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Dorey v. Spicer, 715 A.2d 182 (Me. 1998)

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In supporting its claim that the District's exclusive right violated the Commerce Clause, the Club relied on *C & A Carbone, Inc. v. Clarkstown*. In *Carbone*, the United States Supreme Court held that an ordinance violated the Commerce Clause because it required all in-county possessors of trash to use a specific transfer station, thus depriving in-state and/or out-of-state processors of waste processing and disposal business. The Kansas Supreme Court distinguished this case from *Carbone* in that the District, itself, performs the entire piped pressurized water production and delivery operation within its boundaries; thus, it provided a municipal service.

The supreme court also relied on *U.S.A. Recycling, Inc. v. Town of Babylon*. The court applied the reasoning in *U.S.A.* and held that in creating the District, Kansas had not favored in-state water producers over out-of-state competitors nor had it hindered business from competing against a group of local proprietors. Based on this reasoning, the supreme court found the market participant exception inapplicable. The State of Kansas eliminated the market for piped water when it created the District, which, in turn, fulfilled a governmental duty. Therefore, no market existed due to the exclusive nature of the municipal services. Furthermore, the District did not impose any burdens on interstate commerce and arguably, the benefits of the municipal services would outweigh any burdens that may have been placed on interstate commerce.

Anna Litaker

MAINE

Dorey v. Spicer, 715 A.2d 182 (Me. 1998) (holding that the owner of downstream property had no flowage rights relative to upstream dam when: (1) he did not own lot on which dam was located; (2) the easement he relied upon, created by conveyance of half-interest in the sawmill, was extinguished when gristmill owner gave back that interest to sawmill owner; (3) any appurtenant easement, created by the Mills Act, was incapable of existence separate from the land containing the dam).

Peter M. Dorey ("Dorey") the downstream owner of property along Gristmill Brook ("Brook"), which originated from Foster Pond ("Pond"), filed an action naming as defendants forty-four owners of waterfront property on the Pond. Dorey sought a declaration of his rights to operate the Pond dam, inclusive of a right to flood the waterfront land of the Pond. Dorey also sought an injunction stopping any defendants from interfering with those rights. Dorey used the connection between the original dam and the current surrounding land rights as a basis for his claim.

A downstream gristmill owner conveyed the land near the outlet of the Pond to a sawmill owner in 1839. The sawmill owner constructed the dam in question during that same year to power a sawmill operation. At one time, the sawmill owner conveyed a one-half interest in all his sawmill property, along with "the right to draw water for the use of any mills," to the downstream gristmill owner. However, the gristmill owner relinquished that one-half interest back to the sawmill owner in 1860. As time passed, early owners divided and sold the land surrounding the Pond to various purchasers. Dorey purchased most of the gristmill property, and tried to acquire the original sawmill property, near the dam, to generate electrical power for his residence downstream. Dorey was able to purchase only small portions of the original sawmill land, along with "the flowage rights relative to the sawmill lots purchased." The previous owners conveyed the sawmill land to Dorey through a single deed, and they conveyed the flowage rights through a separate deed, which stated that the flowage rights would be appurtenant to the sawmill land just purchased.

Dorey claimed a private right to operate the dam and flood the property of upstream waterfront owners, based on the Mill Act, 38 M.R.S.A. §§ 651-59 (1989). Dorey claimed his rights under the Act by virtue of three sources. First, Dorey claimed that he had flowage rights to the dam because he owned the gristmill land and, at one time, the sawmill owner gave the gristmill owner a one-half interest in the water rights connected to the dam. Second, Dorey claimed to have flowage rights through his ownership of part of the original mill site. Lastly, Dorey claimed the flowage rights due to the separate deed that gave him those rights appurtenant to the sawmill lots he had recently purchased. Eight of the defendants moved for summary judgment, asserting that Dorey had no flowage rights, of any kind, to the dam.

The Maine Supreme Court held that summary judgment for the defendants was proper. The court refused to allow any of Dorey's alleged connections to the dam's flowage rights through the Mills Act. Under strict construction, the Act's intent was to promote the control of water flow for early industrial uses. The Act tied the water rights directly to the ownership of the land, in the nature of an appurtenant easement, benefiting the mill sight as the dominant tenant.

The court reasoned that the flowage rights at issue came into existence when the mill owner built the sawmill and dam in 1839. It was undisputed that the sawmill was no longer operational and Dorey did not own the dam lot. To the extent that these flowage rights still existed, they were in the nature of an appurtenant easement to the dam lot alone, and could not exist apart from that lot. Therefore, since Dorey owned some land once connected to the original sawmill, but not the dam lot, he did not possess any flowage rights. In addition, because the flowage rights could not exist separate from the dam lot, other owners of the sawmill lots could not convey any flowage rights by a separate deed, as Dorey alleged.

Finally, the court held that Dorey had no flowage rights through

the ownership of the gristmill lots. The court reasoned that when the gristmill owner relinquished his one-half interest in the sawmill property back to the original owner, he merged that land under a single owner. Any flowage right to the dam that might have existed with the gristmill property ended with that merger.

Joseph A. Dawson

MARYLAND

A. H. Smith Assoc. Ltd. Part. v. Maryland Dept. of the Env't, 695 A.2d 1252 (Md. Ct. Spec. App. 1997) (affirming the imposition of civil fines for violation of consent order and wastewater discharge).

A.H. Smith Associates Limited Partnership ("Smith"), owned and operated a sand and gravel processing facility. The facility operated by Smith required a National Pollutant Discharge Elimination System ("NPDES") permit for discharges of wastewater. The Maryland Department of the Environment ("MDE") administered the NPDES for the state of Maryland as authorized by the Environmental Protection Agency. In March 1991, prior to the issuance of a permit, MDE and Smith entered into a consent order allowing for the discharge of wastewater. Both the consent order and NPDES permit authorized the discharge of wastewater, consisting of sand and gravel, wash water, and stormwater runoff. This discharge was subject to a daily maximum and a monthly average maximum effluent limitation for total suspended solids ("TSS"), and an effluent limitation on turbidity with a daily maximum and a monthly average limit. MDE monitored these limits once per week utilizing a grab sample. A grab sample consists of a container filled directly from the outflow of the source at a given point in time. During the period of the consent order and later after issuance of the permit, MDE personnel found numerous violations of the daily and monthly effluent limitations for either TSS, turbidity, or both.

MDE filed suit in the circuit court for Prince George's County seeking \$297,000 in civil penalties and an injunction against further violations of the permit. The court imposed \$49,000 in fines against Smith, but refused to issue an injunction. Smith appealed alleging: the trial court abused its discretion in construing the consent order and permit language in favor of MDE, thereby improperly imposing liability; the trial court erred in concluding that the Appellant violated both the consent order and the permit; and the trial court abused its discretion in awarding \$1,000 per violation despite clear and uncontroverted mitigating factors in favor of MDE. Finding no error on the part of the trial court, the appellate court affirmed.

Smith's appeal contended the state's sampling methods did not