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Town of Groton v. Agency of Natural Res., 772 A.2d 1103 (Vt. 2001)

William H. Fronczak

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exercise reasonable care to avoid endangering those using the highway as a means of travel, and is liable for any injuries resulting from such negligence. This duty was limited to cases where a landowner negligently released upon the highway an "agency that becomes dangerous by its very nature once upon the highway." The Raburns alleged KJI and the Straders diverted water into the culvert by putting crushed concrete on the property, and thus owed a duty to those traveling on that highway.

The court found this allegation to be conclusory, and not supported by more than a scintilla of probative evidence that raised a genuine issue of material fact. Even if the Raburns could put forth sufficient evidence, the court held their claim would fail on alternate grounds. The Texas Water Code states that one who diverts the natural flow of surface waters may be liable for any property damage suffered as a result of the diversion. The code does not include liability for survival actions, personal injuries, or wrongful death.

Additionally, the state of Texas' responsibility over water covering a stretch of highway pertained only to flood water. The court found the trial court accurately held the water discussed here was floodwater, rather than surface water, as a matter of law. This finding was largely due to the admissions of the Raburns themselves, as well as on the clear and unambiguous definitions of surface and floodwaters found in Texas case law.

Since the state of Texas had an exclusive, non-delegable duty pertaining to flood control, the trial court was correct in holding KJI and the Straders did not have a duty of reasonable care pertaining to the highway adjacent to their land. The Raburns failed to produce more than a scintilla of evidence pursuant to one of the elements of a negligence claim, and, thus, the court affirmed the summary judgment granted to KJI and the Straders.

Michael Sheehan

VERMONT

Town of Groton v. Agency of Natural Res., 772 A.2d 1103 (Vt. 2001)
(affirming the Water Resource Board's denial of the Town of Groton's stream alteration permit application).

In July of 1996, the Town of Groton ("Town") filed an application with the Agency of Natural Resources ("ANR") to alter the Wells River so that the Town could repair a dam. The ANR requested more information, as the Town's application was not complete. Before the Town provided the requested information, ice and high water destroyed the dam. Since the dam's destruction, the Wells River below the dam is considered one of the few high quality habitats for sculpin, trout, and salmon.

As a result of the river returning to its natural state and thereby improving fish habitat, the ANR denied the Town's application to alter the Wells River under Vermont statute 10 V.S.A. § 1023. This statute mandates the denial of any application proposing a change in a watercourse which would "significantly damage fish life." The Town appealed this denial to the Water Resource Board ("Board"), who after a *de novo* review, also determined that the proposed alteration would "significantly damage fish life" and thus denied the application. The Town appealed the Board's decision to the Caledonia Superior Court, claiming that the Board erred in upholding the denial by refusing to admit evidence regarding the use of the water for fire safety, and by utilizing an improper river baseline which resulted in a determination of significant fish damage. The court affirmed the Board's decision. The town appealed to the Supreme Court of Vermont, renewing the aforementioned arguments.

The supreme court reviewed this appeal of the Board's decision under criteria set forth in their decisions of *In re Town of Sherburne* and *In re Wal Mart Stores, Inc.* Specifically, the supreme court asked if the board acted arbitrarily, unreasonably or contrary to the law as viewed by a "reasonable person." It also questioned whether the board used its wide discretion within legislative and agency policy in making its findings and conclusions.

The supreme court denied the Town's first claim that the Board erred by failing to consider fire safety as an element relating to the general public interest and welfare. The supreme court disagreed, stating that the Board was bound by statute and could not consider fire safety evidence because it is outside the general public interest and welfare factors identified in 10 V.S.A. § 1023. Next, the supreme court denied the Town's second claim, which urged the supreme court to review the Board's historical practice. The Town claimed the Board erred in utilizing the condition of the river after the destruction of the dam because the Board historically utilized the condition of the river with the dam in place. However, the Board decided previous cases this way because no evidence existed showing the condition of the river prior to the dam. In this case, the supreme court determined the issue was reversed. The Town did not have any reliable information as to the river condition and the fish habitat while the dam was in place, while the ANR had reliable information as to the river condition and the fish habitat after the destruction of the dam. Therefore, the court determined the Board followed its historical practices in refusing to engage in speculation, and looked to the stream in its natural condition as the baseline.

The supreme court concluded the Board acted consistently with its previous decisions and that this decision was not arbitrary, unreasonable or contrary to law.

William H. Fronczak