6/17/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00179 COA

GORDON KLEYLE APPELLANT

v.

EXXON CORPORATION APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. R. I. PRICHARD III

COURT FROM WHICH APPEALED: PEARL RIVER COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT: CHERYL D. JOHNSON

LAURIE J. GIPSON

ATTORNEY FOR APPELLEE: S. WAYNE EASTERLING

NATURE OF THE CASE: DAMAGES TO REAL PROPERTY

TRIAL COURT DISPOSITION: JURY VERDICT FOR DEFENDANT

MANDATE ISSUED: 7/8/97

BEFORE McMILLIN, P.J., COLEMAN, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

Gordon Kleyle filed suit against Exxon Corporation to recover for damages to real property. He alleged that unknown chemical agents were released during a "blowout" of an Exxon gas well located on Kleyle's property. The jury returned a verdict for Exxon. Kleyle appealed arguing that certain of his evidence was erroneously excluded, that improper Exxon evidence was admitted, that the jury was not properly instructed, and that the jury's verdict was contrary to the evidence. We disagree with each contention, and affirm.

THE FACTS

In March 1989, Kleyle began negotiating with William Amacker for the purchase of twenty five acres of property west of Poplarville. At the time, Amacker was negotiating with Exxon Corporation for compensation for Exxon's use of the property in conjunction with a gas well known as Koch # 1. Exxon held a valid mineral lease to the property. Kleyle testified that he and Amacker agreed to wait until Exxon executed a release for the damages before closing on the sale of the property. In April 1989, Amacker reached a settlement with Exxon for certain damages to the property, including the drill site itself and four acres of timber that Exxon cleared to install the well. Exxon paid Amacker $4, 000 prior to Kleyle's purchasing the property.

In May 1989, a blowout of Koch # 1 occurred. A pressure valve on the gas well malfunctioned and certain gases and/or liquids escaped before the well was repaired. Exactly how the blowout occurred and the specific immediate consequences are not clear since neither party offered testimony at trial on what happened. This occurred over a month before Kleyle purchased the property. On June 28, 1989, Kleyle purchased the twenty five acres from Amacker for $35,000. The warranty deed from Amacker to Kleyle stated that "the Grantee acknowledges and accepts this location and recognizes that all claims for damages to the surface have been settled between Grantor and Exxon Corporation . . . ." Kleyle alleges it was two weeks after this closing that he first learned of the blowout on the well.

Kleyle testified that after taking possession he noticed dead fish and vegetation in the pond. It was then that he was first told by an Exxon employee that the blowout occurred. Later that summer he noticed a large number of dead and dying trees and vegetation in the drainage area of the land. In an attempt to revive the pond, Kleyle twice drained the pond and restocked it. Each time the fish died within a few days.

Kleyle contacted Kenneth E. Rich, a retired biologist with the Mississippi Department of Wildlife, to assess the condition of the pond. On September 5, 1989, Rich tested the pond as requested by Kleyle. Rich testified that he noticed an oily scum on the surface of the pond which was not of biological origin. Rich performed a number of tests to determine water quality. He testified that the tests indicated that the pond was more alkaline than normal, had a low oxygen content and increased "conductivity" which he attributed to the presence of sodium chloride or other salt in the water. Rich did not give an opinion as to the possible source of the pond conditions he found. Rich recommended either moving the pond out of the path of the toxic elements or removing twelve to eighteen inches of bottom mud from the pond to remove any contamination.

Kleyle testified that in November 1989 he cleaned the pond by taking twelve to fifteen inches of mud from the pond, refilled the pond with water, limed the pond, and added phosphate. Kleyle restocked the pond with catfish in 1990 and noticed that some fish died. Kleyle testified that a filmy liquid appeared on the pond, having drained from a half acre on the other side of a drainage culvert. Once Kleyle dug the bottom out of the drainage area, the problem with the dying fish stopped.

Approximately one year after Kleyle purchased the property, Exxon abandoned the location and restored the well site. Exxon removed the above-ground equipment and hauled dirt to the site to put the surface back in condition. After Kleyle complained, Exxon also removed several barrels and a tank that had been buried on the site. In addition to the damage to the pond, Kleyle experienced

difficulty in getting anything to grow on the site where Exxon had buried oil refuse. Kleyle first planted clover which turned yellow and died after a rain. Kleyle then planted peas and other crops, but without success. On October 22, 1990, Kleyle was reimbursed by Exxon for the $693.47 he had spent for seed and feed. The release specifically stated that it did not cover "damages to [Kleyle's] farm pond caused by the pressure relief at the well site."

At trial Exxon offered testimony from Floyd Benjamin James, the president of James Laboratories. His environmental testing laboratory performed soil and water tests on Kleyle's property on August 24, 1989. Samples of water were taken from several points in the pond and soil samples were also taken from different locations. The tests results showed that the pond contained an unusually low level of chlorides or salts and that there were no salts or chlorides in the soil.

Each side put on an expert witness as to the value of the property before and after the blowout. Kleyle's witness, Gene Alexander, a licensed real estate broker and land appraiser, testified that the before value of the property was $37,000 and the after value was $15,000, a difference of $22,500. Exxon's witness, David Earl Johnson, a real estate salesman, testified that the before value of the property was $24,000 and the after value of the property was $23,040.

DISCUSSION

I. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN FAILING TO ADMIT THE COMPETENT, RELEVANT, AND MATERIAL EVIDENCE WHICH WAS CRUCIAL TO THE APPELLANT'S PRIMA FACIE CASE.

Kleyle contends that the trial judge erred in not allowing Kleyle to testify as to his contacts with other laboratories to perform testing on his land and pond. Kleyle proffered that these laboratories stated that they would have a conflict of interest in testing for him due to work they were already doing for Exxon or the possibility of losing future work with Exxon. Kleyle contends that this testimony was crucial to show bias on the part of James Laboratories and its test results.

Kleyle did not attempt to bring out this testimony during his presentation of his case. It was only after the defense had rested that Kleyle was called as a rebuttal witness. When Kleyle sought to testify as to others laboratories he had contacted, objection was raised that the testimony was not proper rebuttal. The court sustained the objection and stated that the testimony was "repetitious," noting that Kleyle testified on direct as to whom he contacted. Specifically, Kleyle had testified that he also contacted Mississippi State University to perform testing. The trial judge stated, "I assume if he had contacted other people he would have continued on with his Direct testimony at that point; so it is not in rebuttal." The court also found that the testimony as to what Kleyle was told would be hearsay not within any exception to the hearsay rule.

Kleyle's contention is that the testimony would be admissible under M.R.A.P. 616, which states: "For the purpose of attacking the credibility of a witness, evidence of bias, prejudice, or interest of the witness for or against any party to the case is admissible." Kleyle cites as support *Lacy v. State,* 629 So. 2d 591, 594 (Miss. 1993). In that case, the supreme court reversed the criminal convictions because the trial court had improperly restricted cross-examination of the State's witnesses as to possible bias on the part of the witnesses.

In the present case, the question was the bias of James Laboratories. Kleyle was not restricted in cross-examining Benjamin James as to his possible bias and that of his company. Kleyle questioned James extensively as to his laboratory's relationship with Exxon and the possible risks of working against Exxon. Whether other laboratories were biased or showed bias was irrelevant.

Kleyle also raises the failure of the court to allow him to testify that American Laboratories had conducted tests on his property for Exxon. Again, this proffer of testimony was made after the conclusion of the defense's case and in rebuttal. The court found that the company representative for Exxon had been present during the trial. He could have been called as an adverse witness to testify as to other tests conducted; to allow Kleyle to testify as to what he was told about the testing would be hearsay. The trial court was correct. No hearsay exception is applicable to Kleyle's testimony.

In each instance, the court indicated that similar non-hearsay testimony could have been presented to the jury during Kleyle's case-in-chief. The disputed testimony was offered through Kleyle, would have constituted hearsay, and was not proper rebuttal. There is no indication that fact-based testimony as to testing on his property by American Laboratories would have been excluded if offered through the Exxon representative.

II. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN FAILING TO EXCLUDE ERRONEOUS, IMPROPER EVIDENCE, AND WITNESS TESTIMONY WHICH WAS OVERLY PREJUDICIAL, SUCH THAT THE PREJUDICIAL EFFECT OF THE EVIDENCE OUTWEIGHED ITS PROBATIVE VALUE.

Kleyle argues that the trial judge abused his discretion in qualifying David Earl Johnson as an expert in the area of land sales and allowing his opinion testimony since Johnson was not licensed as an appraiser pursuant to Miss. Code Ann. 73-34-5 (Supp. 1993). Kleyle also argues that Floyd Benjamin James should not have been allowed to testify as to test results where he did not personally perform the testing.

Section 73-34-5 was passed by the Mississippi legislature on April 9, 1993, requiring a license for real estate appraisers. At the January 1994 trial, Johnson was offered by Exxon as an expert witness as to the value of real estate in Pearl River County, specifically Kleyle's property. Johnson had been in the real estate business for fourteen years and had bought and sold property in the area. He had been engaged by Exxon to determine the before and after value of Kleyle's property as of 1989 and had examined the property on May 8, 1991, and arrived at his conclusions as to the value before the new law came into effect. Kleyle's expert, Gene Alexander, was licensed under the new law. The court concluded that since Johnson had been employed and done all his work before the enactment of the new statute that the testimony should be allowed.

M.R.A.P. 702 provides that a witness who is qualified as an expert by knowledge, skill, experience, training or education may testify in the form of opinion testimony. "Generally, the decision of whether or not an expert witness is qualified to testify is within the trial court's [sound] discretion . . . The test is whether a witness 'possesses peculiar knowledge or information regarding the relevant subject matter which is not likely to be possessed by a layman.'" *Goodson v. State*, 566 So. 2d 1142, 1145 (Miss. 1990), quoting *May v. State*, 524 So. 2d 957, 963 (Miss. 1988) (citation omitted).

Two other statutes that attempted to restrict the admission of certain kinds of evidence were

separately addressed by the supreme court and found invalid. "The rules and standards by which evidence is adjudged competent for use in a trial are the concern of the department of government where trials take place: the judicial department." *Hall v. State*, 539 So. 2d 1338, 1344 (Miss. 1989). The court's rulemaking power is a function of separation of powers and therefore no legislative enactment can reduce the judiciary's discretion in determining the admissibility of evidence. *Whitehurst v. State*, 540 So. 2d 1319, 1323-24 (Miss. 1989).

In this case, there was no manifest error in allowing Johnson's testimony. His qualification were established and the court did not abuse its discretion in allowing him to testify.

Next, Kleyle argues that James should not have been allowed to testify on the specific procedures used by Greg Parker in performing the random samples on Kleyle's pond where James took no part in obtaining the samples, performing the tests, or overseeing the results of the tests on the samples. Kleyle also complains about James being allowed to testify as to a sketch drawn by Parker showing the locations where samples were taken. Parker was no longer employed by James Laboratories at the time of trial. The court overruled Kleyle's objections, find the testimony permissible under the business records exception of the hearsay rule under M.R.A.P. 803 (6).

Rule 803 (6) provides:

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

Kleyle concedes that James should have been allowed to testify as to his knowledge as a laboratory president concerning the standard procedures followed by employees of James Laboratories when performing specific tests. James further testified as to his familiarity with the standard procedures governing the maintenance of records and the tests followed. He testified that it was customary to show of the location of the samples taken by preparing a strip map and that the records were maintained by his company in the ordinary course of business. We can find no abuse of discretion in allowing James to testify from his company's business records.

III. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN FAILING TO PROPERLY INSTRUCT THE JURY AND/OR BY OMITTING PROPER JURY INSTRUCTIONS.

Kleyle argues that the court erred in granting the following two instructions:

JURY INSTRUCTION C-6

The Court instructs the jury that the burden of proof is on the Plaintiff to establish all elements of his case by a preponderance of the evidence. You are further instructed that if the Plaintiff fails to establish by a preponderance of the evidence that the blowdown of the well was a proximate cause of the Plaintiff's damages, if any, then it is your sworn duty to find for the Defendant.

JURY INSTRUCTION C-7(2)

The Court instructs the jury that if you find the deed dated June 28, 1989 constituted a settlement between Williams Amacker and Exxon Corporation for all damages, if any, to the land, involved, then it is your sworn duty to find for the Defendant.

The Court instructs the jury that if you find from a preponderance of the evidence that the deed dated June 28, 1989 constituted a settlement between William Amacker and Exxon Corporation of damages to the surface only around the well, then you must continue to deliberate the following issues.

The Court instructs the jury that a release dated October 22, 1990 between the Plaintiff and the Defendant is in evidence. You must determine the legal significance of that release, if any, and if you find it settled all damages to the surface except the pond then you must restrict any verdict you might otherwise return against the Defendant if you find for the Plaintiff to damages, if any, to the pond.

The Court instructs the jury that if you find Plaintiff suffered damages to his real property proven to you by a preponderance of the evidence caused by the actions of the Defendant and such damages are not released either of the above two documents, then you shall continue your deliberations to determine what damages, if any, the Plaintiff suffered as proven to you by a preponderance of the evidence by the Plaintiff.

Kleyle asks the Court to review these instructions under plain error, since no objection was raised to the instructions at trial. In fact, counsel explicitly stated that he had no objection to the instructions.

The burden of establishing causation was on the plaintiff. Kleyle had the burden of proving that the blowout caused him damages. Exxon had pled affirmatively the two document as releasing Kleyle's claims. If Kleyle was successful in showing damages, the jury still had to determine whether his claims had been released in full or in part by the releases. If there was error, which we need not decide, there was no plain error affecting fundamental rights in granting the two instructions.

Kleyle also argues that there was error in granting the following instruction:

INSTRUCTION NO. D-5

The Court instructs the jury that the owner of a mineral interest has an absolute right to use such part of the surface of the land as is reasonably necessary for the production of minerals without any liability therefor to the owner of the surface estate. Therefore, if you find from a preponderance of the evidence that the defendant utilized no more of the surface than was reasonably necessary for the production of minerals, then it is your sworn duty to find for the defendant. Likewise, any such surface area reasonably sued for the production of mineral cannot be considered in determining before and after damages to the plaintiff's property.

Objection was raised to the instruction based on the lack of facts in the record to support it. On appeal, Kleyle argues that the instruction was introduced as an erroneous legal issue not raised at trial and plain error. He contends that the jury could have been confused by the instruction. The

instruction is a correct statement of the law. A surface owner cannot block or otherwise complain of a reasonable use of so much of the surface as is necessary to explore for and produce minerals. *Sun Oil Company v. Nunnery,* 170 So. 2d 24, 29 (Miss. 1964). There were releases that affected the use of the well-site itself. Looking at the instructions as a whole, there was no error.

IV. THE JURY'S VERDICT WAS CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE, ARBITRARY, CAPRICIOUS, AND NOT SUPPORTED BY THE SUBSTANTIAL EVIDENCE.

Kleyle never offered any evidence concerning the effect of the blowout in May 1989. There was conflicting testimony concerning whether the pond and soil were contaminated. No clear evidence regarding the source of the contamination was presented. While the real estate experts agreed that there was some reduction in value of the property, again this reduction was never clearly linked to the May 1989 incident, as opposed to Exxon's use of the well site. There were two releases

that arguably limited or ended Exxon's liability. The verdict was not invalid.

THE JUDGMENT OF THE CIRCUIT COURT OF PEARL RIVER COUNTY IS AFFIRMED. COSTS ARE ASSESSED TO THE APPELLANT.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, AND PAYNE, JJ., CONCUR.