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Cox v. Musson Sand & Stone, Inc., No. 251936, 2005 Mich. App. LEXIS 856 (Mich. Ct. App. Mar. 31, 2005)

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Moot also argued that Golledge's citation to *Opinion of the Justices* was inconsistent with the delegation of licensing authority to the DEP. However, the court agreed with the Supreme Judicial Court, stating there was no constitutional barrier to the legislature's right to delegate authority. The legislature could therefore use its authority to surrender public rights in the tidelands, because neither the public nor the Commonwealth had an interest in the tidelands. Finally, Moot argued that NPCLC's predecessor's license to fill in the Site from 1962 had an express provision, stating that no one could build any structures on the fill without authorization from the Department of Public Works or its successors, and the exemption does not apply because of the previous license. However, the procedures for obtaining a license require a new license if the use of the site changes. The DEP issues licenses for specific uses but applicants do not have the ability to use the tidelands in any way they wish. Therefore, NPCLC had to seek a new license for the Site because they were going to change the use of the tideland. Since NPCLC wanted to use landlocked tidelands and requiring NPCLC to obtain a license for the new neighborhood on the Site would not further the DEP's goal to ensure inhabitants use tidelands only for water-dependent purposes, NPCLC was not required to obtain a license.

Accordingly, the court affirmed Golledge's Final Decision.

Tomi L. Hanson

MICHIGAN

Cox v. Musson Sand & Stone, Inc., No. 251936, 2005 Mich. App. LEXIS 856 (Mich. Ct. App. Mar. 31, 2005) (holding failure to show a correlation between mining activity on adjacent property and water loss and quality concerns based on diametrically opposed scientific evidence is insufficient to prove causation).

In 1980, Olivia and Terrence Cox ("Coxes") purchased and built a home on property that included a pond adjacent to the mining operation of Musson Sand & Stone ("Musson"). The Coxes were aware of the mining operation, and they initially had no objection to the activity. However, they became concerned when the pond's water level dropped substantially. Based on an evaluation of the pond, the Coxes concluded the adjacent mining activity caused the drop in the water level and changed the direction of the groundwater on the property. As a result, the Coxes suspended use of the pond for recreation and, although they never received confirmation that the drinking water was unsafe, began using bottled water. Additionally, the Coxes notified local, state, and federal authorities regarding the mining activities, who subsequently found the activities to be in violation of permit conditions; however, the mining continued. The Coxes filed suit to recoup

damages for loss of water quality and quantity as a result of Musson's mining activities.

To establish scientific support, the Coxes had an environmental assessment performed, which concluded that the drop in the pond's water level and the supposed water quality diminution resulted from the mining activity. Dr. Huang, an environmental engineer, also performed an assessment and concluded the same. Ron Gallagher, a professor from the University of Toledo, performed a second assessment and found a minimal effect on the pond as a result of the mining activity and concluded the methodology employed by Huang was inaccurate. Based on testimony presented at trial, the trial court concluded the Coxes failed to prove causation and damages, and awarded costs and attorney fees to Musson. The Coxes appealed to the Michigan Court of Appeals.

The Coxes first alleged the trial court erred in dismissing the nuisance per se claim based on the erroneous belief that loss of water was not a real damage or injury. The court explained that it gives substantial deference to the trial court's findings of fact in a bench trial and reviews the finding for clear error, but it reviews conclusions of law de novo. Based on its review of the trial court's findings of fact and conclusions of law, the court held the Coxes' allegation was without merit. It noted the trial court never concluded that loss of water was not a compensable injury, and that the Coxes failed to correlate any purported losses in water quantity and quality to the mining activity.

Additionally, the Coxes alleged the trial court erred in failing to render an equitable decision regarding their environmental claim. Basing its holding on the trial court's findings, the court held the trial court did not err. The trial court found no correlation between Musson's property and the Coxes' water conditions. Furthermore, there was no current testimony from the Michigan Department of Environmental Quality regarding the status of Musson's property, and Musson did not attempt to seek remediation. Finally, at the time of trial, Musson was no longer conducting the mining activities. As a result, there was no need to order abatement.

Giving substantial deference to the trial court's findings of fact and finding no clear error on behalf of the trial court, the court of appeals affirmed the ruling of the trial court.

Kelly L. Snodgrass

NEBRASKA

***In re Cent. Neb. Pub. Power and Irrigation Dist.*, 699 N.W.2d 372 (Neb. 2005)** (holding the Nebraska Department of Natural Resources lacked jurisdiction because the legislature had not created an appropriation