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Hess v. McLean Feedyard, Inc., No. 07-99-0519-CV, 2000 Tex. App. LEXIS 8114 (Tex. App. Nov. 28, 2000)

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pressure, quantity, and volume of water provided, and explored the possibility of drilling a private well on their lots. Dyegard denied their request, claiming covenant eighteen barred water well drilling. Subsequently, Dyegard amended covenant eighteen to expressly prohibit well drilling for private water sources.

The Hoovers filed suit for declaratory judgment in the District Court of Parker County, claiming the covenants did not restrict water well drilling on their lots. Dyegard's response stated the amended covenants specifically prohibited drilling water wells and further, the original covenant language prohibited water well drilling. The Hoovers filed a motion for summary judgment. The trial court granted the Hoovers' motion.

Dyegard appealed to the Second District Court of Appeals of Texas, and contended the trial court erred because the original covenants expressly prohibited well drilling. Moreover, Dyegard argued the trial court erred because the amended covenants were enforceable.

Dyegard argued the covenant clearly prohibited drilling for water, because water is a mineral. The court of appeals did not agree. The appellate court pointed to *Fleming Foundation v. Texaco, Inc.*, where that court held the definition of minerals excluded water. Furthermore, the Texas Property Code defines mineral to mean oil, gas uranium, sulphur, and other substances, yet, purposely omits water. The appellate court also noted that laws pertaining to groundwater developed entirely separately from oil and gas law. Covenant eighteen's extensive list of mining prohibitions contributed to the court's conclusion that the covenant referred to minerals, and not water. The appellate court concluded the Hoovers could drill water wells under the original covenants, because water is not a mineral.

Dyegard maintained the amended covenant clarified any ambiguity by clearly prohibiting water wells within Oak View Estates. The Hoovers argued the amended covenants were not valid, because the original covenants did not authorize Dyegard to make modifications to the covenants without property owner concurrence. The appellate court concluded the original covenants clearly reserved the developer's right to amend the covenants, thus finding Dyegard's amendment valid as a matter of law.

The appellate court affirmed summary judgment that the original covenants allowed the Hoovers to drill water wells, reversed summary judgment regarding the amended covenants' validity, and remanded for further proceedings.

Holly Kirsner

Hess v. McLean Feedyard, Inc., No. 07-99-0519-CV, 2000 Tex. App. LEXIS 8114 (Tex. App. Nov. 28, 2000) (affirming no-evidence summary judgment motion on basis that landowners failed to produce expert evidence on the cause of alleged water contamination).

Jake Hess, II and neighboring landowners (collectively, "Landowners") sued McLean Feedyard, Inc., ("McLean") for allegedly contaminating their surface and groundwater when lagoons holding cattle sewage overflowed during a period of heavy rains. In response, McLean filed a no-evidence summary judgment motion asserting the landowners had not provided evidence of causation. The trial court granted McLean's motion and denied the landowners any relief. The landowners appealed, contending genuine issues of material fact precluding summary judgment were raised as to causation, and the trial court abused its discretion when it excluded affidavits as summary judgment evidence. The Texas Court of Appeals affirmed that the trial court did not err in striking the affidavit of the landowner's expert and in granting McLean's no-evidence summary judgment motion.

McLean operated a commercial cattle feedyard, located in the Little Skillet Creek watershed, with a capacity of 25,000 cattle and a series of lagoons to collect and hold cattle waste. The discharge gates of McLean's lagoons were located approximately one mile upstream from the nearest landowner, Hess, who also held 4,000 cattle in his preconditioning operations. On three occasions in April 1997, McLean's lagoons overflowed after repeated heavy rains. McLean properly reported the discharges to authorities.

The Landowners claimed the discharges from the lagoons contaminated their surface water and groundwater supplies, making them unsuitable for consumption by humans and livestock. McLean did not deny the discharges contained manure, but contended the water volume passing through Little Skillet Creek diluted the waste so that downstream landowners were not harmed. However, the Landowners submitted with their summary judgment motion, the affidavit of their expert witness as proof that the lagoon discharges did damage their water supplies.

Under Texas Rules of Civil Procedure, the proponent of an expert opinion submitted by affidavit in a summary judgment proceeding has the burden to show the expert opinion met the requirements of Texas Rules of Evidence. Furthermore, the trial judge is the gatekeeper who determines the admissibility of expert evidence and the appellate court only reviews whether a trial judge abused his discretion.

In considering the Landowners' expert witness affidavit, the court determined the expert opinion constituted bare conclusions and did not provide supporting facts. The most damaging aspect of the expert's submission, according to the court, was the complete lack of data regarding water quality before the April 1997 lagoon overflows. Thus, the court found the expert based his opinion on conjecture or speculation regarding the water quality before the heavy rains. Thus, the opinion did not constitute causation evidence. Furthermore, in response to McLean's no-evidence summary judgment motion, the burden fell on the Landowners to present evidence that raised a genuine fact issue. A no-evidence summary judgment is improperly granted if the non-movant presented more than a scintilla of probative evidence. The Landowners contended the affidavit of their expert

presented the necessary causation evidence, but the trial court disagreed. Therefore, the reviewing court concluded the trial court did not abuse its discretion in striking the affidavit and the trial court properly granted the no-evidence summary judgment motion.

John A. Helfrich

VIRGINIA

Carr v. Kidd, 540 S.E.2d 884 (Va. 2001) (holding an historic mean water line that is unaltered by man is the appropriate measurement in the apportionment of riparian rights, and a riparian owner will gain the right to water frontage unless the grantor of the interest in such riparian property clearly retains such right for himself or another on the face of the granting deed).

Plaintiffs, Robert C. and Marjorie B. Kidd, and defendants, the Mark S. and Lori Crowley, owned adjoining land fronting a cove located on Tanner's Creek in Norfolk, Virginia. Upon the Crowleys' objection to the Kidds' desire to construct a pier into the cove, the Kidds hired Robert L. Taliaferro, a riparian surveyor, to determine each of the parties' riparian rights. Taliaferro determined the Kidds' proposed pier was within their riparian rights and the Crowleys existing pier was encroaching on the Kidds' rights. The Kidds sued the Crowleys requesting a determination of each of the parties' rights and claiming trespass.

In response, the Crowleys hired their own surveyor, Robert M. Kennedy, whose survey results were nearly identical to those of Taliaferro. The parties reached a tentative settlement that would have required the Crowleys to remove their current pier and allow construction of new piers by both parties within their determined rights.

Upon learning of the pending settlement, Leslie G. Carr and Janice N. Kohl (collectively, the "Carrs"), neighbors of the Crowleys, intervened claiming the Kennedy survey incorrectly drew rights across the Carrs' property.

The trial court referred the matter to a commissioner in chancery who recommended allocation of riparian rights pursuant to the Kennedy survey. The commissioner noted in his report that a historic mean water line, or one unaltered by man-made improvements, is the appropriate measurement to determine riparian rights. The trial court affirmed the commissioner's report and entered judgment accordingly.

On appeal, the Carrs first claimed the commissioner's acceptance of the Kennedy survey was inappropriate because the survey used an incorrect mean low water line measurement in determining each of the parties' riparian rights. Second, the Carrs claimed the source deed