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

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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

altered by the distinction between natural or manmade water flow. The Texas Water Code authorized a commission to issue permits for discharges into state waters if the applicant can show feasibility of the proposed amount of discharge from the treatment facility, and that the discharge will not lower the quality of the stream water. In this case, the requirements were met, thus a taking did not exist.

Tiffany Turner

Freeman v. Cherokee Water Co., 11 S.W.3d 480 (Tex. Ct. App. 2000)

(affirming the trial court's grant of summary judgment in favor of appellees on appellant's counterclaims based on the preclusion of the claims by res judicata and statute of limitations).

In 1948, the Freemans' parents settled a condemnation proceeding with Cherokee Water Company ("Cherokee") by conveying the title of tract of land to them. Prior to the settlement, Cherokee sought condemnation of the land in order to construct a reservoir to supply water to the surrounding community and to produce electricity for the community's use. Following the settlement, Cherokee constructed this reservoir, and later built a residential development on the acquired property as well. As part of the settlement with Cherokee, the Freemans' parents inserted a provision in the deed to the land allowing them and their children to fish at the reservoir. When their parents died, a dispute arose between the Freemans and Cherokee as to whether these fishing rights survived the death of the grantors. Cherokee instituted a declaratory judgment action asking the court to construe the fishing rights provision. In response, the Freemans entered counterclaims against Cherokee alleging fraud and violations of the doctrine of eminent domain by Cherokee.

Cherokee filed a motion for summary judgment on the counterclaims stating that the claims were barred as a matter of law by both the statute of limitations and by res judicata. At trial, the court severed the counterclaims from the issue of the fishing rights and then granted Cherokee's motion for summary judgment on the counterclaims.

The Freemans appealed the decision of the trial court arguing that: (1) evidence produced at trial showed that contrary to the law of eminent domain, Cherokee used the land for private rather than public purposes; (2) the statute of limitations should not have barred their counterclaims since the claims arose out of the same transaction or occurrence in dispute in Cherokee's declaratory judgment action; and (3) the counterclaims involve different matters than those decided in the 1948 condemnation suit and therefore were not prohibited by res judicata.

The appellate court rejected these arguments and affirmed the grant of summary judgment issued by the trial court on all of the Freemans' counterclaims. In so doing, the court held that: (1) the counterclaims did not arise out of the same transaction or occurrence that formed the basis of Cherokee's declaratory judgment action; (2) the issues raised by the