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# Environmental Litigation: Arkansas Court of Appeals Upholds Dismissal of Waterway Contamination Claims for Lack of Causation and Proof of Actual Damages

## Arkansas Environmental, Energy, and Water Law Blog

01/28/2016

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The Arkansas Court of Appeals considered a variety of issues in a fall 2015 opinion involving alleged contamination of a waterway. See *Cross v. Western Waste Industries*, 2015 Ark. App. 476 (2015).

The opinion addressed whether a Miller County Circuit Court properly granted summary judgment and dismissed nuisance, trespass, and negligence claims.

The court upheld the lower court decision noting the failure to identify proof of contamination or its source is a fatal flaw if the plaintiff is required to show causation or actual damage.

In 2004, Gary Cross and along with other property owners, (the “plaintiffs”) filed suit against Western Waste Industries (“Western”) and Beazer East, Inc. (“Beazer”), for allegedly introducing contaminants into a local watershed and causing damage to several hundred acres of their land near Texarkana, Arkansas.

Western operated a municipal solid waste landfill from 1976 to 1993 located upstream from the plaintiffs. Further upstream was Beazer, a wood treatment facility which was placed on the Environmental Protection Agency’s “Superfund” National Priorities List for introducing contaminants into the soil and groundwater near its facility in 1980. In 1990, the United States Fish and Wildlife Service began a study of the Sulphur River Management Area, testing samples of water, sediment, and fish upstream, downstream, and on the plaintiffs’ property. The 1993 report identified toxins in the area, but did not identify the source of the contamination.

In 2004, the plaintiffs filed suit against Western and Beazer alleging that they had been harmed by the introduction of the contaminants into the watershed. They testified about sights and smells experienced on their property and sought damages for nuisance, trespass, and negligence.

Western and Beazer filed a motion for summary judgment.

The defendant organizations argued that plaintiffs had not presented evidence of causation or actual harm. Their motion included expert-witness affidavits showing that none of the samples taken from the plaintiffs’ property in the 1993 report displayed signs of contamination. Also, expert testimony indicated

that there were other potential sources of contamination in the watershed and that the impact of any historic releases of pollution upstream had diminished to a negligible level.

The trial court granted the motion, and dismissed the lawsuit finding no evidence of causation or damages.

The plaintiffs appealed to the Arkansas Court of Appeals.

The Court of Appeals addressed first the nuisance claim.

Nuisance is defined as conduct (including odor, noise, dangerous activity, and contamination of surface or groundwater) by one landowner that unreasonably interferes with the use and enjoyment of the lands of another. In order to constitute nuisance, there must be an intrusion that results in physical harm certain, substantial, and beyond speculation and conjecture.

Even though the Cross and other property owners testified about sights and smells of contamination on their property, they did not identify the source of those sights and smells. Further, Western and Beazer presented evidence from the Report that they did not contaminate the plaintiffs' land, and the plaintiffs supplied no proof in the alternative.

The court held that this was sufficient to dismiss the nuisance claim for lack of evidence of causation.

The Arkansas Court of Appeals next addressed the trespass claim.

In order for a trespass to occur, there must be physical invasion of real property that is caused by a defendant and resulting in damages. Western and Beazer again relied on the expert affidavits showing that none of the samples taken from the plaintiffs' property in the Report displayed signs of contamination.

Without proof of contamination, the court concluded that there was no evidence that the companies physically invaded the property so summary judgment on the trespass claim was also affirmed.

Finally, the court concluded that the trial court properly granted summary judgment on the negligence claim.

In order to succeed on a negligence claim, the plaintiff must prove that the defendant breached a duty owed to it and that breach actually and proximately caused it injury resulting in damages.

Like appellant's nuisance claim, the court ruled that the negligence claim also failed because it lacked proof of causation. There was no evidence of contamination on the plaintiffs' property, nor did the evidence establish any source of potential contamination.

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