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Rosenfeld v. Thoele, 28 S.W.3d 446 (Mo. Ct. App. 2000)

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public trust doctrine, the state holds shore lands in trust for the use by the public and protects the public's right to fishing, fowling, and navigation on the flats. As the state had not granted authority to Barnstable to act on behalf of public trust rights, the court held the portions of the Barnstable's bylaws that granted the Commission powers to further the public's interest in trust lands were invalid. Consequently, the court severed the section of the bylaws concerning the protection of public trust rights.

The court disagreed with the Fafards' argument that state statutes regarding pier regulations preempted the Barnstable pier regulations. The court concluded the state statutes were not comprehensive and only established minimum statewide standards regarding pier regulations. Local municipalities were free to establish more stringent standards in addition to the state laws, and to require a local permit, as well as the state permit. The court held the Barnstable bylaws did not frustrate the purpose of state regulations regarding licensing for the construction of piers but furthered the interests that the legislature intended to protect in enacting the state statutes. The legislature granted local conservation commissions the authority to take regulatory action to protect the recreational value of wetlands and to act as a local advisory to the state Department of Environmental Protection.

Because state statutes did not preempt the Barnstable pier regulations, the court held the Commission had the authority to deny the Fafards permission to construct the pier. The court sustained the Commission's decision on the basis of powers granted by the legislature to local conservation commissions to protect recreational values, not on the bylaws which purported to give the Commission the authority to act to further public trust rights.

Spencer L. Sears

MISSOURI

Rosenfeld v. Thoele, 28 S.W.3d 446 (Mo. Ct. App. 2000) (holding placement of debris, fill area, and tie wall on neighboring land produced a cause of action for both trespass and nuisance).

Donald Rosenfeld ("Rosenfeld"), sued his neighbor, Virginia A. Thoele ("Thoele"), alleging nuisance and trespass arising out of Thoele's placement of debris, a fill area, and a tie wall on Rosenfeld's land. Rosenfeld sought both an injunction and damages. Thoele moved to dismiss. The trial court granted Thoele's motion to dismiss without prejudice. The Missouri Court of Appeals determined it had jurisdiction, reiterating that, generally, dismissal without prejudice was not a final judgment and therefore not appealable.

Rosenfeld alleged Thoele entered upon Rosenfeld's land without

authorization. Thoele argued the statute of limitations barred the trespass action. The court rejected Thoele's argument because records at St. Charles County Circuit Court showed Rosenfeld filed the petition within one year.

Rosenfeld argued Thoele placed and maintained the debris, fill area, and tie wall in an "extremely shoddy and ugly form" that adversely affected the commercial value of Rosenfeld's land. The court noted that, because no exact rule to determine nuisance existed, jury resolutions best suited nuisance actions. The court held a reasonable juror could conclude the defendant's placement and maintenance of debris, a fill area, and a tie wall was unreasonable. A reasonable juror could also conclude Thoele's actions substantially impaired Rosenfeld's ability to peacefully enjoy his land. The court noted the existence of unsightly debris, a fill area, and a tie wall did not create an actionable nuisance. Instead, the court focused on the fact that the unsightliness of the debris adversely affected Rosenfeld's land.

Rosenfeld then argued Thoele placed and maintained the debris, fill area, and tie wall in a manner that adversely affected the water table upon Rosenfeld's land. Also, Rosenfeld argued Thoele caused a displacement of both the water reservoir and the flood plain upon Rosenfeld's land, and the diversion of surface waters onto Rosenfeld's land obstructed a natural surface water drain. The court determined Rosenfeld did not specifically allege Thoele's debris caused surface water runoff to circumvent or exceed the capacity of its natural drainway.

Thoele argued Rosenfeld's claim for injunctive relief was moot because Thoele removed the tie wall. The court agreed with Thoele and held the case was moot. However, Rosenfeld also sought injunctive relief for the debris and fill area, as well as reestablishment of the grade. The court held the removal of the tie wall did not preclude the circuit court from granting injunctive relief.

Rosenfeld further alleged Thoele was the owner of the tract of land adjacent to his. Contrarily, Thoele argued Rosenfeld failed to join the owner of the land in question as a defendant. The court concluded a trustee, not Thoele, owned the adjacent land in question. The court noted the elements of trespass do not include ownership of adjacent property. Further, although the strict definition of nuisance mentions the defendant's unreasonable use of his or her property, the primary focus is on the defendant's unreasonable interference with the use and enjoyment of land. The court stated that one who creates a nuisance, whether on his property or not, is liable for the damage caused thereby. The test for liability for damage caused by a nuisance turns on whether the defendant was in control over the instrumentality alleged to constitute the nuisance, either through ownership or otherwise. If this action proceeded in the absence of the trustee or beneficiaries, their ability to protect their interest therein

would be impaired. Thus, the court instructed the trial court upon remand to permit Rosenfeld to join the trustee and beneficiaries as defendants. If joinder was not feasible, the trial court must determine whether indispensable parties exist.

Nicole Anderson

NEVADA

So. Fork Band Te-Moak Tribe of W. Shoshone Indians of Nev. v. 6th Judicial Dist. Ct., 7 P.3d 455 (Nev. 2000) (holding an Indian tribe waived sovereign immunity when it took possession of reservation land subject to previously adjudicated water rights).

In 1913, the Nevada State Engineer ("State Engineer") initiated water rights adjudication procedures for the Humboldt River, eventually known as the Humboldt Decree ("Decree"). This required the state engineer and water commissioners to administer the water rights adjudicated under the Decree. The United States purchased land, subject to the Decree, to create the South Fork Reservation for the Te-Moak Tribe of the Western Shoshone Indians ("Tribe"). The Tribe cooperated with the State Engineer and the water commissioners, allowing them to cross the reservation to administer and maintain the Decree. Further, the Tribe paid assessment fees for administration of the Decree for at least ten years. In spite of this historical activity, on March 8, 1998, the Tribe adopted resolutions prohibiting the State Engineer and water commissioners from entering reservation land and determining the Tribe would no longer pay assessment fees as required by the Decree.

After the Tribe passed these resolutions, three water commissioners entered the reservation to access private land that was inaccessible through any other means, in order to regulate the river in accordance with the Decree. A tribal peace officer arrested the water commissioners for trespassing on the reservation.

Subsequently, the State Engineer and water commissioners filed a complaint with the Sixth Judicial District Court of the State of Nevada claiming the Tribe was in contempt for interference with authorities regulating and administering the Decree. When their motion to dismiss the complaint was denied, the Tribe filed a writ of prohibition contending the court lacked jurisdiction over the Tribe, and that the United States was an indispensable party to the contempt hearing.

In determining whether the district court had jurisdiction over the Tribe, the Supreme Court of Nevada recognized Indian tribes, like sovereign powers, enjoy common law immunity from suit. Sovereign immunity can be waived, but any waiver must be clearly expressed. However, a waiver does not require explicit declaration indicating that immunity is waived. The supreme court concluded the purchase of