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## Bubis v. Kassin, 733 A.2d 1232 (N.J. Super. Ct. App. Div. 1999)

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court concluded that Thompson Falls was not negligent in its operation or maintenance of the storm drain line behind Barnes' duplex. The Montana Supreme Court affirmed the lower court's decision.

*Karina Serkin*

## NEW JERSEY

### **Bubis v. Kassin, 733 A.2d 1232 (N.J. Super. Ct. App. Div. 1999)**

(holding that an express easement was not automatically extinguished when the easement area was below the mean high water line and that when the easement was below the mean high water line the public trust doctrine applied).

In 1883, developers prepared and subsequently recorded a subdivision map for the seaside community of Loch Arbour (now known as the Village of Loch Arbour). The 183 lots on the map contained a number of east-west streets that terminated at the beach. The most easterly north-south street on the map was an unnamed street running along an area described as "Bluff," which immediately adjoined an area described as "Beach." As the developers sold the lots, the deeds conveyed not only the designated lots to the property owner, but also an easement which was described as "on, over and across a certain strip of land, being a part of Beach and Bluff, as shown on the aforesaid Map of Loch Arbour. . . ."

The Plaintiffs owned homes on inland lots on Edgemont Avenue, which was one of the east-west streets shown on the map. Plaintiff Bubis' home was directly across the street from defendant Kassin's eight oceanfront lots, which were on either side of Edgemont Avenue, bordered to the west by Ocean Place and to the east by the unnamed street shown on the 1883 map. Kassin purchased its lots in 1995, and shortly thereafter created a twelve to fourteen foot high sand berm along the westerly border using a bulldozer.

Plaintiffs appealed the lower court's finding that plaintiffs' easement was extinguished because the easement area was below the mean high water line. Plaintiffs also appealed the dismissal of its claim that Kassin's sand berm interfered with plaintiffs' right to an unobstructed view of the Atlantic Ocean and that Kassin's six-foot fence violated a restrictive covenant.

The court held that substantial evidence supported the trial court's finding that all of the area described as Beach and Bluff on the 1883 map was below the mean high water line. However, the court found that the deeds to plaintiffs' predecessors in title conveyed implied private easements over Edgemont Avenue to afford access to the beach and the ocean. The erosion of the Beach and Bluff did not extinguish those easements.

When land was sold with reference to a map on which lots and streets were delineated, the purchaser acquired an implied right of way over the streets. The scope of the implied right included the intention at the time. In most circumstances, only use of the streets shown on a map that was necessary and useful for the beneficial enjoyment of the lot conveyed was a right of way or access from or to some public highway. However, if the circumstances surrounding the conveyance indicated that a more expansive right of way was necessary to obtain the full beneficial enjoyment of the lot, courts would recognize whatever required implied right of access to achieve the conveyance's intent. Additionally, such a sale of lots on which streets are delineated constituted a dedication of the streets to the public, whether a municipality accepts or vacates the dedication.

Here, plaintiffs' predecessors in title purchased lots in a planned development immediately adjoining the Atlantic Ocean. Any person acquiring those lots could reasonably assume that one of the benefits of property ownership was convenient access to the beach and ocean by means of this street network. The express easement over Beach and Bluff indicated the developers' intent.

Additionally, the court concluded that the erosion of Beach and Bluff did not extinguish plaintiffs' private rights of access to the beach and ocean. The word "beach" was commonly understood to refer to the area between the low and high water lines. It was reasonable to assume that the parties to the original conveyances contemplated that a portion of the land subject to the express easement over Beach was below the mean high water line.

The mean high water line delineated the boundary between public and private land and the upland owner did not own the land below the mean high water line. When the area designated as Beach and Bluff on the map remained below the mean high water line, plaintiffs' right to use the beach area was governed by the public trust doctrine. If the mean high water line shifted eastward due to accretion, plaintiffs' express easement over the Beach and Bluff was revived.

Because the trial court found the easement extinguished, it did not reach the question of remedies. The court remanded the case to afford the parties the opportunity to present evidence or arguments for remedies.

The court found no merit in plaintiffs' argument of inconsistency between the Loch Arbor beach fence ordinance and the restrictive covenant. However, the court stated plaintiffs could assert a claim that Kasson or its predecessor in title erected fences violating the restrictive covenant that prohibited any fence more than four feet in height within fifty feet of Edgemont Avenue and Ocean Place. By remanding the case, the court permitted plaintiffs to pursue their claim that Kasson's fence violates the restrictive covenant.

The court dismissed plaintiffs' claim that Kasson's sand berm interfered with plaintiffs' right to an unobstructed view of the ocean. Plaintiffs' reliance on Department of Environmental Protection

regulations adopted under the Coastal Area Facility Review Act was misplaced. The regulations stated that coastal development adjacent to all coastal waters must provide “[a]ccess to the waterfront to the maximum extent practicable, including both visual and physical access.” The court held the regulation did not impose an absolute prohibition against oceanfront development that interfered with the view of inland property owners.

*Elaine Soltis*

## NEW YORK

**United Water New Rochelle, Inc. v. City of New York, 687 N.Y.S.2d 576 (N.Y. Sup. Ct. 1999)** (holding that contract provisions allowing the City to unilaterally discontinue water delivery to utility were unenforceable, contract provisions govern City’s obligation to chlorinate water, and City is not entitled to recompense for the value of water they discarded in order to fulfill their obligations).

United Water New Rochelle (“United Water”), a privately owned public utility, and Briarcliff, a municipal corporation, supplied water to residents and businesses within its borders. New York City (“City”) and its administrative agency, the Department of Environmental Protection (“DEP”), oversaw and administered New York’s statewide water system. The City and DEP controlled much of the water flowing through New York’s system of rivers, lakes, reservoirs, and aqueducts, including the Catskill and Croton Aqueducts. The City and DEP issued permits to United Water and Briarcliff allowing them to tap into the Croton and Catskill Aqueducts. United Water and Briarcliff received most of its water from these aqueducts.

The City’s contract with United Water provided for partial chloride treatment of the water from the Croton Aqueduct. Briarcliff’s contract with the City did not create an obligation for the City to chlorinate the water. The contracts specified that both United Water and Briarcliff were responsible for final chlorination at their own facilities. In July 1998, the DEP notified Briarcliff and United Water that it intended to shut down the aqueducts during September, the peak demand period of the year, in order to make repairs and provide better quality water. The health and safety risks to residents as a result of a prolonged shutdown caused United Water and Briarcliff concern.

United Water and Briarcliff sought declaratory and injunctive relief regarding the City’s ability to shutdown the aqueduct. They argued that they were contractually entitled to receive potable water and requested the court to determine whether the City was obligated to chlorinate water in the aqueduct. The City counterclaimed to recover the value of potable water that United Water and Briarcliff discarded. The City agreed to continue supplying potable water in the