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Williamsburg Rural Water & Sewer Co., Inc. v. Williamsburg County Water & Sewer Auth., 593 S. E. 2d 154 (S.C. Ct. App. 2003)

Brian M. Forbush

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“gpm”) while the average well yield in a two-mile radius was 2.5 gpm and 5 to 7 gpm in Lucas County. The county previously approved the well and maintained a public record of its yield. Expenses to correct the yield exceeded \$18,000. After hearing the evidence, the trial court directed a verdict in favor of the Kiefers. The Witfoths appealed to the Ohio Court of Appeals.

On appeal, the court of appeals first considered whether the water system’s low yield constituted a material problem or defect requiring disclosure. The court noted that the well functioned properly, was approved by the county, and was not substantially lower yielding than nearby wells. As such, no reasonable person could consider the water system a material problem or defect. Furthermore, although the low yield was inconvenient, the court noted judicious use of the well enabled the family to shower, wash clothes and wash dishes. Thus, the court held the Kiefers needed not disclose the low yield.

Next, the court of appeals considered whether the doctrine of caveat emptor precluded recovery for fraud. Under Ohio law, a buyer cannot recover damages where (1) the condition is discoverable upon reasonable inspection, (2) the purchaser had an opportunity to examine the premises, and (3) there is no fraud on the part of the seller. As to the first and second part of the test, the court noted the Witfoths had full opportunity to inspect the property, a test existed to measure well yield, the Witfoths did not order such a test and the yield was public record. Accordingly, the court concluded no reasonable person could dispute the well yield was open and obvious and not misrepresented. As to the third part of the test, absence of fraud, the court considered whether nondisclosure amounted to fraudulent concealment. Again, the court noted the Kiefers did not actively misrepresent the well. Therefore, under the doctrine of caveat emptor precluded the Witfoths from recovering for fraud.

In sum, the court held no reasonable person could consider a water supply with low yield a material defect or problem. The court then held the Keifers had no obligation to disclose the low well yield and the nondisclosure did not constitute fraudulent concealment. Thus, the court affirmed the trial court’s rulings.

J. Reid Bumgarner

SOUTH CAROLINA

Williamsburg Rural Water & Sewer Co., Inc. v. Williamsburg County Water & Sewer Auth., 593 S.E.2d 154 (S.C. Ct. App. 2003) (holding that a county’s constructive approval of a water and sewer service proposal submitted by a non-profit corporation grants only non-exclusive water and sewer service rights and that a county is immune from tort liability for non-intentional conduct which incidentally acts to depreciate the commercial value of the non-profit’s non-exclusive

water and sewer rights).

Williamsburg Water, a non-profit organization, filed an action against Williamsburg County, South Carolina, and its Water and Sewer Authority, along with the Town of Kingstree (collectively, the "County") in the Circuit Court of Williamsburg County. The catalyst for the suit occurred after Williamsburg Water submitted a proposal to provide water and sewer services to specific unincorporated areas of the County. After Williamsburg Water submitted the proposal, there were three public readings of a proposed franchise ordinance that would permit the county to expand its existing water and sewer services into the same areas that Williamsburg Water had previously proposed to serve. Approximately three months after the first public reading, the ordinance passed into law. The County subsequently applied for federal funding and solicited bids to construct a water system in the specific areas designated in the Williamsburg Water proposal.

Williamsburg Water filed suit seeking a determination that it possessed an exclusive right to provide water and sewer services to specified areas of the County. Additionally, Williamsburg Water claimed the County constructively approved its proposal to provide services because the County failed to properly deny its proposal as required by local law. Williamsburg Water further claimed that the County hampered its ability to secure federal funding for the proposal when the County expanded its own water and sewer services into the same areas that Williamsburg Water had already obtained the right to serve. Next, Williamsburg Water sought damages in tort alleging gross negligence occurred when the County took measures to provide water and sewer services to the areas previously designated in Williamsburg Water's approved plan. Finally, Williamsburg Water claimed that it was exempt from the County's franchise ordinance as a bona fide water/sewer system defined by the ordinance.

Williamsburg Water and the County each moved for summary judgment. The trial court granted summary judgment to the County and found that Williamsburg Water had only a non-exclusive right to provide water and sewer service to the specified areas. Also ruling for the County, the trial court held that the County was immune from Williamsburg Water's tort claim under the South Carolina Tort Claims Act. However, the trial court found that there was a "general issue of material fact as to whether Williamsburg Water was exempt from the County's franchise ordinance." Williamsburg Water appealed the trial court's summary judgment rulings to the Court of Appeals of South Carolina.

The first issue identified by the court was whether Williamsburg Water's right to provide water and sewer services in the County was an exclusive right that would have blocked the County from granting future franchises within the specified areas. The court affirmed the decision of the trial court and concluded that though Williamsburg

Water did have a constructive right to provide water and sewer services by virtue of the County's failure to comply with codified procedure for denying the proposal, the right was not exclusive. The court elaborated that Williamsburg Water's service rights were not "superior to the County's own right to decide who will provide water and sewer services to its citizens" and admitted the unfortunate result of the ruling was to deflate the commercial value of the rights possessed by Williamsburg Water.

Next, the court held that it could not review the issue of whether the trial court erred in failing to find that Williamsburg Water was exempt from the County's franchise ordinance because an order denying summary judgment could not be reviewed according to state case law precedent. The court of appeals remanded this issue to the trial court for further proceeding to determine applicability of the franchise ordinance to Williamsburg Water.

Finally, on the issue of whether the County's conduct rose to the level of gross negligence, the court concluded there was no evidence in the record that the County intentionally sought to hamper Williamsburg Water's ability to provide the proposed services. The court instead indicated that it was evident the County proceeded to extend its water and sewer services to the specified area based on the misguided notion that it satisfied the notice provisions of local law when it held public readings of the proposed ordinance. Because the court held that this conduct was not an "intentional, conscious failure" to perform a duty, it concluded that these circumstances immunized the County from liability under the South Carolina Tort Claims Act and affirmed the trial court.

Thus, the court's ruling was to affirm the decision of the trial court and remanded the issue regarding the application of the franchise ordinance. Two of the court judges concurred in the result, each differing with the reasoning and analysis of the majority.

Brian M. Forbush

TEXAS

Chocolate Bayou Water Co. v. Texas Natural Res. Conservation Comm'n, 124 S.W.3d 844 (Tex. Ct. App. 2003) (holding that a party petitioning for judicial review of a water right application must exhaust all available administrative remedies before the court system acquires jurisdiction).

Chocolate Bayou Water Company ("Chocolate Bayou") and Sand Supply, both divisions of Campbell Concrete and Materials, L.P., appealed the decision of the District Court of Travis County granting a plea to jurisdiction, and in the alternative summary judgment, dismissing their suit contesting the validity of a reissued water right