

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 CA 1882

**SPANISH LAKE WILDLIFE REFUGE & BOTANICAL GARDENS,
INC. D/B/A ALLIGATOR BAYOU SWAMP TOURS, BLUFF
SWAMP WILDLIFE REFUGE & BOTANICAL GARDENS, INC.,
AND FRANK BONIFAY**

VERSUS

**THE PARISH OF ASCENSION, THROUGH TOMMY MARTINEZ
IN HIS OFFICIAL CAPACITY AS ASCENSION PARISH
PRESIDENT, AND THE PARISH OF IBERVILLE, THROUGH
JESSEL MITCHELL OURSO, JR. IN HIS CAPACITY AS
IBERVILLE PARISH PRESIDENT**

Judgment Rendered:

MAY 04 2012

**Appealed from the
23rd Judicial District Court
In and for the Parish of Ascension
State of Louisiana
Case No. 93,297**

The Honorable Thomas Kliebert, Jr., Judge Presiding

**Clay Garside
New Orleans, Louisiana
and
Joel Waltzer
Harvey, Louisiana**

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Spanish Lake Wildlife Refuge &
Botanical Gardens, Inc. d/b/a
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Mitchell Ourso, Jr., in his capacity
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McDonald, J. concurs.

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Spanish Lake Mitigation Area,
LLC, Land Investments of
Louisiana, Inc. and Jarrell
Holdings, LLC**

*** * * * ***

BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

GAIDRY, J.

The plaintiffs/appellants, Spanish Lake Wildlife Refuge & Botanical Gardens, Inc., doing business as Alligator Bayou Swamp Tours, Bluff Swamp Wildlife Refuge and Botanical Gardens, Inc., and Frank Bonifay (hereinafter referred to collectively as "ABST"), appeal the decision of the 23rd Judicial District Court for the Parish of Ascension, which granted partial summary judgment in favor of the defendants/appellees, the Parish of Ascension through Tommy Martinez in his official capacity as Ascension Parish President and the Parish of Iberville through Jessel Mitchel Ourso, Jr., in his official capacity as Iberville Parish President (hereinafter referred to collectively as "the Parishes"), and denied ABST's own motion for partial summary judgment. The City of St. Gabriel, Spanish Lake Mitigation Area, LLC, Land Investments of Louisiana, Inc., and Jarrell Holdings, LLC, have all intervened in this suit as defendants/appellees. For the following reasons, we affirm the decision of the lower court.

FACTS AND PROCEDURAL HISTORY

ABST filed a petition for injunction and damages against the Parishes on July 23, 2009, in which they claim that their lucrative swamp tour business had to be shut down due to the Parishes' opening of a flood gate located in Ascension Parish on or about March 24, 2009. The record indicates that Alligator Bayou has historically been maintained at a level between 3.8 to 4 feet in depth, and ABST claim they were able to operate their business and their tour barge at that water level. ABST claim that the bayou was completely drained, grounding their barge and bringing their swamp tour business to a halt. ABST further claim that the joint action of the Parishes was in contravention of a June 1, 2009 Ascension Parish resolution to keep the flood gate closed and maintain the bayou's level at 4

feet. ABST further claim that the actions of the Parishes destroyed the navigability of Alligator Bayou, thereby depriving ABST of their riparian right to access the bayou. ABST also claim that the actions of the Parishes have destroyed the local fish and wildlife, killed a number of cypress trees located on their property, and have prevented ABST from further use and improvement of their land.

ABST therefore prayed to enjoin the Parishes from further damaging their property and the surrounding ecosystem, and to make Alligator Bayou navigable once again by closing the flood gate. ABST also claim damages to their business, to the property itself, and other general and special damages.

ABST pled under the theory of inverse condemnation, which provides a procedural remedy to a property owner seeking compensation for land already taken or damaged against a governmental or private entity having the powers of eminent domain where no expropriation has commenced. Belle Co., LLC v. State, ex rel. Dept. of Environmental Quality, 2008-2382, p. 10 (La.App. 1 Cir. 6/12/09), 25 So.3d 847, 853, writ denied 18 So.3d 1288 (La. 10/9/09). ABST claim the Parishes acted without notifying ABST beforehand, knowing how their actions would impact ABST, and did not compensate ABST for their loss. ABST further claim the Parishes' acts were delictual, and that for many years ABST relied on representations by the Parishes that the navigability of Alligator Bayou would be maintained, to their detriment.

The Parishes answered by stating their decision to open the flood gate was intended to meet a public need, which was to prevent backwater flooding on properties located on Spanish Lake Basin in Iberville Parish. The Parishes claimed this flood water is supposed to naturally flow from

Spanish Lake to Bayou Manchac through Alligator Bayou, and that Alligator Bayou was drained to create capacity for the backflow water as it drains from Spanish Lake. Doing so saved the landowners on Spanish Lake Basin from losing their property due to flooding.

Then, beginning in December of 2009, water from Spanish Lake began to take what the Parishes consider to be its natural course. It flowed through Alligator Bayou to Bayou Manchac, alleviating the backwater flooding problem of Spanish Lake Basin. As a result, much of that water settled in Alligator Bayou, raising the water level to approximately 9 feet. Alligator Bayou went from being drained, as complained of in ABST's original petition, to being even higher than what had been maintained prior to the flood gates' opening in March of 2009. ABST filed an amended petition for damages on May 20, 2010, amending the claims to reflect damages for the Parishes' flooding of their property by leaving the flood gates open so that water from Spanish Lake would flow into Alligator Bayou and inundate ABST's property. Despite the water level of Alligator Bayou being restored past the level that ABST had enjoyed prior to the flood gates being opened, ABST still claimed that a constitutional "taking" was committed by the Parishes' impairing the navigability of the bayou. As a result, ABST claimed that they were still deprived of their riparian right, that their property had been damaged and its usefulness destroyed, and that their swamp tour business no longer exists due to the Parishes' actions.

ABST filed a partial motion for summary judgment on October 6, 2010. The sole issue of the motion is whether the actions of the Parishes constitute a "taking" or inverse condemnation, for which ABST should be compensated. ABST seek the judgment under the three-prong analysis of State Through Department of Transportation and Development v. Chambers

Investment Co., Inc., 595 So.2d 598 (La. 1992). The Louisiana Supreme

Court outlined this analysis as follows:

[W]e must first determine if a person's legal right with respect to a thing or an object has been affected. In other words, we must be able to identify a recognized species of private property right that has been affected, regardless of whether causes of action may exist on other theories; otherwise, it cannot be said there has been an exercise of the power of eminent domain. Second, if it is determined that *property* is involved, we must decide whether the property, either a right or a thing, has been taken or damaged, in a constitutional sense. If property is taken or damaged, one may say that there has been an attempted exercise of the eminent domain power. The final question then is whether the taking or damaging is for a public purpose under Article I, § 4 [of the 1974 Louisiana State Constitution]. *Id.* at 603.

In response, the Parishes filed their own motion for partial summary judgment on February 25, 2011, on the same issue of inverse condemnation. The Parishes' claim is that there is no genuine issue of material fact for ABST to assert because ABST were attempting to claim a private property right in a navigable waterway (Alligator Bayou), which is a public thing according to La.C.C. art. 450, and not capable of being owned privately. Therefore, there can be no constitutional "taking" suffered by ABST if they do not own the subject land.

The judgment of the trial court on the motions for partial summary judgment, rendered and signed May 26, 2011, denied ABST's motion and granted the Parishes' motion, dismissing ABST's claim of inverse condemnation with prejudice. The judgment further designates itself as a final judgment for the purposes of La.C.C.P. art. 1915(B) to avoid any undue delay in the proceedings. ABST filed a motion to appeal the lower court on July 6, 2011. The motion was granted, and the appeal is now before this Court.

ASSIGNMENTS OF ERROR

ABST's assignments of error are as follows:

1. The trial court failed to recognize the legal impact of the physical damage and occupation of ABST's property caused by the Parishes' flooding of ABST's facilities.
2. The trial court incorrectly concluded that a riparian land owner does not have private property rights vis-à-vis a public waterway.
3. The trial court incorrectly concluded that Alligator Bayou Swamp Tours' riparian right to access Alligator Bayou has not been damaged because the swamp tour facilities can still be accessed by road.

STANDARD OF REVIEW

The appellate standard of review for summary judgments is de novo. Brunet v. Fullmer, 2000-0644, p. 3 (La.App. 1 Cir. 1/10/01), 777 So.2d 1240, 1241. Therefore it follows that appellate courts review partial summary judgments using the de novo standard of review. Kimpton Hotel & Restaurant Group, Inc. v. Liberty Mutual Fire Insurance Company, 2007-1209 (La.App. 4 Cir. 12/19/07), 974 So.2d 72, 74.

DISCUSSION

Do ABST have a "property right" to operate a successful swamp tour business?

ABST's swamp tour business was undoubtedly bound to Alligator Bayou. Its success was ostensibly connected to the ability to observe the flora and fauna that lived along the bayou, as well as the natural beauty of the ecosystem itself. The tour was conducted with the use of the barge *Alligator Queen*, which navigated the bayou with customers on board. But while an individual may have a right to conduct a business on property he

owns, that right does not extend past the bounds of his property, and Alligator Bayou cannot be part of ABST's property. La.C.C. art. 450¹.

The situation in the instant case is analogous to that of Louisiana Seafood Management Council v. Louisiana Wildlife and Fisheries Commission, 97-1367 (La. 5/19/98), 715 So.2d 387, where commercial fisherman filed a class action against the constitutionality of the gill net ban law. The Supreme Court ruled that commercial fishermen lack any property interest in the state's waters, for purposes of establishing a private property interest in free-swimming fish for a takings analysis. "[A]n individual has no proprietary interest in the fish he is prevented from catching... [A]n individual has no proprietary right to fish commercially in state waters." *Id.*, at 392. The fishermen were not deprived of their gear or their capital investments; they were simply restricted from the most profitable use of those items. *Id.*

Likewise, the action of the Parishes, which resulted in the draining and then the flooding of Alligator Bayou, has not destroyed or deprived ABST of their capital investments. The land, the facility, and the barge are still there. Although the bayou level has fluctuated since March of 2009, the property of ABST can still be accessed via the bayou and a connecting road. It is undisputed that Alligator Bayou has been altered, and it is possible that ABST's use of their property with respect to Alligator Bayou have been

¹ Art. 450. Public things

Public things are owned by the state or its political subdivisions in their capacity as public persons.

Public things that belong to the state are such as running waters, the waters and bottoms of natural navigable water bodies, the territorial sea, and the seashore.

Public things that may belong to political subdivisions of the state are such as streets and public squares.

altered, but that use is not a proprietary interest. Damages which cause discomfort, disturbance, inconvenience, and even sometimes financial loss as an ordinary and general consequence of public improvements are not compensable. Reymond v. State, ex rel Dept. of Highways, 255 La. 425, 449, 231 So.2d 375, 384 (La. 1970). The actions of the Parishes do not exceed the level of inconvenience and the like, because ABST has not been permanently deprived of their use of the property itself. See SDS, Inc. v. State, ex rel Dept. of Transportation and Development, 2007-0406, p. 6 (La. App. 4 Cir. 2/13/08), 978 So.2d 1013, 1017. The Parishes neither directed the water to flow anywhere other than its natural course, and therefore did not create a circumstance where ABST's use of their property would have been unforeseeably compromised. See Taylor v. State ex rel. DOTD, 2003-0219, p. 12 (La.App. 3 Cir. 6/23/04), 879 So.2d 307, 316, 317.

Based on the prevailing jurisprudence, we find that ABST's use of their land to run a successful swamp tour business is not a "proprietary right" for the purposes of the first prong of the *Chambers* case, and therefore fails the *Chambers* analysis altogether.

Is a land owner's riparian right also a "property right"?

It has long been settled that a conveyance of property fronting on a river conveys not only the property but also the riparian rights belonging there to. Hayward v. Noel, 225 So.2d 638, 640 (La.App. 1 Cir. 1969). Riparian rights or servitudes are in derogation of private property rights. Meyers v. Denton, 99-574 (La.App. 3 Cir. 10/6/99), 747 So.2d 633, 638. It therefore follows that riparian rights, like servitudes, are property rights themselves. ABST's riparian right with respect to Alligator Bayou would therefore meet the first requirement of the *Chambers* test.

Have ABST's riparian right been taken or damaged in a constitutional sense? Property is "damaged," for purposes of Article I, § 4 of the Louisiana State Constitution, requiring just compensation for property which has been taken or damaged by state or political subdivisions, when an action of the State, in the exercise of its power to obtain property for a public purpose, results in diminution of value of tangible property or intangible property right. Huckabay v. Red River Waterway Com'n, 27113 (La.App. 2 Cir. 10/12/95), 663 So. 2d 414, writ denied 1995-3007 (La. 3/8/96), 669 So.2d 403. ABST's claim against the Parishes essentially states that the riparian right has been destroyed or, at the very least, has been diminished in value by the draining and flooding of Alligator Bayou. When the bayou was drained, access to the bayou from ABST's property became difficult if not impossible; it would be arguable that the value of the riparian right was diminished. When the bayou became flooded, the riparian right was restored most notably by the fact that the barge was afloat once again and capable of navigating up and down the bayou.

If we are to follow the comparison to servitudes in Hayward, the riparian right is strictly a right of use or access to a public, navigable waterway. While the water level may be different from what ABST enjoyed prior to March of 2009, the bayou is still navigable and the riparian right is intact. Its value does not change with the water level, and what ABST chooses to do with that right cannot affect its value, either. Whether ABST decide to run a swamp tour business from their property or to simply fish for pleasure, they enjoy the same right of access to Alligator Bayou in either circumstance. ABST's claim, therefore, fails the *Chambers* test at this point since there is no constitutional "taking" of the riparian right. Whether or not

a road provides ABST access to Alligator Bayou is of no moment, as the riparian right on the bayou still exists.

Do ABST have a private property right with respect to Alligator Bayou?

ABST do well by laying out in the record the history of Alligator Bayou from before Louisiana was part of the United States up until now. With the wealth of history and documents ABST have introduced into the records, we agree, along with the Parishes, that Alligator Bayou is a navigable waterway and a public thing under La.C.C. Art. 450. ABST's property, which is a private thing under La.C.C. Art. 453, can be freely disposed of by its owner. La.C.C. Art. 454. In other words, ABST are capable of selling the property on which Alligator Bayou Swamp Tours was run, but not capable of selling Alligator Bayou itself. As a public thing, Alligator Bayou is "out of commerce, to be neither bought nor sold." Xiques v. Bujac, 7 La. Ann. 498 (La. 1852). ABST's exercise, possession, and control over their property extends to the bank of Alligator Bayou and no further. La.C.C. Art. 456. ABST's physical possession or control over Alligator Bayou "is not such a possession as entitles the possessor to maintain himself against the public." Keefe v. City of Monroe, 9 La. App. 545, 549, 120 So. 102, 105 (La. App. 2 Cir. 1929). As ABST cannot exercise a private property right over the public, navigable waterway, it fails the *Chambers* analysis in its first phase.

CONCLUSION

Under the analysis of *Chambers*, ABST had to show that their private property right was taken, destroyed, or impaired by the Parishes for a public use. As to their right to conduct a business, ABST did not prove that such a right existed for them. While ABST do enjoy a riparian right to Alligator

Bayou, which is a property right, that right endures and has not been lost or taken by government intervention. No other private property rights exist for ABST past the banks of Alligator Bayou. The trial court correctly denied ABST's motion for partial summary judgment and correctly granted the Parishes' motions for summary judgment.

DECREE

The ruling of the trial court in favor of the defendants/appellees and against the plaintiffs/appellants is affirmed. All costs of this appeal are assessed to the plaintiffs/appellants.

AFFIRMED.