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McNally v. Zadra, No. 20426-0-III, 2003 Wash. App. LEXIS 68 (Wash. Ct. App. Jan. 21, 2003)

J. Reid Bumgarner

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from other jurisdictions to conclude that the "industrial purposes" exception applied to the Kim's nursery. The court also rejected the DOE's second argument because the noncommercial garden provision differs from the Kim's commercial garden irrigation uses. Finally, the court rejected the DOE's third argument because the DOE interpreted the statute and applied it differently than in the past. An agency may not alter the plain meaning of a statute to cater to changed societal conditions. The legislature must amend the statute to properly remedy a statute's application to changing societal needs.

Thus, the court reversed the superior court's ruling, and held that the Kim's nursery fell within the industrial exception.

Adriano Martinez

McNally v. Zadra, No. 20426-0-III, 2003 Wash. App. LEXIS 68 (Wash. Ct. App. Jan. 21, 2003) (holding plaintiff landowners' rights in water system passed appurtenant to their land; plaintiff landowners' efforts to promote their shared water system's continued use complied with easement agreement; and defendant landowner forfeited rights in the water system by drilling a private well).

Plaintiffs William and Melody McNally ("McNallys") owned Lots C and D, among other property, located adjacent to defendant Elizabeth Zadra ("Zadra"), the owner of Lot A. Significantly, the lots shared a water system which included buried water lines spanning across the lots and a cistern on Lot A. The parties' predecessor in interest conveyed the lots by real estate contract establishing appurtenant easement rights in the water system. A few years later, the parties' predecessor reassigned the rights in the water system to Lot 3. In 1993, Mr. McNally disconnected power to the pump house on his land and removed the water line from the cistern located on Zadra's lot to make repairs to the water system. As a result, a series of disputes transpired between the landowners including issues of ownership and responsibility for the water system.

The McNallys sued Zadra alleging the right to receive water by running it over Zadra's lot. In 1996, the Superior Court of Stevens County granted the McNallys' motion for partial summary judgment, holding the easement in the water system was appurtenant to the McNallys' land; therefore, it passed to them as a matter of law. The McNallys also claimed Zadra drilled a separate well and should forfeit her rights in the water system. The McNallys sought damages and equitable relief for Zadra's interference with their easement rights. Zadra counterclaimed alleging breach of water and road easements, trespass, outrage, conversion and trespass to chattels. Subsequently, at a bench trial in 1999, the trial court concluded the McNallys had not breached the easement agreement and Zadra's separately drilled well effectively relinquished her rights in the water system. As such, she was

not entitled damages and thus could not mitigate by drilling her own well.

On appeal, the Court of Appeals of Washington, Division Three, Panel Two examined two partial grants of summary judgment. Specifically, the court considered whether the water system easement was appurtenant to Lots C and D, and whether the parties may offer evidence to establish the parties intended the rights of the water system easement to be assigned differently than stated in the easement agreement. In addition, the court addressed trial court's findings of fact.

First, the court explained that an appurtenant easement "applies to a specific parcel of land" and that such easements "inhere in the land and cannot exist separate from it; nor can [the easement] be converted into and easement in gross." By way of example, the court noted in *Pitman v. Sweeney* an appurtenant easement expressly mentions the land it is "intended to benefit." Here, the easement was established for the benefit for Lots A, B, C and D. As such, the court recognized the McNallys, as purchasers of Lots C and D, were entitled to the benefits of the appurtenant water system easement.

Second, the court found inadmissible any evidence offered to show the parties' predecessors intended for water system rights to be assigned differently than provided for by the easement agreement. Under the context rule, as stated in *Hollis v. Carwall, Inc.*, extrinsic evidence is not admissible if offered to prove "an intention independent of the instrument." Despite such a restriction, Zadra attempted to submit affidavit testimony from the creator of the easement agreement. However, the court excluded the affidavit which attempted to show intent contradictory to the easement agreement and noted McNallys' deed expressly established Lots C and D's beneficial use of the water system. Accordingly, the court concurred with the decision below and excluded Zadra's proffered evidence as "inadmissible under the context rule."

Next, the court held the water system easement inhered in the land and was appurtenant to Lots A, B, C and D such that no legal instrument could reassign the rights. The court explained, all easement rights existed "appurtenant to the property itself" and passed exclusively to owners of Lots A, B, C and D. Despite the assignment of water system rights to Lot 3 by Zadra's predecessor in interest, the court found that such an assignment could not convert the easement already annexed to Lots A, B, C and D. The easement passed to the owners of Lots C and D by deed, and Zadra's predecessor in interest's attempted assignment failed to dilute the McNallys rights in the water system.

Finally, the court concluded all findings by the trial court were "supported by substantial evidence," and, even if erroneous, were not prejudicial. Specifically, the court examined Zadra's claim for damages. The court determined Mr. McNally did not breach the easement agreement when he disconnected power to the pump house, requested retroactive power service payments, and removed the water

line from the cistern. No breach of the easement terms occurred because Mr. McNally undertook such action to ensure continued use of the shared water system, a right he enjoyed under the easement agreement. Accordingly, Zadra was not entitled to damages for breach of the easement agreement and thus could not mitigate by drilling a separate well.

Still in effect, the easement agreement required forfeiture of interest in the water system if the users "secure or obtain a working well." The court noted Zadra's separately drilled well satisfied her use requirements of the water system; therefore, her duty to forfeit rights in the shared system was not excused.

Thus, the court affirmed the superior court's holding in favor of the McNallys.

J. Reid Bumgarner

O'Hagan v. Kelley, No. 26227-4-II, 2002 Wash App. LEXIS 3192 (Wash. Ct. App. Dec. 31, 2002) (holding that to establish an injury from decreased water level due to an excavation project, plaintiff must establish the excavation project caused the decreased water level and not merely that the water level fell after they completed excavating).

The O'Hagans, the Kelleys, and the Hulberts jointly used water from Deer Creek in Pacific County. In 1993, Pacific County authorized the Pacific County Drainage District ("PCDD") to excavate a drainage ditch from Deer Creek. During the excavation project, Brian Hulbert, the PCDD commissioner, selected the excavation site. After PCDD completed the excavation project, the water level fell below the O'Hagan's culvert. Consequently, the O'Hagans sued Pacific County, PCDD, and the Hulberts for diverting water, negligently or intentionally, from the O'Hagans' property. Additionally, the O'Hagans sued the Kelleys for moving their diversion point, which the O'Hagans claimed also diverted water from their property. The Pacific County Superior Court found the Kelleys had moved their diversion point and diverted water from the O'Hagan's property. However, the superior court granted summary judgment to Pacific County and PCDD on the negligence claim, finding they did not owe the O'Hagans a special duty. The superior court also dismissed the remaining claims against Pacific County, PCDD, and the Hulberts, finding the O'Hagans did not establish the excavation altered the flow of Deer Creek. The O'Hagans appealed to the Washington Court of Appeals, challenging the superior court's grant of summary judgment and dismissal.

The appellate court first addressed whether the superior court correctly concluded the excavation project did not cause the water level to fall. The superior court found the Deer Creek water level fell below the culvert after PCDD completed the excavation project. However, the superior court concluded that the Kelleys caused the