

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT SHIRK and MARY LEE SHIRK,

Plaintiffs/Counter-Defendants-
Appellees/Cross-Appellants,

V

ARNOLD VANDYK,

Defendant/Counter-Plaintiff-
Appellant/Cross-Appellee.

UNPUBLISHED

April 26, 2002

No. 227193

Barry Circuit Court

LC No. 99-000537-CZ

Before: Meter, P.J., and Markey and Owens, JJ.

OWENS, J. (*dissenting*).

I respectfully disagree with the majority’s conclusion that the trial court correctly found that the portion of defendant’s property on which the fence was constructed was a lot with water frontage.

Instead, I believe that the intervening county road prevents a finding that the lot on which defendant constructed the fence abutted the lake, as necessary to qualify as “a lot [that] has water frontage” under § 4.26. Defendant’s deed¹ states that he acquired both “Lot 28 . . . [and] also all land Northeast of said Lot on the Northeast side of the County Road and adjacent thereto between said County Road and Gun Lake.” Land that lies northeast of, and, therefore, necessarily outside of, a lot clearly cannot be part of that lot. Because defendant was deeded land between the county road and Gun Lake, which land clearly abutted the lake and therefore had water frontage, in addition to Lot 28, which equally clearly did not have water frontage, I do not believe that Lot 28 can correctly be characterized as a lot that “has water frontage.” Rather, my “common sense” interpretation of the facts before us is that Lot 28—the lot on which the fence was constructed—is a lot that has road, not water, frontage.

¹ I would note that, contrary to the majority’s conclusion, defendant’s deed does not describe his land by “metes and bounds,” but instead describes the larger parcel by reference to the lot numbers as platted in the Chateau Park No. 1 subdivision land plat, and the smaller parcel by reference to the county road and the lake.

Moreover, I believe that § 4.26 was only intended to apply to lots that were situated between a road right-of-way and the lake. Section 4.26 provides that, unlike a typical lot, a lot with water frontage will have its rear lot line adjacent to the road. In fact, defendant McManus, who testified that he drafted the ordinance, initially opined that § 4.26 did not prohibit defendant's construction of the fence. If anything, this would suggest that the "legislative intent" behind the ordinance was to not apply in the instant matter. Put another way, I believe that § 4.26 was designed to prevent fence construction in what we would commonly refer to as a "back yard" (the side of a lot that is opposite the road), and only if it would obstruct an adjacent property owner's view of the lake. This concern is not nearly as pressing where, as here, there is an intervening county road, the traffic on which will disturb the adjacent property's owner's view of the lake.²

Defendant McManus testified that he changed his opinion only after reading our Supreme Court's opinion in *Thies v Howland*, 424 Mich 282, 293; 380 NW2d 463 (1985). However, the *Thies* Court merely discussed the concept of riparian rights. See generally *id.* Although all lots with water frontage will have riparian rights,³ it does not necessarily follow that all lots with riparian rights have water frontage.⁴ For example, defendant McManus opined that plaintiffs' lot was a lot with riparian rights, even though it was not a lot with water frontage, because of intervening land between the county road and Gun Lake that plaintiffs only partially own. In fact, he testified that if the fence at issue were constructed on plaintiffs' property (a few feet to the southeast), it would not have run afoul of § 4.26. If so, applying § 4.26 to bar defendant's construction of the fence leads to an absurd result.

Regardless, I simply do not believe that the legislative intent behind § 4.26 was to prevent a property owner from constructing a privacy fence in his or her front yard (that area

² In fact, plaintiffs contended that the fence was also a nuisance because it purportedly blocked their view of oncoming traffic when backing out onto the county road. Unlike defendant's fence, this traffic passes directly between plaintiffs' property and the lake. In addition, because of the intervening county road, defendant could not construct a fence that would run from his dwelling to the water, which would clearly block plaintiffs' view of the lake.

³ In *Little v Kin*, __ Mich __; __ NW2d __ (Docket No. 220894, issued 02/01/2002), slip op p 6, we opined that "Michigan Law does not permit the 'severance and transfer of riparian ownership or riparian rights normally owned exclusively by owners of riparian land" We also noted that while "riparian land" is "a piece of land which includes therein a part of or is bounded by a natural watercourse," a "riparian proprietor" is "a person who is in possession of riparian lands or who owns an estate therein." *Id.* at 3, quoting *Thompson v Enz*, 379 Mich 667, 677; 154 NW2d 473 (1967). Thus, while I do not believe that Lot 28 is riparian land, I do not dispute that defendant is a riparian proprietor, inasmuch as he owns land between the county road and Gun Lake.

⁴ I construe the *Thies* decision as recognizing a circumstance where a parcel would have riparian rights—by bordering a road that, in turn, borders on a lake without any intervening land—even though the parcel does not directly border or "front" the lake, as necessary to have water frontage." In other words, I believe that the *Thies* decision could fairly be construed as finding "riparian rights" for land that does not have water frontage.

between the dwelling and the road). For these reasons I conclude that the trial court erred as a matter of law by requiring defendant to remove three sections of his fence.⁵

In addition, I disagree with the majority's conclusion that the trial court erred by only requiring defendant to remove three sections of his fence. Where applicable, § 4.26 prevents a fence from being constructed "in the setback area," but does not define setback area. Section 3.1(84) of the zoning ordinance defines the "setback" as the "minimum horizontal distance between the building line of the building and the front lot line." Assuming arguendo that defendant's property was a lot with water frontage, § 4.26 provides that "the front lot line shall be the boundary line of the lot immediately opposite to the street right of way with the narrowest frontage and the rear lot line shall be adjacent to the street right of way with the narrowest frontage."

As I have interpreted the application of the zoning ordinance to defendant's property, this would require measurement from the side of defendant's lot that is adjacent to lot 52. Even using the majority's interpretation of "lot" to include defendant's property lying to the northeast of the county road, the setback area could be measured from the line where defendant's property actually fronts on the lake. Of course, because the evidence established that the county road right of way was sixty-six feet, the majority's fifty-foot setback area would not even extend into Lot 28, much less reach the end of defendant's fence.

Instead, the majority has opted to affirm the trial court's selection of a front lot line that is not a boundary line for defendant's property, but is instead a boundary line for Lot 28. Obviously, this contradicts their earlier construction of defendant's property as one lot including both Lot 28 and the area to the northeast of the county road. Moreover, if a lot, no matter how it is defined, is a lot that has water frontage, the lot line that is adjacent to the street right of way is actually the "rear lot line," and not the "front lot line." Thus, the area where defendant's fence was constructed was not even in the setback area of Lot 28, unless the zoning ordinance's definition of "setback," § 3.1(84), is disregarded—an action that is, in my opinion, beyond the scope of our judicial construction.

I also question the majority's application of the fifty-foot setback area of § 4.32 to defendant's property. Section 4.32(B) does prohibit the construction of any buildings or structures within fifty feet of a county road. However, I am not persuaded that defendant's fence qualifies as a "structure" under the zoning ordinance. Section 3.1(94) does broadly define structure as "[a]nything constructed, erected or to be moved to or from any premises which is permanently located above, on or below the ground, including signs and billboards." Under this definition, defendant's fence would be a structure. On the other hand, § 3.1(119) defines structure as a "walled or roofed building that is principally above ground, gas or liquid storage facility, as well as a mobile home." This definition would not encompass defendant's fence. Because the zoning ordinance defines "structure" twice, I believe that this creates an ambiguity that should not be resolved against defendant, the landowner whose desired use of his property is

⁵ I do agree that neither laches nor the doctrine of "unclean hands" provides a basis for reversing the trial court. Further, I agree with the majority's conclusion that the trial court did not abuse its discretion by dismissing defendant McManus as a party.

infringed upon by the zoning ordinance. See *City of Hancock v Hueter*, 118 Mich App 811, 817; 325 NW2d 591 (1982).

Of course, defendant's fence is not a "building," as defined by § 3.1(12). Accordingly, I do not believe that the supplementary setback requirements of § 4.32 were applicable to defendant's fence. Consequently, even if I were to agree that the trial court correctly required defendant to remove three fence sections because it would marginally improve plaintiffs' view of the lake, I do not believe that the trial court was correct in requiring defendant to remove additional fence sections because there was no evidence that removing these additional fence sections would impact plaintiffs' view of the lake, nor did the evidence establish that defendant's fence was constructed in the "setback area," as defined by the zoning ordinance.

In conclusion, while I certainly believe that the zoning ordinance could have been drafted to prohibit defendant's construction of the fence, I am not persuaded that, as a matter of law, this zoning ordinance was sufficient to do so. As a result, I would have reversed the trial court order requiring defendant to remove the three sections of his fence, and denied plaintiff's cross-appeal.

/s/ Donald S. Owens