contended, those rights includes the placement of a pier, among other things.

In defining the Lobermeiers' property rights in terms of fee simple absolute ownership, Bradley contended, the majority ignored the most salient fact of the case: the presence of navigable water over the Lobermeiers' property.

"The presence of navigable water for over three quarters of a century alters the Lobermeiers' property rights in the waterbed, subordinating them to the riparian rights of the Movriches and the rights of the public under the public trust doctrine," she wrote.

Indeed, Bradley argued, riparian rights are independent private property rights that are not conferred under the public trust doctrine, and, in making their decision, the majority opinion overlooked the interplay between private property rights, riparian rights, and the public trust doctrine.

"Although separate and distinct, these competing rights intertwine and the majority opinion errs in its rigid approach toward applying them to the Movriches' and the Lobermeiers' property interests," she wrote. "The majority adopts an unprecedented holding that a fee simple interest in land submerged by water cancels riparian rights presumptively recognized under the common law for at least 140 years."

And, she argued, the significance of the departure from more than a century of common law should be one the Legislature makes, not the courts.

"The consequences of what began as a family squabble are not confined to the parties before us but fundamentally transform property rights for thousands of Wisconsin property owners along hundreds of flowages," she wrote. "Such a dramatic change in the law should be the Legislature's prerogative, not that of the four justices comprising the majority."

Unlike the majority, who contended that the Lobermeiers' private property rights were unaltered by the public trust doctrine, Bradley asserts that those rights were in fact modified by the existence of navigable waters over the land.

"The Movriches are unquestionably riparian owners because their property lies on the banks of the flowage," she

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wrote. "The legal description of their property extends 'to the shoreline' of the flowage. Yet, the majority holds that the Movriches are not riparians, contrary to every definition of riparian ownership existing in this state's pertinent precedent, dating back to 1877."

For one thing, Bradley says, the majority asserts that, in the case of artificial bodies of water, all of the incidents of ownership are vested in the owner of the land. But that case law applies only to a man-made body of water located wholly on the property of a single owner, she argued.

"If the Lobermeiers owned the entire waterbed beneath the flowage, the Movriches would not be able to maintain and erect a pier because they would enjoy no riparian rights under the common law," she wrote. ".... However, the Lobermeiers own only a portion of the waterbed, the public trust doctrine applies to the flowage because it originates from the public, natural, and navigable waters of Sailor Creek, and the Movriches have a fundamental right to place a pier in the water as riparian owners whose land abuts natural, navigable waters."

In addition, Bradley wrote, the majority points out that "when Movriches took title to their land, the legal description on their deed made no reference to riparian rights."

It did not need to, Bradley observed.

"The majority equates the deed's silence on riparian rights to the nonexistence of either riparian ownership or riparian rights," she wrote. "This conclusion is patently incorrect."

Indeed, Bradley argued, the deed's silence meant just the opposite of what the majority said it did.

"Therefore, the riparian rights attached to the property were conveyed to the Movriches under common law when they purchased their waterfront property," she wrote. "The deed does not need to expressly mention the status of riparian ownership because the presumption of riparian rights exists by operation of law unless the deed expressly excludes riparian rights."

Furthermore, Bradley contended, the right of a riparian to maintain a pier is subject to only a few statutory limitations - they cannot interfere with public rights in navigable waters or with the rights of other riparian owners.

"Notably, the right to maintain a pier is in no way statutorily limited by the rights of non-riparian owners," she wrote.

And that's critical, Bradley continued, because the Lobermeiers did not own property on the bank of a waterbody, and thus were not riparian owners.

"And while they retain ownership of a portion of the flowage bed in fee simple, that title is qualified by the presence of navigable waters," she wrote.

What's more, Bradley continued, the majority cited a string of cases that did not contemplate the presence of navigable water over the land, and no authority in Wisconsin or in any other jurisdiction had adopted the majority's reasoning or otherwise restricted placement of a pier on navigable waters by a riparian owner in favor of non-riparian, fee simple ownership of the waterbed.

"The presence of navigable waters qualifies the Lobermeiers' title to the flowage bed subject to the public trust doctrine and the rights of riparian owners along the banks of the flowage," she wrote. "As riparian owners, the Movriches are entitled to exercise riparian rights to access the surface waters and to have their pier rest on the flowage bed."

The bottom line is, Bradley wrote, during the three quarters of a century that the land has remained submerged, both riparian rights as well as public trust rights extended to the artificial expansion of Sailor Creek.

"While the creation of the flowage did not transfer any property rights from the Lobermeiers to either the state or the Movriches, it subordinated the Lobermeiers' property rights to riparian rights under the common law as well as public rights under the public trust doctrine," she wrote. "While this reconciliation of three distinct rights perhaps leaves the Lobermeiers with property of limited value, this construction of the law takes nothing from the Lobermeiers and preserves what has always been, as reflected in the \$400 assessed value of the flowage bed owned by the Lobermeiers."

In contrast, Bradley concluded, the majority strips the Movriches of their riparian rights and reallocates them to the Lobermeiers.

Richard Moore is the author of the forthcoming "Storyfinding: From the Journey to the Story" and can be reached at richardmoorebooks.com.

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