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~~CLERK~~ SUPREME COURT OF THE STATE OF WASHINGTON

COURT OF APPEALS, DIV. III, CASE NO. 25161-6-III

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.

SUPPLEMENTAL BRIEF OF PETITIONER OKANOGAN COUNTY

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FILED AS
#0250 ATTACHMENT TO EMAIL

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RULES

RAP 13.7(e)1

I. IDENTITY OF PETITIONER.

Petitioner Okanogan County submits this Supplemental Brief pursuant to RAP 13.7(e).

II. ISSUES PRESENTED FOR REVIEW

A. Whether the Court of Appeals' decision contradicts settled caselaw regarding the common enemy rule and the elements of an inverse condemnation claim.

B. Whether a party that participates in construction of a dike which effectively prevents floodwaters from overflowing the banks of a river is protected from liability to a downstream landowner by the common enemy rule.

C. Whether an inverse condemnation claim is properly dismissed where the damage was not contemplated by nor necessarily incident to the governmental project.

III. BRIEF FACTUAL SUMMARY.

On June 16, 2002, a home owned by plaintiffs/respondents Fitzpatrick and Sturgill (hereinafter "Fitzpatrick") was swept away in a significant flood event on the Methow River. Fitzpatrick contends that the property damage was caused by the presence of a dike on the river, in combination with a log jam which had formed several years earlier upstream from this property. (CP 5). The dike is located on the other side of the Methow River from the Fitzpatrick property. At the time of its construction, the dike was approximately one-half mile upstream from the property subsequently purchased by Fitzpatrick.

In the mid-1970s, Okanogan County obtained approval from the state of Washington and the U.S. government to construct/improve the dike so as to provide protection against the washout of Washington State Highway 20 and other property. (CP 3, 93-94). The dike improvement occurred in 1975.

A flood event in July 1999 resulted in a partial breach of the dike. The Army Corps of Engineers performed emergency repairs. (CP 94; 146-147). On or about June 16, 2002, rapid melting of snow pack in the North Cascades resulted in a high water flood event in the Methow. During the storm the river current avulsed (changed course) and the Fitzpatrick home was washed away.

Fitzpatrick sued Okanogan County, the State of Washington and private defendants in June 2005. On March 7, 2006, the Honorable John Hotchkiss of Douglas County Superior Court granted the defendants' motions for summary judgment. (CP 232-234). Fitzpatrick sought review in the Washington Court of Appeals, Division III, only with respect to the inverse condemnation claim against the County and the state. The Court of Appeals reversed the trial court, holding by a 2-to-1 vote that the defendants are not protected by the common enemy rule. The Court of Appeals further held that inverse condemnation could lie even though the washout of the Fitzpatrick property in 2002 was not necessarily incident to nor contemplated by the dike construction project.

This Court accepted review on September 3, 2008. Petitioner Okanogan County now submits this Supplemental Brief, seeking reversal of the Court of Appeals' decision and reinstatement of the trial court's summary judgment order.

IV. LEGAL ARGUMENT.

- A. The Court of Appeals Erroneously Applied the "Watercourse Obstruction" Exception to the Common Enemy Rule.
 - 1. The Watercourse Obstruction Exception Requires Blockage of an Existing Stream to the Detriment of an Upstream Landowner.

Division III of the Washington Court of Appeals erred in applying the "natural watercourse obstruction" exception to the common enemy rule in the context of a river dike

which effectively keeps water within the banks of the river. Both the trial court and the Court of Appeals recognized that longstanding Washington law ordinarily supports application of the common enemy rule, protecting landowners who erect dikes to protect property against unwanted waters leaving the banks of rivers during high water events. The rule has been repeatedly applied to immunize local governments and private parties against liability to downstream property owners allegedly caused by a dike or levee along a river. Cass v. Dicks, 14 Wash. 75, 78, 44 Pac. 113 (1896); Harvey v. Northern Pacific Railway Co., 63 Wash. 669, 676-77, 116 Pac. 464 (1911). The rule was recently affirmed by this Court in Halverson v. Skagit County, 139 Wn.2d 1, 983 P.2d 643 (1999).

The application of the common enemy rule to river dikes and levees reflects a policy determination that local governments and other parties should be encouraged to take appropriate actions to protect property from the catastrophic effects of floods. This policy is also reflected in RCW 86.12.030 (see part B, *infra*).

The trial court properly dismissed Fitzpatrick's claims in this case, based on the authority of Cass v. Dicks and Halverson v. Skagit County. In contrast, the majority of the Court of Appeals' panel, while recognizing the historic application of the common enemy rule, reversed the trial court, citing a narrow exception which has not previously been applied to river dikes. This was a departure from settled caselaw. Indeed, if the rationale of the Court of Appeals were widely adopted, it would effectively eviscerate the longstanding protection of the common enemy rule in cases involving dikes and levees, and would discourage local governments and flood control districts from undertaking measures designed to protect private and public property from catastrophic flood losses.

In essence, the Court of Appeals applied the “natural watercourse obstruction” exception to the common enemy rule in a way that would create liability in virtually all cases where damage results from the presence of a river dike or levee, i.e., wherever the ground next to a river is in any respect uneven, with depressions and swales. In the real world, this would mean that in 100% of cases involving river dikes or levees, the common enemy rule would no longer be available as a defense. Simply put, a plaintiff’s attorney and expert could always point to an area of unevenness in the surface of the ground and assert that the dike prevented water from reaching an “overflow channel.” Indeed, that is what the Court of Appeals decided in this case, when it held the “watercourse obstruction” exception applicable to old abandoned swales where no water had flowed for years.

Okanogan County submits that the “watercourse obstruction” exception applies only where the defendant has blocked an actual watercourse with water flowing in it, causing the water to back up onto an upstream owner’s land. This interpretation is consistent with longstanding Washington law. Colwell v. Etzell, 119 Wn.App. 432, 441, 81 P.3d 895 (2003); Wilber v. Western Properties, 14 Wn.App. 169, 173, 540 P.2d 470 (1975). Indeed, the trial court’s interpretation of the common enemy rule is supported by more than 100 years of jurisprudence. In the seminal case of Lamb v. Reclamation District No. 108, 73 Cal. 125, 14 Pac. 625 (1887) the California Supreme Court rejected the argument of a downstream property owner that the reclamation district could not rely on the common enemy rule, where its dike had the effect of cutting off overflow channels on the opposite side of the river. The court held that, simply because water will flow in depressions and swales during times of flood, that is not a basis to avoid the defense of the common enemy doctrine:

The water at some places pours over the entire bank in continuous sheets for considerable distances; but more commonly finds its way through the lower parts or depressions of the banks, which, of course, have gradually been worn down deeper and wider by the action of the water. These short depressions by which the water gets through the banks into the lower lands beyond are called "sloughs," and Wilkins' Slough, mentioned in the complaint, is quite a large depression of that character, and affords means of escape, during overflows, for a considerable quantity of water.

14 Pac. at 625-26. The Lamb court held that the watercourse obstruction exception to the common enemy rule did not apply to overflow channels which carry water only in rare high water events:

Wilkins' Slough is not a channel or fork, continuously carrying a large part, or any part, of the waters of the Sacramento River. It carries no water at all except "in times of flood," and then the amount which it carries, when compared with the volume of water in the river, is insignificant. In fact, it has no original water of its own at all, but is simply a conduit by which occasionally some of the flood-water of the river escapes into the lower lands joining. This same office is performed by every other low place along the bank; and every other part of the levy could be removed as a nuisance if that part of it which is at Wilkins' Slough can be so removed.

Id. at 629. Significantly, the Lamb decision was cited with approval by this Court in Cass v. Dicks, supra, 14 Wash. at 80.

The Washington cases which have found the "watercourse obstruction" exception applicable have all involved blockage of a stream - with water presently flowing in it - by a downstream property owner, which caused a backup onto the land of an upstream owner along the blocked stream. See, e.g., Dahlgren v. Chicago M&P S.R. Co., 85 Wash. 395, 402, 148 Pac. 567 (1915); Island County v. Mackie, 36 Wn.App. 385, 387, 391, 675 P.2d 607 (1984).

The applicability of the rule to blockage by downstream landowners is explicit in several Washington cases:

A natural drain way must be kept open to carry water into streams and lakes, and a **lower proprietor** cannot obstruct surface water **when it is running** in a natural drainage channel or depression.

Currens v. Sleek, 138 Wn.2d 858, 862, 983 P.2d 626 (1999). (Emphasis added). In accord, Colwell v. Etzell, supra, 119 Wn.App. at 441; Wilber v. Western Properties, supra, 15 Wn.App. at 173.

Such conditions were simply not present in the instance controversy, and therefore the Court of Appeals erred in applying the watercourse obstruction exception to the common enemy rule in this case.

2. Fitzpatrick Was Not a Riparian Owner Along the Alleged Overflow Channels.

Not only was Fitzpatrick not an *upstream* riparian landowner, he was not a riparian owner at all with regard to the “overflow channels” which were allegedly blocked. Therefore, he has no standing to seek recovery against the County based on the riparian rights doctrine. It is settled that riparian rights are possessed only by landowners whose property borders on the natural watercourse in question:

Riparian Right: The right of a landowner whose property borders on a body of water or watercourse.

Black’s Law Dictionary (8th ed. 2004). It follows that one who does not own or occupy property along an obstructed watercourse has no standing to claim injury to a riparian right:

Subject to certain exceptions hereinafter noted, riparian rights subsist only for riparian proprietors, and those who did not own or control riparian land cannot claim them.

78 Am.Jur.2d Waters, § 42 (2002). This rule has been recognized by the Washington courts:

Riparian rights, where they exist, derive from the ownership of land contiguous to or traversed by a watercourse.

Dept. of Ecology v. Abbott, 103 Wn.2d 686, 689, 694 P.2d 1071 (1985).

One claiming damage to riparian rights as a result of obstruction of a watercourse, therefore, must own land along that obstructed watercourse. Judson v. Tidewater Lumber Co., 51 Wn. 164, 169, 98 Pac. 377 (1908). In Lamb v. Reclamation District No. 108, supra, the court rejected the plaintiff's claim for this second reason, i.e., that he did not own property on the allegedly blocked flood channel (Wilkins' Slough) and therefore had no riparian rights which could be asserted for obstruction of that flood channel. Interestingly, as in this case, Lamb's property was on the *other side* of the river from where the alleged flood channels had been blocked:

Counsel for appellant contends that Wilkins' Slough is within the legal definition of a "watercourse," and argues for the application here of the doctrine that one landowner on a water course cannot dam it so as to flood the land of his neighbor above. But in the first place, appellant is not a riparian owner upon Wilkins' Slough. His land is two miles away, and divided from it by a large navigable river. He has no interest in whatever rights landowners on Wilkins' Slough, if there were any, might have as between themselves.

14 Pac. at 629.

Similarly Fitzpatrick's land does not border the flood channels identified by Jeffrey Bradley. To the contrary, those old abandoned flood channels flowed south from the west bank of the Methow, nowhere near Fitzpatrick's property. (CP 152-155). Because Fitzpatrick owns no land bordering the alleged blocked overflow channels, he has no standing to assert a violation of riparian rights.

In short, there are three reasons why the “watercourse obstruction” cannot apply in this case: 1) there was no existing stream which was blocked; 2) the river was not backed up; and 3) Fitzpatrick did not hold riparian rights along the abandoned flood channels. Because Fitzpatrick did not own riparian rights along any blocked watercourse, and because the alleged blocking of the overflow channel did not cause backup onto an upstream property owner’s land, the “watercourse obstruction” exception to the common enemy rule simply does not apply.

3. The Cases Relied Upon by the Court of Appeals Do Not Expand the Watercourse Obstruction Exception to Dikes Blocking Overflow Channels.

It is indeed significant that the principal case upon which Fitzpatrick relied, and which was held to be dispositive by Division III is Sund v. Keating, 43 Wn.2d 36, 259 P.2d 1113 (1953). Importantly, Sund did not involve a dike or levee, but rather involved **excavation and removal** of a portion of the stream bank, which directed water onto the plaintiff’s property. Id. at 38-39. Indeed, the trial court in Sund concluded that the defendant **should have built a dike** to prevent the discharge of river waters onto their property. 43 Wn.2d at 39-40. Thus, Sund is totally inapposite to the issues raised in this case. Indeed, contrary to Fitzpatrick’s argument, this Court in Halverson distinguished Sund v. Keating, noting its very different factual background. 139 Wn.2d at 15-16.

Moreover, the Court of Appeals failed to note that even the Sund case supports the proposition that the watercourse obstruction exception applies only where the obstruction has caused water to back up onto an upstream owner’s property:

. . . no structures or obstructions of any kind can be placed in its bed which will have a tendency to dam the water back upon the property of the upper riparian owner.

43 Wn.2d at 43 (quoting 3 Farnham, Waters and Water Rights, 2561, § 880). Thus, to the extent the Sund opinion has any applicability to this case, it supports the decision of the trial court, and not the majority opinion of Division III.

The other case relied upon by Fitzpatrick is similarly inapposite. Currens v. Sleek, *supra*, did not involve a dike or levee or, for that matter, any obstruction on a river. Rather, Currens involved an upland property owner who denuded the slopes of a forested hillside, causing water to run with greater velocity and intensity downhill onto plaintiff's land. 138 Wn.2d at 860.

Okanogan County submits that the absence of caselaw supporting application of the "watercourse obstruction" exception in a river dike case is significant. Simply stated, the exception was inappropriately applied in this context.

4. The Fact That Overtopping Waters Might Temporarily Flow in Depressions and Swales Should Not Eviscerate the General Rule.

As the trial court properly observed, the protection of the common enemy rule should not be eviscerated in river dike cases, simply because floodwaters escaping from the banks of a river will find low ground and tend to flow in channels or depressions until floodwaters cover the entire flood plain. If such an exception were recognized, it would devour the general rule. Instead, the rule cited in Sund v. Keating is that when water is **flowing** in a natural watercourse, it cannot be dammed or diverted out of that watercourse to the detriment of other riparian owners. ("*So long as the waters remain within the flood channel*, the waters are properly classifiable as riparian waters." 43 Wn.2d at 42-43, emphasis by court.)

Fitzpatrick pointed to the Declaration of Jeffrey B. Bradley and argued that, because floodwaters overtopping the banks of the Methow River in the past tended to flow through

forests and farms in depressions or swales (“overflow channels”), this prevents the application of the common enemy rule to a river dike. No Washington court has so held. Most importantly, the alleged “watercourses” in this case had no water in them at the time of the damage to Fitzpatrick’s property downstream. Indeed, there is no water in any of the “watercourses” on any of the aerial photos attached to Bradley’s declaration, including those taken before the dike was built. Most would be invisible but for Bradley’s sketching them in with a color pen. (CP 152-155). That is because these “watercourses” were merely depressions in the floodplain which had previously carried water escaping from the banks of the Methow River only in rare flood events.

Thus, the County’s action did not divert water flowing in existing watercourses, but rather kept the floodwaters within the banks of the Methow. In contrast, the watercourse obstruction exception applies only where an existing river or stream has been dammed causing a backup onto upstream properties. To apply the exception as urged by Fitzpatrick would mean that the common enemy rule is effectively abrogated in river dike cases.

B. Fitzpatrick’s Claim Sounds in Tort, Not Inverse Condemnation.

Although Fitzpatrick’s lawsuit included tort claims as well as an inverse condemnation claim, on appeal Fitzpatrick conceded that his tort claims were barred by RCW 86.12.037 which provides in relevant part:

No action shall be brought . . . against any county . . . for any noncontractual acts or omissions . . . relating to the improvement, protection, regulation, and control for flood prevention and navigation purposes of any river or its tributaries and the beds, banks and waters thereof.

Like the common enemy rule itself, RCW 86.12.030 reflects a strong policy of the state encouraging counties to address catastrophic flood risks by constructing appropriate dikes

and levees.¹ Because of the immunity granted by the statute, it was necessary for Fitzpatrick to attempt to couch his claim in terms of inverse condemnation, rather than tort. But the critical elements of inverse condemnation are simply not present in this case. This is a further reason why summary judgment was properly granted by the trial court.

In short, even if the defense of the common enemy rule were not available, there would still be no basis for Fitzpatrick to recover under a theory of inverse condemnation against Okanogan County because the washout in 2002 was not “necessarily incident to” nor contemplated by the County’s plan of construction of the dike. The Washington courts have repeatedly stressed that a tortious damaging of real property does not become a constitutional taking simply because the actor is a governmental entity. Olson v. King County, 71 Wn.2d 279, 284, 482 P.2d 462 (1967).

Indeed, the concept of “inverse” condemnation was developed to provide a remedy where a local government has undertaken actions constituting a de facto condemnation, but where no formal eminent domain proceedings have been instituted. Phillips v. King County, 136 Wn.2d 946, 957, 968 P.2d 871 (1998). Thus, one may ascertain whether a claim sounds in tort or inverse condemnation by asking whether the government could have affirmatively condemned the plaintiffs’ property when the original activity occurred. And under this test, inverse condemnation clearly does not apply in this case.

When Okanogan County assisted in the construction of the Sloan-Witchert dike in 1975, it certainly did not contemplate that 27 years later, after a major log jam had formed in

¹ Okanogan County is not arguing that dikes are always appropriate or beneficial in controlling flood damage. Certainly, ecological and wildlife considerations must come into play. But the issue before this Court is whether a local government should be exposed to civil liability whenever a property owner alleges damage resulting from construction of a river dike. That is the issue which the common enemy doctrine and RCW 86.12.030 address.

the Methow River, a river avulsion would occur which would result in the washout of the property now owned by Fitzpatrick a half mile downstream. There is no way the County could have satisfied the "Public Use and Necessity" element for such a condemnation. King County v. Theilman, 59 Wn.2d 586, 594-96, 369 P.2d 503 (1963). Indeed, if the County had sought in 1975 to condemn the Fitzpatrick property under such a theory, it would have been laughed out of court. As this Court held in Eastvold v. Superior Court for Snohomish County, 48 Wn.2d 417, 294 P.2d 418 (1956):

[It is a] fundamental principal that no greater estate or interest should be taken than reasonably necessary for contemplated public necessity or use.

48 Wn.2d at 423. This point was made persuasively by the Court in Lamb v. Reclamation District No. 108, supra, where it was held that the case could not be seen as arising in inverse condemnation, because eminent domain would not have allowed condemnation of the property when the structures were built:

In the first place, when respondent built the levee, it could not possibly have condemned appellant's land under the power of eminent domain. It could not have shown that it had any use for said land, or intended to use it, or even to damage it, or to interfere with it in any way; and then the subsequent damage which happened years afterwards, was not a "taking" within the meaning of the most extreme cases on that subject.

14 Pac. at 628. Similarly, because eminent domain proceedings condemning the Fitzpatrick property would not have been appropriate when the County's dike work occurred, so, too, the County's actions cannot be viewed through the prism of inverse condemnation now.

Inverse condemnation "was designed to compensate for damages resulting from planned action rather than mere negligence." Wilson v. Keytronic Corp., 40 Wn.App. 802, 815-16, 701 P.2d 519 (1985); Fralich v. Clark County, 22 Wn.App. 156, 162, 589 P.2d 273

(1978), rev. denied, 92 Wn.2d 1005. The rule limiting inverse condemnation claims to those where the damage was a necessary result of a project or was contemplated by the government in the plan of construction has been reaffirmed several times in recent decades. See, Olson v. King County, supra, 71 Wn.2d 279 (1967); Songstad v. Municipality of Metropolitan Seattle, 2 Wn.App. 680, 472 P.2d 574 (1970); Seal v. Naches-Selah Irrigation District, 51 Wn.App. 1, 10, 751 P.2d 873 (1988), rev. denied, 110 Wn.2d 1041.

The above principal was recently reaffirmed by this Court in Dickgieser v. State, 153 Wn.2d 530, 105 P.3d 26 (2005). Although in Dickgieser it was found that an inverse condemnation had arguably occurred, it was based on the undisputed evidence that DNR's logging had been expected to result in flooding of the Dickgieser's property. Indeed, the Department had met with Ms. Dickgieser before the work began, and asked her to grant a flowage easement to DNR for the expected flooding. Id. at 541-42. No comparable facts exist in this case. Indeed, it would be absurd to suggest that the County contemplated in the mid-1970s that a log jam would form 25 years later resulting in a river avulsion and a flooding of Fitzpatrick's home one-half mile downstream in 2002!

Curiously, the Court of Appeals did not address the extensive Washington caselaw on inverse condemnation, especially in the context of flooding. Instead, it relied almost exclusively on Lambier v. City of Kennewick, 56 Wn.App. 275, 783 P.2d 596 (1989) which can only be described as an unusual decision from Division III which arose in a peculiar context having nothing to do with dikes, rivers or flood damage. Rather, Lambier involved a highway which was allegedly designed in such a manner that it made it more likely that cars would leave the road and wind up in the plaintiff's back yard. Under this strange fact pattern, Division III accepted the plaintiff's argument that a taking had occurred.

While Lambier has not been overruled, it provides no meaningful guidance for the Court in a case such as this. Indeed, it is not consistent with numerous decisions from this Court including Olson and Dickgieser, nor with flooding cases from the Court of Appeals such as Songstad and Seal, which have all required that before inverse condemnation may be found, there be a showing that the damage was “necessarily incident to” or contemplated by the government in its plan of construction.

The inapplicability of inverse condemnation becomes even clearer with a significant passage of time. Thus, in Olson v. King County, supra, this Court affirmed the dismissal of an inverse condemnation claim in a road washout case, noting that construction of the road by King County occurred 27 years before there was damage to plaintiff’s property, and thus the damage could not have been necessarily incident to the work. 71 Wn.2d at 284-85. A similar ruling was made in Seal v. Naches-Selah Irrigation District, supra, at 51 Wn.App. at 10. (In contrast, in Lambier the damage from errant vehicles began to occur shortly after the roadwork was completed.)

In this case, approximately 27 years elapsed from the construction of the dike around 1975 until the flood in 2002. Any suggestion that the damage was “necessarily incident” to the project or that it was contemplated by the County or the state is unreasonable. The trial court properly dismissed the inverse condemnation claim.

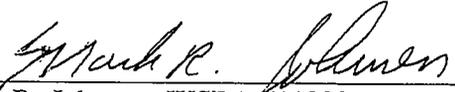
V. CONCLUSION.

Okanogan County respectfully requests that the Supreme Court reverse the Court of Appeals and reinstate the summary judgment entered by the trial court. The “watercourse obstruction” exception to the common enemy rule does not apply where a river dike prevents water from reaching an old abandoned flood channel. The County’s actions did not cause a

damming of any existing watercourse or the backup of water onto the plaintiffs' property. Therefore, the general common enemy defense applies.

Moreover, even if the common enemy defense were not available, the damage which occurred decades after the construction of the dike did not constitute an inverse condemnation, because such damage was neither contemplated by the government nor necessarily incident to the work.

DATED this 3rd day of November, 2008.



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