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Reitsma v. Pascoag Reservoir & Dam, 774 A.2d 826 (R.I. 2001)

RHODE ISLAND**Reitsma v. Pascoag Reservoir & Dam, 774 A.2d 826 (R.I. 2001)**

(holding that the government could obtain a prescriptive easement or title over privately-held property by establishing all statutory requirements of adverse possession, and a property owner's failure to protest hostile use is acquiescence, not permission).

Since 1860, Pascoag Reservoir and Dam, LLC ("Pascoag"), or its predecessors in title owned Echo Lake, an artificial body of water in Glocester, Rhode Island. In 1964, the Department of Environmental Management ("State") acquired waterfront property on Echo Lake. In 1965, the State constructed a boat ramp and erected signs purporting to regulate public use of the lot, the ramp and the lake. The State maintained and operated the property for thirty-two years, and allowed public access to Echo Lake for boating, fishing and other recreational activities. In 1997, Pascoag posted a "no trespassing" sign on the property. Then, on July 30, 1997, Pascoag notified the State in writing that it withdrew any express or implied permission to use the reservoir. Further, Pascoag advised the State that it withdrew its permission for public access to Echo Lake via the boat ramp. Prior to these actions, Pascoag had not objected to public use of the lake.

As a result, the State brought suit, which alleged violation of the Freshwater Wetlands Act, claimed a prescriptive easement for public recreational use of the lake, and claimed adverse possession of the lake bottom supporting the boat ramp. The State also sought an injunction against further action by Pascoag. Pascoag filed a counterclaim, alleging inverse condemnation, trespass, and violations of substantive due process rights held under state and federal constitutions. The Rhode Island Superior Court voluntarily dismissed Pascoag's inverse condemnation claim without prejudice. Further, at the request of the State and over Pascoag's objection, the court severed allegations relating to violation of the Freshwater Wetlands Act from the case. Finally, the court found that construction of the ramp and use of Echo Lake all took place within full view of Pascoag, which acquiesced to these uses from 1964 to 1997. The State's use of the lake was permissive, rather than adverse, thus preventing creation of a prescriptive easement.

The State appealed to the Supreme Court of Rhode Island. The Court found no evidence to support the lower court's finding that the State's use of Echo Lake was permissive. The State never sought or received permission to build or maintain the boat ramp, nor to regulate public use of the lake. Both acts were hostile to Pascoag's possessory interests; thus the State's use of Echo Lake was adverse, not permissive. This adverse use continued for thirty-two years, far beyond the ten-year statutory period required for adverse possession and prescriptive easement. Thus, the State acquired a portion of the lake

bottom by adverse possession, and a prescriptive easement for public access to Echo Lake via the boat ramp. In addition, Pascoag failed to assert an inverse condemnation claim within the six-year statute of limitations, which barred any consideration of whether the State's actions constituted an unconstitutional taking of private property.

Alan Curtis

TEXAS

Larry Koch, Inc. v. Texas Natural Res. Conservation Comm'n, 52 S.W.3d 833 (Tex. Ct. App. 2001) (holding the trial court erred in dismissing suit for want of jurisdiction for injuries to property resulting from failure of the Texas Natural Resource Conservation Commission to carry out its statutory duties).

A number of wells that drew water from the Gulf Coast Aquifer tested positive for benzene at levels that exceeded the Environmental Protection Agency's fixed safe level. As a result, the Department of Housing and Urban Development refused to provide new mortgage insurance to a subdivision in which Larry Koch, Inc. ("Koch") owned property. Koch filed suit against the Texas Natural Resource Conservation Commission ("TNRCC") for violations of statutory duties imposed on TNRCC by the Texas Health and Safety Code and the Texas Water Code ("TWC"). Koch alleged failure of the TNRCC to publish an annual registry identifying sites contaminated by hazardous substances, failure to issue notices to persons suspected of contamination of a site and failure to perform duties in a reasonable time. The trial court dismissed all of Koch's causes of action without stating grounds on which it made its decision. Koch appealed.

The Texas Court of Appeals stated sovereign immunity barred Koch's actions unless it came within the class of cases of which the legislature had consented to suit. A person affected by inaction of the Commission is authorized to file petition to compel the commission to show cause why it should not be directed to take immediate action. The court stated the legislative intent and purpose of this statute clearly waives immunity to suit brought by persons adversely affected by failure of TNRCC to perform duties. The court also stated the statute established a remedy for such suits by empowering the courts of Travis County to issue orders compelling TNRCC to show cause why it should not be directed to take immediate action to perform a required duty. Koch's allegations, according to the court, brought its actions within this class, and therefore sovereign immunity did not deprive the court of subject matter jurisdiction.

TNRCC asserted that the administrative process of considering Koch's petition requesting the agency list the contaminated area on