STATE OF MICHIGAN

COURT OF APPEALS

DAVID PERSELL and KAYE PERSELL,

Plaintiffs-Appellees,

v

DENNIS WERTZ,

Defendant-Appellant.

FOR PUBLICATION
March 23, 2010
9:00 a.m.

No. 288858
Eaton Circuit Court
LC No. 06-001144-CZ

Before: OWENS, P.J., and SAWYER and O'CONNELL, JJ.

SAWYER, J.

Defendant appeals from a judgment of the circuit court entered on a jury verdict in favor of plaintiffs. We affirm in part, reverse in part, vacate the case evaluation sanctions and remand for further proceedings.

Plaintiffs and defendant are neighbors in Charlotte. They originally had a very amicable relationship. Indeed, that relationship gave rise to an event that ultimately forms part of the instant dispute. Defendant had hired an excavator to dig a pond towards the rear of his property. Plaintiffs apparently found the idea appealing and it was agreed that the excavation would extend across the common property line. As a result, an artificial pond was created, with approximately three-quarters of the pond on defendant's property and the remainder on plaintiffs' property.

But that relationship seems to have deteriorated in recent years and a number of disputes have given rise to the instant litigation, with plaintiffs having filed a six-count complaint against defendant. The first two counts of the complaint alleged common law and statutory trespass over an incident in June 2006 in which plaintiffs claim that defendant entered upon their property, sprayed an unknown herbicide, resulting in the killing of a large portion of their lawn. The third and fourth counts of the complaint allege statutory trespass and nuisance arising from defendant, in August 2006, erecting a two-strand wire fence across the pond along the boundary line of the adjoining properties. Count V of the complaint alleged defamation based upon several statements defendant made to third parties regarding plaintiff David Persell. Count VI alleged intentional infliction of emotional distress based upon defendant's conduct regarding the preceding counts. At trial, the jury found in favor of plaintiffs on all counts except for defamation. The herbicide counts resulted in a judgment of $3,000, while the pond fence resulted in a judgment of $2,200. The emotional distress claim resulted in a judgment of $15,000. With the addition of costs, case evaluation sanctions, and prejudgment interest, the total judgment was in the amount of $42,937.76.

Defendant first argues that the trial court erred in failing to dismiss Counts III and IV regarding the fencing of the pond. We review this question de novo[1] and agree with defendant that these counts should have been dismissed. Plaintiffs' right to recover under these counts is dependent upon the conclusion that plaintiffs possess riparian rights in the pond giving it the right to use the entire surface of the pond. Unlike the trial court, we believe that it is clear under Michigan law that no riparian rights arise from an artificial body of water. In reaching this decision, we rely on the Supreme Court's decision in *Thompson v Enz*.[2]

Thompson involved the development of a parcel of land that abutted Gun Lake. The development provided for 144 lots, approximately 16 of which actually abutted the natural shoreline of Gun Lake. The remaining lots would front on canals that would give access to the lake.[3] In determining whether these back lots had riparian rights, the Supreme Court made it clear that artificial waterways do not give rise to riparian rights. First, the Court observed the following principles:[4]

> "Riparian land" is defined as a parcel of land which includes therein a part of or is bounded by a natural water course. 4 Restatement, Torts, § 843, p 326. See, also, *Palmer v Dodd*, 64 Mich 474, 476 [31 NW 209 (1887)]; *Stark v Miller*, 113 Mich 465 [71 NW 876 (1897)]; *Monroe Carp Pond Co v River Raisin Paper Co*, 240 Mich 279, 287 [215 NW 325 (1927).
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> A "riparian proprietor" is a person who is in possession of riparian lands or who owns an estate therein. 4 Restatement, Torts, § 844, p 331.

See also *Little v Kin*[5] which adopted *Thompson*'s definition of "riparian land" being land bounded by a natural water course.

While the above alone would make it clear that an artificial pond does not create riparian lands with riparian rights, the Court went on to make the point even clearer:[6]

> Artificial water courses are waterways that owe their origin to acts of man, such as canals, drainage and irrigation ditches, aqueducts, flumes, and the like. 4 Restatement, Torts, § 841, subd h, p 321.
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> Land abutting on an artificial water course has no riparian rights.

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[1] *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003).

[2] 379 Mich 667; 154 NW2d 473 (1967).

[3] *Id.* at 675.

[4] *Id.* at 677.

[5] 249 Mich App 502, 508; 644 NW2d 375 (2002).

[6] *Thompson*, 379 Mich at 679.

The trial court's error in the case at bar is its reliance on an unpublished decision of this Court in *Parsons v Whittaker*,[7] which incorrectly distinguished *Thompson.* That case considered riparian rights arising from an artificial lake created when a gravel pit filled with water. The Court[8] acknowledged that there were no published decisions of a Michigan court regarding whether riparian rights arose in an artificial lake. Indeed, it acknowledged that the common law rule was that land abutting an artificial watercourse had no riparian rights, citing *Thompson* for that proposition. But *Parsons* then distinguished *Thompson* on the basis that it considered the rights where the artificial watercourse connects to a natural body of water.[9] Ultimately, *Parsons* concluded that the common law did not preclude a determination that artificial bodies of water give rise to riparian rights and that, in any event, the Inland Lakes and Streams Act of 1972[10] created riparian rights to an artificial lake at least 5 acres in size.

While *Thompson* did deal with an artificial waterway that connected to a natural lake, there is nothing in the opinion to suggest that the Court was relying on any such distinction. Rather, it seems clear to us that *Thompson* relied on the very broad principle that the common law does not establish riparian rights in artificial bodies of water. Furthermore, we need not determine whether *Parsons* correctly determined that there are statutory riparian rights because, even if *Parsons* is correct on this point, it does not apply to the case at bar because the pond at issue is smaller than five acres in size.

For these reasons, we concluded that the trial court erred in its reliance on *Parsons* and in concluding that plaintiffs could establish that they had riparian rights to use the entire surface of the artificial pond. Because plaintiffs could not establish riparian rights with respect to the artificial pond, the trial court erred in submitting counts III and IV to a jury. Furthermore, we also agree with defendant that this conclusion compels a reversal of the jury verdict on Count VI, the claim for intentional infliction of emotional distress. While it is true that the emotional distress claim was based not just on the construction of the fence across the pond and the jury could have found for plaintiffs on this count without regard to the fence across the pond, it is equally true that it is impossible to determine the extent to which the fence may have improperly influenced the jury's determination that defendant inflicted emotional distress or its assessment of damages. Accordingly, while our decision on Counts III and IV does not compel a judgment for defendant on Count VI, it does invalidate the jury's verdict on that count and necessitates a new trial on Count VI.

Defendant's remaining argument on appeal is that the trial court erred in denying summary disposition as to Counts I and II regarding the herbiciding of plaintiffs' lawn. We disagree. With respect to Count I, the common law trespass claim involving the spraying of herbicide on plaintiffs' lawn, it is true that plaintiff does not point to any direct evidence

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[7] Unpublished opinion per curiam (Docket Nos. 170274, 171456, issued August 23, 1996).

[8] *Slip op* at 4.

[9] *Parsons, slip op* at 5.

[10] MCL 281.951 *et seq.*

establishing that defendant did so on the one occasion alleged in the complaint. But, plaintiff David Persell did testify that he observed defendant spraying herbicide on plaintiffs' side of the pond on a different occasion, that he observed defendant spraying a herbicide on his property around the time in question and that the resulting effect appeared similar to what plaintiffs thereafter observed on their own lawn. We conclude that this did create a factual dispute for the jury to resolve, which it resolved in plaintiffs' favor.[11]

But we do agree with defendant that Count II, alleging treble damages under MCL 600.2919(1)(c) should have been dismissed because that statute is inapplicable to this case. Like summary disposition, questions of statutory interpretation are review de novo.[12] The goal of statutory interpretation is to give effect to the legislative intent.[13] In doing so, we examine the language of the statute and where the intent is clearly expressed in the statute, no further construction is necessary.[14]

MCL 600.2919(1) provides that a person who intentionally does one of the following on the land of another is liable for treble damages:

> (a) cuts down or carries off any wood, underwood, trees, or timber or despoils or injures any trees on other's lands, or
>
> (b) digs up or carries away stone, ore, gravel, clay, sand, turf, or mould or any root, fruit, or plant from another's lands, or
>
> (c) cuts down or carries away any grass, hay, or any kind of grain from another's land . . .

Defendant essentially argues that the statute only applies to items of agricultural value. Plaintiffs counter that a strict reading of the statute does not include any requirement that the item cut down or carried away must be of agricultural value.

Plaintiff is correct in that nothing in the statute limits the applicability of the statutes to crops or other valuable resources. But for the same reason, a proper interpretation of the statute necessitates that plaintiffs lose because nothing in the statute covers the poisoning of the grass. That is, by its very terms, section (1)(c) only applies to grass that a person "cuts down or carries away" and it is not alleged that defendant did either. In other words, just as defendant may not read into the statute a requirement that the grass, hay or grain be a crop or otherwise a valuable resource, plaintiffs may not read into the statute that it covers poisoning the grass in addition to cutting it down or carrying it away. While, as plaintiffs suggest, the grass may have "essentially been cut down," it was not actually cut down and, therefore, the statute is inapplicable.

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[11] *Dressel*, *supra*.

[12] *Dressel*, *supra*.

[13] *Id.* at 562.

[14] *Id.*

Moreover, this is not a mere parsing of words. Section (1)(a) clearly reflects that the Legislature could have included coverage of damage to the grass. That section, in dealing with trees, in addition to providing for coverage for cutting down or carrying off trees, also specifically provided for coverage for despoiling or injuring a tree. This clearly reflects that the Legislature did not include within the concept of cutting down other injuries to vegetation and had the Legislature wanted to include injuries to grass in addition to cutting it down, it would have included language similar to that which it employed in reference to trees.[15]

In sum, we agree that the trial court should have dismissed Counts II, III and IV and not submitted these counts to the jury. But we do conclude that the verdict on Count I should stand and we affirm the award of $750 on this count. As for Count VI, while it is possible that plaintiffs could still prevail on this claim, it cannot be based upon the allegations of trespass with regard to the placing of the fence across the pond along the property line as defendant had a right to do this. Accordingly, we conclude that defendant is entitled to a new trial on Count VI only, with plaintiffs' proof not to include reference to the fence across the pond.

Affirmed in part, reversed in part, vacated with respect to the case evaluation sanctions and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs, neither party having prevailed in full.

/s/ David H. Sawyer
/s/ Donald S. Owens
/s/ Peter D. O'Connell

[15] See *Farringston v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993) ("Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there.").