

CIVIL NOTICE
KOSCIUSKO CIRCUIT COURT
121 N LAKE STREET
2ND FLOOR
WARSAW IN 46580

POWELL VS EPWORTH FOREST
43C01-1602-MI-000047

TO: MATTHEW R SHIPMAN
BLOOM GATES SIGLER WHITELEATHE
119 S MAIN ST/P.O. BOX 807
COLUMBIA CITY IN 46725

ATTORNEYS

PARTIES

413-43 STEPHEN SNYDER
413-43 STEPHEN SNYDER

PETITIONER
GERRY LEE POWELL
PATRICIA ANN POWELL

20664-49 MATTHEW SHIPMAN

RESPONDENT
EPWORTH FOREST ADMINISTRATION

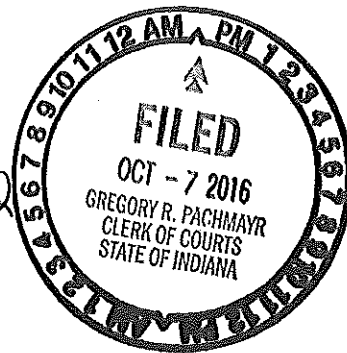
6402-02 JOHN POWELL
6402-02 JOHN POWELL

INTERVENING PARTY
ROBERT J MILLER
DEBORAH S MILLER

10/12/2016

On October 7, 2016, Defendant, Epworth Forest Administration Committee, Inc., by counsel, filed Notice of Appeal.
(Memo: Shipman, Snyder, Powell) (Memo w/copy: Court Reporter) st

IN THE INDIANA COURT OF APPEALS
 CAUSE NO. 43A03-1610-MI-2332



EPWORTH FOREST ADMINISTRATION, COMMITTEE, INC.)
Appellant/Defendant below,)
) Appeal from the Kosciusko Circuit Court
v.)
) Trial Court Case No.:43C01-1602-MI-47
GERRY LEE POWELL, PATRICIA ANN POWELL, Appellee/Plaintiffs below,)
)
And) The Honorable Michael W. Reed, Judge
)
ROBERT MILLER and DEBORAH MILLER Appellee/Defendants below)

NOTICE OF APPEAL
 (Appearance)

Party Information

Name: Epworth Forest Administration Committee, Inc.
 Address: P.O. Box 214
 North Webster, IN 46555

Requesting service of orders and opinions of the Court by:
 E-mail FAX or U.S. Mail (choose one)
In forma pauperis: Yes No

Attorney or attorneys representing party filing Notice of Appeal, if any:
 Name: Matthew R. Shipman
 Attorney # 20664-49
 Address: 119 S. Main St.
 Columbia City, IN 46725
 Tel. No.: (260) 248-8900 Fax No.: (260) 244-3913
 E-Mail: mattshipman@bgswlaw.com

IMPORTANT: Each attorney specified above:

- (a) certifies that the contact information listed for him/her on the Indiana Supreme Court Roll of Attorneys is current and accurate as of the date this Notice of Appeal is filed;
- (b) acknowledges that all orders, opinions, and notices in this matter will be sent to the attorney at the email address(es) specified by the attorney on the Roll of Attorneys regardless of the contact information listed above for the attorney; and
- (c) understands that he/she is solely responsible for keeping his/her Roll of Attorneys contact information accurate, see Ind. Admis. Disc. R. 2(A).

Attorneys can review and update their Roll of Attorneys contact information on the Indiana Courts Portal

INFORMATION FOR JUDGMENT/ORDER BEING APPEALED

Date of Judgment/Order being appealed: September 9, 2016

Title of Judgment/Order being appealed: Findings of Fact, Conditions of Law and Judgment

Date Motion to Correct Error denied or deemed denied , if applicable: N/A

If case was heard by a magistrate, date trial judge approved judgment or order: N/A

Basis for Appellate Jurisdiction:

X Appeal from a Final Judgment, as defined by Appellate Rule 2(H) and 9(I)

This appeal will be taken to:

X Court of Appeals of Indiana, pursuant to Appellate Rule 5

Trial Court Clerk/Administrative Agency/Court Reporter Instructions

Pursuant to Appellate Rule 10 or 14.1(C), the Clerk of Kosciusko Circuit Court is requested to assemble the Clerk's Record, as defined in Appellate Rule 2(E).

Pursuant to Appellate Rule 11 or 14.1(C), the Court Reporter of the Kosciusko Circuit Court is requested to transcribe, certify, and file with the Clerk of the Kosciusko Circuit Court the following hearings of record, including exhibits: Hearing and Exhibits from May 4, 2016, and August 10, 2016.

Public Access

Was the entire trial court or agency record sealed or excluded from public access?

Yes X No

Was a portion of the trial court or agency record sealed or excluded from public access?

Yes X No

If yes, which provision in Administrative Rule 9(G) provides the basis for this exclusion:

N/A.

Appellate Alternative Dispute Resolution

If civil case, is Appellant willing to participate in Appellate Dispute Resolution?

Yes X No

If yes, provide a brief statement of the facts of the case. (Attach additional pages as needed.)

N/A.

Attachments

The following SHALL be attached to this Notice of Appeal (in all appeals):

X Copy of judgment or order being appealed

The following SHALL be attached to this Notice of Appeal if applicable:

X Copy of the trial court or Administrative Agency's findings and conclusion.

Certification

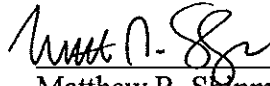
By signing below, I certify that:

(1) This case does X does not involve an interlocutory appeal; issues of child custody, support, visitation, adoption, paternity, determination that a child is in need of services, termination of parental rights; or an appeal entitled to priority by rule or statute.

(2) I have reviewed and complied, and will continue to comply, with the requirements of Appellate Rule 9(J) and Administrative Rule 9(G)(4) on appeal; and,

(3) I will make satisfactory payment arrangements for any Transcripts ordered in this Notice of Appeal, as required by Appellate Rule 9(H).

Respectfully submitted,



Matthew R. Shipman
Bloom Gates & Whiteleather, LLP
119. S. Main St., P.O. Box 807
Columbia City, IN 46725
(260) 248-8900
Atty. No. 20664-49

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 7th day of October, 2016, the foregoing was filed with the Clerk of the Indiana Supreme Court, Court of Appeals, and Tax Court by depositing same with the United States postal service first class postage prepaid.

I also certify that on this 7th day of October, 2016, the foregoing was served upon the following in accordance with Rule 24:

Stephen Snyder
200 W Main St
Syracuse, IN 46567

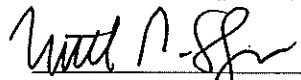
John B. Powell
SHAMBAUGH, KAST, BECK,
& WILLIAMS, LLP
229 West Berry Street, Suite 400
PO Box 11648
Fort Wayne, IN 46859

Kosciusko Circuit Court Judge
The Honorable Michael W. Reed
121 N Lake Street
Warsaw, IN 46580

Kosciusko Circuit & Superior Courts Clerk
Ann J. Torpy
121 N Lake Street
Warsaw, IN 46580

Kosciusko Circuit Court Reporter
Jill Miner
121 N Lake Street
Warsaw, IN 46580

by depositing same with the United States postal service first class postage prepaid.



Matthew R. Shipman

2. Defendant is an Indiana corporation established pursuant to Order of the Court dated April 15, 2014 in Cause No. 43C01-9109-CP-732.

3. Since 1941 and during the ownership of the Powell Lot by Plaintiffs and Plaintiffs' predecessors, there has been a pier maintained at a location on the waterfront of Lot 48 Block C in the Plat of Epworth Forest, which lot is now owned by Robert J. Miller and Debra S. Miller ("Lakefront Lot").

4. The location of the Powell pier assignment on the Lakefront Lot was approved by this Court in its Order entered January 21, 2014 in Cause No. 43C01-9109-CP-732.

5. Defendant Epworth Forest Administration Committee, Inc. ("EFAC") has demanded relocation of Plaintiffs' pier assignment to a location different than that previously approved by this Court in Cause No. 43C01-9109-CP-732.

6. Plaintiffs appealed the determination of EFAC and all appeals have been denied and this litigation followed.

7. The rights and obligations of non-lakefront owners of lots in the Plats of Epworth Forest have been determined by judgment and various orders of this Court in Cause No. 43C01-9109-CP-732, in particular, the Judgment entered August 2, 1994 (Exhibit 2), the Order dated November 7, 1997 (Exhibit 3), the Order dated January 21, 2014 (Exhibit 5) and the Order dated April 15, 2014 (Exhibit 6).

8. Pursuant to Exhibit 6, EFAC was established by the filing of its Articles of Incorporation with the Secretary of State of Indiana (Exhibit 7) and the adoption of its Bylaws (Exhibit 8).

9. EFAC now administers the lakefront in the various plats of Epworth Forest including, but not limited to, assignment of pier locations for both onshore and offshore lot owners.

10. The various Orders of this Court and, in particular, Exhibit 6, states:

Onshore owners' pier assignments will continue from year to year and be presumed permanent. An offshore pier assignment/location, in accordance with the 1994 judgment, may be changed only for substantial change of circumstances making the prior assignment unreasonable under current facts and circumstances.

11. Exhibit E to Exhibit 5 is a listing of assigned pier spaces approved by the Court as part of its Order dated January 21, 2014, and specifically assigned Pier Space 35A to Plaintiffs and Pier Space 34 to the predecessor of Defendants Robert J. Miller and Debra S. Miller, Suetta Johnson. The same exhibit indicates that the lake frontage of the Miller property is 50 feet and at the time of the January 21, 2014 Order, consisted of 16 feet assigned to Plaintiffs for Pier 35A, 24 feet assigned to Suetta Johnson for Pier 34 and 10 feet of open shoreline, a total of 50 feet.

12. Defendants Miller desire to place a boat lift on each side of their pier without relocating their pier within the 24-foot space assigned to them by Exhibit 5. Doing so without relocation of the Miller pier would leave insufficient space for the Powell boat and pier as assigned by Exhibit 5.

13. The Court's Order dated January 24, 2014 approving the then existing pier assignments approved not only the then existing pier placements (actual and based on prior usage), but also the assignment of a certain location zone for pier and other equipment usage (based on actual prior usage), as noted on the list and map showing pier assignments for 2014 attached to the Court's Order as Exhibit E.

14. It was further the Court's intention, and order, that the pier assignment based on Exhibit E was assigned based on an allocation of the frontage of each lot and created a zone of use for these assignments (an actual area assignment), which would not be subject to future change except as specifically provided by the Court's Orders, as the original and subsequent assignments were controlled by frontage or footage necessarily.

15. It was further the Court's intention, and order, that each assignee of a pier assignment be free to fully and freely utilize their zone assignment, but not so that this usage would affect others, especially adjacent pier location assignments, (i.e. the pier or other equipment may be moved within the assigned area, but may not be moved to affect the use of an adjacent assigned area.)

16. Therefore, the proposed change of actual use of an area by an assignee cannot be a substantial change of circumstances making the prior assignment unreasonable under current facts and circumstances.

17. Exhibits 11 and 12 clearly indicate there is ample space lakeward from the Miller lot to allow Miller to place a 4 foot wide pier with a 10 foot wide boat lift on each side of the pier and still maintain in excess of 4 feet of open space if the Miller pier were moved slightly west within the 24 feet of lake frontage assigned to Miller.

18. As indicated by Richard Presser, Vice President of EFAC, if the Powell pier is eliminated, they would be placed on a "waiting list" for a new pier assignment. Presser was unaware of when a new pier assignment space would be available.

19. If the Powell pier is left within the 16 feet assigned to Powell, Defendants Miller will retain the same 24 foot zone assigned to their predecessor, Suetta Johnson, and Millers are free to locate whatever structures they desired within the same 24 foot zone, so long as this does not affect the usage of the adjacent pier assignments.

20. The Court's Order of January 21, 2014 in Cause No. 43C01-9109-CP-732 established the area (zone) along the shoreline assigned to particular onshore and offshore owners. That Order was based on historic usage of the shoreline and not necessarily the exact location of a pier within the assigned shoreline.

21. Persons to whom a portion of the shoreline has been assigned are free to locate any structures within the assigned shoreline and may relocate those structures as long as they are located within the assigned area.

22. Assigned shoreline areas are based on historical usage as determined by this Court in prior Orders in Cause No. 43C01-9109-CP-732 and are not controlled by the location of platted lot lines extended to the water's edge.

CONCLUSIONS OF LAW

23. The judgment and various Orders in Case No. 43C01-9109-CP-732 of this Court clearly indicate that it was the intention of this Court that assignments of pier assignments for onshore owners were intended to be permanent, and offshore pier assignments were not to be changed without a significant change in circumstances.

24. The desire of Defendants Miller to place two boat lifts, one on each side of their current pier location, is not a significant change in circumstances.

25. The determination made by EFAC requiring Powells to remove their pier and boat lift was necessarily arbitrary and capricious and was, as a matter of the law of

the case, not in conformity with the prior Judgment and Orders of this Court, the Articles of Incorporation of EFAC and the Bylaws of EFAC,

26. The placement of the Powell pier is in conformity with the Judgment and Orders in Cause No. 43C01-9109-CP-732 and no significant change in circumstances exists which would require the elimination or relocation of the original Powell pier assignment.

27. The determination of the Epworth Forest Administration Committee, Inc. made January 26, 2016 requiring Powells to remove their pier should be reversed.

JUDGMENT

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the determination made by Defendant, Epworth Forest Administration Committee, Inc., requiring Plaintiffs to relocate their pier is reversed, Plaintiffs' pier assignment as determined by this Court's Order of January 21, 2014 in Cause No. 43C01-9109-CP-732 is affirmed, and Plaintiffs are entitled to the use of their allocated waterfront area without interference from Defendants. The costs of this action are taxed to Defendants.

SO ORDERED THIS 9th DAY OF SEPTEMBER, 2016.



Michael W. Reed, Judge
Kosciusko Circuit Court

Distribution:
Stephen R. Snyder
Matthew R. Shipman
John B. Powell

MWR/st

OFFICIAL RECEIPT
Clerk of the Supreme Court, Court of Appeals, and Tax Court
Indianapolis, Indiana

Payor
Bloom Gates & Whiteleather, LLP

Receipt No.
2016-01128

Transaction Date
10/14/2016

Description	Amount Paid
Epworth Forest Administration Committee, Inc. 43A03-1610-MI-02332 Epworth Forest Administration Committee, Inc. v. Gerry Lee Powell, et al.	
Appellate Courts Filing Fee	250.00
Appellate Courts Filing Fee	250.00
SUBTOTAL	250.00
Remaining Balance Due: \$0.00	

PAYMENT TOTAL 250.00

Check (Ref #37600) Tendered	250.00
Total Tendered	250.00
Change	0.00

10/14/2016
03:22 PM

Cashier
Station AMC11

Audit
66178181

OFFICIAL RECEIPT