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Snider v. Kirchhefer, 115 P.3d 1 (Wyo. 2005)

Laura L. Chartrand

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other mechanism, onto a neighbor's land in a manner or quantity different from its natural flow; and (3) landowners who alter the flow of surface water must act in good faith and avoid unnecessary damage to adjacent property. The Association argued the City and College's actions fell under the second and third exceptions.

To establish the second exception, the Association produced a declaration and three-page report from an expert. The expert opined that paving and grading the property altered the land from its natural forested state in which the water would have percolated into the ground. However, the court held that paving and grading alone are insufficient to establish liability in the absence of specific facts showing that the paving and grading collected, concentrated, and channeled the water in an unnatural manner. The Association made no such showing here.

As to the third exception, also known as the "due care exception," the Association contended that the City and College failed to act in good faith because they were aware that surface water was draining into the ravine causing damage, yet they took no action. The court disagreed, noting the due care exception applies only when the landowner alters the water's natural flow, which the Association failed to establish. The court further noted that the College pre-dated the Shorewood Hills subdivision by fifteen years. Thus, when it was developed, the College had no reason to suspect that its actions would burden a neighboring housing development with excess water.

The court also rejected the Association's claims that the City assumed a statutory duty from King County to maintain the ravine when the City incorporated. The court affirmed the summary judgment motion in favor of the City and College.

Noah Klug

WYOMING

Snider v. Kirchhefer, 115 P.3d 1 (Wyo. 2005) (denying a petition for abandonment of water rights because of failure to show reasonable likelihood that injury would result from reactivation of the water right).

Yvonne Snider had a 1915 water appropriation right on Six Mile Creek. The appropriation permitted the diversion of water from Six Mile Creek at a point on Fred and Donita Kirchhefers' ("Kirchhefers") land. An easement to construct, maintain, and repair the ditch as well as a right of way across the Kirchhefers' land accompanied Snider's appropriation. The Kirchhefers had no surface appropriation rights for Six Mile Creek but possessed a ground water permit from the Kirchhefer Spring No. 1, a well built into the creek bank of Six Mile Creek approximately 100 feet upstream from the point of diversion.

On August 29, 2001, Snider entered the Kirchhefers' land to repair Budget No. 2 Ditch after at least five years of no beneficial use. The Kirchhefers objected to the construction activities, alleging that Snider was outside her easement at the wrong point of diversion. The Kirchhefers sought and received a temporary restraining order to stop construction activities. On August 31, 2001, the Kirchhefers filed a petition for abandonment of the appropriation, alleging Snider had not used the appropriation for more than five years. On May 9, 2002, the Board of Control ("Board") ordered the abandonment of the appropriation. Snider appealed to the district court. The court remanded the case to the Board because the Board's order contained no findings of fact or conclusions of law to establish a reasonable likelihood that abandonment would benefit or injure the Kirchhefers' water right. On August 28, 2003, the Board found that the Kirchhefers proved a reasonable likelihood that benefit from abandonment or injury by resuscitation would result. Snider appealed again to the district court and the court found that the Board made appropriate findings and affirmed the decision. Snider appealed.

The Wyoming Supreme Court reviewed the Wyoming statute governing the abandonment of water rights. In order to have standing to petition for abandonment, the Kirchhefers needed to prove three essential elements: 1) that they possessed a valid water right of equal or junior status to the water right sought to be abandoned, 2) that the water right relied upon by the Kirchhefers and the water right for which a declaration of abandonment was sought are from the same source of supply, and 3) that they stand to benefit from a declaration of abandonment or to sustain an injury by reactivation of the contested water right.

The court focused on the third element, and found that the Kirchhefers must prove they have a reasonable likelihood that the abandonment would benefit their water right or reactivation would injure it. The court examined the Board's findings and found the Board's inquiry focused on the Kirchhefers' appropriation *only if* subject to regulation. The court found that injury to the Kirchhefers would only result if regulation occurs. The court held that evidence was absent to support a finding that there was a reasonable likelihood that regulation would actually occur because there was insufficient evidence to support the allegation that Six Mile Creek was limited in supply or that the creek experienced historical shortages.

Consequently, the court found that the Kirchhefers failed to provide sufficient evidence to show a reasonable likelihood that benefit from abandonment or injury by resuscitation would result. The court reversed the district court's order upholding the abandonment and remanded with directions to deny the petition for abandonment.

