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SUPREME COURT
STATE OF WASHINGTON

NO. 81257-8

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SUPREME COURT OF THE STATE OF WASHINGTON
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DON L. FITZPATRICK and PAM FITZPATRICK, husband and wife;
BRAD STURGILL and HEATHER FITZPATRICK STURGILL, husband and wife,

Respondents,

v.

OKANOGAN COUNTY,

Petitioner,

and

THE STATE OF WASHINGTON, JOHN L. HAYES and JANE DOE HAYES,
husband and wife, and METHOW INSTITUTE FOUNDATION,

Defendants.

OKANOGAN COUNTY'S ANSWER TO PLF AMICUS BRIEF

Mark R. Johnsen, WSBA #11080
Karr Tuttle Campbell
Attorneys for Petitioner

1201 Third Avenue, Suite 2900
Seattle, Washington 98101-3028
(206) 223-1313

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I. INTRODUCTION

Pacific Legal Foundation (“PLF”) has submitted an amicus brief in this appeal in support of Respondents Fitzpatrick and Sturgill (“Fitzpatrick”). PLF’s brief addresses only the issue of whether an action sounds in inverse condemnation, when the damage which occurred was neither contemplated in the planned action nor necessarily incidental to the governmental project. The amicus brief does not address the primary basis for the trial court’s summary judgment order, i.e., there is no inverse condemnation because the dike contains floodwaters consistent with the Common Enemy Rule.

Okanogan County respectfully submits that PLF mischaracterizes the arguments of Okanogan County and the State of Washington, and does not accurately describe the current state of Washington law relative to inverse condemnation. Contrary to PLF’s contention, the law of inverse condemnation in this state is not defined solely by the opinion in the 1927 case of Wong Kee Jun v. City of Seattle. This Court and the Court of Appeals have in numerous more recent decisions confirmed that a claim for inverse condemnation does not arise simply because damages can be traced to the actions of a governmental entity.

The issue is not whether the government “intended” to damage the plaintiffs’ property. However, an inverse condemnation does require evidence that the damage was reasonably contemplated by the plan of work *or necessarily incidental to* the governmental project. The distinction is an important one. Under the facts of this case, the damage which occurred to Fitzpatrick’s property in 2002 could not be seen as necessarily incident to the construction of a dike 27 years earlier. The trial court

properly dismissed the claims against the defendants in this case based both on application of the Common Enemy Doctrine, but also because the damages claim in this case does not meet the requirements of inverse condemnation.

II. ARGUMENT

A. The County Does Not Contend That Inverse Condemnation Depends On Intent To Condemn.

In its brief, PLF repeatedly uses the word “intention” or “intentional” to describe the arguments by Okanogan County and the State of Washington relative to inverse condemnation. Indeed, those words are repeated more than a dozen times in the amicus brief. Yet neither the Washington courts nor the Petitioner herein have maintained that a local government must “intend” to damage or harm a plaintiff before inverse condemnation may arise. Instead, the law in Washington is that an inverse condemnation claim does not occur unless the damage suffered by the plaintiff was either “contemplated by the plan of work” or “necessarily incident to” the governmental action. Olson v. King County, 71 Wn.2d 279, 284-85, 482 P.2d 462 (1967); see also Dickgieser v. State, 153 Wn.2d 530, 541, 105 P.3d 26 (2005) (requiring a showing that “damage to private property” was “reasonably necessary to the proper maintenance of property already devoted to a public use”).

By repeating the mantra of “intentional” harm, PLF sets up a straw man that does not assist the Court in analyzing this appeal. There is a critical distinction between intending to cause harm and undertaking an action that can reasonably be expected to necessitate damage to private property. A governmental entity in Washington cannot avoid liability for the either the contemplated or the necessary consequences of its project by simply saying “sorry, we didn’t intend to damage you.”

Rather, the inverse condemnation test involves a two-step analysis to determine whether the damage was contemplated by the plan of work *or* was necessarily incident to the project.

In other words, where the damage was a necessary result which was or should have been foreseen by the government, then an inverse condemnation may have occurred. But where the harm is too remote to be a necessary incident of the governmental project, there is no inverse condemnation. Olson v. King County, *supra*, 71 Wn.2d at 284-85. It is for this reason that the courts often look to the length of time between the governmental project and the plaintiffs' damages, in determining whether the action properly sounds an inverse condemnation. *See, e.g., Olson v. Seattle*, *supra* (27 years between road project and slide damage); Seal v. Naches – Selah Irrigation District, 51 Wn.App. 1, 10, 251 P.2d 873 (1988), *rev. denied*, 110 Wn.2d 1043 (1989) (damage occurred several decades after canal was built).

For example, if the dike in this case caused washout damages to adjoining property when it was built in 1975, then the owner of such adjoining damaged property might reasonably argue that those damages were necessarily incident to the work performed. *See, e.g., Ulery v. Kitsap County*, 188 Wash. 519, 521, 63 P.2d 352 (1936) (where flood damage commenced within a year following construction of a highway). But here, the dike was in place for 27 years, from 1975 to 2002 before any damage occurred. Fitzpatrick acknowledged that there was no damage to his property between 1975 and 2002. (CP 123). Moreover, as Fitzpatrick makes clear in the Complaint, it was the formation of a log jam which precipitated the river avulsion and damage to his property. (CP 3-5). (The Complaint alleged fault on the part of the

state and Okanogan County in not removing the log jam. That theory of recovery was later abandoned by Fitzpatrick).

In light of the long time during which there was no avulsion and the fact that an intervening log jam precipitated the river avulsion, the river avulsion and erosion of the Fitzpatrick house site in 2002 was not “necessarily incident” to the construction of the dike. Inverse condemnation is simply not the appropriate legal theory for recovery where the chain of causation is remote and tenuous. The trial court properly dismissed this case on those grounds, as well as the Common Enemy Rule.

B. Washington Caselaw on Inverse Condemnation Did Not Cease With the 1927 Wong Kee Jun Case.

PLF asks the court to conclude that the law of inverse condemnation was set in stone in 1927 in the case of Wong Kee Jun v. City of Seattle, 143 Wash. 479, 255 P. 645, and that any subsequent inverse condemnation opinions are at best footnotes and at worst wrongheaded. PLF refers to the Wong Kee Jun case 19 times in 20 pages. At the same time, PLF makes only dismissive reference to the numerous subsequent Washington cases confirming the viability of the “necessarily incident” element for inverse condemnation. Old law can be good law. But an 80 year old case cannot be seen as the final word on a legal principle, when there is abundant recent Washington case law analyzing and defining the elements of that principle.

The Court should therefore reject PLF’s implicit invitation to ignore its more recent opinions – especially those involving slides and flood damage – handed down in recent years. See, e.g., Olson v. King County, *supra*; Songstad v. Metro, 2 Wn.App. 680, 472 P.2d 574 (1970); Seal v. Naches – Selah Irrigation District, *supra*; and Dickgieser v. State, *supra*.

The Olson case, decided more than 40 years after Wong Kee Jun, bears a significant resemblance to the facts of this case. In Olson, the county had performed road work in 1935. Twenty-seven years later, in 1962, a slide occurred which damaged the plaintiff's property. In dismissing the inverse condemnation claim as a matter of law, this Court confirmed that inverse condemnation will not be found where the damage was not "contemplated by the plan of work" and, relevant to this case, was not "a necessary incident" to the governmental project:

In the instant case, it appears that Northrup Road was constructed sometime prior to 1935. The fill above the plaintiffs' properties occasioned no damage to the properties until 1962. The inundation of the plaintiffs' properties with rock, dirt, silt and debris in 1962 was neither contemplated by the plan of work, *nor was it a necessary incident in the building or maintenance of the road.* [Emphasis added].

71 Wn.2d at 284-85.

Subsequently, in two cases involving the flooding of property allegedly related to local governmental water projects, the Washington Court of Appeals dismissed the inverse condemnation claims as a matter of law, based on the same reasoning. Songstad v. Municipality of Metropolitan Seattle, *supra*, 2 Wn. App., at 684, and Seal v. Naches – Selah Irrigation District, *supra*, 51 Wn. App. at 10. This Court denied review in the Seal case.

Moreover, the continued viability of the "contemplated by the plan of work" and the "necessarily incident to" elements was made clear by this Court in Dickgieser v. State, *supra*, a case that was decided in 2005, nearly 80 years after Wong Kee Jun. In Dickgieser, the Court cited the Olson v. King County case with approval. The

absence of any reference to Wong Kee Jun refutes the PLF's contention that Wong Kee June is the Rosetta Stone of Washington inverse condemnation law. Indeed, the Court in Dickgieser held that an issue of fact existed as to whether an inverse condemnation had occurred but the question of fact was "whether the resulting damage to the Dickgiesers' property *was reasonably necessary in order for* the Department to log its land." 153 Wn.2d at 542. In reaching that conclusion, it expressly relied on the evidence in the record showing not only that the flooding that occurred shortly after the DNR forestry project was necessarily incident to that project, but that DNR expressly contemplated and gave advance warning of the increased flooding expected on the plaintiff's property. 153 Wn.2d at 542. Dickgieser confirms that inverse condemnation claims remain distinct from tort remedies; inverse condemnation does not exist for damages that are not reasonably necessary to the public project.

In cases involving a significant lapse of time between the project and the plaintiff's damage, the courts have shown no hesitancy in dismissing inverse condemnation claims as a matter of law. The trial court was correct in doing so in this case. Here, even when the evidence is construed in favor of the non-moving party, the damage to private property occurred years after the dike was built, and there is no evidence that the damaging was reasonably necessary to the proper operation of the dike.

C. Not Every Harm Caused by Government Constitutes a Constitutional Taking.

PLF in effect argues that whenever a governmental action is connected to substantial property damage the Takings Clause is implicated. According to PLF, if the government caused damage, the Constitution must be involved. By means of this

argument, PLF seeks to avoid the clear public policy considerations of RCW 86.12.037 which strictly limits tort liability arising from counties' efforts to control flooding. This Court, however, has always maintained the distinction between governmental torts and constitutional takings.

In considering PLF's invitation to overlook Dickgieser and Olson, it is worth recalling that inverse condemnation is a variant of the government's affirmative power of eminent domain. In other words, inverse condemnation applies where the government could have (and presumably should have) affirmatively condemned the plaintiff's property at the time the governmental project was undertaken. Phillips v. King County, 136 Wn.2d 946, 957, 963 P.2d 871 (1998). Thus, in determining the contours of inverse condemnation, the courts need only look at the boundaries of the governmental powers of eminent domain.

PLF's position, if accepted, would necessarily expand the power of eminent domain so as to allow the government to condemn any property which may be remotely capable of being affected sometime in the future by a governmental project. In practical terms, this implies a government could be expected to dramatically expand its exercise of eminent domain when building a dike, levee, culvert, or other flood control structure. Since it is at least conceivable that at some future time downstream properties could be affected (especially in the event that a log jam or other intervening event might occur) then local government should presumably condemn a broad swath of downstream land and prevent development on that property before the construction begins.

Okanogan County submits that this is not what is contemplated by the Washington courts in developing the distinction between tort and inverse condemnation. Because Okanogan County could not have reasonably condemned the Fitzpatrick property in 1975 (Fitzpatrick's property was a half mile downstream from the dike, on the other side of the Methow River), the damage to that property should not be viewed through the prism of inverse condemnation decades after the fact.

III. CONCLUSION

Recent decisions by this Court and by the Washington Court of Appeals make clear that inverse condemnation requires a showing that the plaintiff's damages were contemplated by the plan of work or necessarily incident to the governmental project. Okanogan County believes that this case can be decided based on the Common Enemy Doctrine. But the trial court was correct in concluding that an additional basis for dismissal was the inapplicability of inverse condemnation.

Respectfully submitted this 13th day of May, 2009.


Mark R. Johnsen, WSBA #11080
Of Karr Tuttle Campbell
Attorneys for Petitioner Okanogan County