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Fitzpatrick v. Okanogan Cnty., 238 P.3d 1129 (Wash. 2010)

Karina B. Swenson

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association could face the prospect of being unable to obtain judicial review of department orders that adversely affect its property rights.

Considering the outcomes under the two canons of construction, the court found that the trial court erred in dismissing the petition for judicial review on the ground that the homeowners association was not a “party” within the meaning of the water rights statute.

Accordingly, the court reversed and remanded the trial court’s decision.

Molly Callender

WASHINGTON

Fitzpatrick v. Okanogan Cnty., 238 P.3d 1129 (Wash. 2010) (holding that statutory immunity does not apply where the cause of action is based solely on constitutional grounds and that the common enemy doctrine does not bar inverse condemnation claims for property damage caused by water flowing through a natural watercourse).

In 1999, Okanogan County (“County”) implemented major improvements to the Sloan-Witchert Slough Dike (“Dike”) on the Methow River (“River”). Afterwards, a Washington State Department of Ecology hydrogeologist (“State hydrogeologist”) submitted a memorandum to the County shoreline permit coordinator, explaining that the improvements cut off the River’s natural overflow channels. He maintained that the cut off would compress more flood flow into the main channel and reduce that natural flood conveyance capacity of the river.

In 2002, the River flooded and washed away a substantial portion of private real property, including the Fitzpatrick and Sturgill’s (“owners”) private log cabin. The owners had built the cabin outside the 100-year flood level. They alleged that the Dike caused the River to change course and wash away their property. The owners filed a complaint with the Douglas County Superior Court (“trial court”) against the County and the State of Washington (“State”). The complaint contained claims for inverse condemnation, trespass, negligence, and wrongful injury or waste to property. An inverse condemnation claim is an action alleging a governmental taking or damaging to recover the value of property that the government appropriated in fact, with no formal exercise of the power of eminent domain. The elements of an inverse condemnation claim include: (1) a taking or damage (2) of private property (3) for public use (4) without just compensation (5) by a governmental entity that has not instituted formal proceedings.

The County and State moved for summary judgment, citing the common enemy doctrine and statutory immunity, which the trial court granted. On appeal, Division Three of the Washington Court of Appeals (“court of appeals”) reversed the trial court, holding that

there were material issues of fact that precluded summary judgment and that the County and State were not immune from the owners' inverse condemnation claims.

Subsequently, the Washington Supreme Court ("court") granted the County's petition for review to determine whether the owners' inverse condemnation claim could proceed against the County and State in light of the common enemy rule. (The common enemy rule allows landowners to dispose of unwanted surface waters, which are the "common enemy" that any may defend themselves against, even if such waters subsequently harm another.) The court first addressed whether the County and State had statutory immunity from the owners' inverse condemnation claim pursuant to Washington law. The court found that the Washington code provides for immunity from liability related to county improvements for flood control. However, the court further found that statutory immunity does not extend to claims for damages resulting from flood control measures when a party based the cause of action solely on a constitutional taking claim. Because the owners based their inverse condemnation claim solely on Article 1, section 16 of the Washington Constitution, the court determined that the County and State were not entitled to statutory immunity.

Next, the court examined whether the common enemy rule precluded the owners' inverse condemnation claim. The County and State argued that the common enemy doctrine applied and that it allowed landowners to alter the flow of surface water to the detriment of their neighbors so long as they did not block a watercourse or natural drain way. In contrast, the owners argued that the natural watercourse rule applied and that it prevented interference with the natural flow of a waterway and, therefore, did not afford common enemy doctrine protection to parties that divert water from a natural watercourse and damage other properties. To determine which rule applied, the court evaluated the character of the water at issue. If water within a natural watercourse washed away the owners' property, the natural watercourse rule would apply; conversely, if surface water backed up onto the owners' property and caused the damage, the common enemy doctrine would apply.

The court noted that the only evidence presented to the trial court on this issue was evidence that supported the owners' argument. The owners presented that the Dike work affected the River by cutting off natural overflow channels in the floodplain, forcing all of the flow during the high-water event into the main channel and onto the owners' property. A declaration from the owners' expert, a Ph.D. in Civil Engineering-Hydraulics, and the memorandum from the State hydrogeologist supported this argument.

Accordingly, the court held that the common enemy doctrine did not bar the owners' inverse condemnation claim because water flowing through a natural waterway may have caused the damage to their property. Therefore, the court found that a genuine issue of

material fact existed, and that the trial court erred in granting summary judgment.

Finally, the County and State argued that because the work plan did not originally contemplate the property damage nor was it a necessary incident to the government project the owners could not bring an inverse condemnation claim. The court determined that the information contained in the State hydrogeologist's memorandum effectively notified the County and State three years prior to the high water event that the River may, as a necessary incident to or a consequence of the Dike improvements, flood the owners' property. Accordingly, the court found that the record reflected a genuine issue of material fact as to whether the damage to the owners' property was a necessary incident to the County and State's work on the Dike.

Therefore, the court affirmed the decision of the appellate court and remanded the case to the trial court for further proceedings.

Karina B. Swenson

WISCONSIN

Lake Beulah Mgmt. Dist. v. Wis. Dep't of Natural Res., 787 N.W.2d 926 (Wis. Ct. App. 2010) (holding that because the Wisconsin Department of Natural Resources ("DNR") had authority to consider scientific evidence of adverse environmental impacts to the waters of the State from all wells, the DNR must consider an affidavit regarding the subject well's impacts to the waters of Lake Beulah).

In 2003, the Village of East Troy ("Village") applied for a well permit from the DNR to add a fourth well. The proposed site of the well was only 1,400 feet from Lake Beulah. As part of the permitting process, the Village prepared a report, estimating that the well would not have adverse effects on the lake. The DNR accepted the report and issued a permit, which was valid for two years. Soon after, the Lake Beulah Management District ("District") petitioned for a case before the DNR, arguing that the DNR did not comply with its duty to protect navigable waters. The District believed the DNR had a duty to consider independently the environmental effects before approving the permit. The DNR originally denied the petition but later granted a hearing. The Lake Beulah Protective and Improvement Association intervened and allied with the District (collectively, the "District"). The Village filed a motion for summary disposition, which the Administrative Law Judge ("ALJ") granted, stating that because the language of the statute expressly required the DNR to consider only certain impacts, the statute excluded considering others. The ALJ further reasoned that the District failed to present any scientific evidence demonstrating adverse impacts on the well.

After the District filed a petition for judicial review in the Wisconsin District Court ("district court") of the 2003 permit, the DNR changed its opinion, spontaneously deciding it had authority to