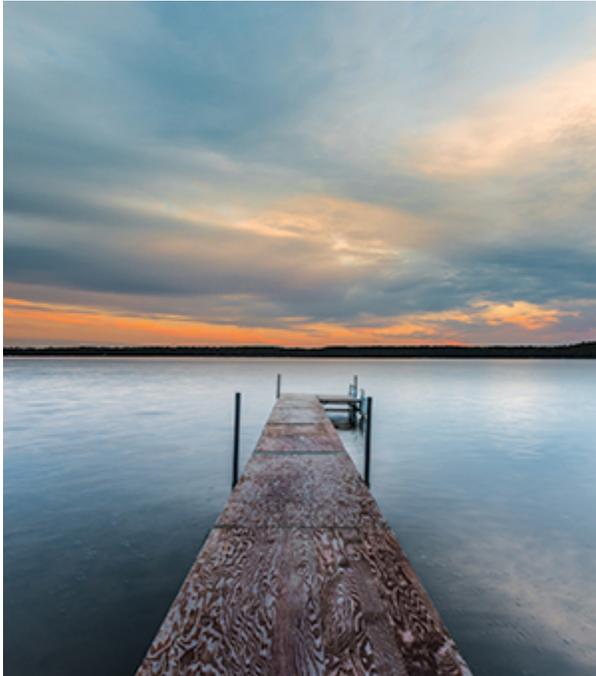


Pierless in Paradise

Tom Larson | April 05, 2018



On January 23, 2018, the Wisconsin Supreme Court, in *Movrich v. Lobermeier*, held that riparian owners on a flowage do not have a right to place a pier. This decision could impact thousands of waterfront property owners by limiting their access to the water and significantly decreasing the value of their property.

Background

Wisconsin has approximately 260 flowages around the state. A flowage is a body of water created by a dam, but not all flowages are the same. Some are created by damming lakes, while others are formed by damming rivers and streams. The bed of a flowage created by a lake is generally owned by the public, and the bed of flowage created by a river or stream is generally owned by a private entity.

Under Wisconsin law, an owner of property adjacent to a navigable waterway, who is often referred to as a “riparian,” has certain rights related to reasonable use and enjoyment of the waterway. Generally, these riparian rights were considered to include the right to place a pier as long as the pier did not unreasonably restrict the public’s right to reasonable use and enjoyment of the waterway, which is protected under the Public Trust Doctrine in the Wisconsin Constitution.

The dispute in this case involved a brother and a sister, Movrich and Lobermeier. The Lobermeiers own land beneath the waters of Sailor Creek Flowage. Historically, the flowage was a creek, but in the 1940s, the city obtained the rights to flood the area with a dam, which resulted in the flowage. The property adjacent to the flowage was subdivided, and waterfront lots were sold off as part of Sailor Creek Flowage Subdivision.

The Movriches purchased one of the waterfront lots in the subdivision. For years, the Movriches and the other waterfront property owners placed seasonal piers into the flowage, which sat on the bed of the flowage. The Movriches and Lobermeiers had a dispute, and the Lobermeiers demanded that the Movriches and the other property owners remove their piers from the water and refrain from using the water for recreational purposes.

In response, the Movriches filed a lawsuit, asking the circuit court for a declaratory judgment establishing their right to install a pier. The Movriches maintained that waterfront property owners have an inherent right to reasonable use and access to the waters that are adjacent to their property and, in addition, the Public Trust Doctrine set forth in the Wisconsin Constitution guarantees public access to the water. The Lobermeiers argued that the Movriches did not have pier rights because the body of water involved was a flowage created by the damming of a creek, rather than a lake, and the legal description in their deed specifically included the flowage bed.

Both the circuit court and court of appeals agreed with the Movriches and held that riparian owners have the right to place a pier in all navigable waterways.

Supreme Court ruling

On appeal to the Wisconsin Supreme Court, the court in a 4-3 decision ruled in favor of the Lobermeiers, finding that the property owners along a flowage created by a creek do not have an inherent right to place a pier. The court explained that the Lobermeiers owned a fee simple interest in the land underneath the flowage waters, which entitled them to exclude others from placing a pier or structure on the property. Because the Movriches' deed did not explicitly authorize them to place a pier on the Lobermeiers' property, the court concluded that they did not have pier rights. The court stated, "[A]ny property rights the Movriches may enjoy in regard to the man-made body of water created by the flowage easement must be consistent with the Lobermeiers' property rights or the flowage easement's creation of navigable body of water."

The court, however, determined that the Movriches and the other riparians along the flowage may directly access the water from their property. The Lobermeiers argued that the Movriches could not access the water from their property and, instead, must access the water from a public access area.

Impact of ruling on other waterfront property owners

By declaring that not all riparians have the right to place a pier, this case will have a significant impact on the value of numerous waterfront properties in Wisconsin because the ability to place a pier adds value to waterfront property. According to a 2007 Wall Street Journal article, "*When the Dock Is Worth More Than the House*," homebuyers in some parts of the county sometimes pay twice as much for a home that includes its own dock. In some areas of the Midwest, the ability to place a pier can add \$15,000 to \$20,000 to a property's value, according to the article.

In Wisconsin, while difficult to measure in terms of exact dollars, the financial impact of pier rights to waterfront property values will likely be substantial throughout the state. Some homeowners have invested thousands of dollars on piers, boats and other recreation vehicles with the expectation these items could be used to enjoy their waterfront property. Moreover, some businesses have likely purchased property along a flowage with the expectation that their customers will be able to access their business directly from the water. In fact, some businesses such as restaurants, marinas and gas stations rely exclusively on customers who access their businesses by a boat and park at their pier.

In light of the Wisconsin Supreme Court's ruling, REALTORS® should keep the following tips in mind.

Not all waterways are the same: The outcome of this case would likely have been different if the flowage was created by damming a lake, or if the bed of the flowage was owned by a government or other public entity. Wisconsin has over 15,000 lakes and 84,000 miles of rivers and streams. Thus, the case serves as a good reminder that not all water bodies are the same. Each water body is unique, and the regulations, restrictions and rights associated with the use of each water body may be different.

Do not assume something is true: When the Movriches purchased the property, they had “the expectation that their property would include riparian rights.” Before this case, this was a reasonable presumption because owners of waterfront property were generally presumed to have riparian rights, unless something in their deed, a recorded easement or regulation explicitly stated otherwise. With respect to waterfront property located on a flowage created by a creek or river, we now know that owners are presumed to not have riparian rights unless expressly indicated in their deed. This is significant change. Given that deeds for waterfront property generally do not expressly grant riparian rights, most waterfront property owners on such flowages will be unable to place a pier.

Be careful when marketing property: One of the interesting facts of this case was that when the Movriches purchased the property from a third party, the property was marketed and sold as a “waterfront lot,” and many of the surrounding properties maintained a pier into the flowage. The court suggested that the outcome may have been different if the Lobermeiers were the ones who had marketed and sold the property in such a manner.

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