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Halverson v. Skagit County, 983 P.2d 643 (Wash. 1999)

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inconsistent with the state's historic deference to property rights, the court declined to abandon its common enemy jurisprudence in favor of the reasonable use rule.

The court reversed the summary judgment ruling and remanded to determine whether the third, due care, exception applied allowing the Currenses to bring suit.

Melody Divine

Halverson v. Skagit County, 983 P.2d 643 (Wash. 1999) (holding that the flood damage to landowner's properties did not support an inverse condemnation claim against Skagit County because it did not actually or proximately cause the levees to come into existence and the common enemy doctrine protected Skagit County from liability).

The Skagit River delta floodplain was located in Skagit County, Washington just before the Skagit River empties into the Skagit Bay on the Puget Sound. The floodplain was approximately eleven miles by nineteen miles and covers about 90,000 acres of property. The Nookachamps area was located upstream from Mt. Vernon, Washington and across the river from Burlington, Washington. This area has historically been subject to flooding. In fact, there are records of numerous severe floods during the 1800s and the Skagit River reached flood stage an average of once every 2.2 years between 1900 and 1991. Beginning in 1863, landowners built dikes to combat the flooding. The legislature passed legislation allowing the creation and organization of public diking districts in 1895. The legislature made these diking districts independent of the government and they have the power of eminent domain, the power to assess taxes, and the power to issue bonds. Sixteen diking districts currently exist and they maintain about fifty-six miles of levees and thirty-nine miles of sea dikes in the delta.

Severe flooding occurred twice in November 1990 and the Halversons and the other property owners in the Nookachamps area (together "Halversons") sued both Skagit County ("County") and the two diking districts they felt were at fault for the flooding. The diking districts were voluntarily dismissed; however, the Halversons pursued the suit against the County. The Halversons alleged that the County acted in concert with the diking districts in the maintenance, improvement, and operation of the diking system, and thus it's actions caused an increase in the amount of flooding on the land. They further allege that this increased flooding constituted an inverse condemnation under the Washington State Constitution. The County also brought a contribution and indemnity claim against the State of Washington ("State").

In the lower court the Halversons argued that the levees flooded their property more severely than it would have been had there been no levees along the river. The County countered that it was not liable for the construction and operation of the levees because the independent diking districts owned them. The County continued stating that if it was

responsible, despite its lack of ownership, that it was immune from liability under the theories of prescriptive easement, common enemy doctrine, and a statute limiting county liability. The trial judge instructed the jury on joint and several liability as to the tort theory of acting in concert and the jury found for the Halversons, awarding over $1.62 million in damages. The court added additional penalties bringing the total judgment against both the State and the County to over $6.3 million.

The first issue on appeal was whether the County was solely or jointly liable for the damage to the Halverson's property that the levees (that are owned by independent diking districts) caused. The Halversons argued that the County, either alone or acting in concert with others, interfered with the use and enjoyment of their personal or real property by diverting the overbank floodwater onto their property. The County countered that because the diking districts exist as statutorily independent entities and the dikes allegedly caused the flooding, it was not liable because it did not build the dikes or own the property on which the dikes were built. The court agreed with the County on this issue based on case law stating that in order to have a taking there must be some government activity that was the direct or proximate cause of the damage. The Halverson's provided no proof that the County designed the levee system, owned the land on which the levees were built, or provided maintenance, repair, or improvement activities to the extent that it would give rise to liability. The court states that the acting in concert theory that the trial judge submitted to the jury stated the incorrect standard for liability in an inverse condemnation action. Additionally, because the court found no liability against the County, there was no basis for the County's contribution claim against the State because that claim was derivative.

The second issue on appeal was whether the common enemy doctrine also precluded the Halversons from recovery. This court found that even if the Halversons had stated a valid legal claim, then, contrary to the holding of the lower court, the County should have been able to raise the common enemy doctrine as a defense. The common enemy doctrine allows a landowner to repel surface water from their property with dikes, regardless of the possibility that the water may enter upon and injure adjoining land. This defense was applicable here because once the water went above the banks of the river it became surface water. Surface water cannot maintain its identity and existence as a body of water and can be distinguished from water flowing in its natural course or collected into and forming definite and identifiable channels. The Halversons argued that the common enemy doctrine did not apply because these waters remained in a defined channel and that these waters fell in to a recognized exception to the doctrine, but the court dismissed both of those arguments.

The court found that the Halversons failed to state a legal claim for imposing liability of the County, and in addition, it found that if the County was held responsible that it would have a valid defense in the common enemy doctrine. The court thus reverses the lower court's judgment of $6.3 million to the Halversons, and remands for dismissal.

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