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The Difference Between Tort And Inverse Condemnation

An interesting read from the South Dakota Supreme Court, on the often fine line between tort liability and inverse condemnation claims.

A big rain, just weeks after the State completed a highway improvement project which included drainage culverts originally installed in 1949, which could not adequately drain an 8-year rain event. Nearby private property flooded. And you know what that means: inverse condemnation, against both the State, and the City of Sioux Falls. The City eventually settled, and the State cross-claimed against the City seeking indemnity if the City was deemed liable to the property owners.

The trial court bifurcated liability and damages, and eventually concluded the State was liable in inverse condemnation for the flooding. The court also dismissed the cross claim against the City, concluding that the City's permitting nearby development did not contribute to the run-off which flooded the plaintiffs' land. The jury got the damage issue, and issued verdicts in favor of the property owners.

In *Long v. South Dakota*, No. 27386 (Nov. 21, 2017), the South Dakota Supreme Court addressed the issues of whether the damage claims against the State were barred by sovereign immunity, whether the flooding qualified as inverse condemnation, and whether the State could seek contribution from the City.

The first question is the most interesting to us, as it has cropped up in many cases lately ([see here, for example](#)). We've argued that the just compensation requirement is self-executing, and thus, not subject to claims of sovereign immunity (there's nothing for the sovereign to waive), Not all courts have agreed with that argument entirely ([see here, for example](#)), but in *Long*, the court held that sovereign immunity only extends to tort claims, and not inverse claims:

"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." *Id.* As we noted in *Hurley v. State*, "[n]either consent to sue the state nor the creation of a remedy by legislative enactment is necessary to obtain relief for a violation of the [Constitution]." 82 S.D. 156, 169, 143 N.W.2d 722, 729 (1966). Accordingly, the State is not shielded by sovereign immunity from Landowners' inverse condemnation claims.

Slip op. at 8. The opinion rejected the reasoning of the dissent that this case really presented a tort, concluding that there was no claim the State acted negligently, only that the highway improvements were within its "validly exercised authority." Slip op. at 11. Sounds about right to us.

On the question of whether the State's building of the highway and culverts could support the lower court's verdicts, the Supreme Court held that the owners proved that these activities were the actual and proximate cause of the flooding of their land, and that the damage they suffered was unique to them, and not suffered by the public as a whole. The court reviewed the record, and concluded that there was sufficient evidence introduced to support the verdicts. The key takeaway from this section of the opinion is on "foreseeability."

The court agreed that the property owners had the burden to show their losses were foreseeable to the State. Not at the time of the construction as the State and the dissent argued, but at the time the damage was done:

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.

Slip op. at 16-17.

There's more, of course, and a vigorous dissent, but we leave the remainder of the opinion to you, including the majority's conclusion that the State's cross-claim against the City for indemnity failed.

Congratulations to our Owners' Counsel colleague Mark Meierhenry and his team for the win.

Long v. South Dakota, No. 27368 (S.D. Nov. 21, 2017)