

1-1-2000

Huber v. Oliver County, 602 N.W.2d 710 (N.D. 1999)

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Julie E. Hultgren, Court Report, Huber v. Oliver County, 602 N.W.2d 710 (N.D. 1999), 3 U. Denv. Water L. Rev. 475 (2000).

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caused by the dam. Ultimately, the claimant conceded that the water rights were severed from the north side property and the court concluded that claimant failed to produce any sufficient evidence to rebut the facts asserted in the certified title abstract. Therefore, the claimant was not entitled to any compensation for water rights.

Anna Litaker

NORTH DAKOTA

Huber v. Oliver County, 602 N.W.2d 710 (N.D. 1999) (holding that: (1) landowners were not entitled to a new trial for damages and injunctive relief for flood damage to farm land as the jury was properly instructed concerning the “Act-of-God” defense; (2) Oliver County (“County”) met its duty to maintain the natural course of Otter Creek when constructing a road and was not required to construct road to avoid all possible damage; and (3) damages were properly awarded to the County).

The Huber family (“Hubers”) owned a farm where they raised crops and livestock. Otter Creek (“Creek”) meandered on and off the land providing irrigation for forty acres along the creek and water for the livestock. In the 1950’s, Oliver County (“County”) voters approved the construction of a federal-aid “farm-to-market road” on the land. In 1961, the Hubers contracted with the County for a provisional qualified easement across the land to build the road. By building the road across the Huber farm, the County would save money by crossing the Creek only twice at either end of a small oxbow in the Creek. The contract required that the County construct two culverts and a concrete barrier to maintain normal flows of water along the oxbow. The contract also specified that the County would pay for the cost of constructing an additional structure to maintain the natural course of the Creek’s flow in the event the culverts and barrier failed to achieve the purpose.

The County constructed the road with the two culverts and barrier. The system soon failed despite additional County efforts to maintain the Creek flows. The Hubers sued the County in 1989 for breach of the 1961 easement contract seeking damages and specific performance. The trial court denied specific performance and granted summary judgment dismissing the breach of contract claim as barred by the statute of limitations. In 1995, the supreme court affirmed the denial of specific performance, but reversed and remanded for trial concerning the statute of limitations issue.

After the Hubers experienced flood problems in 1993 after a heavy summer rain and in 1996 after a heavy spring runoff, the Hubers sued the County in 1996 alleging that the County’s insufficient culvert system failed to prevent the 1993 and 1996 flood damage. The Hubers sought damages and injunctive relief to require the County to install additional culverts to prevent future flood damage.

The 1989 and 1996 actions were consolidated into one trial. The lower

court dismissed the 1989 lawsuit as barred by the statute of limitations. The Hubers tried the 1996 claims for injunctive relief and damages. Prior to trial the County agreed to build another nine-foot culvert which doubled the amount of culvert capacity in order to alleviate future flood damage. The jury found that the County's road construction or culvert and barrier system did not cause the flooding on the Hubers' land, which barred a damages award. In addition, the trial court denied injunctive relief stating that the Hubers had "an adequate remedy at law, and a multiplicity of suits would be necessary to address their claims" The Hubers moved for a new trial on the 1996 claims challenging the jury instruction on the County's "Act-of-God" defense, the denial of injunctive relief, and the taxation of costs and disbursements against them. The trial court denied the post-trial motions and the Hubers appealed.

The issues on appeal were: (1) whether the trial court's jury instruction concerning the County's Act-of-God defense adequately informed the jury of the applicable law; (2) whether the trial court erred in refusing to grant the Hubers' request for injunctive relief requiring the County to construct more than one additional culvert; and (3) whether the trial court erred in awarding the County \$8,230.96 for its costs and disbursements.

The supreme court first considered whether the trial court's jury instruction adequately informed the jury of the applicable law concerning the County's Act-of-God defense. The Hubers argued that they were entitled to a new trial because the trial court's jury instruction failed to specify that to prevail, the County needed to establish that the Act-of-God was the sole proximate cause of damage to the land to avoid liability. The Hubers argued that they presented evidence indicating the County's negligence. Reviewing the jury instruction as a whole, the court found that the jury instruction language requiring the rainfalls to be of such magnitude that the Hubers' damages "would have been suffered . . . regardless of any acts of Oliver County" was synonymous with specifically stating that the Act-of-God must have been the sole proximate cause of the Hubers' damages. Thus, the court held that the jury instruction adequately informed the jury of the applicable law.

The supreme court next considered whether the trial court erred in refusing to grant the Hubers' request for injunctive relief requiring the County to build more than one additional culvert to alleviate future flood damage. The Hubers argued that the relevant highway construction statutes imposed an absolute duty upon the County to prevent flow obstruction of the Creek and provide drainage necessary to avoid flooding on their land. The court recognized that it previously interpreted the statutes to impose a mandatory duty to construct roads not to obstruct the natural flow and drainage of the surface waters. However, the court rejected the Hubers' argument that the statutes required that the County construct a culvert to withstand any type of flood event including an Act-of-God holding that statutes are not interpreted to produce absurd or ludicrous results. Instead, the court interpreted the statutes to impose a duty upon the County to maintain the natural flow and drainage of the Creek to the extent required by engineering standards and prudent and sound engineering design practices. The court held that the County's

construction met the applicable North Dakota Department of Transportation's twenty-five year flood event design standards. The court concluded that the trial court did not abuse its discretion in refusing to grant injunctive relief to the Hubers.

Finally, the supreme court considered whether the trial court abused its discretion in awarding the County costs and disbursements under the North Dakota statute granting such awards to prevailing parties. The Hubers argued that they were the prevailing party under the statute because of the County's pretrial agreement to build an additional culvert. The court rejected the Hubers' argument finding the County was the prevailing party in the case. The court also rejected Hubers' argument that the costs were not properly detailed and verified as required by the North Dakota rules of civil procedure. Finally, the court held that the trial court did not abuse its discretion in rejecting Hubers' argument that the County inappropriately taxed the costs of its expert engineer because the engineer changed his position before trial which increased the litigation costs.

In conclusion, the court held that the trial court did not err in denying the Hubers' motion for a new trial and affirmed both the judgment and the post-judgment orders.

Julie E. Hultgren

OHIO

Friends of Ottawa River v. Schregardus, No. 98AP-1314, 1999 Ohio App. LEXIS 4236 (Ohio Ct. App. Sept. 16, 1999) (upholding issuance of a section 401 Water Quality Certification to City of Toledo, Ohio, where appellants claimed they had submitted an incomplete application and had made alterations to the original plan).

Friends of Ottawa River ("Friends") appealed the Ohio Environmental Review Appeals Commission's ("ERAC") decision to uphold issuance of a section 401 Water Quality Certification to City of Toledo, Ohio ("Toledo") by the Ohio Environmental Protection Agency ("OEPA"). Toledo agreed to remediate several parcels of real estate to prepare for Chrysler's expansion of a Jeep production plant ("Jeep project"), thereby making Toledo responsible for the appropriate permits.

Toledo applied to the United States Army Corps of Engineers ("COE") for a section 404 permit to fill roughly twenty-five acres of wetlands surrounding the facility, including 5.34 acres adjacent to the Ottawa River. The Clean Water Act required section 401 certification as a prerequisite to a section 404 permit. Under Ohio law, a section 404 permit application with COE simultaneous effects application for section 401 certification from OEPA. Toledo filed supporting documentation as required.

After the notice and comment period, OEPA issued section 401 certification for the Jeep project to Toledo. Shortly thereafter, Friends argued the certification invalid for two reasons: (1) incompleteness of the application; and (2) a change of the planned uses after the public