

9-1-2001

City of Dothan v. Eighty-Four West, Inc., No. 2991351, 20001 Ala. Civ. App. LEXIS 313 (Ala. Civ. App. June 15, 2001)

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Rachel Sobrero, Court Report, City of Dothan v. Eighty-Four West, Inc., No. 2991351, 20001 Ala. Civ. App. LEXIS 313 (Ala. Civ. App. June 15, 2001), 5 U. Denv. Water L. Rev. 268 (2001).

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sued Marock for negligence. Marock sought a declaratory judgment maintaining St. Paul had a duty both to defend and to indemnify Marock in the suit. Marock and St. Paul both moved for summary judgment.

As the determinative issue in this case, the court looked to whether Trinity's injuries resulted from an accident. The court agreed with Trinity and found foreseeability, not intent, as the threshold at bar. The court maintained Marock intentionally diverted the creek while simultaneously lacking specific intent to cause injury. However, the court did not deem the natural and predictable consequences of such acts accidental. Thus, Trinity's injuries were not the result of an accident.

Furthermore, Trinity argued a decrease in available downstream water was a natural and foreseeable result of diverting the creek. The court agreed and found the very presence of a water permit system reflects the finite nature of water resources, such as this creek. Therefore, although Marock may have lacked knowledge as to the identity of the downstream users, a decrease in downstream water was a natural and foreseeable result of diverting the creek, which harmed downstream users.

In order to indemnify St. Paul, Marock argued Trinity's negligence allegations proved the accidental nature of the harm. The court disagreed, finding that the diversion was intentional, but not negligent. Therefore, St. Paul did not have a duty to defend or indemnify Marock. Finally, Marock argued it did not intend to inflict harm on Trinity, however, the court reiterated it found foreseeability, not intent, as the issue in this case.

Willow Arnold

STATE COURTS

ALABAMA

City of Dothan v. Eighty-Four West, Inc., No. 2991351, 20001 Ala. Civ. App. LEXIS 313 (Ala. Civ. App. June 15, 2001) (holding the "common enemy rule" entitles a property owner to construct a dam on his property to fend off oncoming surface water).

The City of Dothan ("Dothan") appealed a trial court order that found a landowner, Flowers, was authorized to construct a dam on his property pursuant to the "common-enemy" rule. Flowers owned property over which an easement ran to allow drainage of surface water from his property through adjacent property. In 1997, Flowers applied for a permit from Dothan to build an earthen dam on his property to prevent surface water from an upper property not owned

by him from flowing onto his property. Dothan alleged it conditioned granting the permit to Flowers on his designing a system that adhered to local ordinance. Dothan claimed Flowers refused to design such a system because the easement on Flowers' land did not limit the amount of water that flowed through it so the need for the dam did not exist. Flowers disagreed. Dothan did not grant the permit but instead filed a complaint for declaratory judgment on the questions of the amount of water the easement could allow to pass and whether it had to grant the permit to Flowers that would allow him to build an earthen dam. Flowers asserted the "common-enemy" rule entitled him to build a dam to prevent surface water runoff from coming onto, and damaging his land. The trial court ruled in favor of Flowers. Dothan appealed and argued the trial court erred in applying the "common-enemy" rule in determining Flowers was entitled to construct a dam.

The "common-enemy" rule is an exception to a civil law rule. The civil law rule states, as to lands outside a municipality, the lower surface is doomed by nature to bear servitude to the superior in that it must receive the water that falls on, and flows from higher land. The Alabama courts recognize and adhere to the "common-enemy" exception to the civil law rule, which applies to city lots. The "common-enemy" rule entitles the owner of urban property to fight off oncoming surface waters by building walls or dams to prevent water flowing from the higher property onto his land. A critical requirement of the rule is a determination of whether the water at issue is surface water or an intermittent stream. The test for determining into which category water falls consists of two factors; whether the water is channeled in well defined banks, and what source provides the water.

Each party to the suit presented witnesses in the trial court who testified and gave their opinions of into which category the water in question on Flowers' land fit. Dothan's witnesses concluded it was an intermittent stream. One expert based his opinion on the fact that the watercourse lacked vegetation and contained alluvial soils, although he admitted rainwater provided the only source for the stream. He stated an intermittent stream did not necessarily have to be fed by groundwater. Flowers' expert concluded the water was surface water. He asserted an intermittent stream, by definition, is fed by groundwater at least some of the time and that this area did not contain a headwater outcropping.

The court found the trial court did not abuse its discretion by considering Flowers' rights under the "common-enemy" rule. Thus, the court affirmed the trial court's holding that Flowers was entitled to construct a dam on his property to fend off oncoming surface water pursuant to the rule.

Rachel Sobrero