

WASHINGTON SUPREME COURT AFFIRMS SUMMARY JUDGMENT AGAINST CATTLE RANCHER FOR “SUBSTANTIAL POTENTIAL” TO VIOLATE WATER QUALITY LAWS

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Lemire v. Washington Dept. of Ecology, et al., 178 Wn.2d 227, 309 P.3d 395
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In a case illustrating some of the risks in summary judgment practice before the Washington Pollution Control Hearings Board (“PCHB”), the Washington Supreme Court has ended a lengthy dispute between the State Department of Ecology (“Ecology”) and Joseph Lemire, a cattle rancher in Columbia County. On August 15, 2013, the court affirmed the PCHB’s grant of summary judgment dismissing Mr. Lemire’s appeal of an Ecology administrative order. In an 8-1 decision, the court agreed with the PCHB that Mr. Lemire failed to raise a genuine issue of material fact as to whether allowing his cattle access to a stream created a “substantial potential” for violation of state water quality laws.

Background

Mr. Lemire owns approximately 265 acres of land near Dayton in eastern Washington on which he operates a small cattle ranch. Pataha Creek, a tributary of the Tucannon River, flows through the property. Under Washington’s water pollution control act, RCW chapter 90.48, Ecology has authority to issue

administrative orders whenever it determines that a person creates a “substantial potential” to violate state water quality laws.

An Ecology employee, Chad Atkins, observed the Lemire property in February 2003, February 2005, February 2006, March 2008, and in March, April, and early May of 2009. Mr. Atkins stated in a declaration that he observed livestock with direct and uncontrolled access to Pataha Creek, manure visible in the stream corridor, severe overgrazing of the riparian corridor, livestock confinement areas adjacent to the creek, numerous bare ground cattle trails leading to and along Pataha Creek, extensive hoof damage and erosion along stream banks, and a lack of vegetation by the creek “due to livestock grazing and trampling.” PCHB No. 09-159, Order Granting Motion to Dismiss and Motion for Summary Judgment (Oct. 27, 2010) at 3. According to the Supreme Court majority, Mr. Atkins also stated that he observed cattle “wallowing” in the creek.

Based on Mr. Atkins’ observations, Ecology concluded that “the consistent, regular, and extended access of cattle to Pataha Creek over the course of many years demonstrated negative impacts to water quality and a substantial potential to cause water pollution.” PCHB No. 09-159 at 3. Ecology issued an Administrative Order to Mr. Lemire, requiring livestock fencing in pasture or rangeland grazing areas, confinement and feeding area controls, and future access to the property by Ecology personnel to inspect Pataha Creek.

Mr. Lemire appealed the Administrative Order to the PCHB. Ecology moved for an order granting summary judgment and dismissing the appeal, on the ground that the conditions Mr. Atkins observed on the Lemire property – specifically, cattle having regular and extended access to Pataha Creek – create a substantial potential to violate state water quality laws. In response, Mr. Lemire contended that disputed material facts preclude summary judgment on the issue of whether his cattle management practices create a substantial potential of pollution.

Mr. Lemire conceded that his cattle drink from the stream and cross the creek on small trails to reach pasture areas, but disputed Atkins’ observation of cattle “wallowing” in the creek. He stated that the banks of Pataha Creek are naturally sparsely vegetated, and were not denuded by his cattle. He stated that he employs best management practices (“BMPs”) at the site to manage his livestock, including installation of “drift fencing” in areas where the cattle had broken down

the stream banks. Mr. Lemire asserted that, to protect them from flash flooding, his cattle are not even permitted access to the creek from late November through the run-off period in April. Mr. Lemire's notice of appeal also contended that Mr. Atkins had seen gopher mounds, not manure, in the stream corridor.

The PCHB characterized its review of the summary judgment motion as requiring it to "consider whether practices at the Lemire property violated, or created a substantial potential to violate, water pollution control laws, and if so, whether the order was appropriate under the circumstances." PCHB No. 09-159 at 12. According to the PCHB it was "undisputed in the record before us on summary judgment that cattle have access to the creek, cross it, and have, at a minimum, the potential to deposit organic material in the stream and around the riparian corridor." *Id.* The PCHB continued: "Ecology need only show that the actions at the Lemire property posed substantial potential to discharge pollution to the water of the state," and that "Ecology has met its burden by presenting the detailed observations" of Mr. Atkins. *Id.* Ruling that Mr. Lemire's "conclusory" allegations and assertions "are simply not sufficient to create a material issue of fact with respect to the presence of cattle along and in the stream," the PCHB concluded that Ecology appropriately issued the Administrative Order.

The Columbia County Superior Court, observing that Mr. Lemire "never had his day in court," reversed the PCHB's grant of summary judgment and invalidated Ecology's Administrative Order. Ecology's appeal to the Supreme Court followed.

The Court's Decision

The Supreme Court reinstated the PCHB's summary judgment order and Ecology's Administrative Order. The court began by observing that, in an appeal from an administrative decision by the PCHB, summary judgment can be affirmed "only where the undisputed facts entitle the moving party to judgment as a matter of law." From that starting point, the court went on to determine that substantial evidence supports Ecology's Administrative Order. This approach suggests a quite stringent standard for determining whether a disputed issue of material fact exists.

Explaining that "substantial evidence will support Ecology's order if the evidence shows that conditions on Lemire's ranch have substantial potential to violate

prohibitions against discharging into state waters organic material that pollutes or tends to cause pollution,” the court discussed in detail Chad Atkins’ summary judgment declaration, characterizing it as “evidence Ecology presented at the administrative hearing before the Board.” Inasmuch as there was no administrative hearing before the PCHB, this was obviously a misstatement by the Supreme Court; the crux of Lemire’s appeal was that he had been denied a hearing.

The court stated: “We acknowledge Lemire’s challenges to Atkins’s observations, but substantial evidence nonetheless supports Ecology’s order. And, reviewing the record in the light most favorable to Lemire, the evidence supports a grant of summary judgment for Ecology. Atkins averred that his observations of the cattle’s access to the stream was consistent with the kind of pollution found in the stream, such as sediment content, fecal coliform, and other disturbances of the water quality. This was all Ecology was required to prove Ultimately, as the Board recognized, Lemire did not dispute those facts that were operative to Ecology’s order. In particular, he did not dispute that his cattle have unrestricted access to the stream.”

Justice J.M. Johnson dissented, objecting that the majority was disregarding the standard of review for summary judgment, “glossing over” genuine issues of material fact, and making impermissible credibility determinations. The dissenting opinion set out a point-by-point comparison of Atkins’ and Lemire’s statements (something not included in either the PCHB order or the majority decision), concluding that “Lemire’s statements amount to much more than ‘conclusory allegations’ and create genuine issues of material fact about whether or not the conditions Ecology’s witness (not a qualified ‘expert’) allegedly observed are present.”

Observing that the PCHB’s “cursory dismissal of Lemire’s statements as ‘conclusory allegations’ was inappropriate,” the dissent argued that Lemire’s appeal should have been remanded for an evidentiary hearing. In response, the majority noted that there are “no facts in the record” to support the dissent’s suggestion that Mr. Atkins’ observations were made from a distance outside the Lemire property, or that the manure piles he saw were actually gopher mounds. This may be because some of the facts cited in the dissent were drawn from Mr. Lemire’s notice of appeal.

Conclusion and Implications

Mr. Lemire's inability to obtain his "day in court" to challenge Ecology's administrative order is clearly attributable in part to Ecology's extremely broad authority under Washington water pollution laws. However, it is also partly attributable to Ecology's and the PCHB's inclination toward more frequent use of summary judgment motions to dispose of appeals.

This decision illustrates some of the challenges and risks inherent in summary judgment practice before the Pollution Control Hearings Board. Factual assertions set out in a notice of appeal may not be recognized as creating "disputed issues of material fact" unless they are also submitted in a declaration. Even where allegations are separately set forth in a declaration, the PCHB may disregard them as "conclusory" or insufficiently "material" to avoid summary judgment. Most importantly, litigants should maintain a sharp focus on the proper standard of review on summary judgment. Appellants who invoke "substantial evidence" in the summary judgment context are in effect inviting the PCHB to weigh the evidence and determine credibility without a hearing on the merits.