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Wilson v. Texas Parks & Wildlife Dep't, 8 S.W.3d 634 (Tex. 1999)

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concluded no prescriptive easement existed as to the 1993 extension. The statutory period could not have begun until Sherburn suffered damage after the construction.

Finally, the supreme court found the trial court did not abuse its discretion in granting a permanent injunction. The court found that the trial court addressed the four basic factors that need consideration when granting a permanent injunction. Those factors were: (1) Did the party to be enjoined cause the damage? (2) Would irreparable harm result without the injunction because of lack of an adequate or complete remedy? (3) Was the party to be enjoined acting in bad faith or was its injury-causing behavior an "innocent mistake?" and (4) In balancing the equities, was the "hardship to be suffered by the [enjoined party] . . . disproportionate to the . . . benefit to be gained by the injured party?" However, because no flooding damage occurred until after the 1993 extension construction, the supreme court held that the permanent injunction was only proper for the extension. Therefore, the supreme court reversed and remanded the case requesting the trial court limit the permanent injunction to removal of the western extension or the installation of culverts allowing the flow of water at ground level.

Anna Litaker

TEXAS

Wilson v. Texas Parks & Wildlife Dep't, 8 S.W.3d 634 (Tex. 1999)

(allowing petitioners, on remand, to assert that respondents undertook a duty to make the river safe for park visitors and that it breached that duty).

Wilton and Wilford Wilson, brothers, drowned in the Pedernales River that flooded while they were fishing. The accident occurred on a stretch of the river that borders the Pedernales Falls State Park. The brothers' beneficiaries ("Beneficiaries") sued the Texas Parks and Wildlife Department ("Department") for wrongful death and survival damages on a premise liability theory. The Beneficiaries claim that the Department had the authority to set certain areas of the river off limits to visitors and that it established a flood early warning system which failed on the day of the accident. The district court found evidence that the Department attempted to control the conduct of its visitors even though it had no control over the river itself.

The district court ruled in favor of the plaintiffs, holding that the Department's negligence proximately caused the Wilson brothers' deaths. The appeals court reversed the judgment, finding that the Department did not own the river; therefore, ownership, not control, was at issue before the jury. That court further stated that because control was not an issue placed before the jury, remand on that issue was proper.

On remand, the supreme court held that there was no evidence that the Department controlled the river condition. Therefore, it found that remand

solely on the issue of river control would be improper. However, this court found that there was evidence with regard to the Department's attempt to control the conduct of its visitors; therefore, remand may involve the issue of the Department's duty to make it safe for visitors to use the river, and whether the Department could be liable for the breach of that duty.

Sheela S. Parameswar

Domel v. City of Georgetown, 6 S.W.3d 349 (Tex. Ct. App. 1999)

(holding that the permission of a landowner was not required, and a taking was not implicated, when a properly state licensed City wastewater treatment facility released treated wastewater through a state owned watercourse).

The Domel's filed suit against the City of Georgetown ("City") for a taking by devaluation of property due to treated wastewater released into a stream on their property by the City from a wastewater treatment plant. The trial court granted a summary judgment in favor of the City. The Domels appealed the decision.

The Texas Court of Appeals affirmed the trial court's decision. The court addressed two issues on the appeal: 1) whether the stream on the Domel's land was a watercourse, and 2) if the stream was a watercourse, then if the City's actions constituted a taking. The court ruled that the stream over the Domel's property was a watercourse belonging to the state, and therefore, the City did not need the permission of the Domels for its actions.

Diffuse surface water belonged to the owner of the land on which it has gathered. Water in a natural watercourse was the property of the state, and held in trust for the public. A watercourse may be determined as a matter of law. A watercourse must have a defined bank and beds, a current of water, and a permanent source of supply. The court accepted the testimony of the City's Director of Community-Owned Utilities, which included two surveys of the Domel's property, that the three elements of a watercourse existed in this situation. The court stated that an affidavit by Mrs. Domel that the tributary was not a watercourse was not adequate, admissible evidence that raised a question of fact. The court said the affidavit set forth legal conclusions and not facts. The fact that the Domel's did not include flooding problems in their complaint was another factor that aided the court in determining a watercourse existed. The court said if a natural watercourse did not exist, the increase in water flow would have flooded the property.

Also, the court ruled that since the stream was a state owned watercourse, and the City had the proper licensing from the state, that the release of the treated wastewater was not a taking. In order to meet the state's duty to conserve and develop the state's water resources, the state had the right to transport water through watercourses for a public purpose without permission from the riparian owners. This right was in no way