

**AOPA COMMITTEE  
OF THE  
NATURAL RESOURCES COMMISSION  
June 22, 2015 Meeting Minutes**

**AOPA COMMITTEE MEMBERS PRESENT**

Jane Ann Stautz, Chair  
Jennifer Jansen  
R. T. Green

**NRC, DIVISION OF HEARINGS STAFF PRESENT**

Sandra Jensen  
Dawn Wilson  
Jennifer Kane

**GUESTS PRESENT**

Lisa Meiners  
Bob Meiners  
William Gooden  
Stephen Snyder  
Isaac Gaylord

**Call to Order**

Jane Ann Stautz, Chair, called the meeting to order at 9:01 a.m., EDT, at the Fort Harrison State Park, Garrison, 6001 North Post Road, Lawrence Room, Indianapolis, Indiana. With the presence of three members present, the Chair observed a quorum. She, Jennifer Jansen, and R. T. Green introduced themselves.

**Consideration and approval of minutes for meeting held on May 19, 2015**

Jennifer Jansen motioned to approve, as presented, the minutes of the meeting held on May 19, 2015. R. T. Green seconded the motion. Upon a voice vote, the motion carried.

**Consideration of objections with respect to “Findings of Fact and Conclusions of Law with Nonfinal Order” by the Administrative Law Judge in *Holland v. Phillips and Meiners, and DNR (Agency Respondent)*, Administrative Cause No. 14-056W**

William Gooden, representing Lisa Meiners and Sara and Mark Phillips (“Respondents”), noted that he filed with the Commission’s Division of Hearings a copy of the certified transcript of the administrative hearing along with citations to the transcript. He stated that issue in this matter is the meaning or intent of the easement reserved by Mr. and Mrs. Wilt (the “Wilts”) as the original

owners of the backlot property. Gooden explained the easement of reservation is on Lot 4, located on Dallas Lake in LaGrange County. The Respondents own the lakefront property, Lot 4 in Bruner Park. Lots 98 and 99 compose the backlot property, all originally owned by the Wilts for the purpose of this matter. Wilts, in 1988, sold the lakefront property along with the backlot property and reserved the easement in question. Gooden explained that the Wilts reserved the easement on the lakefront property to allow access from the back lot property across the front lot property.

Gooden said the Respondents contend that the easement language is clear and unambiguous. “We think to get into extrinsic evidence beyond the language of the easement is a mistake.” He said the easement granted ingress and egress, access to a waterline. He noted that there is a comma inserted in the easement language that creates some level of consternation. “Although you can say ‘question’, I don’t think a fair interpretation of it is that the comma creates enough, based upon some other factors within the easement, to create a situation where extrinsic evidence ought to be considered to determine the grantor’s intent.” Gooden said the easement grants “‘ingress and egress, access to a waterline’. Within that language itself, there is nothing that follows it; there is not a further comma; there’s not an ‘and’ and some additional things that it allows.” He said the easement also prohibits the use of motorized vehicles within the easement. Gooden explained that the covenant would run with the land and the owners had the responsibility for maintaining the waterline. “The easement did a lot of things, in addition to stating what the access was for. And it’s our view that in not overthinking it, the grantor could have very easily indicated that there was some access to the lake itself, or to the shoreline, or to place a pier, or to not place a pier, or do lots of other things.”

Gooden said the Respondents believe the easement language itself is clear enough to prevent any extrinsic evidence and clearly indicates that the easement is for the specific purpose of accessing and maintaining the waterline. He said the evidence presented indicates that the Wilts, at the time when the Wilts owned the lakefront property, the Wilts maintained a garden on the backlot property. The Wilts placed a waterline to and a pump in Dallas Lake for irrigation of the backlot garden. The Wilts “continued to do that for some time after...selling the lakefront property.”

Gooden said there are two instances in the record that may be considered extrinsic evidence, but only one piece of information is indicative of the Wilts’ intent in granting the easement (Transcript Page 66, Lines 8 through 15). “Mr. Wilt told Mark Phillips at or around the time the [Respondents] bought the lakefront property that the only reason that he had the easement was for the waterline. The second time that Mr. Wilt—at least as far as the record goes—it was the first time, in time, but the second time in the record that Mr. Wilt indicated his intent was when he spoke to Tom Rofkahr, who was his friend, realtor, and owned the title company that did the title work at the time that they sold the front lot.” (Transcript Page 93) Gooden noted that Tom Rofkahr testified that, as the real estate agent and the owner of the title company, Rofkahr had discussions with Mr. Wilt about the easement itself, because Rofkahr “needed to order a deed in conjunction with the sale.” Gooden explained that after some discussion on the evidentiary issue of opposing Counsel’s hearsay objection and the response, Rofkahr testified that Mr. Wilt told Rofkahr that Wilt “didn’t need the access to the lake because he had a swimming pool now on the new backlot house, and he also had two lots on the channel behind him that were accessible to Dallas Lake where he maintained a boat and a pier.” Gooden said the crux of the objection

today with respect to Rofkahr's testimony is that under Rule of Evidence 803(3), the testimony falls within exception to hearsay. "A statement of a state of mind of the declarant, Mr. Wilt, who obviously wasn't present to testify and about whose intention both Mr. Phillips and Mr. Rofkahr testified to is a declaration of his intent...which specifically falls within the exception of the hearsay rule. And the reason that is important is that under IC 4-21.5-3-26(a), the nonfinal order indicates that where there is hearsay evidence that is properly objected to, that hearsay cannot form the basis of the decision. If you read the statute, Section 26(a) states that the administrative law judge may admit hearsay. If not objected to, the hearsay evidence may form the basis of an order. ...So, point number one, we think it is clear that this falls within an exception under 803(3), but even if it didn't the resulting order may not be based solely upon hearsay. So really we have two objections within this objection. The first objection is that it falls within the recognized exception to the hearsay rule...and it could form the basis, the evidence of his intent, the only evidence of his intent that we have on two occasions, stated approximately 22 years apart is that it does fall within that recognized exception. Even if it didn't, in the supplemental filing and tender of the transcript, we've cited several instances where there has been testimony, although not direct indication of his intent, would be corroborative of Mr. Wilt's intent."

Gooden said testimony was given to indicate that the Wilts, after selling the lake front property but before selling the backlot property, only once, out of 22 years, extended a two-foot wide, approximately ten to 12-foot long pier, to occasionally moor and launch a canoe. Mr. Rofkahr testified that he helped Mr. Wilt install the pier. ...and was a close personal friend of the Wilts. Gooden continued to explain that the exception to hearsay "could form the basis, even the sole basis of the order. It's the only evidence of Mr. Wilt's intent that we have. Secondly, even if it was properly objected to as hearsay, there is still ample evidence in the record to corroborate that. And even if it was hearsay, it could form the partial basis of the Order. In either case, it's the only direct evidence of Mr. Wilt's intent that we have."

Gooden addressed the Petitioners' response to the objections, and pointed to *Pelley v. State*. He explained that the Indiana Supreme Court in a footnote indicated specifically that although sometimes the 803(3) exception called the "state of mind of a witness exception" can specifically be used, and should specifically be used, in the case of any non-present declarant who expresses an intention. "It isn't just in the criminal case, and it isn't just with the state of a mind of a victim. For those reasons, we think the nonfinal order should be revised."

Stephen Snyder, representing Walter and Kathleen Holland (the "Claimants"), stated that the first issue to be decided in this case is in regards to the applicable rules of construction when construing the grant of an easement. He explained that the first rule of construction is that the language, if there is any ambiguity, is always construed in favor of the grantee of the easement. "In this particular case there is a reservation of easement, which means the easement is to be construed in favor of the person who is reserving it, which in this case is the Hollands' predecessor-in-title. The language of the easement is admittedly less than artfully drafted, but that's nothing unusual as far as the [AOPA] Committee is concerned." Snyder noted that the five-foot easement is located on the entire east side of Lot 4, and Lot 4 runs from the public street to the water's edge of Dallas Lake. "I would suggest that a reasonable construction of that language is that it is for both ingress and egress, and access to a waterline, which was maintained by Mr. Wilt at the time of the easement construction. That waterline, in order to have water,

must go to the lake. I would suggest, as a result, ingress and egress ran from the street to the lake, and also provided access to the waterline itself, which was apparently underground but also ran to the lake.”

Snyder explained that parole evidence is appropriate when there is an ambiguity in the easement language. He cited *Hutner v. Kellogg*, which conveyed the comment by the “Court of Appeals that said it would be implausible for, in this case, Mr. Kellogg, to have sold off his lakefront property and reserved an easement over the property he sold off without intending to utilize it for riparian purposes. No statement in that reservation of the easement specifically describing the right to maintain a pier or place a boat, but the Court of Appeals said it just doesn’t make any sense not to do that.” Snyder said the crucial evidence in *Hutner* was whether there had ever been a pier placed at the end of that easement. “And there is no question in this case that even though Mr. Wilt had at least two channel lots behind his newly constructed residence, on Lots 98 and 99, he did place a pier at the end of this five-foot easement and utilized it for placing a canoe there. That is the direct factual testimony we have from Mr. Rofkahr who resided on what had been the Wilt lakefront property at the time the pier was placed there.”

Snyder noted that by rule hearsay evidence cannot form the basis of a decision if uncorroborated. He said the exception to the hearsay rule is also qualified by one more fact that if there is an intent expressed, it must be expressed contemporaneously with the act for which it is serving as a description of intent. “We know that one of these came years after the easement was reserved by Mr. Wilt. And we don’t know the date of the one that Mr. Rofkahr testified to as regarding Mr. Wilt’s intent in the use of that easement. Whether it was a year before it was granted [or] a year after it was granted. We can assume it was probably before it was granted, but we don’t know when before. And the law simply requires that it be contemporaneous, and if it’s not shown in the evidence then we can’t assume that it was contemporaneous.” Snyder said that the transcript of the evidence does not show that the statement by Mr. Wilt to Mr. Rofkahr was made contemporaneously with the reservation of the easement. “It might have been two years before, a year before. We simply don’t know. Without that statement contained in the record somewhere in the form of evidence, then the exception to the hearsay rule is not applicable.”

Snyder noted the civil case, *American Standard Ins. Co. of Wisconsin v. Rogers*, which Gooden cited, was a summary judgment case where affidavits are permitted because direct testimony is not permissible. “So it’s clearly distinguished on that basis”. He said that criminal cases *Pelley* and *Stewart* apply a different standard, which is the intent of the state of mind of a victim or the intent of the state of mind of the perpetrator of the crime. He said that the only civil case cited by Gooden, *American Standard*, was a summary judgment where affidavits are appropriate.

Snyder stated that the Respondents are asking the AOPA Committee to reweigh the evidence. He said Judge Jensen heard the testimony of the parties and made the determinations as to the credibility of the witnesses. “The memory that Mr. Phillips may have had of any conversation he had 22 years after the fact with Mr. Wilt, it could be Mr. Phillips’ memory that was bad or it could be that Mr. Wilt’s memory that was bad at the time. So we have nothing to show that there was anything contemporaneous about the statements made by Mr. Wilt. Without that, they cannot serve as the basis because they are, in fact, hearsay, and do not fall within that exception.” He said the evidence that Judge Jensen heard was that Mr. Wilt, even though Mr. Wilt “may

have had other places to put a pier on his channel lots chose to put a pier here. Under *Hutner*, that is the strongest intent, strongest evidence of the intent of the person reserving the easement. And to take hearsay evidence would have been inappropriate and Judge Jensen's decision not to consider that hearsay evidence was the proper ruling."

Gooden provided brief rebuttal. Gooden stated that Mr. Rofkahr's testimony starting at Transcript Page 93, Line 5 "is pretty strong evidence of the contemporaneous nature of Mr. Wilt's expression of intent at a very important time, at the time they were selling it and at the time that Mr. Rofkahr needed to get a deed prepared within which this easement language was contained." He said *Pelley* is applicable. Gooden explained that although the declarant in *Pelley*, whose statements were admitted in Footnote 5 on page 504 of the opinion, "was a victim in this case, the exception is not limited to victims and it's not necessary that the defendant raise the issue. The exception to hearsay permits statements of any person to show his or her intent, and the issue is frequently whether the person's state of mind is relevant. And, clearly, in this case, the state of mind is really the only thing that is relevant. What was the grantor's intent? The issue often arises in the context of deceased victims statements, but it is not limited to that context. For that reason it is sometimes described in terms of 'victim's state of mind,' and *Pelley* frames his argument in those terms. The Supreme Court was saying in this case that the opponent of the evidence making a similar argument that the Hollands are making today that this really goes to the criminal context and it goes to the victim's state of mind. I think it's pretty clear that the Supreme Court wanted to make sure that that was clarified."

Gooden agreed that *American Standard* was in the context of summary judgment and the evidence was an affidavit, but the court did not limit its opinion and the Court specifically referenced Rule 803(3) with similar language that the Supreme Court then used and confirmed in *Pelley*. "It said that a statement of a declarant's then existing state of mind is not excluded by the hearsay rule. While we acknowledge that the statements made in that case, which was this person [Wilson] did not intend to renew his insurance policy, the statements made by Wilson were admitted to prove the truth of the matter, Wilson's intention. Such hearsay is admissible under that 'state of mind' exception. There isn't anything that limits that to the issue of summary judgment to the issue of affidavit testimony rather than live testimony."

Stephen Snyder said that he understood Gooden's position, but stated that even if the AOPA Committee accepted the statement that there is evidence of the intent of Mr. Wilt and what Mr. Wilt expressed to Mr. Rofkahr was contemporaneous "it still is not sufficient to overcome the actual fact that after Mr. Wilt reserved the easement, after Wilt had sold the lakefront property and while the owner of Lots 98 and 99...Mr. Wilt placed a pier at the end of the easement and parked or moored a boat at that pier. Under *Hutner*, that is the most significant expression of intent and should carry the greatest weight."

The Chair then opened the floor for Committee member discussion.

R. T. Green asked whether both parties agreed the easement language is ambiguous.

Gooden said, "We don't think it is, but certainly even if it is, we're happy to have the discussion...about what the intent was."

Green asked whether if the easement language is unambiguous would there be a bundle of rights associated with that easement to include riparian owner's rights.

Gooden stated, "Not necessarily. If it's ambiguous, then what rights are granted through the easement are subject to the evidentiary process."

Green then asked whether if the easement language is declared unambiguous would there be riparian rights that the law would impose upon that easement.

Gooden said that if the easement language is unambiguous then the only rights granted by the easement are within the language of the easement specifically.

The Chair agreed with Gooden's interpretation.

Snyder said, "We take the position that if it's not ambiguous, then ingress and egress gets you from one point to another point. As the Court of Appeals has said there has to be a reason for getting from one point to another point. Quoting the dissenting opinion of Justice DeBruler in the original case of *Klotz v. Horn*, it's not just a sylvan pathway to the lake. There is some reason to get there. In *Klotz v. Horn*...the Supreme Court said that 'yes, it would carry with it the right to do something in the riparian area once you got there.'" Snyder stated that in the instant case "whether you look at it from the standpoint that the easement language is unambiguous and include 'ingress and egress' this carries with it that bundle of riparian rights." Snyder said that if the easement language is declared ambiguous then Judge Jensen appropriately considered parole evidence to determine what the intent of the grantor was at the time the easement was created—"that intent being best expressed by his actions as opposed to someone's memory of statements made by him."

Gooden responded, "If the easement language is not ambiguous, the easement states the reason for the ingress and egress, access to a waterline. The evidence is that there is a pump in the lake. There had to be to get the water to the waterline and back to the back lot so there would have had to have been some ancillary access to the lake." He said that if the easement language was ambiguous, the question would be what is allowed within riparian area. "At best, it would seem that if there is ingress and egress, access to the lake, there are a lot of cases that do talk about the use of it being nothing more than accessing the lake to swim or push off a canoe or a kayak, but extending a pier and mooring a boat are all additional rights that are not necessarily implied simply by having access to the water's edge."

Green asked for clarification regarding the date of the pier placement.

Gooden stated that the testimony given at hearing was the pier was placed in Dallas Lake in 1993 or 1994.

Green asked whether the installation of the pier took place after the sale of the lakefront property.

Gooden answered in the affirmative, and noted that the lakefront property sold in 1988.

Green asked whether the Department of Natural Resources issued a license for the pier that was installed in 1993 or 1994.

Gooden stated that evidence was not presented to show that the Department issued a permit. He noted that Tom Rofkahr testified that he helped Wilt extend the pier in order to reach greater lake depth.

Green asked, "So, you're just saying that's just incidental then, right? That really it's not expressive of his intent that it has a bundle of riparian rights?"

Gooden answered, "With his intent with respect to the easement itself, a use for convenience with the help of their good friends who owned the property is something entirely different in our view than what he intended to run with the land. In other words, our view, that was simply a permissive use of the predecessors of my clients' lakefront property because they were friends." He noted there was an issue that was raised and addressed in the nonfinal order about whether or not the assistance Rofkahr gave to Wilt in extending the pier could be considered a permission. "Our view is that if Mr. Rofkahr, who was the owner of the property, helped Wilt place the pier on one occasion, one season out of 22, that that was clearly permission even though he didn't issue him some sort of statement that said I hereby give you permission. He allowed them to cross their property and place a pier. ... That would be an incidental convenience between neighbors and personal friends that Mr. Wilt, in our view, didn't intend to run throughout time and across his property."

Snyder responded, "But it would be equally as reasonable to assume that Mr. Rofkahr helped because he felt that Mr. Wilt had a right to do so based upon the language of the easement. And that Mr. Wilt felt he had a right to do so because he didn't bother to ask Mr. Rofkahr for permission. He just placed [the pier] there." He stated that the Respondents are asking the AOPA Committee to "reweigh the evidence and that is inappropriate. The administrative law judge is the finder of fact."

Gooden stated that Judge Jensen did not consider the statements by Mr. Wilt as Mr. Wilt's intent based upon the Judge's understanding of the objection made at the administrative hearing. "We believe that it isn't just weighing the evidence. She didn't weigh that evidence it does not appear based upon the order. So if that evidence is weighed, is admitted, then we believe we've got the only direct evidence of Mr. Wilt's intention at the time Mr. Wilt reserved the easement."

Green asked, "Would it be best for us to then ask to go back to... Judge Jensen to consider that evidence in another hearing?"

Gooden said, "We think that if the evidence is admissible, which it is and can form the basis, even a partial basis of the order, that it's sufficient to revise the order such that there's a determination that the easement does not confer those riparian rights and the back lot owner, the Hollands in this case, are afforded the access to the waterline to be able to maintain it and use it and nothing further."

Jennifer Jansen stated, “It sounds to me that you are contending that...Judge Jensen doesn’t have discretion to weigh which evidence that she finds most credible.”

Gooden stated, “Not at all. That’s not at all what we are contending. It’s our view in reading the nonfinal order that had the evidence been properly admitted and considered, it was admitted for purposes of the hearing...If she felt as if she could consider it, then the order would have been different.”

Judge Jensen said, “I typically tend to not say anything, but the idea that I did not consider the evidence at all, I would point the [AOPA] Committee to Finding 41. I did consider it. I didn’t just ignore it, but I considered it in the context of what I consider allowable.”

Gooden responded, “[Judge Jensen] said that it can’t form the basis of an order. Obviously, the evidence was admitted and it was heard. But, if considered in the proper context that we view as the proper context under 803(3), there would be a different determination.”

The Chair said, “It is always challenging to look back on the language to determine intent.”

Green asked that if the AOPA Committee remanded the nonfinal order and requested Judge Jensen to consider the evidence as admitted as an exception to the hearsay rule, “would it still not be something that Judge Jensen could weigh considering the actions of the grantor when Wilt installed the pier?...Then at that particular point in time, Judge Jensen could say that I considered all the hearsay under the exception and I still find that the grantor’s actions are much greater and I just believe that his intent is to give a bundle of riparian rights with it because that’s the way he acted. Could she not do that?”

Gooden said, “Absolutely, and [Judge Jensen] could consider and weigh and decide in any way she saw fit.”

Jansen asked, “If the evidence is properly objected to and does not fall within the recognized exception then the order may not be solely based upon hearsay evidence?”

Gooden answered in the affirmative.

Jansen then said, “But all of this is permissive. It may form the basis of the order, but it doesn’t have to.”

The Chair agreed.

Gooden said, “It could, in our view, because we believe it falls within an exception. It could form the sole basis of the order.”

Jansen noted, “If Judge Jensen found it to be persuasive.”

Gooden said, “Yes, it would be allowable to right.”



The Chair stated, “I am still back at whether the easement language is ambiguous or unambiguous. That’s my challenge as I look at this particularly...with regard to the sale of the property and consideration at that time of whether or not there was lake access or any indication of consult with the DNR in regard to that.” The Chair noted that when she read the easement language initially she understood the easement “was for ingress and egress, access to maintain this waterline and pump. We’ve seen a lot of different easements over the years as matters come before us and [this easement] didn’t specifically say ‘for recreational activities, for docking, or mooring of a boat or placement of a pier.’ Then say, that in one summer where a pier overrides that, the other 21 years, because it was one out of 22 years.”

Green said, “My difficulty with that only to the extent I just don’t know. When there is such an easement like that and you don’t say more does the law automatically say we are going to throw the bundle in or not? To me, that’s the issue. The other things, I think, suggest two things: (1) that Wilt did intend to do it; and (2) he did not intend to do that.”

Snyder said, “That’s why I cited *Hutner*, because there was no additional language.”

The Chair stated, “But still it is somewhat vague.”

Gooden said, “I haven’t read *Hutner* in a while and not in connection with this, but I will tell you, and I said it in the post hearing brief, I’m not aware of nor could I find...any case where the easement at issue granted some sort of riparian right and didn’t at least mention the lake by word, the shoreline by word, the water by word. And that’s the case in this particular situation.”

Green responded, “My problem of it is if you are going to grant an easement upon any lake in northern Indiana it would obviously be to be able to get access to the lake. That’s just me. I guess to the extent whatever the law says. ...I’m with the Chair in the sense that I don’t think it’s ambiguous if the law says what it says. If the law says that’s it, and there’s no bundles that go along with it, then fine. If the law says that if the easement is silent and there is this easement and along with this easement comes certain rights, certain bundles including the riparian rights, because common sense tells me why would you just do that? Why not just a little line three foot and say specifically for the waterline and that’s it and no more. Maybe that’s what he did say. I don’t know if he said that. I think that’s what he meant to say. I would say to the extent that the Judge said that that language is unambiguous, I would disagree with that. I would say that whatever the law says that goes along with such a written easement like that, whatever that law might be, is it something that there is a greater bundle of rights.”

Jansen stated that she understood Green’s statements, but stated the easement language seems ambiguous “although I would like to know a little bit more of what the law says. The thing I keep running into is I’m not hearing or seeing anything here that isn’t sort of reweighing or reconsidering the evidence that Judge Jensen has already considered.”

Green said, “I think that’s a time honored process...and that’s the problem I have. Either we stop short and just say it’s unambiguous and it is what it is, and let them appeal it on what that really means even though it’s considered unambiguous. Or we say it is ambiguous and leave Judge Jensen’s findings the way they are. ...I’m good with either of those approaches.” He

continued, “I think the simpler way would be to say that we disagree, and we can say that is unambiguous and that there are no rights other than what [Wilt] has written. Having said that, I think that gives room to appeal it.”

The Chair agreed.

Green said, “We’ll find out once and for all what that really means, if anything. That would be the best way that I think I ought to do it.”

The Chair then asked for a motion.

R. T. Green motioned that Judge Jensen’s Findings of Fact and Nonfinal Order be revised to indicate that the “easement is, in fact, unambiguous and that the rights that were given are limited to just the access for the waterline and the water pump and no more, but with the understanding perhaps the law says otherwise.” Chair Jane Ann Stautz seconded the motion.

The Chair called for a vote. Chair Stautz and Green voted to revise the Findings of Fact and Nonfinal Order as stated in the motion as the Commission’s Final Order. Jansen voted against the motion.

**Consideration of objections with respect to “Findings of Fact and Conclusions of Law with Nonfinal Order” by Special Administrative Law Judge in *Moriarity v. Department of Natural Resources*, Administrative Cause No. 12-094W**

This item was withdrawn.

**Adjournment**

R. T. Green moved to adjourn the meeting. Jennifer Jansen seconded the motion. The motion was approved and the meeting adjourned at 9:49 a.m., EDT.