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Spear T Ranch, Inc. v. Knaub, 691 N.W.2d 116 (Neb. 2005)

On appeal, the court first noted, to acquire title by adverse possession, a claimant must show actual, continuous, exclusive, notorious, and adverse possession under a claim of ownership for a period of ten years. Moreover, each element must be both continuous and uninterrupted for the entire ten-year period. The court determined the Boltes' use was not continuous, because the land was suitable for year-round use, and the Boltes only used it intermittently. Next, the court rejected the Boltes' claim that the use of the fence as a boundary line sufficiently established adverse possession. The court reasoned the fence was insufficient because this use lacked a claim of ownership of a nature sufficient to put the real property owner on notice. In conclusion, the court held the Boltes did not establish continuous use, exclusive use, or the claim of ownership necessary for an adverse possession claim and, accordingly, the court reversed the trial court ruling and remanded the case.

Jonathan Long

Spear T Ranch, Inc. v. Knaub, 691 N.W.2d 116 (Neb. 2005) (adopting the Restatement (Second) of Torts rules for disputes between users of hydrologically connected ground and surface water; holding that although Spear T did not precisely state a claim under the Restatement, Nebraska's pleading rules require the district court to allow amended claims, and determining that the Nebraska Ground Water Management and Protection Act does not abrogate any common-law claims).

Spear T Ranch, Inc. ("Spear T") alleged in the District Court for Morrill County, Nebraska, that Knaub's irrigation wells drained water from Pumpkin Creek, depriving Spear T of its surface water appropriation. Knaub moved to dismiss for failure to state a claim upon which the court could grant relief.

On appeal to the Nebraska Supreme Court, Spear T argued it stated a claim for conversion, trespass, or injunction. Knaub made two arguments in the alternative. First, the Nebraska Ground Water Management and Protection Act ("GWMPA") abrogated any common-law claims, and second, under the primary jurisdiction doctrine, the North Platte Natural Resources District ("NRD") possessed jurisdiction to determine the issues.

The court considered Spear T's prior appropriation claim and rejected it for three reasons. First, Nebraska law maintains a legal fiction to the effect that the over-pumping of groundwater cannot harm a user of surface water. Second, neither Nebraska's statutes, nor extant case law, developed a system or doctrine to address conflicts between users of surface and groundwater. Finally, if the court adopted Spear T's rule, first-in-time surface water appropriators would have a superior right to all later groundwater users. The court stated that this could shut down all the wells in areas where ground and surface water are

hydrologically connected. Therefore, the court declined to apply Nebraska's statutory surface-water appropriation rules to conflicts between users of ground and surface water. The court also rejected Spear T's conversion claim because surface water rights are usufructory, not property, rights and thus could not support a claim of conversion or trespass.

The court next considered whether Spear T stated a claim under other common-law doctrines. The court discussed various groundwater rules and concluded that the best rule was set forth by the Restatement (Second) of Torts ("Restatement"). The Restatement permitted a user of groundwater to pump water for beneficial purposes unless: it caused harm by unreasonably lowering either the water table or artesian pressure; it exceeded the user's reasonable share of the annual supply or total store; or it had a direct and substantial effect on a watercourse or lake and unreasonably harmed a user entitled to use of those waters. The Restatement determined reasonableness on a case-by-case basis and kept the test flexible by permitting consideration of many factors during the determination. Because the Restatement acknowledged and attempted to balance the competing equities of users, and because it permitted the fact finder flexibility in determining reasonableness, the court adopted the Restatement rule to govern conflicts involving hydrologically connected surface and groundwater users. Thus, the court held that a groundwater user is not subject to liability for interference unless the ground water use directly and substantially affects a watercourse or lake causing unreasonable harm to a person entitled to use of the surface water.

The court concluded that under this rule, Spear T alleged that Knaub's use of groundwater directly and substantially affected Pumpkin Creek. However, Spear T had not alleged that Knaub's actions harmed Spear T, thus, Spear T failed to state a claim upon which the court could grant relief. However, the court concluded that Nebraska's pleading rules permit a plaintiff to amend its complaint and thus, the district court erred in dismissing Spear T's claim rather than permitting Spear T to amend the claim.

The court also found that the GWMPA neither expressly abrogates a common-law claim nor demonstrates any intent in its legislative history to abrogate a claim by a surface user against a groundwater user. Moreover, the court found that the GWMPA is ambiguous regarding procedure when a party requests that the NRD take action, nor does the GWMPA authorize the NRD to remedy a past harm. Thus, the GWMPA does not abrogate any common-law claim. Finally, the court examined joinder, and held that Spear T did not need to join all the well users in the Pumpkin Creek basin because a joint tort-feasor is liable for his or her conduct that causes harm. The fact that the harm would not occur without another party's concurrent actions provides no defense. Thus, the district court erred in finding Spear T failed to

join all necessary parties. The court reversed and remanded to the district court for further proceedings.

Jeff Gillio

NEW HAMPSHIRE

Sandford v. Town of Wolfeboro, 868 A.2d 1002 (N.H. 2005) (holding the character and nature of the use that created the prescriptive easement defined the scope of that prescriptive easement, and a town had limited flexibility in exercising its prescriptive easement where the water levels the town maintained affected private property owners).

Joseph W. Sandford, Jr. ("Sandford") appealed a decision from the Carroll Superior Court of New Hampshire that determined the scope of the Town of Wolfeboro's ("town") easement included the right to flow Sandford's land as a secondary result from adjusting to the needs, desires, and circumstances of the town's water situation by controlling its dam. The superior court concluded it could not use the scope of an easement to determine prescriptive flow rights because the nature of the two rights was extremely different; instead, the court found only historically and customary use of the dam could determine the scope of an easement. On appeal, the Supreme Court of New Hampshire considered whether the superior court's assessment of the scope of the easement was proper.

Sandford owned land on the shore of Lake Wentworth in Wolfeboro. A dam controlled the lake's water level and maintained a water level of approximately 534.7 feet above sea level, which it had been since the 1920s. In 1958 Smith River Corporation deeded the dam to the town, and the deed required the town maintain certain minimum water levels in the lake, which varied by season. The deed did not specify a maximum water level for the lake. Through its predecessors in title, the town also had a prescriptive easement to flow water up to the top of the dam. As a result, for parts of each year, the town would flow Sandford's land to the same level: approximately 534.7 feet above sea level.

Sandford argued the trial court improperly defined the scope of the town's easement based on intent, rather than actual use. He contended pre-1958 water reports and other documentation established the town did not historically flow the dam, and thus his land, to the full height, but that in most years, the town maintained lower water levels. The New Hampshire Supreme Court stated the character and nature of the use that created the prescriptive easement was what defined the scope of that prescriptive easement. The court then noted it had previously addressed a similar case where the court held one acquires a right to an easement by uninterrupted use of the right at all times in accordance to the pleasure or convenience of the party claiming the right. Accordingly, the court reiterated the right to a water level "as