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Dyball v. Lennox, No. 241296, 2004 WL 345278 (Mich. Ct. App. Feb. 24, 2004)

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The court noted that MDEQ based its decision on competent, material and substantial evidence, and the trial court did not err in their review of the decision. The City of Romulus, the City of Taylor, and Wayne County argued that the trial court erred in its review of MDEQ's actions, but they did not allege any specific error in the trial court's review. On appeal, this court held that, without a more specific allegation of error, the trial court was correct in reasoning that MDEQ's decision was valid.

The court thus affirmed the trial court's decision, finding that the trial court did not err in its evaluation of the MDEQ's decision to issue the Part 111 permit allowing EDS to construct their hazardous waste underground deep injection well facility.

Ryan D. Phillips

Dyball v. Lennox, No. 241296, 2004 WL 345278 (Mich. Ct. App. Feb. 24, 2004) (holding trial court may not consider circumstances surrounding a grant when interpreting an unambiguous easement for ingress and egress to a body of water, and right of way in easement did not give rise to riparian rights).

George and Linda Dyball were riparian owners of property on Lake Fenton. The Dyball property was subject to an easement that Edith Crane granted Bob Crane in 1955. William Lennox owned a lot in Cranewood No. 1 that enjoyed a dominant estate regarding the easement. Crane's deed provided, "The Easterly 16 feet of the above described premises being reserved for the use of those parties, their heirs, assigns, and successors, owning lots in Cranewood No. 1 Subdivision . . . for the purposes of ingress and egress to and from the premises in which they may have an interest to the water's edge of Lake Fenton." The Dyballs filed a complaint seeking declaratory judgment limiting Lennox's easement use for ingress and egress only and a permanent injunction restraining improper use. The Dyballs alleged Lennox abused the easement by installing and maintaining a dock, using the premises to temporarily store boating equipment, using the premises for recreation, and attempting to exercise general dominion over the premises. Lennox argued that factual circumstances demonstrated the original grantor's intent to include use and placement of a dock within the easement's scope. Lennox asked the court for a judgment (1) declaring the easement included riparian rights for the dominant tenement holders, and (2) reflecting Lennox's rights to store the dock on the easement and continue historic dock placement at the end of the easement. The trial court denied the Dyballs' motion for summary disposition, finding that the easement was for ingress, egress, and riparian rights, and was not limited to the right to maintain a dock on the lake end of the easement.

On appeal to the Michigan Court of Appeals, the Dyballs argued

the trial court erred by considering the circumstances surrounding Crane's deed because the easement's language was unambiguous. The court had to determine whether, if the easement's language was unambiguous, the trial court could consider surrounding circumstances. In *Little v. Kin* the Michigan Supreme Court held that when the language of a legal instrument is plain and unambiguous, the court must enforce it as written and inquire no further. Lennox argued that the easement language "to the water's edge" created ambiguity because it was traditional language for creating riparian rights. Lennox failed to support his claim of ambiguity, and the court of appeals found the easement was unambiguous; hence, the trial court could not inquire into circumstances surrounding the easement grant or the time of grant.

The court then had to determine whether the deed's unambiguous language gave rise to riparian rights. According to the court's interpretation of *Thies v. Howland*, the terms "ingress" and "egress to the water's edge" did not demonstrate intent to grant riparian rights. Prior Michigan case law established that permanently mooring a boat and erecting and maintaining a dock near the water's edge are riparian rights. Since the easement's plain and unambiguous language did not permit Lennox to erect and maintain a dock or permanently moor a boat, and since Lennox could not expand the easement, the court held the trial court erred by granting Lennox summary disposition and denying the Dyballs's motion to declare the easement for access, and ingress and egress only.

Elizabeth Frost

NEBRASKA

Dep't of Natural Res. v. Bose, 267 Neb. 430 (Neb. 2004) (holding the cancellation of a water appropriation right was proper where the appropriators received sufficient notice, had not used the appropriation for more than three consecutive years, and did not demonstrate sufficient cause for nonuse).

The Nebraska Department of Natural Resources ("DNR") notified Lee and Craig Bose, holders of a water appropriation right on the Republican River, of a hearing to determine whether DNR would cancel all or part of their water appropriation because of nonuse for more than three consecutive years. The Boses attended the hearing at which Lee Bose testified. Following the hearing, DNR's director canceled the Boses' appropriation, concluding the testimony established that the Boses' had not irrigated the land subject to the appropriation from the River for more than three consecutive years. The Boses appealed the DNR ruling to the Nebraska Supreme Court contending (1) DNR did not provide adequate notice of the hearing;