CIRCUIT COURT OF SOUTH DAKOTA
SECOND JUDICIAL CIRCUIT
Minnehaha County
425 N. Dakota Ave.
Sioux Falls, SD 57104

October 30, 2020

(Sent to all attorneys via email)

David Ganje
[redacted]

Dustin DeBoer
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Gary Thimsen & Joel Engle III
Woods, Fuller, Schultz & Smith, P.C.
[redacted]

Re: Denise Zimmerman, Dale Olstad, Emily Muller & Jeffrey James v.
State of South Dakota
49 CIV 20-808

Dear Mr. Ganje, Mr. DeBoer, Ms. Engle, Mr. Thimsen and Mr. Engle:

This letter is my decision regarding the State's pending motion for summary judgment. As explained below, I deny that motion.

Facts and Procedural Background

This case of alleged inverse condemnation presents many interesting legal issues, some of which will be addressed herein, some of which must wait for another day.

Plaintiffs own residential properties near Renner, South Dakota. Plaintiffs' properties abut South Dakota Highway 115, also known as 475th Avenue. Hwy. 115 runs north/south and crosses an unnamed tributary of Silver Creek near Renner. The tributary acts as drainage for surface waters and runs east-to-west. Plaintiffs Olstad, Zimmerman and -Muller own properties near the tributary on the east side of Hwy. 115. Plaintiff-James owns property abutting the highway from the west.

I did not see in the record when Hwy. 115 was constructed. Because the highway crosses the tributary, there is evidence the state initially installed a 6' x 6' box culvert that ran perpendicular to the highway and allowed the tributary to continue to drain to the west.

In 1988, the South Dakota Department of Transportation ("DOT") removed the 6' x 6' box culvert and replaced it with four forty-eight (48") inch reinforced concrete arch pipe culverts. *Kangas Aff.* ¶¶ *36-37*. Plaintiff's properties are located approximately 170 feet to the south of the culverts.

On March 13, 2019, the area received a large amount of rainfall. The soil was frozen and not able to absorb additional water, and the four culverts were completely clogged with ice and snow, thus the highway acted like a dam. The ground water that normally drains through the course of the unnamed tributary began to pool up on the east side of Hwy. 115. The pooling water eventually flowed over the top of Frederick Road[1] to the south of the culverts resulting in flooding to the property of Plaintiffs Zimmerman, Olstad and Muller. The water also overtopped Hwy. 115 resulting in flooding to Plaintiff James' property located west of Hwy. 115.

The State, through an Affidavit of Travis Dressen, Sioux Falls Area Engineer for the DOT during the time in question, asserts that the first notice that Defendant received regarding rising water in the area of the intersection of Hwy. 115 and Frederick Road was on March 12, 2019. *Dressen Aff.* ¶*8*. The DOT received a call from Troy Jensen, a landowner in the area, who informed the DOT there was "water ponding in the ditch in the area." Id. ¶ 9. There was no rainfall on March 12, and the temperatures were above freezing. Defendant's Statement of Undisputed Material Fact ¶ 24 ("DSUMF").

A substantial amount of rain began to fall around 8 a.m. on March 13, 2019. According to Dressen, he was notified by DOT maintenance crews of obstructed culverts and potential flooding. *Dressen Aff.* ¶ *26*. Dressen had already directed a maintenance crew that morning to go unblock the culverts near the intersection of Hwy. 115 and Frederick Road. *Id.* at ¶ 13. The DOT maintenance crew, however, was unable to unblock the culverts with the means that they had, so the State contracted with Dakota Clearing and Grading to attempt to remove the ice. *Id.* at ¶¶ 14-16. Dakota Clearing and Grading was

[1] Frederick Road is an east-to-west road that intersects Hwy. 115 just north of the Plaintiffs' properties.

able to remove the ice from the inlets to the culverts but was unable to clear the ice plugging the inside sections of the culverts. *Id.* at ¶ 17.

Plaintiffs allege the water invaded their property, including their residences, causing damages.

Plaintiffs filed this suit against the State in March 2020, asserting inverse condemnation and requesting compensation for the damages caused by the flooding. In response, the State filed a motion to dismiss the complaint on the basis that the complaint did not assert that a recognized property right had been infringed by state conduct, a necessary element of an inverse condemnation claim.

On April 8, 2020, Plaintiffs filed their Amended Complaint which included an allegation that the State's construction and maintenance of Hwy. 115, including the culverts, was the legal cause of the flooding and resulting damages.

On October 2, 2020, the State filed a motion for summary judgment along with pleadings in support, including a statement of undisputed material facts, brief and an affidavit. The State filed additional affidavits on October 9, 2020.

On October 10, 2020, Plaintiffs filed their pleadings in resistance to the summary judgment request, including a brief, affidavits, and objections to the State's statement of undisputed material facts.

The State filed its reply brief on October 15, 2020.

A hearing was held October 19, 2020, at which time the parties made oral arguments, and the court took the motion under advisement.

Legal Analysis

Housecleaning.

Before turning to the summary judgment motion, there are a couple of housekeeping matters to address. There was no order entered pursuant to SDCL 15-6-15 authorizing Plaintiffs to file an amended complaint. There also was never a hearing or decision issued on the State's motion to dismiss. The parties, however, have agreed that they are proceeding under the amended complaint and the motion to dismiss is moot.

Summary Judgment Standard

SDCL 15-6-56 was adopted by Supreme Court Order in 1966. Under SDCL 15-6-56(c), summary judgment is appropriate if the pleadings, depositions, answers to

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. There of course are many cases over the years that have addressed the standard to be applied in considering summary judgment motions, but it appears the first South Dakota case that references SDCL 15-6-56 is *Wilson v. Great Northern Railway Company*, 83 S.D. 207, 157 N.W.2d 19 (1968), in which the court stated:

> Summary judgment is a comparatively new procedure in this state and became a part of our practice when we adopted the federal rules of civil procedure with a few minor variations. Consequently we turn to the federal court decisions for guidance in their application and interpretation. In an opinion rendered shortly after the adoption of the federal rules, the late Judge Gardner wrote: "The question presented by such a motion is whether or not there is a genuine issue of fact. It does not contemplate that the court shall decide such issue of fact, but shall determine only whether one exists." The trial court chose to enter findings of fact and conclusions of law. Since a summary judgment presupposes there is no genuine issue of fact, findings of fact and conclusions of law are unnecessary.
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> Certain guiding principles on the use of summary judgment have evolved. They are: (1) The evidence must be viewed most favorable to the nonmoving party; (2) The burden of proof is upon the movant to show clearly that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law; (3) Though the purpose of the rule is to secure a just, speedy and inexpensive determination of the action, it was never intended to be used as a substitute for a court trial or for a trial by jury where any genuine issue of material fact exists; (4) A surmise that a party will not prevail upon trial is not sufficient basis to grant the motion on issues which are not shown to be sham, frivolous or so unsubstantial that it is obvious it would be futile to try them; (5) Summary judgment is an extreme remedy and should be awarded only when the truth is clear and reasonable doubts touching the existence of a genuine issue as to material fact should be resolved against the movant; (6) Where, however, no genuine issue of fact exists it is looked upon with favor and is particularly adaptable to expose sham claims and defenses.
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> Summary judgment may be used in all types of litigation, but there are some kinds of cases which lend themselves more readily to summary adjudication than others. Statistics show it is granted more frequently in actions on notes and for debts than in other kinds of

> cases. Three classes of litigation which are not usually suited for summary disposition are (1) negligence actions, (2) actions involving state of mind, (3) equitable actions.

Overview of Inverse Condemnation Law

> The United States Constitution provides that private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V. Article VI, § 13 of the South Dakota Constitution provides that "[p]rivate property shall not be taken for public use, or damaged, without just compensation...." This Court has previously determined that South Dakota's Constitution provides greater protection for its citizens than the United States Constitution because "our Constitution requires that the government compensate a property owner not only when a taking has occurred, but also when private property has been 'damaged.' " *Krier v. Dell Rapids Twp.*, 2006 S.D. 10, ¶ 21, 709 N.W.2d, 841, 846.

Rupert v. City of Rapid City, 2013 S.D. 13, ¶ 9, 827 N.W.2d 55, 60. "[A]n action by a landowner for inverse condemnation is maintainable where a governmental entity causes an invasion of the land by 'water, earth, sand, or other matter or artificial structures placed upon it, so as effectually to destroy or impair its usefulness[.]'" *Id.* ¶ 10, 827 N.W.2d at 61 (quoting *Searle v. City of Lead*, 73 N.W. 101, 103 (SD 1897)).

In an inverse condemnation case, a plaintiff must prove: (1) State action pursuant to its eminent domain powers; (2) that action proximately caused the damage suffered by Plaintiff's property, and (3) that the invasion of Plaintiff's property effectually destroyed or impaired its usefulness. Further, "in order for a plaintiff to recover under the consequential damages rule, he or she must prove that 'the consequential injury is peculiar to [their] land and not of a kind suffered by the public as a whole.'" *Id.* ¶ 10, 827 N.W.2d 55, 61 (*quoting Krier*, 2006 S.D. 10, ¶ 26, 709 N.W.2d at 847–48) (alteration in original). "The underlying intent of the [damages] clause is to ensure that individuals are not unfairly burdened by disproportionately bearing the cost of projects intended to benefit the public generally." *Id.* ¶ 9, 827 N.W.2d at 61 (quoting *Hall v. State ex rel. South Dakota Dept. of Transp.*, 2011 S.D. 70, ¶ 37, 806 N.W.2d 217, 230) (alteration in original).

"The tendency under our system is too often to sacrifice the individual to the community; and it seems very difficult in reason to show why the State should not pay for property which it destroys or impairs the value, as well as for what it physically takes." *Rupert,* ¶ 9, quoting *Hall.*

The viability of a takings claim is dependent upon situation-specific factual inquiries. *Rupert*, ¶ 10. There is "no magic formula that enables a court to judge, in every case, whether a given government interference with property is a taking." *Id.*

A Public Entity's Construction, Improvement and Maintenance of a Highway Can Give Rise to an Inverse Condemnation Claim

As stated in *Smith v. Charles Mix County*, 85 S.D. 343, 182 N.W.2d 223 (1970):

> Our law relating to the drainage of surface waters in rural areas is summarized in *Bruha v. Bocheck*, 76 S.D. 131, 74 N.W.2d 313: "the owner of the dominant land, in the exercise of a reasonable use of his property, has the right by means of ditches and drains on his [85 S.D. 346] property to accelerate the flow of surface waters into a natural watercourse, and into which such waters naturally drain, provided he does not permit an accumulation of water on his property and cast the same on the servient land in unusual or unnatural quantities." These principles apply to a county in the construction, improvement, and maintenance of its highways. In the performance of such work a county cannot divert surface waters into unnatural watercourses or gather water together in unnatural quantities and then cast it upon lower lands in greater volume and in a more concentrated flow than natural conditions would ordinarily permit. Damages caused thereby constitute a compensable taking or damaging of private property for a public use under Section 13, Article VI, SD Constitution. See *Bogue v. Clay County*, 75 S.D. 140, 60 N.W.2d 218, and *Shuck v. City of Sioux Falls*, 79 S.D. 505, 113 N.W.2d 849.

See also Long, ¶ 31, confirming the holding in *Charles Mix* that a public entity's construction, improvement and maintenance of its highways can give rise to a compensable taking or damaging of private property for public use.

Whether There Has been an Inverse Condemnation Taking is a Matter of Law for the Court to Determine

The ultimate determination of whether government conduct constitutes a taking or damaging is a question of law for the court. *Rupert*, ¶ 29; *Hall*, ¶ 8. "If the court decides a taking of damaging of property occurred, the parties may request that a jury resolve their claim for just compensation and affix damages." *Krsnak v. Brant Lake Sanitary District*, 2018 S.D. 85, ¶ 15.

As stated in *Schliem v. State of South Dakota*, 2016 S.D. 90, Footnote 12:

> ...However, our Legislature has declared that "[t]he *only* issue that shall be tried by the jury...shall be the amount of compensation to be paid for the property taken or damages." SDCL 31-19-4 (emphasis added); *accord* SDCL 21-35-15.

Inverse Condemnation vs. Tort Claim

Our South Dakota Supreme Court has made it clear that in situations such as this, a claim for inverse condemnation is the exclusive remedy, and no tort claim for trespass or negligence may be maintained.

In *Rupert*, after a thorough analysis of the rationale for the general rule that if a statute provides an adequate remedy for obtaining just compensation, the statutory remedy is exclusive, the court ruled:

> [¶43] South Dakota does not have specific statutes regarding inverse condemnation. However, inverse condemnation actions have been explicitly recognized [827 N.W.2d 71] in South Dakota through case law. An individual's right to bring an inverse condemnation action stems from Article VI, § 13 of the South Dakota Constitution because Article VI, § 13 essentially abrogates sovereign immunity. The abrogation of a governmental entity's sovereign immunity in cases involving a taking or damaging of private property is so fundamental that it is not found in statute, but rather in our Bill of Rights in the Constitution. See *Benson*, 2006 S.D. 8, ¶ 14, 710 N.W.2d at 139. Our Constitution allows a property owner to file suit to secure "just compensation" for a taking or damaging of his or her property if the public entity does not institute formal proceedings to take or damage the property. No such similar abrogation is found for the torts of negligence and trespass. Because the landowner is already guaranteed "just compensation" from the governmental entity under Article VI, § 13, when there has been a taking or damaging of property by a governmental entity, he or she is entitled to no more.
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> [¶44] In this case, the City had both the authority to maintain the roads and the authority to damage the Ruperts' property. In concluding that the City's actions constituted a "damaging" of the Ruperts' property under Article VI, § 13, of the South Dakota Constitution, the trial court established that the City validly exercised its authority. Thus, the City's actions cannot be deemed "tortious" or in violation of any "duty" that is necessary to support a tort. As a result, the Ruperts are not entitled to recover for the City's damaging of their property under theories of trespass or negligence. Instead, the Ruperts are limited to recovery of "just compensation" pursuant to Article VI, § 13, of the South Dakota Constitution.

In *Long v. State of South Dakota*, 2017 S.D. 79, 904 N.W.2d 502, in an inverse condemnation action, the State asserted that it was protected from an award of damages based upon the doctrine of sovereign immunity because the landowners' claims involved the design, construction and maintenance of a public highway. Our Supreme Court rejected that defense, holding that the State was not shielded by sovereign immunity from the landowners' inverse condemnation claims. *Long*, ¶ 17. The Court further stated:

> [¶20] This Court provided in *Rupert* that when a condemnor validly exercises its authority, the condemnor's "actions cannot be deemed 'tortious' or in violation of any 'duty' that is necessary to support a tort." 2013 S.D. 13, ¶ 44, 827 N.W.2d at 71. As a result, we held that even though the Ruperts pleaded claims for tort and a taking, the Ruperts' recovery was limited to "'just compensation' pursuant to Article VI, § 13, of the South Dakota Constitution." *Id.* Likewise in this case, the State validly exercised its authority in constructing, reconstructing, and maintaining Highway 11 from the time of construction through the time of the flood. Consequently, a theory of tort could not be supported. Landowners properly dismissed their tort claim and their recovery was limited to just compensation.

Proximate or Legal Cause

In a typical civil case, proximate cause is a question of fact for the jury to determine. *First American Bank & Trust, N.A. v. Farmers State Bank of Canton*, 2008 S.D. 83, 756 N.W.2d 19. As outlined above, however, in an inverse condemnation case the ultimate determination of whether government conduct constitutes a taking or damaging is a question of law for the court.

Rupert and *Long* make it clear that in an inverse condemnation claim, the landowner has the burden to prove that the government's action was a legal cause of the invasion that led to the damage. *Rupert*, ¶ 17; *Long*, ¶ 23. Proximate or legal cause is a cause that produces a result in a natural and probable sequence and without which the result would not have occurred. *Long*, ¶ 23. Such cause need not be the only cause of a result. It may act in combination with other causes to produce a result. *Id.*

For proximate or legal cause to exist, "the harm suffered must be found to be a foreseeable consequence of the act complained of." *Long*, ¶ 26, quoting *Hamilton v. Sommers*, 2014 S.D. 76, ¶ 39, 855 N.W.2d 855, 867. "This does not mean, of course, that the precise events which occurred could, themselves, have been foreseen as they actually occurred; only that the events were within the scope of the foreseeable risk." *Long*, ¶ 26, quoting *Musch v. H-D Co-op., Inc.*, 487 N.W.2d 623, 625 (S.D. 1992).

In *Long*, three of the five Justices agreed that the damages needed to be foreseeable as of the time the damages occurred, stating:

> [¶27] The dissent begins with the proposition that "Landowners had the burden of proving their losses were foreseeable (i.e., probable) at the time the State constructed Highway 11." *Infra* ¶ 63. However, the dissent misapprehends how this Court views foreseeability as it relates to duty and causation. Our Court has recognized that "foreseeability for purposes of establishing a duty is not invariably the same as the foreseeability relevant to causation." *Poelstra v. Basin Elec. Power Co-op.*, 1996 S.D. 36, ¶ 18, 545 N.W.2d 823, 827. "The latter essentially is to be viewed as of the time when the damage was done while the former relates to the time when the act or omission occurred." *Id.* Thus, Landowners are not required to prove that their losses were foreseeable when the State constructed Highway 11 in 1949, i.e., when the act occurred. Rather, to determine foreseeability as it relates to causation, we must look to when the damage was done. The standard is whether the damage "ought to have been foreseen in the light of the attending circumstances." *Musch*, 487 N.W.2d at 625.
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> [¶28] The circuit court appropriately considered all of the attending circumstances from the time the flooding occurred back to the time the State constructed Highway 11. Specifically, the court found that the State constructed Highway 11 across the natural watercourse of the Spring Creek Tributary; that the State installed two 48-inch culverts and one 24-inch culvert to accommodate drainage of the basin; that, during a 2010 resurfacing project of Highway 11, an analysis of the culverts showed that flooding would occur during an eight-year-rain event; that the culverts were of insufficient size to handle the drainage needs of the Spring Creek Tributary; and that, based on the foregoing "the State knew or should have known that an eight year rain event and above would cause flooding to [Landowners] property as a result of the Highway 11 blockage of the natural drainage." Although the court did not use the precise terms of "foreseeability" or "natural and probable sequence," the court's findings are sufficient to sustain a finding of foreseeability for the purpose of proximate cause.

Two of the Justices, however, dissented on this issue, stating that the damage had to be foreseeable at the time the highway was constructed. They wrote:

> [¶62] As the Court notes, "[p]roximate cause is defined as 'a cause that produces a result in a natural and probable sequence and without which the result would not have occurred.'" *Howard v. Bennett*, 2017 S.D. 17, ¶ 7, 894 N.W.2d 391, 395 (emphasis added) (quoting *Hamilton v. Sommers*, 2014 S.D. 76, ¶ 39, 855 N.W.2d 855, 867). The first half of this definition requires

the plaintiff to prove the loss was foreseeable. *Hamilton*, 2014 S.D. 76, ¶ 39, 855 N.W.2d at 867; *State v. Ruth*, 9 S.D. 84, 92-93, 68 N.W. 189, 191 (1896) ("[I]n order to warrant a finding that . . . an act . . . is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the . . . act, and that it ought to have been foreseen, in the light of the attending circumstances."). The second half requires the plaintiff to prove the conduct complained of is a but-for cause of the loss. *Compare Howard*, 2017 S.D. 17, ¶ 7, 894 N.W.2d at 395 (requiring a cause to be one "without which the result would not have occurred" (quoting *Hamilton*, 2014 S.D. 76, ¶ 39, 855 N.W.2d at 867)), *with Cause, Black's Law Dictionary* (10th ed. 2014) (defining the term *but-for cause* as "[t]he cause without which the event could not have occurred"). Thus, proving but-for causation is not sufficient to establish a right to compensation—the plaintiff also has the burden of proving foreseeability.

[¶63] In this case, Landowners had the burden of proving their losses were foreseeable (i.e., probable) at the time the State constructed Highway 11. *Hyde v. Minn., Dak. & Pac. Ry. Co.*, 29 S.D. 220, 231, 136 N.W. 92, 96 (1912) ("The damages to be recompensed for under the law of eminent domain are . . . only such as could be anticipated by a jury in the trial of an action brought before the 'damage' had taken place."). The circuit court found that when Highway 11 was constructed in 1949, the surrounding area was undeveloped farmland. The first of Landowners' homes was not constructed until 1974. The court also found that none of Landowners' properties had been flooded prior to July 2010. And as Landowners recognized in their complaint, the upstream population contributing to runoff increased significantly between 1949 and 2010. Thus, Landowners had the burden of proving that when the State constructed Highway 11 in 1949, it was *probable*—not merely *possible*—that 61 years later, runoff from a population base more than triple the size of that in 1949 would combine with severe rainstorms to destroy homes that had not been built in a community that did not exist.

There Are Questions of Fact Requiring an Evidentiary Hearing

As stated in *Rupert*, the viability of a takings claim is dependent upon situation-specific factual inquiries and there is no magic formula to determine whether a given government interference with property constitutes a taking. In this case there are questions of fact that require denial of the State's motion for summary judgment. There are questions of fact whether the replacement of the box culvert with the pipe culverts constitutes a state action for purposes of an inverse condemnation claim. If so, there are questions of fact whether the state's conduct was a legal cause of the flooding and damages, including whether the flood damage was a foreseeable consequence of the act complained. There

are questions of fact whether the injury is peculiar to the plaintiffs' properties and not of a kind suffered by the public as a whole. The answers to these questions will require a court trial. If the court determines there was a compensable taking, then a jury will be empaneled to determine damages, if any.

Conclusion and Order

For the reasons set forth above, I deny the State's motion for summary judgment and enter this order regarding the same.

Sincerely,

Jon Sogn – Circuit Court Judge