

Town Must Pay For Midge Swarm From Wastewater Treatment Plant - Neighbors Win Inverse Condemnation Verdict

By: michael.dayton March 31, 2003

Three Florence County homeowners whose properties were overrun by swarms of bugs have recovered \$594,440 from the town of Timmonsville.

VERDICT REPORT

According to the homeowners, the town's wastewater treatment plant generated an invasion of flying insects called phantom midges. For the past 15 years, the midges were a constant nuisance from spring through the fall, the plaintiffs said.

The homeowners brought an inverse condemnation action against the town, seeking damages for diminution in value to their real property. On Feb. 28, a Florence County jury deliberated less than two hours before returning a verdict in their favor.

The case is *Pigates, Wilsons and McNeil v. Town of Timmonsville* (Florence County Court of Common Pleas; Case No. 01-CP-21-140). Judge Hicks Harwell presided over the five-day trial.

Inverse condemnation is a cause of action against a governmental entity to recover the value of property which has effectively been taken even though the power of eminent domain has not been formally exercised. The doctrine is predicated on the proposition that a taking may occur without formal proceedings.

That occurred in the property next to Timmonsville's treatment facility, said Mt. Pleasant attorney Richard D. Bybee, who represented the plaintiffs.

"When my clients walked into the yard, they were bombarded with tens of thousands of the things," Bybee said. "They could not use the outside or the majority of their property. Also, it resulted in a physical invasion in the home, because the bugs would follow you in when you opened the door, and if there were any cracks or crevices, they'd come in. Some of my clients couldn't open the window. And once the bugs got inside the house, it caused additional maintenance issues because they'd get caught in filters and in the refrigerators."

The town will appeal the verdict, said its lawyer, Brown Johnson of Florence. He said the facts did not meet the legal standard for an inverse condemnation.

"Our contention is that there is no inverse condemnation because, first, the operation of a wastewater treatment facility does not constitute an active, aggressive act on the part of the government," Johnson told Lawyers Weekly. "The second requirement is that there must be a taking without compensation, and the third requirement is that the taking must have some degree of permanence. In our opinion, there was no taking."

Bybee said his clients had complained about the insects for more than a decade. The wastewater plant was built after the homes, and the plaintiffs' backyards were "within two football fields" of the pond, Bybee said.

"They were constantly in communication with the town, and the evidence at trial from the town's minutes showed it was as early as 1989 when they first started complaining about the conditions," Bybee said. "For a number of years the town denied they were the source of the problem. But in 2000, the South Carolina Department of Health and Environmental Control established conclusively they were the source of the problem, finding the pond contained this genus of Chaoboridae, the phantom midge. DHEC then took samples from the yards of the plaintiffs and found the same phantom midge."

The town's highest settlement offer was \$150,000 according to Bybee's case report.

"Up until the discovery phase of the case, the town was denying it was the source, but by the time I got to trial they had amended their requests for admissions and were admitting that," he said.

Bybee said a videotape shot by one of his clients, coupled with testimony about the enduring nuisance caused by swarms of bugs, were key pieces of evidence.

"One of the clients actually videotaped a night of midges," Bybee said. "It wasn't any more than five minutes, but it was very persuasive. This was during a time frame when the town was claiming it was taking care of the problem. The video showed the bugs which were attracted to lights, all over the back of her porch and her back door."

Each of the homeowners received a different damages amount, based on the diminution of value to their property.

"They have right to continue living there because the issue was diminution in value," Bybee said.

The S.C. Insurance Reserve Fund insured the town but may dispute coverage under its policy, Bybee said. However, Bybee said a recent state Supreme Court case said the fund's insurance policy applied in an inverse condemnation proceeding.

"That decision was handed down after I filed suit in 2000," Bybee said. "It held the Insurance Reserve Fund was responsible for these kinds of constitutional takings under the then current policy. Under my reading of the case, insurance is available. But the Insurance Reserve Fund may appeal and bring a declaratory judgment action that their policy does not cover this."

'Severe Nuisance'

Charles Apperson, a professor in North Carolina State University's department of entomology, said it was unusual to find phantom midges in sewage treatment plants. A related midge, the chironomid or "blind mosquito," thrives in that environment. Apperson said both kinds of midges can cause severe nuisance and other economic problems.

"Both of these insects emerge synchronously in very large numbers and they're attracted to light and may accumulate in large numbers on window screens and around porch and street lights," he told Lawyers Weekly. "Swarms of adults may be so dense that they interfere with outdoor activities and stain walls. They're not very strong fliers, so if there's a strong wind, they'll be blown in that direction. Homes or buildings that are sticking out, say on a peninsula of a lake, will see an accumulation of them on vegetation, under porch alcoves in carports and on walls of homes and other buildings."

Densities of over 4,000 midge larvae per square foot often occur on the bottoms of nutrient rich bodies of water, according to Apperson. Several thousand adults per square yard of surface water can emerge on a nightly basis.

Questions or comments may be directed to mdayton@sc.lawyersweekly.com.

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VERDICT REPORT

[NOTE: The following information was provided by the counsel for the winning party and represents the attorney's characterization of the case.]

\$594,440 Verdict

Inverse Condemnation

Other useful info: The Town of Timmonsville located, built and operated a waste water treatment plant in a manner which caused an invasion of flies called "phantom midges" upon the plaintiffs homes from March to November for the past 15 years. The claim was for the diminution in value to the homes plus interest. The defense was that there was no affirmative, aggressive act and no permanent taking. The trial lasted five days with the jury returning a verdict in an hour and 45 minutes (including lunch).

Principal injuries (in order of severity): Diminution in value to real property .

Special Damages: n/a

Tried or settled: Tried

County where tried or settled: Florence

Case Name and Number: Pigates, Wilsons and McNeil v. Town of Timmonsville, Case No. 01-CP-21-140.

Date Concluded: Feb. 28, 2003

Name of Judge: Hon. Hicks Harwell

Amount: \$594,440 (all three consolidated cases)

Insurance Carrier: S.C. Insurance Reserve Fund

Expert Witnesses & Areas of Expertise: Wilburn Brown, Lake City; appraiser and contractor

Attorney for plaintiff: Richard Bybee, Mt. Pleasant

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