

NUMBER 03-219

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

MARK TAYLOR, ET AL.

Plaintiffs - Appellees

Versus

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF  
TRANSPORTATION AND DEVELOPMENT

Defendant - Appellant

On appeal from the Seventh Judicial District Court [No. 19,098], for the Parish of Catahoula, State of Louisiana; the Honorable Kathy Johnson, District Judge, presiding.

Woodard, J., dissenting.

Respectfully, I must dissent from the majority's opinion, as I do not find sufficient evidence in the record to prove a taking – in fact or at law. All we have are the Taylors' unsupported impressions.

The testimony established that the Taylors' property had a history of flooding before the improvements, and the photographs in evidence demonstrate that it had suffered erosion before the constructions on Highway 8. Further, the previous owners of the property testified to the history of flooding and erosion on the property.

The Plaintiffs do not dispute that it has a history of flooding; rather, Mr. Mark Taylor and Mr. Drewitt Taylor testified that, since the improvements, the flooding was more frequent and occurred with less rainfall. However, the only evidence they offered to support this contention were photographs of the property which were taken after a flood in January of 2001. (The new bridges were constructed in 1994 and the old bridges were taken out in April of 1995.) Neither offered any verification that flooding increased after the improvements in 1995. In fact, Mr. Drewitt Taylor

testified that in October of 1995, he could not tell whether the improvements had affected the property. Likewise, Mr. Mark Taylor stated:

A. That's six years ago, I can't tell you. I can't answer that.

Q. From 1995 to present, and again, approximately how many times do you think that it flooded?

A. What is it, six years about?

Q. About.

A. Really, I don't know. It could have flooded 30 times.

Q. And your brother indicated ten, maybe more?

A. He's just guessing, I guess. I'm just saying it could have. I don't know. I guess we'd have to get data to – I don't know.

However, Mr. Dewitt Carpenter, whose father owned the property from 1979 to 1989, explained that during that time, Bushley Creek would overflow and flood the property “anywhere from two to five times a year, just depending on what kind of rainy season that you had.” Further, Mr. Mark Taylor conceded that Mr. Lamar Cruse's and Mr. Huey Womack's neighboring properties, likely, flooded every time the Taylors' property flooded. Both, Mr. Womack and Mr. Cruse testified that they had experienced no noticeable difference in the flooding of their properties after DOTD's improvements.

The Taylors point, specifically, to two areas in which the Bushley Creek overflows and causes greater erosion to their property. One area is dubbed the “big washout,” which is the most prominent bend in Bushley creek once it reaches the Taylors' property. The other area is the next bend of the Creek. However, all of the previous owners of the property stated that these areas had always been areas of primary concern due to flooding and erosion.

For example, Mr. Ily Ewing grew up on the property and has been familiar with it since 1931. He said that, when he was raised there, about 100 acres were cleared and that in the early 1970's, Mr. Shelby Beasley cleared more of it, resulting in the amount that is cleared now. Mr. Beasley, who owned the property from the early 1970's until 1979 or 1980, testified that he had cleared 180-200 acres of it. Regarding

the “washout” area, which the Taylors claim DOTD’s improvements has damaged, Mr. Beasley testified:

A. We didn’t put any debris in the Bushley at that point. We did have trouble with erosion. When the creek got out of it’s banks, and I had cleared it, and I had plowed it, and invariably, when it would rain in the spring, we had problems to the extent that I decided to build up the road going in and make sort of a levee effect.

.....

Q. And you built it up, you built up the road, how did you do that, you’d scrape dirt up?

A. I had a backhoe and a cat come in, Mr. David I. Patten built it for me.

Q. And after you did that, did that prevent the water from coming over it?

A. No, it didn’t. That very fall, I had the worst blowout ever.

.....

Q. That’s where we have big wash out?

A. Right.

Q. That was the first time it blew out there, or did you have problems with that?

A. Heretofore, before that, this wasn’t the first year I had it. This was getting on up to the very latter part of the time I had it. I kept trying to raise the road and do this and do that to keep the water from coming, and that was possibly a mistake, because had it been in grass and it would come over without the head that it got when it went over the little old levee, it might not have washed as bad, but by building it up and then it fresh, too, well, it washed out pretty bad.

Q. Had you had other wash outs besides this big was out area?

A. Yeah. There [sic] had several areas that went out.

Further, Mr. Dewitt Carpenter, whose father owned the property from 1979 to 1989, testified:

Q. Is that – was the big wash out there when you got there?

A. Yes. . . And then I put a dam along the creek bank, I stopped that off right there.

Q. In other words, you put a dam between the big wash out and Bushley?

A. Right.

Q. In other words, it was traveling through there?

A. Oh yeah.

Q. And it was coming down, once it travels through the big wash out, it would go all the way south to –[Mill Creek]?

A. Right.

Q. So, you had trouble from the big washout all the way down to the property – during the time that y'all had it?

A. Oh yeah absolutely.

.....

A. That area up there had just started to, the trees was sliding down the bank and going in the creek.

Q. Okay. Was that something that occurred all the way down?

A. Oh, yeah. Just different areas, it just depends on – something might start it, even if the cattle start going down and watering in one spot, and then you get a big flood rain, it might start it to washing right there.

Q. Okay. So it's fair to say that this eroded all during the period of time that you had it at a fairly regular pace?

A. Yes, I would work on it, keep patching it back, but it did it.

Further, the parties entered in evidence areal photographs taken of the area in 1989, 1990, 1995, 1998, and 2001. In trying to establish that the DOTD's improvements caused the increased erosion, the Taylors pointed out the differences and the increase in the erosion by comparing the 1989 photograph with the photograph taken in 2001. However, the testimony regarding the history of flooding and erosion on the property supports that there would be noticeable differences in the

property over an eleven-year period, regardless of DOTD's actions. In support of their assertions that DOTD's actions caused increased erosion, the Taylors compared the 1989 photograph with one taken in 1995. However, when the 1995 photograph was taken, the old bridges were still in place. Accordingly, any of the variables that Plaintiffs' experts had attributed to the existence of the older bridges, were still in place, and playing the same role in restricting or slowing the water in 1995 as they had in 1989. For example, if the wooden piers slowed the water in 1989, they were still slowing the waters in 1995, even though the new bridge, with fewer and smoother piers, was fully constructed by then. And as one of the Plaintiffs' own experts admitted, had he known that the old bridges were still there in 1995, it may have affected his study.

Therefore, I cannot agree that the Plaintiffs' testimony in this case was sufficient to establish that they experienced more flooding or erosion after DOTD's improvements than they did before the improvements. Moreover, even accepting such a factual finding, I do not believe the Taylors have shown, as a matter of law, "damage in a constitutional sense."

In the instant case, determining whether there has been "damage in a constitutional sense" involves an examination of whether DOTD's actions frustrate servitude laws. The trial court committed a legal error by omitting an analysis under the natural servitude drainage articles. Such analysis is mandated in order to determine whether property has been "damaged in a constitutional sense."<sup>1</sup> The majority supplies this analysis and supports the trial court's ultimate conclusion that DOTD's actions constituted a taking. However, as I appreciate the majority's analysis, DOTD's only impermissible action was failing to return the water to its ordinary channel before it left DOTD's property, as La.Civ.Code art. 658 requires; rather, it returns to its ordinary channel some 400 feet south of DOTD's property. Significantly, however, it resumes its ordinary channel *before* it reaches the Taylors' property.

Additionally, while I subscribe to the majority's proposition that an increased flow that causes the water to back up in instances of less rainfall can constitute a

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<sup>1</sup>See *Chambers*, 595 So.2d 598. See also *Stagni v. State ex.rel. DOTD*, 01-374 (La.App. 5 Cir. 3/13/02), 812 So.2d 867, writ denied, 02-1469 (La. 9/20/02), 825 So.2d 1173.

taking, even absent an increase in the total volume of water traversing the property, for the reasons I already stated, I do not believe the Plaintiffs proved this fact by a preponderance of the *evidence*.

Furthermore, because I believe this to be the sole potential basis for finding a taking in the instant case, I disagree that the trial court's error concerning DOTD's expert, Mr. Wyble, can be dismissed as "harmless." The failure to recognize Mr. Wyble as a hydrology expert and, consequently, giving no weight to his testimony unfairly prejudiced DOTD.