

IN THE INDIANA COURT OF APPEALS
Appellate Case No. 43A03-1610-MI-02332

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

REPLY BRIEF OF APPELLANT

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IV. SUMMARY OF THE ARGUMENT

The trial court's Findings of Fact, Conclusions of Law and Judgment of September 9, 2016, are clearly erroneous. EFAC's January 26, 2016, decision ordering the Powells to relocate their pier from the property of the Millers was a reasonable interpretation of the trial court's previous orders and as such was not arbitrary or capricious.

V. ARGUMENT

The Appellees suggest in their Brief that the trial court's previous orders were ambiguous. Further, Appellees argue that the trial court gets to determine the meaning of the previous orders because of that ambiguity. The Appellee makes this argument without offering any explanation of how an order can be ambiguous, and at the same time how EFAC's interpretation of that ambiguous order can somehow be arbitrary or capricious. No explanation is offered by the Appellees for this inconsistency because none exists. If an order is ambiguous and if a board is charged with interpreting a court's order like EFAC is in this case, there interpretation cannot be arbitrary and capricious unless the board misinterpreted the plain language of the order.

The Appellees rely on the case of *Commonwealth Land Title Ins. Co. v. Robertson*, 5 N.E.3d 394 (Ind. Ct. App. 2014), for this assertion; however, this reliance is misplaced. In *Commonwealth*, an agency misconstrued a statute. If an administrative agency misconstrues a statute, the trial court is required "to reverse the agency's action as being arbitrary and capricious." *Id.* at 405. However, the facts of *Commonwealth* are not analogous to the instant case. Specifically, *Commonwealth* cites to *Pierce v. State Dept. of Corr.*, 885 N.E.2d 77 (Ind. Ct. App. 2008), which states:

[a]n interpretation of a statute by an administrative agency charged with the duty of enforcing the statute is entitled to great weight, unless this interpretation would be inconsistent with the statute itself. ***Deference to an agency's interpretation of a statute becomes a consideration when a statute is ambiguous and susceptible of more than one reasonable interpretation.*** When a court is faced with two reasonable interpretations of a statute, one of which is supplied by an administrative agency charged with enforcing the statute, the court should defer to the agency. If a court determines that an agency's interpretation is reasonable, it should terminate its analysis and not address the reasonableness of the other party's proposed interpretation.

Id. at 89 (emphasis added). *Pierce* goes on to say that if an agency's interpretation of a statute is incorrect, then that interpretation is entitled to no weight. *Id.* This rationale is not applicable to the facts of the instant case as both the trial court and the Appellee have seemingly admitted that the previous orders of the trial court are either ambiguous (See Appellees' Brief, p. 12-14) and/or unclear (Tr. pp. 194-195).

In the instant case, there is no plain language in the previous orders that gave EFAC adequate direction on how to determine where piers were to be placed. A review of the facts and timeline of events actually leads to a different interpretation than the one asserted by Appellee. Pursuant to the 1994 Order, on-shore pier owners got to choose their pier location first. Because on-shore owners got to pick their pier locations first and because their pier locations are permanent pursuant to the Court's Order, EFAC always assumed that the twenty-four feet assigned to an on-shore owner was centered on their pier. (Tr. p. 147).

To effectuate the 1994 Order, the conference notified all pier owners in 1995 that the on-shore owners were to put their piers in first on their property. (Tr. p. 147). No off-shore piers were put in at that time. (Tr. p. 147). Suetta Johnson (predecessor in interest to the Millers) put her pier in its current location in 1995. (Tr. p. 148). In the summer of 1995, after the on-shore owners placed their piers, the Conference started assigning pier locations to the off-shore

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property owners. (Tr. p. 148). The determination on where to locate the off-shore piers was based off of the location and use of the on-shore owners. At that time, Suetta Johnson only used one side of her pier so presumably an assumption was made that she could accommodate on off-shore owner's pier.

Nowhere in the January 21, 2014, or the April 15, 2014, Order of the Kosciusko Circuit Court does it give EFAC direction as to the location of the beginning or the end of the 24 feet of shoreline allotted to an "on-shore" owner. See (Barnes, Kosciusko Circuit Court Order dated January 21, 2014 and April 15, 2014). The Board assumed that the twenty-four feet of space assigned to the Milers was centered on their pier. (Tr. p. 86). EFAC's assumption that an on-shore owner's pier is the center of their twenty-four assignment is based off of every other pier in Epworth Forest. (Tr. p. 86). EFAC also assumed that moving an on-shore pier would violate the trial court's orders that said that on-shore assignments were permanent. (Tr. p. 86).

Presumably, if the *Barnes* court wanted the on-shore piers in a specific location when it issued its 1994 order, it would have said so. There is no direction that the on-shore owners twenty-four feet starts at the property line or that the location of the twenty-four feet is anywhere other than centered over the center of the on-shore owner's pier. It is completely logical that an on-shore pier would be the center of an on-shore pier assignment because the boat lift and boats that someone would put in the riparian zone in front of their property would be attached or abut their pier. Therefore, it is reasonable to interpret that the twenty-four feet allotted an on-shore owner would likewise be centered on the pier.

EFAC found that there was a substantial change in circumstances based off of these interpretations of the trial court's orders. What constitutes a "substantial change" is subjective. What constitutes a "substantial change" is not defined in any of the Orders of the trial court.

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Therefore, EFAC was left to use its own reasonable interpretation of what constituted a “substantial change.” EFAC determining that the on-shore pier assignment was to be centered on the pier location is not inconsistent with the Court’s orders. Also, EFAC applying that interpretation to the Millers’ property and ordering the Powells to relocate because the Millers wanted to use both sides of the pier is not inconsistent with a reasonable interpretation of the trial court’s orders.

The trial court seemingly understanding that the previous orders were unclear when it introduces new concepts into its September 9, 2016, Judgment. The trial court tries to remedy this lack of direction by inserting new terms into the September 9, 2016, Judgment like a “certain location zone for pier and other equipment usage,” or “a zone of use for these assignments (an actual assignment)” or a “zone assignment.” Certainly, this direction will be helpful going forward, but should not be used against EFAC to demonstrate that their decision was somehow arbitrary or capricious. Instead, the trial court created new rules for EFAC to follow and instructed EFAC repeatedly on the “Court’s intentions” with respect to its previous Orders. Nowhere in the trial court’s prior orders does it mention a “location zone” nor does it direct EFAC to make determinations based upon the “location zone.”

The trial court stated “I guess, and what I thought was clear, maybe wasn’t clear.” (Tr. p. 194). By acknowledging the potential that the previous orders were not clear, the trial court seemingly answered the question of whether the actions of EFAC were arbitrary and capricious. If the actions of EFAC were reasonable, then they cannot be arbitrary and capricious and the trial court’s Judgment of September 9, 2016 must be set aside.

VI. CONCLUSION

The trial court's Judgment of September 9, 2016, is clearly erroneous. The January 26, 2016, decision of EFAC ordering the Powells to relocate their pier from the property of the Millers was a reasonable interpretation of the trial court's previous Orders and as such was not arbitrary or capricious. The judgment of the trial court should be reversed and remanded with instructions to enter an Order affirming the January 26, 2016, decision of EFAC.

Respectfully submitted,

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WORD COUNT CERTIFICATE

I verify that this brief contains no more than 7,000 words and I verify that this Brief contains 1,370 words.

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the above and foregoing Reply Brief of Appellants-Defendants, Epworth Forest Administration Committee, Inc., has been e-filing via the Indiana Electronic Filing Service on this 8th day of May, 2017:

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