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Supreme Court of Texas

Carol Severance, Plaintiff-Appellant,

v.

Jerry Patterson, Commissioner of the Texas General Land Office; Greg  
Abbott, Attorney General for the State of Texas; and Kirk Sistrunk,  
District Attorney for the County of Galveston, Texas, Defendants-  
Appellees.

No. 09-0387

November 19, 2009

Oral Argument

Appearances: J. David Breemer, Pacific Legal Foundation, Sacramento, CA,  
for plaintiff-appellant.

Daniel L. Geysler, Office of the Attorney General, Austin, TX, for  
defendants-appellees.

Before:

Nathan L. Hecht, Harriet O'Neill, Dale Wainwright, David Medina, Paul  
W. Green, Phil Johnson, Don R. Willett and Eva M. Guzman, Justices.

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JUSTICE NATHAN L. HECHT: The Court is ready to hear argument in 09-  
387, Severance against Patterson.

MARSHALL: May it please the Court, Mr. Breemer will present argument  
for the Appellant. Appellant has re-served four minutes for rebuttal.

ORAL ARGUMENT OF J. DAVID BREEMER ON BEHALF OF THE PETITIONER

ATTORNEY J. DAVID BREEMER: Thank you, and may it please the Court.  
Your Honors, under the rolling beach easement policy at the heart of  
this case, state officials believe that private beach-front property  
instantly becomes a public beach whenever the plants happened to  
disappear. If a tsunami or hurricane should wipe away the grass for a  
hundred yards inland and move the vegetation line past a third or  
fourth row of houses, under the rolling easement policy the officials

claim that all this land has become a public beach park, even if it was lawfully developed long ago with homes, churches or businesses, and even if the public has never once set foot on that area. The State then claims the right to confiscate all incidents of private ownership, any homes on the denuded subject area become illegal.

JUSTICE DAVID M. MEDINA: I don't think the State claims the right to confiscate, I think the State asserts a right that it already had when it's an easement on property, which moves depending on how the tide or how the hurricanes affect Galveston Island.

ATTORNEY J. DAVID BREEMER: Well, I suppose that's the question, whether they have an easement, and you're correct that they claim that an easement moves up onto private property by hurricane, but they are incorrect in adhering to that position for several reasons.

JUSTICE DALE WAINWRIGHT: But his point is that the State isn't claiming title to the property, it's claiming an easement.

ATTORNEY J. DAVID BREEMER: That's correct, it's claiming an easement in the property based on the disappearance of plants. The State claims that when the plants disappear, an easement that was previously proven over a specific strip of land expands and moves to wherever the new plant line is.

JUSTICE NATHAN L. HECHT: I'm not clear, was there ever such an easement in this case?

ATTORNEY J. DAVID BREEMER: There is an easement; there was an easement proven in 1964 in the Seaway case along Galveston Island. It's in front or seaward of my client's property. Her property is not on any known easement, and that easement in 1964 was proven to a fixed vegetation line. It was proven over a specific area.

JUSTICE NATHAN L. HECHT: But it does not cover this property?

ATTORNEY J. DAVID BREEMER: No, Your Honor.

JUSTICE NATHAN L. HECHT: All right.

ATTORNEY J. DAVID BREEMER: There's no common law principle that allows an easement that's created by public travel over one strip of land to pick itself up and move onto an entirely new area simply because some geo-graphical feature or marker has moved. The common law is --

JUSTICE DON R. WILLETT: Does it make a legal difference whether the change in the property was the result of gradual erosion, like currents or tides versus a more violent event like Hurricane Rita or something else?

ATTORNEY J. DAVID BREEMER: It would absolutely make a difference. If you assume that the vegetation line is the legal boundary of a proven public easement, then there's no common law authority, rule or precedent that would allow a sudden storm, an avulsive event to move that property boundary. In the Bernard case, in York, this Court has repeatedly held that extreme events do not change property boundaries.

JUSTICE DAVID M. MEDINA: Do you agree that there was an easement?

ATTORNEY J. DAVID BREEMER: Excuse me?

JUSTICE DAVID M. MEDINA: Do you agree that there was an easement or there is an easement?

ATTORNEY J. DAVID BREEMER: Seaward of my client's property, I agree that there was easement proven by prescription and dedication.

JUSTICE DAVID M. MEDINA: Well, how should those easements be set when you have events that are uncon-trollable?

ATTORNEY J. DAVID BREEMER: How should the easement be set? Under the common law, the easement is set by the line of public travel that existed at the time that easement was created. The vegetation --

JUSTICE DAVID M. MEDINA: If the easement gets underwater like most of Galveston Beach westward of this area you're talking about, or eastward from the area you're talking about, that used to be all beach, now it's gone, so there's no easement there.

ATTORNEY J. DAVID BREEMER: Well, there's two points on that. First of all, if the water, the high tide line comes up, the mean high tide line, which is the legal boundary of public ownership, if that line comes up, it will cover any land and that land becomes public property. So if it covers a proven easement area that's proven over a fixed area, it covers it and it will go back and it will go forward, but that easement area stays in the same place because it's defined by the line of public travel where that prescriptive easement was proven or where the area was dedicated. Now also it's important to remember in this case, this is not a one-for-one replacement doctrine, this is not like the State is saying, "Well, if we lose a little bit of our proven easement here, we just want a little bit upland to replace it." Because this is based on vegetation, grass, surface vegetation, if the vegetation blows away or for all I know, a fungus, a disease could destroy it, people drive on the beach, they destroy the grass, that beach is going to expand inland even though the previous beach areas are existing there.

JUSTICE DAVID M. MEDINA: Well, actually driving on a beach is very limited in West Beach, and you can drive on East Beach in some areas, but it's very limited now.

ATTORNEY J. DAVID BREEMER: Well, be that as it may, the point is that this is not a proportional doctrine. It's not a, "Well, we're going to lose part of our proven easement, so we want a proportional part up here." It expands.

JUSTICE EVA GUZMAN: Does your theory, though, ignore that the beach does recede?

ATTORNEY J. DAVID BREEMER: The beach has, yes, the beach recedes, it accretes, it erodes, the [inaudible] on Galveston Island was created by accretion, but --

JUSTICE EVA GUZMAN: And so the easements will move over time.

ATTORNEY J. DAVID BREEMER: No, the easement will not move. Under their theory, the easement moves. Under the common law, an easement that is proven over by prescription, by the public walking over a particular area for a certain amount of time, or a dedication of that area, that is a fixed static property interest. It's confined, it's defined, it's bounded by the path of public travel that existed when the easement was created. The vegetation line is not the boundary of the easement. If the public proves it has an easement by prescription or dedication between the high tide line in an area between the high tide line and the vegetation line, the vegetation line is not that boundary. It marks the boundary. The boundary in the eyes of the law is the line of public travel, the area where that easement was created. If you prove an easement between my barn and my hedge, in that area you have an easement to that area, but if a storm blows my hedge into the neighbor's yard, it doesn't move the easement into my neighbor's yard, all it's done is move the marker, the boundary marker. But the legal boundary is still that path of public travel that existed at the time the easement was created.

JUSTICE DALE WAINWRIGHT: Of course the physical terrain, when you're talking about shorelines and oceans are not as static as a hedge on somebody's farmland. Let's make sure we're talking about the same thing here and kind of focus where we're going. From the mean low tide line or the sea essentially to the mean high tide line, that's wet beach. The State owns that. You don't contest that, right? From the mean high tide line to the vegetation line, dry beach. Do you agree that the State had an easement before the hurricane in the dry beach for this property?

ATTORNEY J. DAVID BREEMER: No, I do not agree to that.

JUSTICE DALE WAINWRIGHT: But even if you did, you would say it disappeared when the hurricane changed everything because the new easement would have to be proven; is that what you're saying?

ATTORNEY J. DAVID BREEMER: That's what I would say and I also say even if you were to decide that the vegetation line is a legal boundary of the easement and that it can migrate based on erosion, it's still erosion. It's gradual and perceptible erosion. Avulsion does not count. And if you look at the disputes all through the history of this issue, it's all been avulsive agents, Hurricane Rita, Hurricane Ike, Hurricane Alicia, Tropical Storm Francis. None of these events would be able to change property ownership boundaries at the mean high tide line. If the mean high-tide line changes because of an avulsive event, a storm, the property ownership doesn't change. But the rolling easement is based on an extreme, not a mean. There's no mean vegetation line. It just goes as far in as the most extreme event pushes it.

JUSTICE DALE WAINWRIGHT: You did point out in response to a question, the difference in the treatment of these easements when there's an erosion versus an avulsive event.

ATTORNEY J. DAVID BREEMER: That's correct.

JUSTICE DALE WAINWRIGHT: What's the reason for that? What's the compelling reason to treat those two circumstances differently?

ATTORNEY J. DAVID BREEMER: It's settled expectations. Look, if you have -- remember that the property ownership is defined by the mean high tide line. It's a mean over an 18-year period. By the way, you can't see that line. When you're walking on the beach, you won't know where it is, just like you might not necessarily see an easement that's proven by prescription, but it's there.

JUSTICE DALE WAINWRIGHT: Or a utility easement in your residential home. You don't see that either.

ATTORNEY J. DAVID BREEMER: Correct, right. But by --

JUSTICE DALE WAINWRIGHT: But you know there's one there.

ATTORNEY J. DAVID BREEMER: Excuse me, I'm sorry. But by gradual, imperceptible erosion, the public and the property owners can conform their expectations to that gradual change. But when you have a sudden -- if you allow the biggest hurricane on record to move the easement far inline, you cannot do that.

JUSTICE EVA GUZMAN: Well, wouldn't you have expectations that if you bought property in Galveston, at some point there would be a sudden event? And in fact, isn't why these disclosures have attached to these properties, the property for years, about the changing boundary areas. I mean you can expect a sudden event at some point.

ATTORNEY J. DAVID BREEMER: Well, you certainly expect storms, you assume the risk of storms.

JUSTICE EVA GUZMAN: And you can anticipate the consequences of those storms might include exactly what happened here.

ATTORNEY J. DAVID BREEMER: You can anticipate certain consequences, what you don't anticipate is that State officials are going to go outside the Common Law and create an easement where no one has ever walked before. You don't expect that the State is going to say, "Well, avulsion changes property lines." You can't find any expectations for that if you look in the case law. If you look at the Open Beaches Act, as you should do if you're buying property around here, it doesn't say there's a rolling easement. It says, "prescription, dedication or customary rights over an area." And that's fine, that's no different than the law anywhere. If you prove an easement, you have an easement. But that easement is in that area, and if you want to move it and maybe you can, then you've got to prove it in the new area. If the grass moves, you've just have standing property now, you've just lost your plants.

JUSTICE DON R. WILLETT: Mr. Breemer, I'm curious about something in which is a little off topic, so forgive me. But Rita was a little over four years ago, and how has Galveston County been appraising their client's property since then? Have they been appraising it as if the property were not subject to removal, as if she had full use and control over it?

ATTORNEY J. DAVID BREEMER: You know, I do not know. I wasn't a part of any appraisals. I know they've appraised it once. I do not know if they took into consideration the rolling easement issue, the policy here. But I do know that there are many people down in Surfside Beach, for instance, who have had their utilities turned off, their homes barricaded, they're subject to removal without compensation. The State says it has the ability to offer \$40,000 or maybe \$65,000 when it feels like it, but that's not an obligatory or Constitutionally adequate compensation program.

JUSTICE NATHAN L. HECHT: But in this property, these two tracts, there never was an easement. And on other property, if there had been an easement your argument is it doesn't move with the vegetation line?

ATTORNEY J. DAVID BREEMER: That's correct, because the vegetation line is not the legal boundary of that easement, it's a monument. It's like if I put two stakes down in the ground, and you prove you have an easement in that area, and then someone throws away one of the stakes farther, that easement is not moving because the legal boundary is not something you can see. It's just like you can't see the mean high tide line, but that's the legal boundary. You can't see the boundary between your house and the next neighbor's house if there's no fence, but there's still a legal boundary there. It's the same on the shore.

JUSTICE NATHAN L. HECHT: The amicus Chamber of Commerce argues it's really a use easement, it's not a geographic easement. What do you say?

ATTORNEY J. DAVID BREEMER: Well, they argue that easements are defined by their purpose, but they're not defined geographically by their purpose. Their scope, how you can use them is defined by their purpose, but where, the location of the easement, there's no rule that defines the physical location of easement by what you're allowed to do on that easement, otherwise, well, you know you have a situation in which any part of property can be claimed at any time because it suits the purpose. That's not the, the rules they recited go to the scope of the usage. And by the way, those rules would support us here and support the property owner here because you don't need to remove a home for public access. You can have public access without removing homes, without barricading, without denying them utilities.

JUSTICE EVA GUZMAN: Even if the home ends up right in the path of where the public would walk? You wouldn't have to remove it?

ATTORNEY J. DAVID BREEMER: Well, I guess that's a factual question about whether you have public access or not, but what I'm saying is where the purpose would come in, the scope or the purpose of the easement, that's where it would come in, but it doesn't define where the -- the purpose of a prescriptive easement has never defined where that prescriptive easement is, the purpose of an implied dedication never defines where the dedication is. Prescription is by the path of public travel over a long period, dedication is by intent. Intent. It defies logic that someone would intend to dedicate a slice of property along the beach and then build homes. They intended to dedicate that area to the public but they built homes there, they sold it in fee simple? No.

JUSTICE PAUL W. GREEN: Well, let me ask you this. It's the public policy of this state that there be open beaches, and what I hear you say, "Well, not really." Because if somebody has a property like your client's, that that property can be restricted, I mean that access to the beach is restricted there. Am I following you on that, that there really isn't an open beach at that point? It goes away?

ATTORNEY J. DAVID BREEMER: Well, I think I'm a little bit back further. I don't have a problem with open beaches, but it begs the question of what is a public beach?

JUSTICE PAUL W. GREEN: Well, right. Well, how do you get access to the beach then so that it is open?

ATTORNEY J. DAVID BREEMER: Oh, how do you get access to it. Let's say we assume, we agree on where the public beach is, how would you get access across private property to do that? You buy the title, you buy an easement, you prove --

JUSTICE PAUL W. GREEN: And so a landowner would then have to sell the State an easement across their property to get to the beach?

ATTORNEY J. DAVID BREEMER: That's one way. Or you could do what the Open Beaches Act text says, you prove that there's a prescriptive easement there. Prove that there's a dedicated easement there. They can permit the travel between it. They can have a license. There's probably not going to be a lot of disputes about just getting to the beach.

JUSTICE PAUL W. GREEN: Have there been any situations where that's been done?

ATTORNEY J. DAVID BREEMER: What has been done?

JUSTICE PAUL W. GREEN: Well, in order for the access to the beach to be open, that the State would have to go to a private landowner and say, "Okay, we want to buy this lease from you," and that they sell it to them, this easement.

ATTORNEY J. DAVID BREEMER: I don't know a lease, but certainly the fee simple title. That's how city parks and state parks along the coast are created, the park is created. They condemn it and buy it. You could also condition access under certain conditions when they build homes.

JUSTICE PAUL W. GREEN: Isn't that sort of at odds with the notion of an open beach, that the State would have to purchase that?

ATTORNEY J. DAVID BREEMER: Purchase access on private property? Maybe it's at odds with the concept of open beaches, but it's not at odds with the concepts of the United States and Texas Constitution.

JUSTICE DON R. WILLETT: And I'm guessing your view is that the passage of Prop 9 has really no bearing on the case today, right?

ATTORNEY J. DAVID BREEMER: It's the same language that's at issue, so your decision on the rolling easement will determine whether the Proposition 9 includes the concept that a beach rolls wherever the

plants go, regardless of whether the public has ever walked on there before and it's lawfully developed.

JUSTICE NATHAN L. HECHT: Any further questions? Thank you, Counsel. The Court is ready to hear argument from the respondent.

MARSHALL: May it please the Court, Mr. Geysler will present argument for the Appellees.

ORAL ARGUMENT OF DANIEL L. GEYSER ON BEHALF OF THE RESPONDENT

ATTORNEY DANIEL L. GEYSER: May it please the Court. The plaintiff is incorrect to invite this Court to ask the Texas taxpayers to compensate her for a property right that she never had. For centuries now it has been settled matter that the common law recognized dynamic property boundaries.

JUSTICE NATHAN L. HECHT: But you don't cite a single easement case for that proposition. Why? Is there just not one?

ATTORNEY DANIEL L. GEYSER: Actually, I believe we do, Your Honor.

JUSTICE NATHAN L. HECHT: Which one?

ATTORNEY DANIEL L. GEYSER: The navigational servitude context is a great example of an easement that shifts with its property boundaries.

JUSTICE NATHAN L. HECHT: I know, but for the rolling -- no, I don't disagree that there might be that concept, but for the rolling easement at the beach, there's just not a case? The earliest we've got is 1979, is that right?

ATTORNEY DANIEL L. GEYSER: Well, that's the earliest that the state courts had an occasion to answer the question, but also --

JUSTICE NATHAN L. HECHT: Anywhere in the world?

ATTORNEY DANIEL L. GEYSER: Well, in other states they actually have different doctrines that they've applied to give the public the right to use the beach. In Texas we've looked at the situation of an easement, and the easement is of longstanding duration. It's been there for recreation, trade and transportation dating back to the 1800s.

JUSTICE NATHAN L. HECHT: Well, I was looking through your brief at the invitation of the Appellants in the case for a case that went back before 1979, and since I've been licensed to practice law before that, it's hard to view that as a longstanding common law rule. But is there one?

ATTORNEY DANIEL L. GEYSER: I'm not aware of one that specifically addresses this situation before that time, but I also know for a fact that does not bear necessarily on the inquiry. The common law is a functional doctrine. It's a case-by-case adjudication, and the way the common law traditionally develops is applying settled principles that do date back centuries, as with dynamic property boundaries.



JUSTICE NATHAN L. HECHT: And I took that to be your argument, but I just want to be clear with respect to the case law and the authorities. You cite them, and the earliest one I saw was 1979, except the Feinman case cites some other cases that don't talk about rolling easements at all. Most of them don't even mention easement. One of them is Luttes. And that's the state of the case law, I guess that's the best we can do?

ATTORNEY DANIEL L. GEYSER: In the appellate level in Texas, there's also a district court case in Texas in 1964 --

JUSTICE NATHAN L. HECHT: Right.

ATTORNEY DANIEL L. GEYSER: -- that applied the identical rolling easement concept, which is that this doctrine, even applied to this specific situation, has been around for 40 or 50 year, long before the plaintiff purchased her property in this case. But again what's really critical here to remember is the way that the common law works. This is not a technical, mechanical inquiry that requires lining up exactly a case that matches every single situation, as if you couldn't apply the nuisance doctrine to a nuclear power plant because nuclear power plants weren't around a hundred years ago. In this case, the question is how do the traditional principles governing dynamic boundaries, how do they apply to this situation? And the question is does the common law prohibit or forbid the application in this case? And I think it's quite clear that they don't. In the same that we don't cite an easement case dating back a hundred years that deals with this situation.

JUSTICE NATHAN L. HECHT: Well --

ATTORNEY DANIEL L. GEYSER: The plaintiffs also don't cite a case that contradicts it because that's the first time that these principles were applied to this situation.

JUSTICE NATHAN L. HECHT: But it's up to you to establish an easement, right?

ATTORNEY DANIEL L. GEYSER: To establish an easement --

JUSTICE NATHAN L. HECHT: It's not up to the other side to disprove an easement.

ATTORNEY DANIEL L. GEYSER: No, but the question still is what does the common law provide.

JUSTICE NATHAN L. HECHT: Right.

JUSTICE DON R. WILLETT: You think there's a blanket Gulf-wide easement, without any kind of sign of showing actual historical public use, right?

ATTORNEY DANIEL L. GEYSER: There is an easement that has to be established in the first instance, and that is established over this stretch of beach. And that's not in dispute in this case. At page 494 of the Fifth Circuit's opinion, the --

JUSTICE DAVID M. MEDINA: Let's take this to the extreme. What if the hurricane wipes out everything going toward San Luis Pass, and then you get into Pirate's Cove and all those homes are wiped out and there's nothing but the rest of the sandbar from Galveston Island left. You're saying those, all those people are not to be compensated because the easement moved that far?

ATTORNEY DANIEL L. GEYSER: Well, in the first instance, most of that land would be shifted, title would change from the hands of the private owners to the State under the submerged land doctrine. So we're really talking about, again another example of dynamic property boundaries in effect. Everyone who buys land near the beach is aware of the dynamic property principles and how they apply to rolling easements.

JUSTICE EVA GUZMAN: The question you have to prove though, the prescription or the dedication of the land that was suddenly stripped of the vegetation before you just include it in the public's easement, why wouldn't that be an appropriate burden if you suddenly want it? Why wouldn't you have to prove that?

ATTORNEY DANIEL L. GEYSER: Well, the reason that you don't have prove with natural changes in the line of vegetation, changes that are tied to the ocean, which is the normal case. This is different than the case that I think the plaintiff has posited, about vegetation being artificially removed. That's not the line of the easement. It's the natural vegetation that forms naturally as a link to the ocean. But in the case where the ocean and the vegetation line naturally move, that's just a simple application of these settled common law principles. Every state court that has looked at this, and there are four different intermediate courts of appeals dating back for about 30 or 40 years, has looked at this question and applied these principles in exactly the same way.

JUSTICE NATHAN L. HECHT: But they just made it up. That's what bothers me about it is they say, "This is an ancient doctrine, it goes all the way back to 1979."

ATTORNEY DANIEL L. GEYSER: They identify -- well, no, the ancient doctrine goes back centuries, and that's looking at situations like navigational servitude, like the submerged land rules, like any other situation where title is affected when natural changes in the property move and change the associated rights. The question is how do those rules apply in this setting. And there are sound reasons as a matter of policy and as a matter of simple practice that show why those rules should be applied exactly the way that the intermediate appellate courts have uniformly applied them. There's actually not a single court and not a single judge who has yet pronounced on the record that those rules shouldn't apply to this situation.

JUSTICE NATHAN L. HECHT: The other thing that troubles me it is just seems to me that the State made the same argument in Luttet and lost.

ATTORNEY DANIEL L. GEYSER: No, Your Honor. Luttet involved title.

JUSTICE NATHAN L. HECHT: Right.

ATTORNEY DANIEL L. GEYSER: And as Justice Wainwright pointed out there, there's a distinct difference between title and an easement. An easement is a property right to reasonably use the servient estate. That's the right that the public established.

JUSTICE NATHAN L. HECHT: But if you can't do anything but look at the property, which is all you can do really. I mean you can't build on it or use it. You don't really own it, I mean you own it, but it seems like it would have been worth mentioning in *Luttet* that we're saying that the boundary line is the mean high or high tide, but it doesn't really matter because the use easement goes back even further?

ATTORNEY DANIEL L. GEYSER: A few quick responses. First, it's not necessarily true that you don't have the right to use the land. The house removal claims at issue here, they've been abandoned on appeal. But the Open Beaches Act doesn't necessarily require the removal of every house, it requires the removal of obstructions, things that interfere with the reasonable use of the easement. So it's not true in the first instance that you don't have a meaningful use of the property. Another point on that is that *Luttet* didn't have occasion to talk about the easement. It certainly didn't even question or note the fact that the public has used the beach in Galveston dating back to the 1800s for recreation, transportation and trade. It's given rise to significant and settled expectations. It's the driving force of the local economy in Galveston, and in turn a significant factor to the economy in Texas.

JUSTICE DAVID M MEDINA: Let's say we agree with all of that, why is the vegetation line, how is that picked up? That sounds somewhat arbitrary, and why not 50 feet from where the high tide is and go backwards? I mean why is it the vegetation line which, I may be wrong here, but can change and actually go back towards the beach in some instances? And so if the State takes this property and three years later the vegetation line moves back towards the Gulf, then these people don't have a chance to rebuild and then their home is taken away from them? That just doesn't seem right.

ATTORNEY DANIEL L. GEYSER: Well, Your Honor, it's not taking the property, it's not taking title. It's the State has the right to reasonably use the servient estate, given the purpose of the easement. The purpose is to use the dry beach for these historic purposes that the public has always used the beaches for, and everyone in this area knows that. And when the vegetation line moves back, then the -- because title stays with the landowner, because again, we're not shifting title, we're talking about a right to use the servient estate, they debatably could rebuild a house because at that point it would not be burdening the public's easement. And these are separate property rights. There's a static property right with the property and a dynamic property right shaped by its historic purpose and use, an easement, and the question is what happens when the two collide. And if you look to the navigational servitude cases, if you look to the submerged land doctrine cases, you see that there is good, settled precedent dating back centuries now, for letting the dynamic easement prevail over the servient estate. And there's a reason it's called the "servient estate." This also reflects the expectations not just of every court that's looked at this to date, but the Texas legislature which clearly contemplates the easement rolling.

JUSTICE NATHAN L. HECHT: But let me be sure I understand. You say in your brief, "The State has never contended that the public has easement rights over the dry beach without first proving a valid easement under the common law." But your position is under the common law you have a valid easement over the dry beach everywhere it is? Is that right?

ATTORNEY DANIEL L. GEYSER: Your Honor, the way it works is that we have to first establish an easement in the first instance over a stretch of beach. If we haven't done that, let's suppose contrary to fact --

JUSTICE NATHAN L. HECHT: But let me be sure about my question.

ATTORNEY DANIEL L. GEYSER: Okay.

JUSTICE NATHAN L. HECHT: I want to be sure. You say you have to have a valid easement under the common law, but your contention is that you have such an easement under the common law on all the dry beaches in Texas?

ATTORNEY DANIEL L. GEYSER: I'm not sure if it's every dry beach in Texas. I do know that the dry beach at issue here, the West Beach in Galveston has, due to its historic use as a dry beach for the public and due to the fact that there is no indication that the private landowners have ever blocked the public from that stretch, dating back to the history of the Texas founding essentially in joining the Union, that stretch of beach definitely is burdened by a public easement.

JUSTICE NATHAN L. HECHT: Well, I guess I'm puzzled. Are we talking about foot by foot by foot along the beach? Are we talking about the beach along the Gulf Coast?

ATTORNEY DANIEL L. GEYSER: You have to prove the easement according to the settled rules. So the beach at issue here, and it's whatever stretch of beach covered the relevant properties at issue. I think it probably runs the length of Galveston, given the historic use of the beach and the economy that developed in response to that.

JUSTICE NATHAN L. HECHT: And so how would you prove it?

ATTORNEY DANIEL L. GEYSER: You can prove it in different ways. Some cases have recognized the proof by dedication, back when the lots actually weren't small subdivided units, but in fact took up the majority of the Island. You can prove it by prescription, showing the longstanding historic use of the dry beach.

JUSTICE NATHAN L. HECHT: But if you can't prove that anybody ever used the dry beach on Mrs. Severance's property, you're just out of luck?

ATTORNEY DANIEL L. GEYSER: No. If there hadn't been a beach in the first instance, then we would be out of luck. But because the easement that is developed is shaped by its purpose and by its dynamic boundaries, it's that same easement that was founded back centuries ago and recognized by courts decades ago. That same easement is the easement that is burdening this property.

JUSTICE NATHAN L. HECHT: I'm wondering about how. I mean does the State have to show that people ac-tually walked on the dry beach on the Mrs. Severance's land?

ATTORNEY DANIEL L. GEYSER: Not on her specific land, but on that stretch of beach, that relevant stretch of the ocean along the coast, and they have proven that and that's not at issue in this case.

JUSTICE DAVID M MEDINA: Which is now gone.

ATTORNEY DANIEL L. GEYSER: Which that specific area may be covered with water, but the easement moves with it because it is shaped by its dynamic boundaries. Just like a navigational servitude moves with changes in the river, just as title shifts hands to the State with changes in the mean high tide mark.

JUSTICE DAVID M. MEDINA: What happens in places like Port Bolivar where the entire area was wiped out up to highway, and the vegetation line is maybe 10 feet from the highway, so that all becomes public beach now?

ATTORNEY DANIEL L. GEYSER: The question is there an easement established there and is it defined by its natural boundaries, and if it is, then it moves with the changes in those boundaries. That's the way this operates. And again, if that area is actually wiped out, the majority of it, the title will shift to the State. That's how this traditionally works. I think it's important to note too that this easement actually attached to this piece of property before the plaintiff bought it, and it's clear that a rolling easement attached to her property because that is the nature of the easement as the legislature has defined it, and I think that's most clear from Section 61.025.

JUSTICE NATHAN L. HECHT: Well, the Circuit said, "No easement has ever been established on either parcel via prescription, implied dedication or continuous right." They were wrong about that?

ATTORNEY DANIEL L. GEYSER: No. What the Circuit is saying that the public has not, for example, used the static meets and bounds lines of Ms. Severance's lot for the 10-year period. That doesn't mean that the easement hadn't actually reached the land before she purchased it. And the plaintiff actually concedes that in his complaint. Their theory of the case is that when the State posts a moratorium notice saying that this piece of land is actually on the dry beach, that they're saying the dry beach is now, it's on that estate and that that easement now burdens that property.

JUSTICE DON R. WILLETT: I thought the state had listed prior to her purchase of the property, her property as encroaching and subject to removal. Is that true or not true?

ATTORNEY DANIEL L. GEYSER: That's exactly correct, and they did it twice, in 1999 and again in 2004. So what she bought was clearly property already burdened by an easement. So the question is --

JUSTICE NATHAN L. HECHT: The Circuit statement is wrong?

ATTORNEY DANIEL L. GEYSER: The Circuit statement that the public has not established an easement by prescription.

JUSTICE NATHAN L. HECHT: I'm going to read this to you and I want you to tell me if it's right or wrong. "No easement has ever been established on either parcel via prescription, implied dedication or continuous right." Is that right or wrong?

ATTORNEY DANIEL L. GEYSER: It is correct, but -- and this is the critical "but" --

JUSTICE NATHAN L. HECHT: Yes.

ATTORNEY DANIEL L. GEYSER: -- the question is on her property have they shown a dedication, have they shown that Ms. Severance dedicated that land. That's what the Circuit is talking about.

JUSTICE NATHAN L. HECHT: They say either parcel. Yeah.

ATTORNEY DANIEL L. GEYSER: They're not talking -- well, the question here is, and the Circuit actually on page 494 of its opinion says there is an easement that was established by prescription, dedication or customary use on the relevant stretch of beach.

JUSTICE NATHAN L. HECHT: Seaward.

ATTORNEY DANIEL L. GEYSER: Seaward at some point. Now, it also happened to go and reach Ms. Severance's land before she bought it. This is the 1999 and 2004 notice. She bought it in 2005. So there wasn't the easement, the rolling easement. It's a single easement. It's not this unworkable series of static lines, and you can just imagine the nightmare that would create. And this is again for practical reasons something the common law takes into account. It's a practical doctrine. You don't set up a situation under the common law that is completely unworkable, and it would be unworkable to take a property right defined by its purpose, recognizing the historic use of the beach, and to say it is now bound in a dynamic setting by static lines. It would create the absurdities, as Judge Weiner called it, of an endless litigation by a case by inch by inch incremental easements. Every time the beach advances another inch, you have another takings claim. And if the beach then recedes, what happens? Does a property owner have to recompensate the State because the State is no longer using the land? Is it instead true that the State now owns a stretch of land that it's not using as an easement, or that land could be put to more productive uses by private parties?

JUSTICE DON R. WILLETT: Does it matter or should it matter that coastal erosion is not a totally natural phenomenon? People could argue that, look, Mother Nature has some help sometimes from Big Brother maybe. Maybe government steps in to build a jetty or some other activity, manmade activity, that affects tides, affects currents, accelerates erosion, creates more erosion at a faster pace and therefore sort of makes the easement continually sort of come landward. Does that matter at all or should it?

ATTORNEY DANIEL L. GEYSER: I think some cases do question if there's a difference in treatment between manmade and natural acts, but in this

stretch of the beach, the allegation is it's nature, it's the hurricane that came in and pushed the vegetation line. But I think even that is not necessarily correct, in the sense that we're not talking about enforcement of the Open Beaches Act a week in the aftermath of a hurricane, we're talking about the enforcement of the Open Beaches Act in its ordinary and natural course after the waters have relatively stabilized. So the General Land Office and the State executive doesn't rush out and put out flags and try to declare more property or expand the easement beyond what is reasonably needed to accomplish its historic purposes. That's not what we're talking about in this case.

JUSTICE EVA GUZMAN: It is nonetheless though, as compared to the I guess normal rate of erosion, a sudden event in context of how that process gradually takes place? Even though it's been a couple of years.

ATTORNEY DANIEL L. GEYSER: It's comparatively sudden, but I think this actually brings up another point, which is that the -- I think the plaintiff respectfully is wrong that the avulsion doctrine would apply to the sea. Under *State vs. Balli* and the *Corpus Christi vs. Davis* case, it's actually clear that avulsion doesn't apply in the ocean setting, and there's good reason for this. The common law again isn't set and tied to, in a mechanical way. It develops, given the purpose of developing and recognizing different property boundaries in different contexts. And when you're dealing with a river, it makes good sense to say that if two adjacent property owners defined a common boundary by a river, they don't expect the property to shift based on a sudden and completely unpredictable movement in the channel of the riverbed. When you're dealing with the ocean, it's entirely predictable that there are hurricanes. This is not a sudden event or an unpredictable event. As anyone who has the Weather Channel knows, there are hurricanes every year, they operate in virtually the same ways. Sometimes they have different strengths. But anyone buying property in this area knows that they're buying property in a dynamic setting.

JUSTICE DALE WAINWRIGHT: If the avulsion doctrine did apply to the sea, and your argument is it doesn't, does it make a difference whether the change occurs gradually or as an avulsive change in your mind?

ATTORNEY DANIEL L. GEYSER: If the Court were to hold that the avulsion doctrine applied to the rolling easement, then it would make a very big difference, and I think it would lead to the unworkable result where the public's easement would disappear despite its longstanding duration and its longstanding use. But we think the avulsion doctrine doesn't apply to the context of this property right for the very reason that if you look to the most analogous, the most directly analogous example of the state-owned submerged land, the Avulsion Doctrine doesn't apply there, and that's dealing with the mean high tide line that's right adjacent to the rolling easement. And again, you look to the reason why that's so. It is predictable that the ocean line moves with hurricanes. It moves in and it moves out. This is different than the avulsive setting of a river unpredictably shifting course and cutting sometimes in deep and drastic ways into property.

JUSTICE DALE WAINWRIGHT: So your rationale there is not a reasoning that the public should have right through open beach doctrine to use the beaches on the Gulf, it's an argument that the common law should

enforce the expectations of the parties. So it's a different approach then?

ATTORNEY DANIEL L. GEYSER: Well, I think they're one and the same. They are different reasons that support the same result. I think the fact that the legislature setting the public policy of the State -- I see my time is about to --

JUSTICE NATHAN L. HECHT: Please finish.

ATTORNEY DANIEL L. GEYSER: -- thank you -- has recognized that this is the longstanding expectation of the public, the economy, and the landowners in the area, as they know because they receive a disclosure announcing how this doctrine works in this area. So I think it's both the expectation of the legislature, as expressed to the Open Beaches Act, of the executive, as they've consistently enforced the Open Beaches Act now for decades, of the Texas taxpayers, who by almost an 80 percent margin voted to elevate this doctrine in the most foundational way into the State Constitution, and in fact by all the plaintiffs because they receive a clear-language disclosure meant for laypeople, and the plaintiff here is both a lawyer and a real-estate agent, so certainly it must have been clear to her that there's an easement established on this piece of land and that it moves with the natural changes of the boundaries.

JUSTICE DON R. WILLETT: Before you slip away, there have been a series of back and forth letters about mootness, including I guess the latest one yesterday replying to your reply to his reply to your reply. Do you have anything before you slip away to respond to the latest?

JUSTICE DALE WAINWRIGHT: Are you arguing that the case is moot?

ATTORNEY DANIEL L. GEYSER: No, we're absolutely not. And we concede it is entirely up to the plaintiff, and we're not suggesting that the Court shouldn't decide the issues in a proper dispute. We're just saying, we wanted to alert the Court when it came to our attention that the case could become moot with the sale of the property. That was our only intention in disclosing that fact to the Court.

JUSTICE NATHAN L. HECHT: Any other questions?

JUSTICE DALE WAINWRIGHT: I do have one more question, Mr. Acting Chief.

JUSTICE NATHAN L. HECHT: All right.

JUSTICE DALE WAINWRIGHT: The Fifth Circuit said the takings claim isn't ripe and they asked this Court to take a look at the rolling beach easement doctrine. Under a theory of recovery based on the Fourth Amendment seizure provision, have you ever seen a claim for civil damages or civil remedies under the Fourth Amendment seizure provision?

ATTORNEY DANIEL L. GEYSER: No, Your Honor, and in fact this is the --

JUSTICE DALE WAINWRIGHT: I have not either. I was --



ATTORNEY DANIEL L. GEYSER: This is a right that I think can best be described as located for the very first time lurking in the shadows of the Fourth Amendment. This is a newly minted constitutional right. There has not been a single panel in the history of over the 200 years of the Fourth Amendment being part of the U.S. Constitution where a panel has described an ordinary Fifth Amendment taking as a Fourth Amendment seizure. And in fact it would stand on its head, the traditional rules about prudential standing and ripeness in the Fifth Amendment context, and as it currently stands would effectively render irrelevant this Court's traditional use of an inverse condemnation remedy. Instead of filing an inverse condemnation claim, plaintiffs will instead file 1983 seizure claims in federal court for an unreasonable search and seizure taking. It also creates the unusual situation where the federal courts would be effectively reviewing state courts on state law property questions, where of course the state law or the state court has a final say. That's a question of state law and the state court is the right forum for deciding what state law says.

JUSTICE NATHAN L. HECHT: Any other questions? Thank you, Mr. Geysler.

JUSTICE DALE WAINWRIGHT: Mr. Breemer --

REBUTTAL ARGUMENT OF J. DAVID BREEMER ON BEHALF OF PETITIONER

ATTORNEY J. DAVID BREEMER: Thank you, and may it please the Court.

JUSTICE DALE WAINWRIGHT: -- would you first address the liability of your seizure claim. Of course, that's not our question, but I've never seen one that seeks civil remedies or civil damages before.

ATTORNEY J. DAVID BREEMER: Well, the Fifth Circuit relied on another case presently --

JUSTICE DALE WAINWRIGHT: The Fourth Circuit?

ATTORNEY J. DAVID BREEMER: The same thing happened.

JUSTICE DALE WAINWRIGHT: So there's two courts that have mentioned it.

ATTORNEY J. DAVID BREEMER: Two Circuit Courts that I know of.

JUSTICE DALE WAINWRIGHT: Any others?

ATTORNEY J. DAVID BREEMER: I don't know of any district court cases that have done that, and it's probably just a reflection of the fact that most times people are trying to use the Takings Clause because you have a higher standard of review. It's not reasonableness. You've got in this context a per se automatic takings context, so it's likely just the reflection that people haven't tried it.

JUSTICE DALE WAINWRIGHT: In over 200 years, we haven't thought it's viable. Has something changed?

ATTORNEY J. DAVID BREEMER: Well, the Takings Clause in this context of takings by easement, it hasn't been 200 years, that body of law is a lot more recent that people have been going in and --

JUSTICE DALE WAINWRIGHT: The Fourth Amendment has been around.

ATTORNEY J. DAVID BREEMER: That's correct, but in the taking of private property by imposition of beach access and regulatory takings and that type of thing, it hasn't been 200 years, it's been more like 20, 30 years. But I want to get back to this idea of dynamic boundaries. Counsel keeps saying, using the words "dynamic boundaries," "dynamic boundaries," and "centuries of dynamic boundaries," and "property boundaries." Notice the vagueness. He doesn't say "dynamic easements" because you can't find one. Look through the case law, there's no such thing as a roving, roaming easement, especially in Texas common law.

JUSTICE DAVID M. MEDINA: How can this be balanced with the Open Beach Act Provision and compensation for the people who have lost their homes because of these rolling easements? What's the balancing test, or how can we comply with the Open Beach Act and also take care of people who have lost their homes because of erosion to the beaches?

ATTORNEY J. DAVID BREEMER: Well, I think you comply with the Open Beaches Act by enforcing its language. Prescription, dedication, customary right over the area where the State wants to claim an easement. Now if there's some other way that you want to recognize that there's a rolling easement, then the way to achieve a practical or balanced approach is to hold that it doesn't move by avulsive storm events. Counsel is wrong. Avulsion, the avulsion exception applies to the seashore. Look at the York case. It is the most recent seashore. Or also look at the Luttet case. The reason the Court set at the mean high tide line and not the highest high tide is so that it wouldn't be based on an extreme. It's not just rivers, it's the seashore as well. Avulsive storm events don't change property lines because there's a sense of justice and fairness in that and there's also a sense of being able to conform expectations. If you want a practical doctrine, a practical doctrine is not, the next the hurricane comes in and the vegetation is 300, 200 feet inland past homes that have been there for decades, no one knows where the public beach is anymore because there's homes sitting there. As a person walking the beach, do you want to walk on someone's front door? As a property owner, do you expect because of that storm property that you've had in your family is now not yours? That's not a practical doctrine. Property doctrines are practical because they're stable. A stable proof of an easement is the best way to conform expectations. Just like in your deed you have coordinates --

JUSTICE DALE WAINWRIGHT: However, Counsel, your client purchased this property knowing that the State claimed that easement, and it published it twice. So when she bought, she fully expected the state to claim that easement here, right?

ATTORNEY J. DAVID BREEMER: No. She went and read the Open Beaches Act, and it said prescription, dedication and customary right.

JUSTICE DALE WAINWRIGHT: Doesn't the law require disclosure of the easement on purchases?

ATTORNEY J. DAVID BREEMER: The law requires disclosures of the official's enforcement policy, correct.

JUSTICE DALE WAINWRIGHT: Let's ask it this way: Did your client purchase that property not knowing that the State would claim the easement?

ATTORNEY J. DAVID BREEMER: Not in violation of her constitutional rights and not with any proof the public has ever set foot there.

JUSTICE DALE WAINWRIGHT: It's a yes or no question.

ATTORNEY J. DAVID BREEMER: Well, I guess the answer is --

JUSTICE DALE WAINWRIGHT: Did your client purchase the property knowing that the State would claim the easement?

ATTORNEY J. DAVID BREEMER: No.

JUSTICE DAVID M. MEDINA: But that doesn't necessarily preclude her from challenging that, right?

ATTORNEY J. DAVID BREEMER: Right, you don't waive your constitutional rights because you slip a notice into a contract saying, "By the way, at a later date we might take your property if the grass disappears."

JUSTICE DALE WAINWRIGHT: Does the State claim this right by virtue of the easement, by virtue of continuous right in the public or some other method?

ATTORNEY J. DAVID BREEMER: That's the, I guess the \$100,000 question here. We're not sure what they claim it based on. In the old days, they used to prove it by prescription or dedication. That's what happened in the Seaway case. By the way, in Brazoria County they have never proven an easement up in Crystal Beach, never. You can't find it. But they do enforce it on the dry sand everywhere, the whole coast.

JUSTICE NATHAN L. HECHT: Any other questions? Thank you, Counsel. That concludes the argument in the three cases. And the Marshall will adjourn the Court.

MARSHALL: All rise.

[End of proceedings.]

Carol Severance, Plaintiff-Appellant, v. Jerry Patterson, Commissioner of the Texas General Land Office; Greg Abbott, Attorney General for the State of Texas; and Kirk Sistrunk, District Attorney for the County of Galveston, Texas, Defendants-Appellees.  
2009 WL 4823928 (Tex. ) (Oral Argument )

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