

Issue Presented

Whether the trial judge erred in failing to impose strict liability for flood damage upon Geoffroy and the other plaintiffs.

Interest of Amicus

The Association to Preserve Cape Cod (APCC) seeks leave to file the accompanying brief as amicus curiae. APCC is a member supported, nonprofit organization of more than 5,600 individual members. APCC's goal is to protect Cape Cod's environment and natural resources, which are essential for protecting human health and quality of life, and which are at the core of our coastal economy. APCC is Cape Cod's leading advocate for preserving the Cape's water resources, wetlands, natural resources, open space and way of life.

The case at bar challenges APCC's belief that there must be zero tolerance for the destruction of our natural resources, particularly where those resources are providing critical public safety and flood/storm surge protection.

With increasing frequency and cost, APCC devotes much of our energy and resources toward undoing development decisions of the past that directly and

adversely impact our wetland resources, our economy, our quality of life, our safety and our ecological values. Flood damage, storm surge and stormwater runoff are particularly challenging in the coastal environment. Sea level rise makes the challenge even more daunting.

APCC has a 45-year history of pragmatic, science-based environmental advocacy that recognizes the implications and consequences of the environment taking a back seat to poorly executed, unpermitted (rogue) land use and development decisions. Our history has taught us that well-planned, carefully permitted development can enhance both the environment and the economy while providing private property owners scenic views and vistas. Environmental stewardship does not inhibit private property rights; it enhances property values, and in the case at bar, the safety of the public and neighbors.

As such, APCC believes our legal and practical perspective would be of assistance to the Court.

Statement of the Case

APCC relies upon the Statement of the Case and the Statement of Facts contained in the brief of the Falmouth Conservation Commission (ConCom).

Argument

- I. The law requires that strict liability be imposed where private property owners, through their extremely dangerous actions, expose the public to significant harm.

Assuming this Court agrees with the Conservation Commission and Superior Court that Geoffroy illegally altered a coastal dune¹, the chief question of law is what are the consequences? The trial judge erred by not assessing strict liability upon Geoffroy and her confederates² for the flood damage that will certainly result from this series of selfish, ultrahazardous acts.

To impose strict liability,

the only intent required is an intention to commit the acts of filling and

¹ Geoffroy concedes altering the dune. She claims enforcement action against her is time barred. Geoffroy brief 47-50. The trial judge found the neighbor Gross was caught in 2010 with a bobcat spreading more of the dune back onto the beach. All120. The collective actions of this group of neighbors have both destroyed a dune and jeopardized public safety. The public remains at risk.

² Confederates are the other plaintiffs including Gross as well as the landscaping company that performed the work.

altering the wetlands. See Commonwealth v. Belanger, 30 Mass. App. Ct. 31, 33 (1991) (violations of statutes that impose punishment out of public policy concerns "have been described as 'public welfare' or 'strict liability' offenses," and "lack of knowledge of the law or of the fact that the law has been violated does not exonerate the person who may have unwittingly violated the statute)."

Commonwealth v. Clemmey, 447 Mass. 121, 132 (2006) (no agricultural exemption for tree clearing and filling a wetland and strict liability applies). Putting a bobcat to work to dismantle a dune, which is the public's primary protection from storm surge, is certainly sufficient and certainly as harmful, if not significantly more harmful than the tree clearing and filling by Clemmey where there was no danger from the power and fury of storm surge.

The Wetlands Protection Act, G.L. ch. 131 § 40, was enacted because the legislature realized that we were filling in too many wetlands and we were destroying our coastal resources. The essence of the statute is to control, limit and avoid filling/altering wetlands so that the public is protected from natural hazards such as flooding. In 1963 when Massachusetts adopted the first wetlands protection law in the nation, the Jones Act, ch. 426

of the Acts of 1963, the legislature identified placing limits on the filling/altering of wetlands as a measure necessary to protect the public interest. Falmouth followed by adopting an even more stringent local wetlands bylaw.

The purpose of this bylaw is to protect the wetlands, related water resources and adjoining land areas in Falmouth by controlling activities deemed by the Conservation Commission as likely to have a significant or cumulative effect upon resource area values, including but not limited to the following: public or private water supply, groundwater, flood control, erosion and sedimentation control, storm damage prevention, water pollution control, fisheries, shellfish, wildlife and plant species and habitats, agriculture, aesthetics, recreation and aquaculture values. These values, collectively, are the resource area values protected by this bylaw.

Code of Falmouth Ch. 235 § 1.

Dunes are public resources that provide essential public protection from storm surge and flooding. See, ConCom brief 32-36. However, even if there were no statutory basis for strict liability under Wetlands Protection Act or local bylaw, the behavior before the Court is sufficient under common law to impose strict liability. Rylands v. Fletcher, L. R. 3 H. L. 330 (1868).

Dunes are nature's natural barriers that hold back the ocean and the horrific damage an invading ocean brings. The New York Times reported in the wake of Hurricane Sandy that communities that protected sand dunes experienced far less damage than neighboring communities that took no protection action.

The smaller neighboring communities on the barrier island -- Point Lookout, Lido Beach and Atlantic Beach -- approved construction of 15-foot-high dunes as storm insurance. Those dunes did their job, sparing them catastrophic damage while Long Beach suffered at least \$200 million in property and infrastructure losses, according to preliminary estimates.

Joe Vietri, director of coastal and storm risk management for the corps, toured the damaged coastlines after the 12-to-14-foot storm surge of Hurricane Sandy and came to an inescapable conclusion. "The difference was dramatic for areas with vital and healthy dune systems, which did better than those that did not," he said in a telephone interview. "You can see the evidence on Point Lookout and Lido Beach, which did much better than Long Beach."

Rachel Nuwer, *Resisted for Blocking the View, Dunes Prove They Blunt Storms*, N.Y. Times, Dec. 4, 2012 at A1. Here, Geoffroy and her confederates destroyed a dune system allowing the ocean unimpeded access to the surrounding neighborhood. The ConCom's efforts to

aggressively prosecute this deliberate destruction of a public resource should be applauded.

Considering that the tides are constantly changing/rising and will continue to rise more than a meter during this century, the destruction of a dune is even more hazardous to the public. The coastal region between Massachusetts and North Carolina is experiencing and will continue to experience the highest rate of sea level rise in the world.³ Asbury H. Sallenger, Kara S. Doran & Peter Howard, *Hotspot of accelerated sea-level rise on Atlantic coast of North America*, NATURE CLIMATE CHANGE 24 June 2012. The public need to protect dunes is even greater. Falmouth's need is greater than the global community.

The rule regarding the application of strict liability to land use cases was expressed in Clark-Aiken Co. v. Cromwell-Wright Co., 367 Mass. 70, 84-85 (1975).

("The principle of Rylands v. Fletcher . . . does not impose liability for ordinary uses of property like the one presented in this case, which involved no great threat to neighbors."); United Elec.

³ Sea level rise is not uniform. Rates along the Massachusetts coast are three to four times the rate of increase of sea level rise globally. Id.

Light Co. v. Deliso Constr. Co. Inc.
315 Mass. 313, 321-322 (1943) ("The application of the doctrine [strict liability] . . . has been limited in this Commonwealth 'to such unusual and extraordinary uses of property in reference to the benefits to be derived from the use and the dangers or losses to which others are exposed, as should not be permitted except at the sole risk of the user.' . . . Tunnelling in a public way for the construction of a sewer or other structure is not an unusual undertaking or one of such an extremely dangerous nature that it must be performed at the sole risk of the one therein engaged."); Fibre Leather Mfg. Corp. v. Ramsay Mills, Inc. 329 Mass. 575, 577 (1952) ("[T]he rule of Rylands v. Fletcher 'applies to unusual and extraordinary uses [of land] which are so fraught with peril to others that the owner should not be permitted to adopt them for his own purposes without absolutely protecting his neighbors from injury or loss by reason of the use.' Where, however, the injury complained of is caused by a use that is 'ordinary and usual and in a sense natural, as incident to the ownership of the land, liability is imposed only for negligence.

As we saw in Hurricane Sandy the peril to the neighbors from removal and destruction of sand dunes is real and hardly ordinary. Geoffroy removed the natural protection (dune) from storm surge for the sole purpose of, in the words of the trial judge, to provide a "manicured lawn". A112. Destroying a

coastal sand dune is not ordinary use of property. This deliberate destruction was not ordinary construction activity on private property. It was selfish and hazardous to destroy the natural protection of a coastal sand dune merely to have a lawn to the beach.

Imposing strict liability is not necessarily a carte blanche for neighbors who find themselves flooded. In Golden v. Amory, 321 Mass. 406, 408 (1952) the holding in Rylands v. Fletcher was expressly limited to exclude the most extreme acts of God, those storms "beyond the capacity of any one to anticipate." The extent of most coastal storms and flooding are anticipated. There are maps and other tools readily available to make predictions. Under Golden it would only be from an extreme or rogue storm, where everything in the storm's path would be destroyed regardless of what other actions may or may not have occurred, should Geoffroy escape liability. This is equitable since it is likely the routine storm from which the destroyed dune would have provided protection is the most likely event. A major storm

poses the greatest risk of compromise of the dune by nature⁴ had it been left undisturbed.

If we as a society do not recognize that the deliberate acts of private property owners can have catastrophic impact on the public as well as neighboring private property, private property owners will be able to destroy our natural protection to storms and flooding with impunity. This is the direct opposite of what the legislature intended in adopting the Wetlands Protection Act. Without strict liability Geoffroy and her confederates have no incentive to restore the dune. History teaches that compelling restoration even with the threat of fines can take decades. Conservation Comm'n of Falmouth v. Pacheco, 49 Mass. App. Ct. 737, 737-38 (2000). Waiting a decade for Geoffroy to comply places the public in direct risk of harm. The public needs protection from Geoffroy's folly today.

⁴ We can only speculate whether the removed sand dune would have withstood a particular storm event. Time is of the essence for restoration of the dune.

Conclusion

For the foregoing reasons the case should be remanded to the Superior Court so that strict liability can be imposed upon all of the original plaintiffs until such time as the dune is completely restored and functioning to the satisfaction of the Conservation Commission.

Respectfully submitted,

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Brief Certification

In accordance with the Mass, R. App. P 16(k) I certify the brief complies with relevant rules for filing briefs with the Court.

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