

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

DON L. FITZPATRICK and PAM FITZPATRICK,)
husband and wife; BRAD STURGILL and) No. 81257-8
HEATHER FITZPATRICK STURGILL, husband)
and wife,)
)
Respondents,)
)
v.) En Banc
)
OKANOGAN COUNTY,)
)
Petitioner,)
)
and)
)
THE STATE OF WASHINGTON; JOHN L.)
HAYES and JANE DOE HAYES, husband and)
wife; and METHOW INSTITUTE FOUNDATION,)
)
Defendants.)
) Filed September 2, 2010

ALEXANDER, J.—In 2002, after the Methow River washed away a substantial portion of their property, the owners of the property brought suit against Okanogan County (County) and the State of Washington (State). In their complaint, they alleged that a public flood control project was the cause of the damage to the property. The trial court subsequently granted the County and State’s motion for summary judgment dismissing the property owners’ suit. The owners then appealed to the Court of

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Appeals, which reversed the trial court. *Fitzpatrick v. Okanogan County*, 143 Wn. App. 288, 177 P.3d 716 (2008). We granted the County's petition for review in order to address whether the owners may maintain an inverse condemnation claim against a government entity for property damage allegedly caused by a public flood control project, and if they can, whether they raised a factual issue that should have precluded entry of a summary judgment dismissing their action. *Fitzpatrick v. Okanogan County*, 164 Wn.2d 1008 (2008). We affirm the Court of Appeals, concluding that the County and State have no immunity from liability for a taking claim and that there are genuine issues of material fact that preclude summary judgment.

I

At all times material to this case, Don Fitzpatrick, Pam Fitzpatrick, Brad Sturgill, and Heather Fitzpatrick Sturgill (owners) were the owners of a residential lot in Okanogan County. The property, which the owners purchased in 1980, fronts the Methow River near the town of Mazama. In 1986, the owners built a log house and garage on the property. These buildings were situated approximately 80-100 feet from the river and were outside the 100-year flood level. During a high-water event in June 2002, the river changed its course and washed away the log house and a substantial amount of the real property on which it was situated. The owners characterize the high-water event as a "2-year storm event" precipitated by the rapid melting of snowpack in the North Cascades. Clerk's Papers (CP) at 145.

A dike referred to as the Sloan-Witchert Slough Dike lies one-half mile upstream

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from the subject property on the opposite bank of the Methow River. The dike was originally built in the early 1970s by other private landowners. Starting in 1978, following a series of floods that damaged Washington State Highway 20 and other property, Okanogan County began making improvements to the dike. With involvement from the Washington State Department of Transportation, major improvements to the dike were implemented by the County in 1983, 1987, and 1999. Currently, the Sloan-Witchert Slough Dike provides flood protection for Highway 20, two Mazama Irrigation District channels, the Kumm-Holloway Ditch and the McKinney Mountain Ditch, an Okanogan County recreational trail, and private property.

After the 1999 improvements, Al Wald, a hydrogeologist for the Washington State Department of Ecology, provided a memorandum to the Okanogan County shoreline permits coordinator. In it, Wald explained that, in his view, the dike work impacted the Methow River by cutting off natural overflow channels. He indicated that this had the effect of compressing more flood flow into the main channel and reducing the natural flood conveyance capacity of the river.

After the owners' home was swept away, they brought suit against the County and State, alleging that the dike caused the river to change its course and wash away their property.¹ Their complaint contained claims for inverse condemnation, trespass, negligence, and wrongful injury or waste to property. The County and State each

¹The State maintains that it does not have a sufficient proprietary interest in the dike to render it liable for damages claimed by the owners. That issue is not before us and is one to be resolved by the trial court on remand.

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responded by moving for summary judgment. In response to the motions, the owners presented evidence to the trial court that the Sloan-Witchert Slough Dike blocked several naturally defined watercourses that were side channels to the main stem of the river. According to the owners' expert, Dr. Jeffrey Bradley, "[t]hese side channels relieve flow from the main channel as the water level rises during a high flow event." *Id.* at 132-33. Dr. Bradley also opined that the owners' home would not have been washed away if the river's access to the side channels had not been obstructed.

In support of their summary judgment motion, the County and State cited the common enemy rule and statutes that grant immunity to government entities from claims arising from flood control work. These defendants also asserted that the owners failed to establish the essential elements of their liability claims. The trial court granted the motions for summary judgment, determining that there were no genuine issues of material fact and that, as a matter of law, the County and State were entitled to prevail. The owners moved for reconsideration of that ruling. In response, the trial court affirmed its earlier ruling, indicating that the plaintiffs' arguments were previously rejected in *Halverson v. Skagit County*, 139 Wn.2d 1, 983 P.2d 643 (1999), and noting that the County and State actions were "intended to keep the river within its natural banks and protect property from the flood waters. That appears to be the idea of the common enemy doctrine." CP at 273.

The owners appealed to Division Three of the Court of Appeals. In a divided decision, that court reversed the trial court, holding that the common enemy rule does

not apply if a landowner obstructs a watercourse or natural drainway or prevents water from entering a flood channel. Since the owners had presented evidence that the dike blocked the side channels through which high waters would have otherwise flowed, the Court of Appeals determined that there were material issues of fact that precluded summary judgment. That court also determined that the County and State were not immune from the owners' inverse condemnation claims and that they could be liable for damages resulting from their affirmative acts.

We thereafter granted the County's petition for review² to address the issue of whether the owners' inverse condemnation claim may proceed against the County and State in light of the common enemy rule.

II

The overriding question before us is whether the trial court erred in granting summary judgment to the County and State. We review an order granting summary judgment de novo, "taking all facts and inferences in the light most favorable to the nonmoving party." *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 693, 169 P.3d 14 (2007). 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." CR 56(c). "The moving party has the burden of

²Although the State did not file a petition for review, in its briefing it has presented essentially the same arguments as the County and has asked us to affirm the summary judgment entered by the superior court.

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showing that there is no genuine issue as to any material fact.” *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 70, 170 P.3d 10 (2007) (citing *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005)). This court has stated that “[w]hen a question is raised as to the existence of a natural watercourse, that question must be determined by the trier of fact.” *Buxel v. King County*, 60 Wn.2d 404, 408, 374 P.2d 250 (1962) (citing *Tierney v. Yakima County*, 136 Wash. 481, 239 P. 248 (1925)). Similarly, Division One of the Court of Appeals has stated that the “nature or classification” of water as either water in a natural watercourse or surface water is to be determined by a trier of fact. *Snohomish County v. Postema*, 95 Wn. App. 817, 820, 978 P.2d 1101, *review denied*, 139 Wn.2d 1011, 994 P.2d 848 (1998).

As we have noted above, the owners asserted several theories for recovery, but only one is before us and that is their claim of inverse condemnation. The Washington Constitution provides that “[n]o private property shall be taken or damaged for public or private use without just compensation having been first made.” Const. art. I, § 16. An inverse condemnation claim is “an action alleging a governmental ‘taking’ or ‘damaging’ that is brought to recover the value of property which has been appropriated in fact, but with no formal exercise of the power of eminent domain.” *Dickgieser v. State*, 153 Wn.2d 530, 534-35, 105 P.3d 26 (2005) (citing *Phillips v. King County*, 136 Wn.2d 946, 957, 968 P.2d 871 (1998)). “The elements required to establish inverse condemnation are: (1) a taking or damaging (2) of private property (3) for public use (4) without just

compensation being paid (5) by a governmental entity that has not instituted formal proceedings.” *Id.* at 535.

III

At the outset, we address the question of whether the County and State have statutory immunity from the owners’ inverse condemnation claim pursuant to former RCW 86.12.037 (1921) and RCW 86.16.071. Under former RCW 86.12.037, counties have no liability for contractual or noncontractual acts “relating to the improvement, protection, regulation and control for flood prevention . . . purposes of any river or its tributaries.” Likewise, under RCW 86.16.071, the “exercise by the state of the authority, duties, and responsibilities [relating to flood control] shall not imply or create any liability for any damages against the state.” Statutory immunity does not, however, extend to claims for damages resulting from flood control measures when the cause of action is based on a constitutional taking claim. See *Halverson*, 139 Wn.2d at 12 (stating statutory immunity is inapplicable when the alleged violation is based solely on constitutional grounds); *Paulson v. Pierce County*, 99 Wn.2d 645, 652, 664 P.2d 1202 (1983) (holding “RCW 86.12.037 does not affect fundamental rights” and therefore does not prohibit recovery for an inverse condemnation claim under article I, section 16 of the Washington Constitution). Because the owners’ inverse condemnation claim is solely based on article I, section 16 of the Washington Constitution, the County and State are not entitled to statutory immunity.

IV

The central issue before us is whether the common enemy rule bars the owners' inverse condemnation claim. Two common law doctrines have historically applied to water drainage issues in Washington: the common enemy rule and the natural watercourse rule. The County and State each contends that the common enemy rule applies,³ whereas the owners argue that the natural watercourse rule applies.

"[T]he common enemy doctrine . . . allows landowners to alter the flow of surface water to the detriment of their neighbors, so long as they do not block a watercourse or natural drainway." *Currens v. Sleek*, 138 Wn.2d 858, 862-63, 983 P.2d 626 (1999). "Surface water" is defined as that which is "caused by the falling of rain or the melting of snow," or water that escapes from running streams and rivers, and that which loses its identity and existence as a body of water. *Cass v. Dicks*, 14 Wash. 75, 78, 44 P. 113 (1896). "The chief characteristic of surface water is its inability to maintain its identity and existence as a body of water. It is thus distinguished from water flowing in its natural course" *Halverson*, 139 Wn.2d at 15. A natural watercourse, however, has long been defined to include the flood channel of a stream because the flood channel "is as much a natural part of [the stream] as is the ordinary channel." *Sund v. Keating*, 43 Wn.2d 36, 43, 259 P.2d 1113 (1953) (quoting 3 Henry P. Farnham, *Waters & Water Rights* § 880, at 2562 (1904)).

³Alternatively, the County and State argue that the natural watercourse rule applies only when damage is caused to an upstream landowner. Although typically this has been the case, there is no persuasive support for the County and State's argument that the owners in the present case are necessarily precluded from invoking the natural watercourse rule merely because the property at issue is downstream from the Sloan-Witchert Slough Dike.

Water that meets the definition of surface water “is regarded as an outlaw and a common enemy against which anyone may defend himself, even though by so doing injury may result to others.” *Cass*, 14 Wash. at 78. The common enemy rule, therefore, provides that “[i]f one in the lawful exercise of his right to control, manage or improve his own land, finds it necessary to protect it from surface water flowing from higher land, he may do so, and if damage thereby results to another, it is [damage without remedy].” *Id.*

In contrast, the natural watercourse rule prevents interference with the natural flow of a waterway. *Currens*, 138 Wn.2d at 862. This rule is based on the principle that watercourses “must be kept open to carry water into streams and lakes.” *Id.* (citing 78 Am. Jur. 2d *Waters* § 134 (1975)). Under this rule, parties are not protected by the common enemy doctrine if they divert water from a natural watercourse and damage other properties. See *Sund*, 43 Wn.2d at 43 (citing 3 Farnham, *supra*, § 880, 2562).

Here, the Court of Appeals relied on the *Sund* and *Halverson* cases to explain the distinction between a defendant who causes the natural course of a stream to move onto the plaintiff’s property, damaging that property, and a defendant who causes a bottleneck in a river that leads to surface water backing up onto the plaintiff’s property, damaging that property. *Fitzpatrick*, 143 Wn. App. at 295-99 (explaining *Sund*, 43 Wn.2d 36; *Halverson*, 139 Wn.2d 1). As the Court of Appeals observed, in *Halverson*, this court determined that the common enemy doctrine applies to diversion of surface water, whereas in *Sund*, we held that the common enemy doctrine does not apply to

diversion of water that is part of a flood channel.

In *Halverson*, the record showed that levees were built on the north side of the river to deflect surface water back into the river; this deflection caused a backlog of surface water that spread out onto the plaintiffs' property on the south side of the river. The plaintiffs in that case argued that the water that damaged their property was not surface water because the surface water became natural water after being repelled by the levees. We explained, however, that surface water does not become natural water "simply because the water, *after being repelled by the levees*, returns to the defined river channel." *Halverson*, 139 Wn.2d at 16. We stated that "[a]s long as the river remains within its banks, it does not contact the dikes and, thus, *the levees have no influence on the river.*" *Id.* at 18 (emphasis added). Because that case concerned a diversion of surface water, we held that the common enemy doctrine was applicable and "provided a defense to the County's liability." *Id.* at 19.

The facts in *Sund* were quite different. The defendants there moved gravel from a natural ridge separating their property from the plaintiffs' property. That act caused the stream, which ran along the southern border of the subject properties, to change course and move onto the plaintiffs' property. In determining whether the common enemy doctrine shielded the defendants from liability, we considered the character of the water at issue, stating that "if the waters were in the flood channel of a stream, then certain principles become self-evident: (a) They are properly classified as riparian waters rather than surface waters; (b) being riparian waters, the rules relating to

watercourses would apply.” *Sund*, 43 Wn.2d at 44. We then stated that “[s]ince the cause of action is one based on diversion of a watercourse, the applicable body of law is that relating to watercourses and riparian rights—*not the law relative to surface waters.*” *Id.* at 40 (emphasis added). We concluded that because the water at issue was in a natural watercourse, the defendants were not entitled to assert the common enemy defense.

The outcome of this appeal, therefore, turns on whether the water that washed away the owners’ property is classified as surface water or water within a natural watercourse. The distinction between surface water and water in a natural watercourse is important because, as noted above, if the water is surface water, then the common enemy doctrine applies, providing a defense to a plaintiff’s claim. If, however, it is water in a natural watercourse, then the common enemy doctrine is inapplicable and does not shield the defendant from liability.⁴

⁴The dissent’s disagreement with our conclusion is based, in part, on our statement that “[w]hile *Sund* narrows the concept of surface waters, it does not change the rule that landowners seeking to protect against surface waters can build levees without incurring liability for damages, even when those levees keep floodwaters *within* the confines of a stream.” *Halverson*, 139 Wn.2d at 15-16. While we could, perhaps, have been clearer in *Halverson*, when what we said is taken in context, it does not, as the dissent suggests, gut the distinction between surface water and water in a natural watercourse such that the common enemy doctrine is inapplicable when a landowner seeks to protect against floodwater by building a levee or dike. We say this because in *Halverson*, we painstakingly distinguished the facts there from those in *Sund* to reach the conclusion that the character of the floodwater at issue was surface water rather than water in a natural watercourse and, therefore, the common enemy doctrine shielded the defendant from liability. If this court had intended to erase the historical distinction between surface water and water in a natural watercourse in terms of the applicability of the common enemy doctrine, we would not have been so careful to distinguish the character of the water in *Halverson* as surface water from that

The owners contend that the common enemy doctrine is inapplicable because the Sloan-Witchert Slough Dike, which was constructed by the County and improved with involvement by the State, blocked *natural watercourses* that would have reduced the river's flow during the 2002 high-water event and thereby prevented the damage to the owners' property. The owners argue that it is not *surface water* that caused the damage to their property, but rather water in a *natural watercourse*. That being the case, they contend that the common enemy doctrine is inapplicable.

As we observed above, the owners presented the trial court with a declaration from Dr. Bradley as support for their position. Dr. Bradley, who has a Ph.D. in Civil Engineering–Hydraulics, stated that “there are several naturally defined side channels, or watercourses, in the right floodplain of the Methow River in the vicinity of the dike. These side channels relieve flow from the main channel as the water level rises during a high flow event.” CP at 132-33. Dr. Bradley went on to state:

[I]t is clear that one by one the side channels in the right floodplain were blocked off with the construction of dikes beginning in 1975 through the 1999 Army Corps of Engineers flood fight[.] This action has confined flow to the main channel during high flows

. . . By allowing the river to access the[] natural side channels, it would have been able to meander more naturally and the avulsion that occurred in 2002 would not have occurred

[] The construction of the dikes limited the path the avulsion could take to the one that it took in 2002. All other side channels had been blocked by the dike and in June 2002, the river had only one path to take and that was across the large meander bend which resulted in the loss of the Fitzpatrick property

Id. at 133. In addition, the trial court was presented with a map that Dr. Bradley

characterized as water in a natural watercourse in *Sund*.

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prepared. It identified the natural side channels in the area of the dikes and supported his assertion that if the side channels had not been blocked by the dikes, during a high-water event the water would have flowed into the side channels, rather than being confined to the main channel. Confinement of the water to the main channel, the owners' contend, caused what Dr. Bradley called an "avulsion" and the resultant damage to the owners' property.

As noted above, the owners' sought reconsideration of the trial court's summary judgment ruling. Appended to their motion for reconsideration was the aforementioned memorandum that had been prepared by Wald. In it, Wald discussed his observations of the County's work on the dike in 1999:

This road and dike work has impacted the Methow River by cutting off at least three natural overflow channels in the floodplain, thereby compressing more flood flow into the main channel and reducing the natural flood conveyance capacity of the river. Overall this work has cut off about a mile of overflow channels. Additional velocity and quantities of high flows compressed into the main channel during floods are disrupting the natural bed form of the river and causing additional erosion and scour of the main channel downstream. The new dike work is also impacting other high flow channels on the right bank by increasing flows into the next meander downstream. It appears from the aerial photo that it may also exacerbate problems with the river running closer to the toe of the county road (Mazama Road) on the left bank.

Id. at 254-55. Wald also stated that "the dike work is also leaking badly and could easily wash out during the next high flows. If the dike work fails, the rock and sediment will be washed into the floodplain, adversely impacting water quality and plugging up the side channels on the right bank." *Id.* at 255. Wald's memorandum agreed with Dr.

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Bradley that the dikes blocked natural watercourses, and it supported the owners' theory that the property was damaged by water in a natural watercourse rather than surface water.

The County and State presented no evidence to refute the assertions of Dr. Bradley and Mr. Wald. The trial court nevertheless granted the County and State's motion for summary judgment. In doing so and in later denying the owners' motion for reconsideration of that ruling, the trial court appeared to disregard the evidence presented by the owners, relying exclusively on this court's holding in *Halverson* in which we observed that the common enemy rule barred a damage claim based on the construction of levees and dikes, which protected against encroachment of surface water. *Halverson*, 139 Wn.2d at 18-19.

Here, unlike in *Halverson*, the only evidence that was presented to the trial court supported the owners' argument that the water that washed away the subject property was water in the natural watercourse, not surface water. As we explained above, the owners' theory was that the road and dike work impacted the river by cutting off natural overflow channels in the floodplain, thereby forcing all of the flow during the high-water event into the main channel and onto the owners' property. The only counter to this by the County and State was that they are shielded from liability under the common enemy doctrine because the water at issue was surface water. However, the availability of that defense to the defendants turns on whether the water that washed away the owners' property was surface water or water in a natural watercourse. That is a factual

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question.

Under the summary judgment standard, which requires us to view the facts and the inferences from those facts in the light most favorable to the nonmoving party (the owners), it is apparent that there is a factual issue about whether the water that caused damage to the owners' property was water that was diverted from the natural watercourse, and if so, whether liability for that damage flows from the County and State's construction of the dikes.

V

The County and State assert, additionally, that the owners cannot bring their inverse condemnation claim because the damage complained of was not originally contemplated by the plan of work or a necessary incident to the governmental project. As noted above, the elements of an inverse condemnation are "(1) a taking or damaging (2) of private property (3) for public use (4) without just compensation being paid (5) by a governmental entity that has not instituted formal proceedings." *Dickgieser*, 153 Wn.2d at 535.

To support their position, the County and State rely on *Olson v. King County*, 71 Wn.2d 279, 284-85, 428 P.2d 562 (1967) ("The inundating of the properties of the plaintiffs with rocks, dirt, silt and debris . . . was neither *contemplated by the plan of the work*, nor was it a *necessary incident* in the building or maintenance of the road." (emphasis added)), and *Dickgieser*, 153 Wn.2d at 541 ("a taking occurs only if the [S]tate's interference with another's property is a 'necessary incident' to the public use

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of the State's land" (quoting *Olson*, 71 Wn.2d at 285)). The better standard is that which we applied in *Dickgieser*, which focuses on whether the damage to the owners' property was a necessary incident to the governmental project. *Id.* This is not one of the five elements of inverse condemnation, but rather an inquiry under the public use element of the inverse condemnation test.

Wald's opinion, as set forth in his memorandum, runs counter to the contention of the County and State that there is nothing in the record to suggest that flood damage to the owners' property was "a necessary incident" to the dike work. As noted above, Wald's memorandum sets forth his concern about the dike work that was done in response to a high water event in June 1999. Therein, Wald disputed the County's characterization of that event as an "emergency as a result of river flow in the high flow channels" and recommended that the "dike work be removed and replace[d] through the appropriate permit process." CP at 254, 255. In reaching this conclusion, Wald explained that the dike work "impacted the Methow River by cutting off at least three natural overflow channels in the floodplain, thereby compressing more flood flow into the main channel and reducing the natural flood conveyance capacity of the river." *Id.* at 254-55. Wald's memorandum appears to establish that the County and State were on notice three years prior to the high water event that the Methow River may, as "a necessary incident to" or a consequence of the dike work, flood onto the owners' property due to the side channels having been blocked by the work.

We believe that the record shows that there is a genuine issue of material fact

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as to whether the damage to the owners' property was a necessary incident to the County and State's work on the dike. Like the other factual question, this should be resolved by the trier of fact on remand.

VI

In sum, we hold that the common enemy doctrine does not bar inverse condemnation claims for damage to property caused by water flowing through a natural watercourse. Because there are genuine issues of material fact as to whether the water that washed away the owners' property was water in a natural watercourse or surface water and whether the damage to the owners' property was a necessary incident to the County and State's work on the dike, the trial court erred in granting summary judgment. The decision of the Court of Appeals is affirmed and the case is remanded to the trial court for further proceedings.

AUTHOR:

Justice Gerry L. Alexander

WE CONCUR:

Justice Susan Owens

Justice Charles W. Johnson

Justice Mary E. Fairhurst

Justice Richard B. Sanders

Justice Debra L. Stephens

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Justice Tom Chambers
