

1-1-2001

Carr v. Kidd, 540 S.E.2d 884 (Va. 2001)

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Megan Becher-Harris, Court Report, Carr v. Kidd, 540 S.E.2d 884 (Va. 2001), 4 U. Denv. Water L. Rev. 523 (2001).

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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

for both the Kidd and Crowley properties did not contain an express grant of riparian rights and, therefore, the Kidds and Crowleys had no legal right to claim riparian rights to their properties.

With respect to the mean water line claim, the supreme court recognized the Kennedy survey used a mean water line designated in 1908, when the parties' properties were originally platted ("Historic MWL"). The Carrs claimed the correct measure to determine riparian rights was the current mean water line ("Current MLW"). The supreme court stated the general law governing the measurement and allocation of riparian rights is that any man-made improvements to a riparian owner's shoreline that alter the location of the shoreline should be disregarded in a determination of riparian rights, but that any natural accretion of the shoreline may be considered.

The supreme court recognized evidence before the commissioner that indicated man-made improvements altered the Carrs' shoreline. As such, the supreme court concluded the trial court correctly affirmed the commissioner's decision to use the Kennedy survey that used the Historic MWL to determine the parties' riparian rights.

With respect to the Carrs' claim that the Kidds and Crowleys were not granted riparian rights with their land, the supreme court determined that an owner of riparian land has a right to water frontage of such riparian land unless the grantor of the land on the face of the granting deed manifestly retains those rights. The supreme court held there was no evidence of any severance or retention of the riparian rights to either the Kidd or the Crowley property in the chains of title to both of their properties.

Megan Becher-Harris

WASHINGTON

Hsieh v. Wash. Dep't of Ecology, No. 19126-5-II, 2001 Wash. App. LEXIS 3 (Wash. Ct. App. Jan. 2, 2001) (affirming dismissal of permit holders' action, finding the statute of limitations and the doctrine of laches barred declaratory relief, conversion, and injunction claims, reversing the judgment awarding attorney fees, and finding the mortgage was extinguished at the time of foreclosure and the permit holders' action was not frivolous).

Jack and Dorothy Hsieh ("Hsiehs") had a water permit to appropriate water from the Columbia River to irrigate their property. Appellee, State of Washington Department of Ecology, established this water permit initially when it issued the permit to the Esmieu Trust, who later assigned the permit to the Hsiehs. In order to secure a loan, the Hsiehs executed a mortgage to Appellee, John Hancock Mutual Life Insurance Co. ("John Hancock"), on the property covered by the water permit. In 1985, John Hancock foreclosed on the mortgage. Appellees, J.R. Simplot Co. ("Simplot") and Iowa Beef Processors