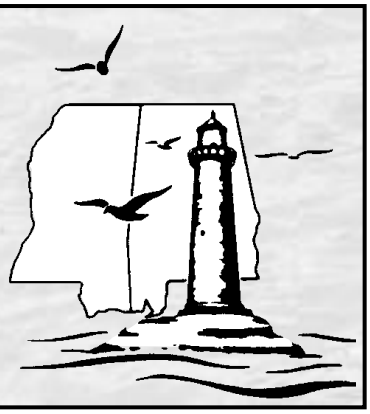
Volume 27, Number 4
February 2008

WATER LOG

A Legal Reporter of the Mississippi-Alabama Sea Grant Consortium



Alabama Supreme Court Reverses $3.5 Billion Punitive Damage Award Against ExxonMobil

ExxonMobil Corp. v. Alabama Dept. of Conservation and Natural Resources, 2007 WL 3224585 (Ala. Nov. 1, 2007).

Stephanie Showalter, J.D., M.S.E.L.

In *ExxonMobil Corp. v. Alabama Dept. of Conservation and Natural Resources*, a contract dispute between a corporation and the state resulted in decades of litigation and an eye-popping, jaw-dropping punitive damage award 180 times greater than the compensatory damages. Corporate greed and arrogance can easily enflame the passions of ordinary citizens serving on juries who have little patience for the word games played by attorneys. Especially when the corporation is Exxon.

In 1979, one of the largest natural gas reserves in the United States was discovered in Mobile Bay. The Alabama Department of Conservation and Natural Resources (DCNR) awarded seven leases to Exxon in 1981 and fifteen more in 1984. Although most standard lease forms are prepared by the oil companies, Exxon's leases were executed using forms prepared by DCNR and contained royalty provisions more favorable to the state.

Exxon began making monthly royalty payments when the wells started production in December 1993. About the time Exxon began making payments, DCNR discovered during an audit of Shell Oil that the oil company was interpreting the lease provisions differently than the state.[1] When the state got around to auditing Exxon in 1996, the state discovered similar disparities in its royalty payments. In February 1997, DCNR notified Exxon that it had miscalculated its royalty payments and as a result owed an additional $50 million to the state of Alabama. On July 28, 1999, Exxon sued the state to obtain judicial resolution of the calculation dispute. The state responded by filing a counterclaim alleging breach of contract and fraud.

See Punitive Damage, page 12

In This Issue . . .

Mississippi Court of Appeals Reverses Coastal Rezoning Decision

Childs v. Hancock County Bd. of Supervisors, 2007 Miss. App. LEXIS 748 (Miss. Ct. App. Nov. 6, 2007).

Sarah Spigener, 3L, University of Mississippi School of Law

In November, the Mississippi Court of Appeals reversed the decision of the Hancock County Board of Supervisors (Board) to rezone approximately 1,000 acres of coastal property. The court held that the Board failed to meet its burden of proof that there was a substantial change in the character to justify the rezoning.

Background

Hancock County's zoning ordinances and comprehensive zoning map were adopted in 1997. In 2005, the Board sought to rezone approximately 1,000 acres of waterfront coastal property. The property was zoned highway commercial, medium density residential, and general agricultural. Before amending the County's comprehensive plan, the Planning Commission (Commission) was required to review the issues and submit its recommendations to the Board.

On April 14, 2005, just a few months before Hurricane Katrina devastated parts of Hancock County, the Commission met and proposed a new zoning classification, "C-4," which would include such uses as condominiums, apartments, hotels, motels, and "tourist accommodation facilities" without height restrictions. At the same meeting, the Commission recommended that the Board rezone the 1,000 acres under this new C-4 or "commercial resort" designation. The Commission's recommendation stated that conditions in the area had changed "which make an amendment to the Zoning Map necessary and desirable and in the public interest."[1] The Commission also stated that development trends in the area called for more "commercial resort uses to support the commercial and recreational uses which will develop in conjunction with the Bayou Caddy Casino."[2] On May 2, the Board adopted the Planning Commission's recommendations and "incorporated by reference the entire record" of the Planning Commission. The Board of Supervisors did not issue independent findings.

On May 18, a group of Hancock County residents ("Appellants") who all owned property adjacent to the newly rezoned area filed a bill of exceptions to the Hancock County Circuit Court appealing the Board's decision to rezone. On May 31, Paradise Properties Groups, LLC and Kudo Developers of Mississippi, LLC separately filed motions to intervene claiming that the court should dismiss the Appellants' bill of exceptions. The circuit court affirmed the Board's decision on March 13, 2006. The property owners appealed to the Mississippi Court of Appeals.

Sea Grant

WATER LOG is a quarterly publication reporting on legal issues affecting the Mississippi-Alabama coastal area. Its goal is to increase awareness and understanding of coastal problems and issues.

To subscribe to WATER LOG free of charge, contact: Mississippi-Alabama Sea Grant Legal Program, 262 Kinard Hall, Wing E, P. O. Box 1848, University, MS, 38677-1848, phone: (662) 915-7775, or contact us via e-mail at: **sealaw@olemiss.edu** . We welcome suggestions for topics you would like to see covered in WATER LOG.

Interim Editor: Stephanie Showalter, J.D., M.S.E.L.

Publication Design: Waurene Roberson

Contributors:
Terra Bowling, J.D. • Sarah Spigener, 3L

For information about the Legal Program's research, ocean and coastal law, and issues of WATER LOG, visit our homepage at
http://www.olemiss.edu/orgs/SGLC

Analysis

In Mississippi, comprehensive zoning ordinances adopted by local governments are presumed reasonable and in the public interest. Rezoning decisions, however, do not enjoy a similar presumption of reasonableness. "For a rezoning application to be approved, the applicant must prove by clear and convincing evidence that either (1) there was a mistake in the original zoning, or (2) the character of the neighborhood has changed to such an extent as to justify rezoning and that a public need exists for such rezoning."[3] The Board did not allege that there was a mistake in the original zoning, so the court focused on examining the evidence of a change in neighborhood character.

After examining the record, the court held that the Board failed to present clear and convincing evidence of a change in the character of the property. The Board's first mistake was incorporating the findings of the Commission without elaboration. The court concluded that "the Planning Commission's findings on the matter are sparse and conclusory at best, and non-existent at worst."[4] The Commission failed to discuss what conditions had changed and how. The Commission also appeared to rely heavily on a document prepared by a local citizen and presented at a Commission meeting. This thirteen-page document contained a number of photographs depicting blighted property, but the court found that it was unclear whether these properties were in the rezoned area or in a different condition than in 1997. While increased blight can justify a zoning change, "the Board of Supervisors may not make a conclusory finding and then defer to the citizenry by throwing page after page of citizen generated material upon its finding."[5] The Board must make its own specific findings and properly support its conclusions.

The Board also argued that there was substantial evidence of increasing development pressures which supported its decision to rezone the area. Increasing development pressure can constitute a change in the character of a neighborhood, but the court found "no evidence of increasing development that over-taxed public infrastracture."[6] In fact, the evidence suggested the problem was a lack of development. A lack of development or development options alone, according to the court, is not sufficient to demonstrate a neighborhood change.

The court also refused to accept the Board's argument that the Commission and the Board relied on "their common knowledge and familiarity with the property in question." If such knowledge was relied on, it was not made clear in the record and could not be invoked in support of the rezoning classification.

Conclusion

Because the Board articulated no factual basis for the ruling, its decision to rezone the property was arbitrary and capricious. The court stated that "neither the Planning Commission nor the Board of Supervisors supported its decision with any reasoned conclusion."[7]

Endnotes

1. *Childs v. Hancock County Bd. of Supervisors*, 2007 Miss. App. LEXIS 748 at *3. (Miss. Ct. App. Nov. 6, 2007).
2. *Id.* The Bayou Caddy Casino, at the time this resolution was adopted, was scheduled to begin operation in 2006. Hurricane Katrina halted construction.
3. *Id.* at *8.
4. *Id.* at *9.
5. *Id.* at *14.
6. *Id.* at *15.
7. *Id.* at *18.

Photograph of Harrison County beachfront after Hurricane Katrina courtesy of Ben Posadas, Ph.D., Mississippi State University-Coastal Research and Extension Center.

Yacht Owner's Hurricane Preparations Found Reasonable

Fischer v. S/Y Neraida, 2007 US App. LEXIS 26698 (11th Cir. Nov. 19, 2007).

Terra Bowling, J.D.

In 2004, Hurricane Frances hit the southeast coast of Florida causing widespread damage. During the storm, a sailing yacht broke free of its moorings and crashed into a dock. The dock owner brought suit and the Eleventh Circuit exonerated the yacht owner. The court found that the yacht owner's preparations for the hurricane were reasonable and that the damage could not have been prevented by the exercise of reasonable care.

Background

The S/Y *Neraida* was anchored in Lake Worth, Palm Beach by its owner, Peter Siavrakas. Siavrakas lived in Michigan and relied on a caretaker to maintain the yacht. When the National Weather Service issued a hurricane warning for the east coast of Florida, Siavrakas contacted the yacht's caretaker and another acquaintance, Steven Cienkowski, to make the necessary preparations. Cienkowski made the preparations alone on the evening of September 3. The main anchor on the yacht was already set, and Cienkowski ensured that the sails were tied and secured to the mast and dropped the yacht's secondary anchor.

On the night of September 4, hurricane force winds began to hit the area and Frances made landfall early the next morning. During the storm, the *Neraida* broke free of its moorings and crashed into David Fischer's dock. Fischer brought suit in rem against the boat and an action in personam against Siavrakas and the Neraida Co.

The United States District Court for the Southern District of Florida ruled in favor of Siavrakas. The court held that Siavrakas met the burden of proving that his actions in securing the yacht were reasonable and exonerated him. Fischer appealed the judgment to the Eleventh Circuit. On appeal, he argued that the district court erred by failing to shift the burden of proof to Siavrakas, the court should have held Siavrakas liable because it found that Hurricane Frances was not so severe as to make the accident inevitable, and that Siavrakas' preparations were not reasonable.

Burden of Proof

The Eleventh Circuit first examined whether the district court correctly shifted the burden of proof to Siavrakas. The Eleventh Circuit concluded that the district court correctly shifted the burden when it stated that Siavrakas would be "relieved from liability only if [he] can show that the damage caused to [Fisher's] dock could not have been prevented by the exercise of reasonable care."[1]

Next, the court addressed whether the *Louisiana* Rule required a higher standard of care than reasonable care. The *Louisiana* Rule states that when a vessel moving or drifting due to an external force, such as the current or the wind, allides with a stationary object, the moving vessel is presumptively at fault.[2] The presumption is rebuttable if the defendant can illustrate one of the following three things: "that the allision was the fault of the stationary object; that the moving vessel acted with reasonable care; or that the allision was an unavoidable accident."[3]

Siavrakas raised the defense that he exercised reasonable care in preparing the yacht for the hurricane. The court cited several allision cases in which the court applied the reasonable care standard, negating Fischer's argument that a higher standard should be used. Fischer based his argument on several Eleventh Circuit cases that "referred to the burden facing a defendant seeking to overcome the *Louisiana* Rule's presumption of fault as "heavy" or "strong."[4] The court noted that the use of those words did not result in a higher standard of conduct, but meant that the defendant had a strong burden of persuasion. Fischer

also argued that the "act of God defense" requires the defendant to prove that he took not just one reasonable course of action among many, but all reasonable measures. The court noted that the reasonable care defense under the *Louisiana* Rule does not require the defendant to show that he took all reasonable measures.

Reasonable Care

Finally, Fischer challenged the district court's decision that Siavrakas took reasonable care in preparing for Hurricane Frances. The court defined the standard of reasonable care in this case as "that of prudent men familiar with the ways and vagaries of the sea."[5]

Fischer first challenged the fact that the *Neraida*'s sails were not removed; however, the court agreed with expert testimony that removing the sails before a storm only protects the sails and does not protect the ship from breaking anchorage. Next, Fischer contended that the anchorage was unreasonable for the storm, but the court noted Fischer's own expert's testimony stating that the use of fewer anchors is safer in shifting wind conditions. Finally, Fischer argued that the ship should have been moved to a different location. The court agreed with expert testimony that not moving the *Neraida* was a reasonable decision given "the storm's movement, the hazards of navigating in shallower waterways, and the risks of docking in more densely packed anchorages further south."[6]

Photograph of Hurricane Katrina damage courtesy of NOAA's Photo Library, from the Collection of Wayne and Nancy Weikel, FEMA Fisheries Coordinators.

Conclusion

The Eleventh Circuit affirmed the district court's decision.˅

Endnotes

1. *Fischer v. S/Y Neraida*, 2007 US App. LEXIS 26698 at *12 (11th Cir. Nov. 19, 2007).
2. *Id*. at *14.
3. *Id*. at *14-15.
4. *Id*. at *19.
5. *Id.* at *24.
6. *Id*. at *25.

Announcement

We invite you to attend the inaugural symposium of the Sea Grant Law and Policy Journal to be held March 25 - 26, 2008 at the University of Mississippi in Oxford, Mississippi.

This year's theme is Coastal Resiliency. Coastal resiliency refers to the ability of coastal cities, towns, and communities to adapt and recover from an increasing number of natural hazards, including hurricanes, tsunamis, floods, and disease epidemics. Presentations will be given on a variety of topics including flood insurance litigation in the wake of hurricanes, local government authority to enact fertilizer ordinances to address harmful algal blooms, and legal mechanisms available to adapt to sea level rise. The keynote address on Tuesday night, March 25, will be given by Lt. Gen. Clark Griffith, Chair of the Biloxi, Mississippi Reviving the Renaissance Commission.

To download the registration form and for more information, please visit the Journal's website at http://www.olemiss.edu/orgs/SGLC/National/SGLPJ/SGLPJ.htm .

We look forward to seeing you in March! ˅

Litigation Update

Parm v. Shumate, 2007 U.S. App. LEXIS 29948 (5th Cir. Dec. 28, 2007).

Update of *La. Court Finds No Right to Fish, Hunt on River*, WATERLOG 26:3 (2006).

Terra Bowling, J.D.

In 2006, the United States District Court for the Western District of Louisiana held that there is no federal common law or state law right to fish and hunt on the Mississippi River when it inundates privately owned land. Recently, the Fifth Circuit Court of Appeals affirmed that decision.

The case began when several fishermen were arrested for trespass after they refused to stop fishing on Gassoway Lake and adjacent small water bodies in East Carroll Parish Louisiana. The land under and surrounding the lake is owned by a limited liability company (LLC), Walker Lands, Inc. At one time, the lake was part of the Mississippi River, but it is now three and a half miles away. The fishermen were able to access the lake when the river was at its annual flood height.

Photograph of man fishing in fog courtesy of USFWS.

The fishermen brought suit against the sheriff in federal district court, seeking damages for false arrest under 42 U.S.C. § 1983 and an injunction prohibiting further arrests for fishing until a judgment was reached. The district court considered the fundamental question: whether the plaintiffs had the federal or state right to navigate, fish, and hunt the Mississippi River at its normal heights. The federal navigational servitude under the Commerce Clause of the U.S. Constitution gives the federal government a "dominant servitude" over the navigable waters of the United States. The court held that neither the federal navigational servitude nor other federal statutes gave the plaintiffs a right to hunt and fish on the lake. The court also held that state law did not give the fishermen the right, noting a comment to the Louisiana Civil Code providing that the right of navigation is merely for purposes "incidental to the navigable character of the stream and its enjoyment as an avenue of commerce."[1]

On appeal, the Fifth Circuit examined whether the fishermen had either a federal or state right to fish on the LLC's property in the spring during the Mississippi River's normal flood stage. The court affirmed that the federal navigational servitude did not create a right to fish on privately owned land. The court further noted that the state of Louisiana had title to all lands below navigable waters in its boundaries and therefore had the exclusive right to regulate those public trust lands.

The fishermen argued that both the state constitution and code created the right to fish on the land when it is submerged. The court disagreed, citing a portion of the constitution providing that "[n]othing contained herein should be construed to authorize the use of private property to hunt, fish, or trap without the consent of the owner of the property."[2] The fishermen next cited a section of the code which provides that

See Litigation Update, page 9

2007 Mississippi Legislative Update

Stephanie Showalter

The following is a summary of legislation enacted by the Mississippi Legislature during the 2007 session.

2007 Mississippi Laws Ch. 313 (S.B. 2890) (Approved March 12, 2007)
Designates the Bogue Chitto River from the confluence with Boone Creek in Lincoln County to the Mississippi-Louisiana state line as eligible for nomination to the State Scenic Streams Stewardship Program.

2007 Mississippi Laws Ch. 346 (S.B. 3002) (Approved March 15, 2007)
Creates a special account, known as the "Coastal Preserve System Timber Account," within the Mississippi Marine Resources Fund to receive funds from the salvage or harvesting of timber or sale of other forest products from lands in or managed as part of the Mississippi coastal preserves system. The account is to be treated as a special trust fund with funds to be expended, subject to the approval of the Legislature, for the management and improvement of the System and the acquisition of additional lands.

2007 Mississippi Laws Ch. 403 (H.B. 1378) (Approved March 15, 2007)
Designates the Noxubee River in Noxubee County from the Oktibbeha County line to the Mississippi-Alabama line as eligible for nomination to the State Scenic Streams Stewardship Program.

2007 Mississippi Laws Ch. 448 (H.B. 702) (Approved March 26, 2007)
Designates the Tombigbee River flowing through Itawamba County as eligible for nomination to the State Scenic Streams Stewardship Program.

2007 Mississippi Laws Ch. 471 (H.B. 827) (Approved March 27, 2007)
Authorizes the Mississippi Department of Fisheries, Wildlife and Parks Commission to promulgate rules and regulations for nonresident recreational and commercial permits and licenses to promote and enter into reciprocal agreements with other states.

2007 Mississippi Laws Ch. 477 (H.B. 1076) (Approved March 27, 2007)
Provides that Mississippi residents on active military duty outside the state do not have to purchase or have in possession a hunting or fishing license while hunting or fishing on leave.

2007 Mississippi Laws Ch. 524 (H.B. 753) (Approved April 17, 2007)
Requires all members of the Building Codes Council to be residents of the state of Mississippi and provides for the replacement of any council member with unexcused absences for more than three consecutive meetings. Authorizes counties and municipalities that adopt or amend their building codes to adopt the codes promulgated by the Council as minimum codes. Establishes within the Department of Insurance a comprehensive hurricane damage mitigation program consisting of a cost-benefit study on wind hazard mitigation construction measures, wind certification and hurricane mitigation inspections, financial grants to retrofit properties, education and consumer awareness efforts, and an advisory council. Implementation of this program is subject to the availability of funds that may be appropriated by the Legislature for this purpose.˅

Eleventh Circuit Upholds Expansive Wetland Permit

Sierra Club v. U.S. Army Corps of Engineers, 2007 WL 4276553 (11th Cir. Dec. 7, 2007).

Sarah Spigener, 3L, University of Mississippi School of Law

The Eleventh Circuit Court of Appeals recently upheld a regional general permit (RGP) issued by the U.S. Army Corps of Engineers (Corps) authorizing the dredge and fill of wetlands across a large area of the Florida panhandle. Environmental groups challenged the Corps' action as violating the general permit provisions of the Clean Water Act (CWA).

Background

In June 2004, the St. Joe Company, Florida's largest private landowner, received a RGP from the Corps allowing it to discharge dredged or fill material into non-tidal wetlands "when constructing residential, commercial, and recreational projects, in addition to accompanying roads, parking lots, garages, yards, utility lines, and stormwater management facilities," provided the company adhere to specific environmental conditions.[1] The RGP covered more than 48,000 acres in the Florida panhandle.

Section 404(e) of the CWA authorizes the Corps to issue RGPs when the proposed permit activities are "similar in nature" and will "cause only minimal adverse environmental effects when performed separately and will have only minimal cumulative adverse effects on the environment." General permits are often used by the Corps to prevent unnecessary delays and administrative burdens associated with the individual permitting process. The June 2004 RGP, however, covered an unusually large geographic area and immediately raised red flags within the environmental community.

To secure the permit, St. Joe agreed "not to alter more than 125 acres of high-quality wetlands on the property and not more than 20 percent of low-quality wetlands in any one subbasin."[2] The company also agreed to mitigate that 20 percent loss through the use of conservation areas and mitigation banks. All in all, the RGP has twenty-four specific conditions intended to preserve 10,000 acres of wetlands in the coverage area.

Several environmental organizations brought action against the Corps alleging that the permit violated the CWA. The district court found in favor of the Corps, and the organizations appealed.

Analysis

The parties dispute whether the development activities authorized by the permit are similar in nature and whether the activities will have minimal environmental impacts. While conceding that this was a "very close case," the court concluded that the RGP's "special conditions effectively cabin the scope of permitted activities and mitigate any environmental impacts such that the [permit] is a proper exercise of the Corps' Section 404(e) general permitting authority."[3]

The court highlighted a number of the special conditions it felt would operate to minimize the environmental impact. For instance, the permit requires the conservation of ten wetland units, comprising over 13,200 acres. The court also seemed comforted by the application process laid out by Special Condition 20. Although a RGP eliminates the need for developers to obtain individual permits, applications must still be submitted to the Corps. Special Condition 20 establishes internal review procedures which include a pre-application meeting with representatives from several federal, regional, and state agencies for evaluation of the project and submission of a detailed application packet. If the Corps determines that the project meets the conditions of the RGP, it may issue a letter of authorization. Development cannot begin until the authorization is received. If the project fails to qualify, the developer must apply for an individual permit.

The court also highlighted other specific conditions of merit. These include a condition that individual projects have specific stormwater treatment plans meeting higher standards for stormwater discharge than Florida's current requirements, restrictions on the type and quality of dredge material, and requirements of buffers for Lake Powell and high quality wetlands. Despite being "acutely aware of [Sierra Club's] legitimate concerns over abuse of the general permitting process," the court concluded that Corps made the best argument when it urged the court to "grant deference to its interpretation regarding the conditions under which it may issue a general permit under Section 404(e) of the [CWA]."[4]

Conclusion

The Eleventh Circuit obviously struggled with the decision it made in the present case. Relying heavily on the district court's 2006, 115-page opinion, the court ultimately decided that the permit, because of the special conditions, fell within the scope of Section 404(e). According to the court, the special conditions "reflect the Corps' efforts to design a permit that is considerate of the [CWA] and yet tailored to the unique problems presented by this large area of northwest Florida."[5]˅

Endnotes

1. *Expansive EPA Wetlands General Permit Draws Activists' Lawsuits*, INSIDE EPA, July 22, 2005.
2. *Id.*
3. *Sierra Club v. U.S. Army Corps of Engineers*, 2007 WL 4276553 at *2 (11th Cir. Dec. 7, 2007).
4. *Id.* at *4.
5. *Id.*

Satellite photograph of Florida panhandle provided courtesy of NASA.

Litigation Update, from page 6

everyone has the right to fish in the state's rivers.[3] The court also rejected this argument, noting the comment cited by the lower court explaining that the right is merely for purposes "incidental to the navigable character of the stream and its enjoyment as an avenue of commerce."[4] Finally, the fishermen argued that Louisiana law created a right to fish on the property when it was submerged on the basis that running waters were public things owned by the Louisiana under LA. CIV. CODE ANN. art. 456. The Fifth Circuit disagreed, noting that although an owner must permit running waters to pass through the estate, the landowner is not required to allow public access to the waterway. For those reasons, the Fifth Circuit affirmed the district court's judgment.˅

Endnotes

1. LA. CIV. CODE ANN. art. 452. cmt. b.
2. LA. CONST. art. I, §27.
3. LA. CIV. CODE ANN. art. 452.
4. *Id.* art. 452. cmt. b.

Company Not Liable for Damage Caused by Shipping Containers

Lee Brother, LLC v. Crowley Liner Servs., 2007 U.S. Dist. LEXIS 46449 (S.D. Miss. June 26, 2007).

Sarah Spigener, 3L, University of Mississippi School of Law

In a negligence action brought by Lee Brother, LLC, against Crowley Liner Services ("Crowley") for damage caused to its business property during Hurricane Katrina, the United States District Court for the Southern District of Mississippi held that Crowley had no duty to take additional measures, beyond reasonable measures, to secure its property from damaging plaintiff's property.

Background

Crowley operated a cargo company at the Port of Gulfport. At 4:00 p.m. on Friday, August 26, 2005, the National Hurricane Center changed its forecast for the landfall of Hurricane Katrina to include the Mississippi Gulf Coast. Immediately after this forecast, Crowley began making arrangements for its customers to retrieve or move their cargo containers from the Port prior to the storm's landfall. Crowley then decided, as it had in preparation for previous hurricanes, to block stow the remaining containers and equipment on its terminal. Block stowage is the arrangement of cargo in a given space to provide stability and strength. The process was completed after the mandatory evacuation of the Port at 1:00 p.m. on Sunday, August 28.

The plaintiff, Lee Brothers, owned business property approximately .75 mile from the Mississippi Gulf Coast in Gulfport, Mississippi. During the hurricane on the morning of August 29, one of Crowley's shipping containers damaged the plaintiff's property. The plaintiff filed

Photograph of containers, boats and other debris spread by Hurricane Katrina courtesy of NOAA's Photo Library, from the collection of Wayne and Nancy Weikel, FEMA Fisheries Coordinators

suit alleging that Crowley acted negligently by failing to timely remove or secure its storage containers before Hurricane Katrina made landfall.

Analysis

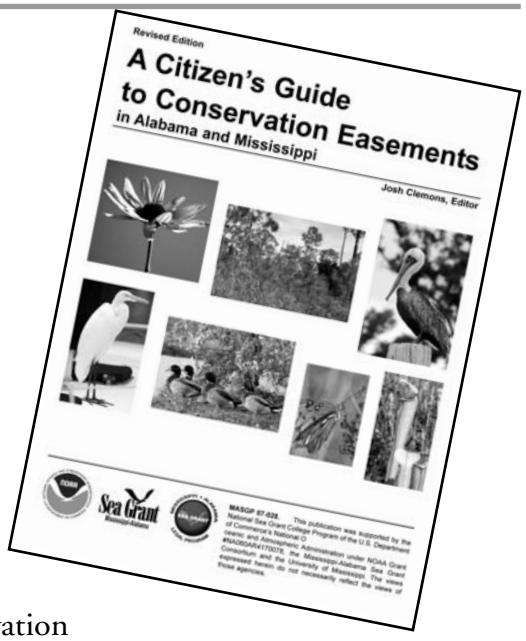
Summary judgment is only appropriate when there is no genuine issue of material fact to be decided by a jury. In order to determine if there was a genuine issue of material fact, the court examined the elements of the plaintiff's negligence claim. In order to prove a claim of negligence, the plaintiff must show (1) that the defendant had a duty to protect others against an unreasonable risk of harm; (2) the defendant breached that duty, (3) the harm was reasonably foreseeable; and (4) harm actually occurred.

The court held that Crowley owed a duty to property owners in close proximity to the Port to take reasonable measures to prevent its shipping containers from washing away during a storm. Evidence presented by Crowley established that block stowing requirements are found within several United States marine terminal hurricane contingency plans, block stowage is typically reliable and greatly minimizes potential damage and loss, and there had never been a separation of the block stow from its facility in the United States or the world prior to Hurricane Katrina. The court held that the measures taken were reasonable under the circumstances because the defendant could not reasonably have foreseen that the extraordinary force of Hurricane Katrina would wash its containers ashore damaging neighboring property. Crowley was, therefore, not required to take additional measures to secure the storage containers.

Conclusion

The court granted summary judgment in favor of the defendant after concluding that the Lee Brothers failed to prove that Crowley had breached its duty to protect neighboring property owners from damage caused by its shipping containers during Hurricane Katrina.˅

A Citizen's Guide to Conservation Easements in Alabama and Mississippi (Revised Edition) Now Available



A revised edition of "A Citizen's Guide to Conservation Easements in Alabama and Mississippi" originally published in 2003 is now available at http://www.olemiss.edu/orgs/SGLC/ - MS-AL/citizen2007.pdf . The conservation easement is a useful tool for landowners to ensure that the cherished characteristics of their land will be preserved and protected in the future. The conservation easement is a flexible tool. It may be exchanged for money or donated to a charitable organization. The landowner conveys only the rights he or she chooses to convey and retains the rest. This guide is intended to acquaint Alabama and Mississippi landowners with the law applicable to conservation easements in their states. Summaries of the relevant state and federal statutes and regulations are provided, along with the text of the statutes and regulations themselves. A list of land trusts and relevant state agencies in Alabama and Mississippi is provided at the end of this guide. Hard copies are available upon request.˅

Punitive Damage, from page 1

The method for calculating royalties on oil and natural gas sales differs depending on where the lease is located (federal or state waters) and the terms of the individual leases. Although royalties are calculated based on sales, oil companies can reduce the value of their sales by deducting certain costs, such as transportation, processing, brokerage fees, and pipeline reservation fees. Excessive deductions can deprive the federal and state governments of millions of dollars in unpaid royalties.

According to Exxon, "the case is a simple disagreement over how to interpret the company's contract with the state, including what expenses it could deduct before paying royalties to the state."[2] Alabama claimed Exxon intentionally underpaid the royalties in a scheme to cheat the state. Key to the state's fraud case was a memo prepared by in-house counsel Charles Broome as construction at the drilling sites was nearing completing in 1993. An Exxon accounting manager asked Broome "to perform a legal analysis of the royalty provisions of the lease agreement 'to ensure that royalties were paid in accordance with the terms of the mineral lease' and to evaluate potential areas of cost recovery for Exxon in the production and treatment process."[3] In his memo, Broome analyzed three different interpretations of the lease language and the likelihood of success. After discussing the state's position, Broome presented two possible interpretations, labeled "more extreme contruction[s]," that would permit a broader range of deductions. Broome cautioned that these interpretations had little chance of success in court. "If we adopt anything beyond a 'safe approach,' we should anticipate a quick audit and subsequent litigation."[4] But, the memo suggested a way to calculate the risk. "Our exposure is 12% interest on underpayments calculated from the due date, and the costs of litigation."[5] Exxon, with full knowledge of the state's position, began paying royalties based on a "more extreme construction" of the lease agreement.

In December 2000, a jury awarded the state $60 million in additional royalties, $27 million in interest, and $3.42 billion in punitive damages. The Alabama Supreme Court reversed this verdict in 2002 on evidentiary grounds. The Court held that the Broome letter, which was heavily relied on by the state during the 14-day trial, was a confidential attorney-client communication which should not have been admitted. The case was retried in late 2003.

Despite being handicapped by the loss of a key document, the state did even better the second time around. In 2003, the jury handed down the largest verdict in Alabama history. The state of Alabama was awarded $63,769,568 in additional royalties for the period of October 1993 through December 2002, $39,235,154 in interest, and *$11.8 billion in punitive damages*!

Large punitive damage awards are rarely rationally related to the damage actually caused by the company. That's what compensatory damages are for. Punitive damages are intended to hurt and send a warning to companies engaging in egregious conduct. According to the jury foreman, the jury "wanted to set an amount that would get their attention."[6] Exxon argued that something more was going on. Alabama was facing serious budget cutbacks in 2003 and the state's fiscal woes were widely reported by the press around the time of the trial. A few comments by jurors afterwards, such as "the verdict would help bail the state out if its financial crisis,"[7] hint at this ulterior motive. Exxon sought a rehearing to consider whether the punitive damages were excessive and the trial judge reduced the award to $3.5 billion in adherence with U.S. Supreme Court guidelines.[8]

Legitimate Disagreement or Fraud?

In November 2007, the Alabama Supreme Court caused a bit of a stir, to say the least, when it overturned the jury's punitive damage award due to the lack of evidence of fraud and reduced the compensatory damage award due to some finer points of contract interpretation. In its simplest terms, this case boils down to whether Exxon openly disagreed with DCNR as to the calculation methods or intentionally schemed to cheat the state out of royalties due under the leases. If

the former was the case, the state would be limited to contractual remedies (basically unpaid royalties and interest). If the latter, the state would be entitled to punitive damages because of Exxon's fraudulent conduct.

While the Supreme Court's decision is hard to swallow, the evidence of actual fraud was thin. Exxon, the multi-billion dollar corporation we all love to hate, never hid anything. DCNR was on notice that the oil companies were calculating royalties differently as early as 1993 and knew about Exxon's calculation methods by 1996. Scandals over oil royalties during this same time period sounded warnings about padded deductions.[9] It should not be surprising or shocking that Exxon would attempt to game the system. But, as one of the Supreme Court justices stated in a concurring opinion, corporate greed does not equal fraud.

> We are thus left with a situation in which one of the parties to a contract has taken a hard-nosed bargaining position, cynically relying on a downside that it accurately deemed to be limited to compensatory damages plus interest, without any risk of exposure to punitive damages. Although a jury could reasonably conclude from the evidence that Exxon's business ethics would pass only the first prong of the Rotary Club's famous "4-way Test," that circumstance does not give rise to a basis under settled Alabama law for an award of punitive damages.[10]

Conclusion

Although Governor Bill Riley decided not to ask the Alabama Supreme Court to reconsider its decision, the case is not over quite yet. The parties went back to court in January to argue over whether the interest on the remaining $51.9 million in compensatory damages should be calculated at 12 or 24 percent. Judge McCooey, agreed with Exxon that 24 percent was too high and approved its calculation of royalties and interest due of $120.4 million.[11] The state's attorneys said they would appeal.[12]

Endnotes

1. Shell Oil later settled with the state following a similar lawsuit agreeing to pay $27.1 million in unpaid royalties and interest and $6.4 million in attorney's fees. See, *Shell Reaches Settlement in Lawsuit by Alabama*, HOUSTON CHRON., March 21, 2002.
2. Phillip Rawls, *This Case is Notorious*, MOBILE REGISTER, Feb. 7, 2007.
3. *Exxon Corp. v. Alabama Dept. of Conservation and Natural Resources*, 859 So. 2d 1096, 1100 (Ala. 2002).
4. Mike France, *When Big Oil Gets Too Slick*, BUSINESS WEEK, Apr. 9, 2001 at 68.
5. *Id.*
6. Phillip Rawls, *Judge Cuts Alabama Verdict Against Exxon Mobil to $3.6 Billion*, AP DATASTREAM, March 20, 2004.
7. Editorial, *Sympathy for Exxon Mobil*, BIRMINGHAM NEWS (Ala.), Aug. 20, 2005 at 15A.
8. Rawls, *supra* note 6.
9. See, Edmund L. Andrews, *As Profits Soar, Companies Pay U.S. Less for Gas Rights*, THE NEW YORK TIMES, Jan. 23, 2006.
10. *ExxonMobil Corp. v. Alabama Dept. of Conservation and Natural Resources*, 2007 WL 3224585 at *36 (Ala. Nov. 1, 2007).
11. Phillip Rawls, *Alabama Judge Sides with Exxon Mobil in State Royalty Dispute*, AP ALERT – ALABAMA, Jan. 8, 2008.
12. *Id.*

Photograph of gas platform courtesy of ©Nova Development Corp.

2007 Alabama Legislative Update

Stephanie Showalter

The following is a summary of legislation enacted by the Alabama Legislature during the 2007 session.

2007 Ala. Laws 150 (H.J.R. 152) (Approved April 11, 2007)

Creates a Permanent Joint Legislative Committee on Energy Policy for the purpose of developing an Alabama Energy Plan to recommend to the Governor and the Legislature courses of action to address the State's long-term and short-term energy challenges. The initial focus of the Committee will be on the diversity of transportation fuels used in Alabama and developing markets and technologies for alternative fuel products. The committee is required to submit its recommendations on a yearly basis.

2007 Ala. Laws 232 (S.J.R. No. 68) (Approved June 1, 2007)

Designates the second Tuesday of every April as "Rivers of Alabama Day" to recognize the many valuable assets rivers bring to the State of Alabama.

2007 Ala. Laws 252 (H.B. 450) (Approved June 6, 2007)

The *Lauderdale County Tennessee River Preservation Act* prohibits the withdrawal of water from the Tennessee River Basin for transfer to any other river basin outside of the Tennessee River Basin in an amount greater than the amount being withdrawn on the effective date of the act.

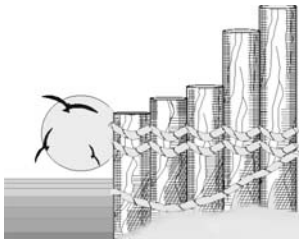
2007 Ala. Laws 418 (H.B. 254) (Approved June 14, 2007)

The *Wildlife Heritage Act of 2007* provides hunting license buyers with the option to hunt under a "supervision required" status in lieu of passing a hunter education course. Hunters under supervision must be under normal voice control, not to exceed 30 feet away from a properly licensed hunter 21 years of age or older. The Act also raised the statewide hunting license fee from $16 to $24 and freshwater fishing license fees from $9.50 to $12.

2007 Ala. Laws 464 (H.B. 426) (Approved June 14, 2007)

The *Alabama Uniform Environmental Covenants Act* provides rules for the creation, enforcement, and modification of environmental covenants to restrict the use of contaminated real estate. An environmental covenant is "a servitude arising under an environmental response project that imposes activity and use limitations." Environmental covenants are used to encourage the redevelopment of brownfields and other contaminated sites.

Interesting Items

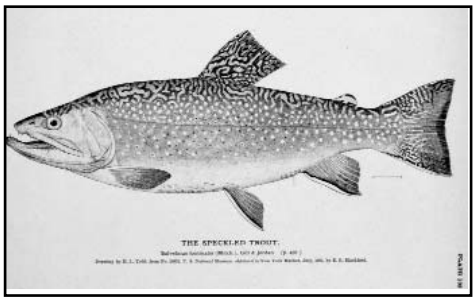


Around the Gulf…

Hurricane Katrina wiped out over 300 homes on Dauphin Island's west end. Now, the future of the 3.5 miles of eroded beach is in question. Last March, the Dauphin Island Property Owners Association voted to turn the private beach into public land. The association's hope was that if the land were converted to a public beach managed by the town, it would be eligible for public restoration funding. However, two property owners filed suit opposing the action. In November, Mobile County Circuit Judge Charles Graddick issued a continuance in the case pending the release of a report in a federal lawsuit. The report concerns the U.S. Army Corps of Engineers' dredging practices in the Mobile Bay Ship Channel. The property owners who filed the suit believe the study will show that the beach has begun to rebuild and there is no reason to turn it over to the public.

Photograph of Dauphin Island welcome sign courtesy of Valerie Winn, Mississippi-Alabama Sea Grant Consortium.

The Mississippi Chapter of the Coastal Conservation Association filed suit against the Mississippi Department of Marine Resources on January 25 to prevent the enforcement of new speckled trout recreational catch limits scheduled to go into effect in February. In December 2007, the Commission on Marine Resources, by a 3 - 1 vote, passed a 13-inch catch limit for the state's coastal waters. CCA alleges that the Commission ignored the recommendations of DMR scientists when establishing the limit in violation of state law.



Speckled trout drawing courtesy of NOAA's Historic Fisheries Collection.

The Mississippi Band of Choctaws recently lost its bid to open a casino on the Mississippi coast in Jackson County. The Bureau of Indian Affairs within the Department of Interior recently quashed the plans of eleven tribes to open off-reservation casinos ruling that the requested sites were too far from the reservations. With respect to the Choctaw's request, the BIA stated that the tribe failed to show how the casino was necessary for tribal self-determination, economic development, or housing. The tribes can appeal the decision to the Interior Board of Indian Appeals or federal court.

Photograph of flooded New Orleans courtesy of NOAA's Photo Library.

On January 30, U.S. District Judge Stanwood Duval reluctantly dismissed a class action lawsuit against the U.S. Army Corps of Engineers for levee breaches following Hurricane Katrina. Judge Duval ruled that the Flood Control Act of 1928 protects the federal government from lawsuits over damages caused by flood control projects. Approximately 489,000 claims by Louisiana businesses, governments, and property owners were associated with this lawsuit and it is unclear which, if any, can move forward. The decision is likely to be appealed to the Fifth Circuit.˅

WATER LOG (ISSN 1097-0649) is supported by the National Sea Grant College Program of the U.S. Department of Commerce's National Oceanic and Atmospheric Administration under NOAA Grant Number NA060AR4170078, the Mississippi-Alabama Sea Grant Consortium, State of Mississippi, Mississippi Law Research Institute, and University of Mississippi Law Center. The statements, findings, conclusions, and recommendations are those of the author(s) and do not necessarily reflect the views of the Mississippi-Alabama Sea Grant Legal Program, The Mississippi-Alabama Sea Grant Consortium or the U.S. Department of Commerce. The U.S. Government and the Mississippi-Alabama Sea Grant Consortium are authorized to produce and distribute reprints notwithstanding any copyright notation that may appear hereon. Graphics and/or photographs by ©Nova Development Corp., USFW, USGS and NOAA.

MASGP-07-003-04

This publication is printed on recycled paper.

February, 2008

. . . *Upcoming Conferences* . . .

• MARCH 2008 •

1st Annual Sea Grant Law and Policy Journal Symposium
March 25-26, 2008, Oxford, MS
http://www.olemiss.edu/orgs/SGLC/National/SGLPJ/SGLPJ.htm

• APRIL 2008 •

Marine Habitat Mapping Technology Workshop for Alaska
April 2–4, 2007, Anchorage, AK
http://seagrant.uaf.edu/conferences/2007/benthic/index.html

WaterTech 2008
April 16-18, 2008 Lake Louise, Canada
http://www.esaa-events.com/watertech/

• MAY 2008 •

Monitoring: Key to Understanding our WatersMay 18-22, 2008, Atlantic City, NJ
http://www.wef.org/ConferencesTraining/ConferencesEvents/NatlWaterQualityMonitoringConference/

9th Annual Smart Growth Conference
May 5-6, 2008, Biloxi, MS
http://www.dmr.state.ms.us/CMP/CRMP/Conference/08/conference.htm

WATER LOG
Mississippi-Alabama Sea Grant Legal Program
Kinard Hall, Wing E, Room 262
P.O. Box 1848
University, MS 38677-1848

University, MS 38677

Non-Profit Org.
U.S. Postage
PAID
Permit No. 6