

STATE OF MICHIGAN

MECOSTA COUNTY CIRCUIT COURT

MICHIGAN CITIZENS FOR WATER
CONSERVATION, a Michigan nonprofit
corporation; R.J. DOYLE AND BARBARA
DOYLE, husband and wife; and JEFFREY R.
SAPP AND SHELLY M. SAPP, husband and
wife,

Plaintiffs,

Case N^o 01-14563-CE

v

NESTLÉ WATERS NORTH AMERICA INC., a
Delaware corporation; and DONALD PATRICK
BOLLMAN AND NANCY GALE BOLLMAN,
husband and wife, a/k/a Pat Bollman
Enterprises,

Defendants.

Hon. Susan Hennigan Grant
By Assignment

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**RENEWAL OF PLAINTIFFS' MOTION FOR SUMMARY DISPOSITION
AND PERMANENT INJUNCTIVE RELIEF UNDER *THOMPSON v ENZ***

May 1, 2009

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Plaintiffs, through their counsel, renew their motion for summary disposition and permanent injunctive relief under *Thompson v Enz*. Plaintiffs present the following as their motion and brief on this issue:¹

MOTION AND BRIEF

At the close of Plaintiffs' case in chief at trial, Plaintiffs moved for summary disposition on the basis that the Defendants' Water Rights Deed² granted Defendant riparian rights in Osprey Lake in violation of the prohibition on the severance and alienation of riparian rights under *Thompson v Enz*, 379 Mich 667; 154 NW2d 473 (1967). This Court took Plaintiffs' motion under advisement, subject to post-trial briefing and argument. In its Opinion and Order, this Court denied Plaintiffs' motion because it found that Defendant did not get riparian rights in Osprey Lake and therefore *Thompson v Enz* did not apply.³ However, Defendant now claims actual riparian rights to Osprey Lake. Based on Defendant's new admission, Plaintiffs renew their motion. Plaintiffs request that Nestlé's water rights deed be found to be void and/or that Nestlé cannot make use of its pumped water anywhere but on the riparian land.

1. Material facts of the Motion

Defendant's Water Rights Deed purports to convey a subsurface interval from 2 feet below the surface to 1,000 feet below the surface, including specifically the "water rights" to collect and transport water from the "Water Sources" on the Property for the purpose of "bottling and commercially merchandising such water to the public...."⁴ The Lease to the Property is for 99 years

¹Exhibits in support of the instant Motion are likewise being used in support of other motions simultaneously filed in this case. Whenever possible, Plaintiffs will refer to documents contained in other exhibit packages. For example, exhibits filed in support of Plaintiffs' Motion for Summary Disposition will be referred to as **MSD Ex ___**.

²**Ex 1** (Water Rights Deed).

³**MSD Ex 3**, Trial Opinion, p 41.

⁴**Ex 1** (Water Rights Deed).

with automatic renewal provisions and provides the right of access and use of the surface for Defendants' pumping and transporting operation.⁵

At trial and in their Post Trial Brief, Plaintiffs noted that the "water sources" included within the Water Rights deed embraced groundwater, several wetlands, at least two small streams, five or six springs in the bed and *along the northern shore of Osprey Lake, and a portion under Osprey Lake itself*. Plaintiffs then concluded that Defendant's Water Rights deed was an attempt to convey riparian rights. Defendant's Lease does not include riparian rights because a lease is a possessory right limited to the rights granted by the lessor. The Lease does not include a lease of riparian rights on its face and therefore did not grant any riparian rights.

In response to Plaintiffs' motion, this Court found that Defendant did not have riparian rights.

In making their arguments here I am afraid Plaintiffs have confused a conveyance of riparian rights with a conveyance of the right to extract groundwater that is hydrologically connected to surface water bodies to which riparian rights have attached. The documents executed between Bollmans and Nestlé's predecessor in interest do not convey the right to use any surface water. That is the touchstone of riparian rights: the right of use to the surface of a surface water body.⁶

In the Bollmans' Application for Leave to the Supreme Court from this Court's denial of the Bollmans' attempt to inject themselves into this case, the Bollmans claim that they are the sole riparians on Osprey Lake and therefore have superior rights to Defendant when it comes to water use. Defendant now argues it has riparian rights because it needs them in order to oppose Bollmans' argument that they have superior rights to water over Defendant. So, for the first time, Defendant now states that it believes it has riparian rights.

Indeed, NWNA itself owns part of Osprey Lake and its bottomlands by virtue of its riparian and/or littoral rights under the Lease dated January 23, 2002 and the Subsurface and Water Rights Deed dated January 23, 2002. A deed or lease describing the boundary of a parcel of land as running along the shore of a particular inland lake or

⁵Ex 2 (Lease).

⁶MSD Ex 3, Trial Opinion, p 41.

watercourse conveys or demises to the center of the lake or the thread of the watercourse.⁷

This is significant for two reasons. One is that Defendant now claims that the subsurface deed granted it riparian rights. Two is that its statement is also an admission that its rights to the water it pumps arise in part from its alleged riparian rights.

2. The General Law

The general rule in this country is that water, because of its physical nature and crucial importance, is not capable of ownership, only use. As a nationally recognized authority on water law, A. Dan Tarlock states:

[T]he special characteristics of water have led courts to adopt the Roman and civil classifications of water and to define all water rights - riparian and appropriative - in terms of the right to use rather than ownership of the corpus of the water. Riparian rights are usufructory rights, which Roman law defined as the use of a res by a nonowner that left the character of the res essentially unchanged. (A. Dan Tarlock, *The Law of Water Rights and Resources*, 3-11 (1995).)

Michigan courts have embraced this fundamental principle, as illustrated by *Collins v Gerhardt*, 237 Mich 38, 45; 211 NW 115 (1926), where the court held that the water in the Pine River, so far as it was capable of ownership, belonged to the state “for the common benefit of the people.” The previous Attorney General and now Governor Jennifer Granholm reached the same conclusion regarding users of an underground aquifer having only a qualified right to use that water and that “[s]uch water cannot be owned; rather, it can merely be used.” (OAG No. 7117 at 3 (Sept. 11, 2002) (citing *United States Aviex Co v Travelers Inc Co*, 125 Mich App 579; 336 NW2d 838 (1983).)

“‘Riparian land’ is defined as a parcel of land which includes therein a part of or is bounded by a natural watercourse.”⁸ *Thompson, supra* at 677. “A ‘riparian proprietor’ is a person who is in possession of riparian lands or who owns an estate therein.” *Id.* Riparian property owners have

⁷Ex 3 (Nestlé’s Brief in Response to Bollmans’ Application for Leave to Appeal to the Supreme Court).

⁸Technically speaking, property along a river or stream is riparian and property on a lake is “littoral,” but the term riparian property is most commonly used to describe both types of land. (See *Thies v Howland*, 424 Mich 282, 288, n 2 (1985).)

certain specified riparian rights, which the court in *Hilt v Weber*, 252 Mich 198, 225 (1930), delineated as: 1) the right to use water for general purposes, such as domestic use; 2) the right to wharf out to navigable waters; 3) access to navigable waters; and 4) the right to natural accretions. The court emphasized that these were property rights that must be compensated for if taken by the state, “unless the use has a real and substantial relation to a paramount trust purpose.” *Id.*

3. Argument

The Defendants’ acquisition of riparian rights creates two violations of the rules of *Thompson v Enz*. First it violates *Thompson* and its progeny’s prohibition against the alienation of riparian rights apart from the surface land. Second it violates the clear limitation that riparian water used for commercial or artificial purposes must only benefit the riparian land and remain on the riparian land.

a. The water rights deed violates the prohibition against alienation of riparian rights

The Supreme Court held in *Thompson* that “riparian rights are not alienable, severable, divisible or assignable apart from the land which includes therein, or is bounded by a natural watercourse.” *Id.* at 686. The court explained that previous decisions that seemed to allow “reservations” of specific riparian rights were limited to grants or licenses of a right-of-way to a lake or stream. *See id.* at 685. In *Little v Kin*, the Court of Appeals followed *Thompson* and stated that riparian rights cannot be transferred apart from riparian land, but that an easement for surface water rights may be had. 249 Mich App 502, 511; 644 NW2d 375 (2002). The Supreme Court affirmed the Court of Appeals making clear that deeds of riparian rights away from the riparian surface owner cannot be made. 468 Mich 699, 700; 664 NW2d 749 (2003).

The purported water rights deed clearly violates the non-alienation and non-severance holding in *Thompson*. The subsurface interval specified in the water rights deed is clearly delineated as separate from the surface of the affected property, and there is no limitation on the water sources included in the water rights deed, so surface waters, groundwater and springs are included. Now,

Defendant is agreeing with Plaintiffs' interpretation and arguing that it did acquire riparian rights under the water rights deed.

Defendant's alleged riparian rights gained by virtue of the subsurface water rights deed violates the prohibition against alienation of riparian rights without complete transfer of the fee. Bollmans retained ownership of the surface land subject to the limited lease. This is an unmistakable attempt to sell and convey water, which is subject only to reasonable use and not ownership, apart from the riparian upland, and this is not permissible under the rules of Michigan law and more specifically the strictures of *Thompson v Enz*. This Court must find Defendant's water rights deed null and void.

b. As a Riparian, Defendant Can Only Use the Water For the Benefit of the Riparian Land

The Supreme Court also specified in *Thompson*, that riparian rights were divided into two classes, natural and artificial. According to the court, natural purposes include those uses that are "absolutely necessary for the existence of the riparian proprietor and his family, such as to quench thirst and for household purposes." *Id.* at 686. These natural uses "enjoy a preferred nonproratable position with respect to all other users rather than a correlative one." *Id.* The court defined the second class of riparian rights, artificial uses, as "those which merely increase one's comfort and prosperity and do not rank as essential to his existence, such as commercial profit and recreation." *Id.* In contrast to natural uses, artificial uses occupy a correlative or shared status with other riparian uses, and these artificial uses "must be (a) only for the *benefit of the riparian land* and (b) reasonable in light of the correlative rights of the other proprietors." *Id.* at 686-697 (citations omitted; emphasis added.)

Defendant's conveyance of water is for a commercial and artificial purpose and, therefore, subject to the limitation that riparian water used for commercial or artificial purposes must only benefit the riparian land and remain on the riparian land under *Thompson v Enz*. Defendant does not attempt to hide the stark commercial and artificial nature of its operation, and the fact that its use of the water is for sale well away from the riparian land. *Thompson* is clear that a riparian's use of its

water “must be (a) only for the *benefit of the riparian land* and (b) reasonable in light of the correlative rights of the other proprietors.” *Thompson, supra* at 686-697. Defendant’s operation in no way benefits the riparian land that it now claims rights to, but instead benefits its pocketbook. Defendant’s operation must be completely enjoined as a violation of *Thompson*.

c. Relief Requested

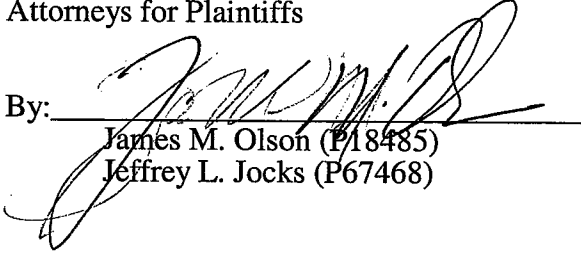
Plaintiffs request that this Court to rule, as a matter of law, that the Water Rights Deed is an attempt to grant Defendant riparian rights (as admitted by Defendant) and therefore is an unlawful alienation of riparian rights and separation from the surface land. Plaintiffs therefore also request that this Court void the Water Rights Deed.

Plaintiffs also request this Court permanently enjoin Defendant’s pumping and diversion of water from the system as being prohibited by Michigan law because as a riparian Defendant’s commercial artificial use of the water may only benefit the riparian land.

Date: May 1, 2009

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