097 D.A. 12-2-93

FILED
SID J. WHITE
NOV 1 1993
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

DAVEY COMPRESSOR COMPANY,

Petitioner,

vs. Case No.: 81,538

CITY OF DELRAY BEACH,

Respondent.
_____/

AMICUS CURIAE BRIEF OF THE FLORIDA ASSOCIATION OF COUNTY ATTORNEYS, INC.

JOSEPH A. MORRISSEY
315 Court Street
Clearwater, FL 34616
(813)464-3354
Fla. Bar No.: 0699918
On Behalf of the Florida
Association of County
Attorneys, Inc.

TABLE OF CONTENTS

TABLE OF CITATIONS

ARGUMENT

I.

THE FOURTH CIRCUIT CORRECTLY RULED THAT WHEN A POLLUTER HARMS A PUBLIC WATER SUPPLY DAMAGES ARE NOT LIMITED TO THE VALUE OF THE REAL PROPERTY ABOVE THE WATER SUPPLY, BUT INSTEAD THE POLLUTER SHOULD PAY THE FULL COST REQUIRED TO SUPPLY DRINKABLE WATER TO THE PUBLIC

The case before the Court has far reaching and important implications for every resident of Florida who receives drinking water from a public water supply facility. At issue is the appropriate method for calculating damages to a public water supply drawn from wells. The withdrawal of the water in the instant case was authorized by a consumptive use permit issued by a water management district as authorized by Chapter 373 Part II, Fla. Stat. (1991).

Defendant, Davey Compressor Company, effectively poisoned an aquifer which supplied 8 million gallons per day of water to the residents of Delray Beach. In order to continue to furnish a safe, wholesome supply of water, Delray Beach installed a temporary treatment unit and then a permanent, more efficient treatment unit. These treatment units enabled the City of Delray Beach to clean Davey's chemical pollution from the public drinking water supply. Through treatment, Delray Beach was able to meet its obligation to its residents to provide a continuous wholesome water supply.

The Fourth District allowed Delray Beach to recover for injury to its right in the use of the ground water beneath its

real property and to recover for damages which resulted from the costs incurred in abating the nuisance caused by Davey's ground water contamination. Davey Compressor Co. v. City of Delray Beach, 613 So.2d 60 (Fla. 4th DCA 1993). Davey seeks to limit the amount of damages it must pay to Delray Beach.

The Appeals Court describes Davey's argument as follows: "Appellant [Davey] argues since appellee [Delray Beach] sued for injury to its real property, its damages cannot exceed the value of its property." 613 So.2d 60, 61. Davey has (in this Court at least) apparently abandoned the argument that Delray Beach can collect no more in damages than the value of the real estate overlying the aquifer (See Page 19 of the Initial Brief of Petitioner, Davey Compressor Company).

The Court of Appeals was quite correct in rejecting such an artificial limit on the damages to water withdrawn from an aquifer pursuant to a consumptive use permit. The Florida Legislature has specifically recognized that groundwater may be transferred and used "beyond overlying land, across county boundaries or outside the watershed from which it is taken. . ." Section 373.223(2), Fla. Stat. (1991). The authorization pursuant to a consumptive use permit to transport and use water beyond overlying land is a change from the common law. The common law limited a landowner's right to transport ground water beyond the boundaries of the land. See Kemp, Interbasin Transfers of Water in Florida: Common Law and the Water Resources Act, 56 Fla. Bar J. 9 (Jan. 1982).

The ability of a consumptive use permit holder to transport water beyond the overlying land is what gives the usufructuary rights to water described in Village of Tequesta v. Jupita Inlet Corp., 371 So.2d 663 (Fla. 1979) value greatly exceeding the value of the overlying land.

The fact that Delray Beach serves 53,000 water customers from the aquifer polluted by Davey distinguishes the instant case from the diminution of value cases cited by Davey in its brief. Davey did not put an individual landowner at risk. Davey threatened the welfare of an entire city. Had Delray Beach not acted quickly and decisively to treat the polluted water, Davey would have faced potential claims from 53,000 water customers. For example, in Pensacola Gas Co. v. Pebley, 25 Fla. 381, 5 So. 593 at 597 (1889) the Court awarded damages for the "vexation of the nuisance" of being deprived of water.

The Fourth Circuit's decision which awards Delray Beach restoration costs is eminently reasonable. Such a decision allows a water supply authority to quickly mitigate potential damages as required by Florida law. State ex rel. Dresskel v. City of Miami, 13 So.2d 707, 709 (Fla. 1943). The water utility is in the best position to evaluate the remedial actions necessary to maintain a wholesome water supply for the public. In some instances it may be as Davey suggests, that the best solution will be the relocation of the wellfield and temporary cleanup measures. As in this case, the better solution might be to treat the water in place. However, the cleanup decision must

be made at the time the pollution is discovered, not years later with the benefit of 20-20 hindsight.

The damage rule proposed by Davey would only encourage the polluter of a public water supply to delay taking responsibility for its actions. As in this case, the polluter can count on the public supply authority to clean up the pollution as best it can. Otherwise the supply authority's customers might suffer catastrophic injury. The polluter then can go into litigation knowing its assessment for damages will be no more than costs of the actual remediation measures taken by the public supply authority. The polluter is then free to argue the public supply authority should have undertaken a less costly alternative. The rule proposed by Davey is a guarantee of protracted, unproductive litigation at the public's expense.

The District Court's damage allowance in the instant case allowed Delray Beach to be made whole. Davey in its argument is correct in that there is a slight risk that a public supply authority may choose a corrective alternative which in hindsight can be evaluated as not being the least expensive possible. But who should bear that risk, the public supply authority which is trying to maintain a water supply to thousands (or hundreds of thousands) of customers or the polluter? Common sense and the common law tells us the tortfeasor bears the responsibility for the damages caused.

Davey raises in its brief the possibility of Delray Beach becoming unjustly enriched by collecting for restoration of

the water supply but never actually completing the restoration project. The possibility of an unjust enrichment is just about nil. As demonstrated by this case the decision to undertake restoration for a polluted water supply must be made immediately and paid for immediately. It is not possible for a water supply authority to wait until after its day in court to restore the polluted water. The problem is immediate and must be fixed immediately. The money must be spent before the judgment not after. The risk that a water supply authority will make unnecessary expenditures is small particularly when balanced against the need to supply wholesome water to the public.

II

THE FOURTH DISTRICT UNREASONABLY LIMITED THE PERIOD OF TIME FOR WHICH THE CITY OF DELRAY BEACH COULD COLLECT FOR FUTURE DAMAGES BY NOT RECOGNIZING THAT DELRAY BEACH HAD A LEGAL INTEREST PURSUANT TO CHAPTER 373 PART II FLA. STAT. (1991) IN THE RENEWAL OF ITS CONSUMPTIVE USE PERMIT

The Fourth District did err by not allowing Delray Beach to recover for damages beyond the expiration date of the consumptive use permit. A water management district is required to issue a permit if the applicant can meet the criteria of Chapter 373, Part II, Fla. Stat. (1991). More particularly, Section 373.233(2) gives a preference to prior users in competing permit applications. The Court below should have recognized the presumption that the City of Delray Beach's consumptive use permit would have been renewed. As a practical matter, public water supply consumptive use permits are invariably renewed.

A contrary rule would lead to anomalous results. For example a firm could destroy a community's water supply on the first day a consumptive use permit was issued. The polluter would then be liable for damages to water supply for the entire term of the permit. However, if the same act destroyed the same community's water supply on the last day of the permit, damages would be zero. Such a result is not in the public interest or consistent with Chapter 373, Part II, Fla. Stat. (1991).

CONCLUSION

The decision of the Fourth District Court of Appeals affirming the Trial Court's instructions and ruling on the proper measure or damages should be affirmed. That portion of the decision below that reversed and award of damages for the period of time beyond the expiration date of the consumptive use permit should be reversed.

Respectfully submitted,

Joseph A. Morrissey
315 Court Street
Clearwater, FL 34616
(813)464-3354
Fla Bar No.: 0699918
On Behalf Of The Florida Association of County Attorneys, Inc.

Susan H. Churuti
President, Florida Association of County Attorneys, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to Susan A. Ruby, City Attorney's Office, City of Delray Beach, 200 N.W. First Avenue, Delray Beach, Florida 33444; Steven R. Berger, Wolpe, Leibowitz, Berger & Brotman, Biscayne Building, Suite 520, 19 West Flagler Street, Miami, Florida 33130; Douglas M. Halsey, Douglas M. Halsey, P.A., Attorneys for Petitioner, First Union Financial Center, Suite 4980, 200 South Biscayne Boulevard, Miami, Florida 33131-5309 on this 29th day of October, 1993.

Joseph A. Morrissey