

Plaintiffs/Respondents:

Denise Zimmerman, Dale Olstad,

Emily Muller, Jeffrey James

vs.

Defendant/Petitioner:

State of South Dakota

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)Plaintiffs' Response in Opposition to
Defendant's Petition for Permission
to Take Discretionary Appeal

Plaintiffs in the captioned matter, through undersigned counsel, for Plaintiffs' Response to Defendant's Petition for Permission to Take Discretionary Appeal (Petition), state as follows:

INTRODUCTION

1. It is respectfully submitted that Defendant's arguments supporting its Petition are highly irregular and are not supported by its cited authority. Defendant (herein Defendant or Petitioner) asks this Court to reverse the Circuit Court's interlocutory Order denying Defendant's Motion for Summary Judgment of dismissal (Motion). The Circuit Court's Order denied Defendant's Motion because Plaintiffs (herein Plaintiffs or Respondents) established material disputed facts that the cause of the flood to their properties was Defendant's construction and maintenance of Highway 115 and its culverts. The Circuit Court's Order denying summary judgement was not a final judgment, was not certified as a final judgment, and did not decide the case on the merits.
2. Defendant filed the Motion after Plaintiffs filed a Motion to Compel discovery and before Plaintiffs' discovery was completed. In opposition to Defendant's Motion, among other evidence, Plaintiffs submitted two extensive expert affidavits supporting their allegations that the cause of the flood to Plaintiffs' properties was Defendant's construction and maintenance of Highway 115 and its culverts. Plaintiffs presented an affidavit from a licensed civil engineer with personal knowledge of the matter that concluded the construction and maintenance of Highway

115 caused the flood. The Affidavit of Andrew Kangas, filed on this case's docket on October 10, 2020, attached as Exhibit A, is incorporated into this Response by this reference. Plaintiffs presented a second affidavit from a meteorologist with personal knowledge of the matter that concluded weather around the flood event was not unprecedented or unforeseeable. The Affidavit of Matthew Bunkers, filed in this case's docket on October 10, 2020, attached as Exhibit B, is incorporated into this Response by this reference.

3. In support of its Motion, Defendant presented no report or testimony from a civil engineer about the cause of the flood. In support of its Motion, Defendant presented no report or testimony from a hydrologist or meteorologist concerning the cause of the flood.

REASONS THE COURT SHOULD DENY THE PETITION

A. Plaintiffs Demonstrated Genuine Disputed Material Facts for Trial.

4. Contrary to the premise of the Petition, Plaintiffs met their burden of production and established disputed material facts that (i) state conduct proximately caused water to invade Plaintiffs' properties, (ii) the water invasions effectually destroyed the usefulness of Plaintiffs' properties, and that (iii) the injury Plaintiffs suffered was peculiar to their land and not of a kind suffered by the public as a whole. *Peters v. Great W. Bank, Inc.*, 2015 S.D. 4, ¶ 13 (quoting omitted) (Parties opposing summary judgment need only "substantiate allegations with sufficient probative evidence ...[to] permit a finding in [their] favor on more than mere speculation[.]").

Plaintiffs established that state conduct proximately caused the flood.

5. In response to Defendant's Motion, Plaintiffs established disputed material facts that Defendant's construction and maintenance of Highway 115 foreseeably caused the blocked culverts and a flood to Plaintiffs' properties, as follows:

- a. Surface water in the subject tributary would not have overtopped Fredrick Road or Highway 115 onto Plaintiffs' properties on March 13, 2019 but-for the construction and maintenance of Highway 115 and its culverts.¹ Affidavit of Andrew Kangas, at ¶ 32.
- b. Surface water levels in the subject tributary are significantly affected by Highway 115 and its culverts, *id.* ¶¶ 31-32, such that surface water can overtop Fredrick Road and flood Plaintiffs' properties when the culverts are blocked, *id.* at ¶¶ 19-20, 32.
- c. Blocked culverts in Highway 115 were foreseeable because Defendant removed a box culvert from Highway 115 in 1988 and installed the current arch-pipe culverts that are naturally prone to blockage. Affidavit of Andrew Kangas ¶ 36-38. At the time of and before the flood, snow and ice accumulated and blocked the culverts. SUMF at ¶12. Plaintiffs' engineering expert opined the flood would not have occurred if the culverts were maintained and the snow and ice removed. Affidavit of Andrew Kangas ¶ 39.
- d. The weather in the area affected on and before March 13, 2019, was not unprecedented. Affidavit of Mathew Bunkers ¶ 43 (“[R]ain ... on March 13, 2019, and the preceding weather was not unprecedented.”); ¶ 33 (“50 to 100% chance in a given year of ... an event with a 24- hour rainfall of 2.48 inches in Renner. This amount of rain has a 1- to 2-year average recurrence interval according to NOAA.”); *id.* ¶42 (“[T]he ground around Renner is commonly saturated, or becomes saturated, during large rain events.”).
- e. The weather on March 13, 2019 was anticipated at least two days before on

¹ Similar to the plaintiffs in *Long*, Plaintiffs' presented an affidavit from an engineer who modeled the conditions of the tributary north of Plaintiffs' properties (1) on the day of the flood and (2) before the construction and maintenance of Highway 115 and its culverts. Affidavit of Andrew Kangas, ¶¶ 17, 18, 29, 30.

March 11, 2019 as shown by a flood watch issued by Sioux Falls National Weather Service. Affidavit of Matthew Bunkers, at ¶ 37; *id.* ¶ 39 (The NWS flood watch said a “large storm system will bring warmer air northward, along with the potential for moderate to locally heavy rainfall ... [and] increased risk ... of flooding due to the ... heavy rain, snowmelt, and poor drainage due to frozen soils. Significant and rapid ... stream level increases are possible due to runoff with ... potential... ice jams.... Residents are ... urged to clear storm drains and make sure downspouts are clear to drain.”).

f. A neighbor of Plaintiffs phoned the South Dakota DOT about the blocked culverts and pooling water at Highway 115 north of Renner at least a day before March 13, 2019, when there was no heavy rain or flooding. Affidavit of Travis Dressen ¶ 8-11.

6. The Circuit Court determined Plaintiffs alleged state action could support an inverse condemnation claim by holding that Defendant’s construction, improvement and maintenance of Highway 115 supports an inverse condemnation claim in its Letter Decision:

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 ... is summarized in *Bruha v. Bocheck*, 76 S.D. 131.... These principles apply to ... the construction, improvement, and maintenance of ... highways. In the performance of such work a county cannot divert surface waters ... upon lower lands in greater volume ... than natural conditions would ... permit. Damages caused thereby constitute a compensable taking or damaging ... 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.

Oct. 30 Letter Decision at pg. 6, case no 49CIV 20-8080, filed on the docket on October 30, 2020

(underlining of Letter Decision section heading in original).

7. The Circuit Court also held that Plaintiffs presented sufficient facts that Defendant's construction and maintenance of Highway 115 and its culverts caused the flood, as follows,

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.

Oct. 30 Letter Decision at pgs. 10-11.

ii. Plaintiffs established the flood effectively destroyed the usefulness of their properties.

8. Plaintiffs showed that the flood effectively destroyed the usefulness of their properties by introducing their individual affidavits, invoices, and other forms of proof that demonstrated Plaintiffs incurred significant costs repairing their real properties because of the flood, among other damages incurred by Plaintiffs because of the flood. Affidavit of Plaintiff Denise Zimmerman ¶¶ 7-10, Affidavit of Plaintiff Dale Olstad ¶¶ 7-10, Affidavit of Plaintiff Jeffrey James ¶¶ 7-10, Affidavit of Plaintiff Emily Muller ¶¶ 7-10, all filed in this case on the docket on October 10, 2020, which affidavits are incorporated herein by this reference.

iii. Plaintiffs established their injuries were peculiar.

9. Plaintiffs showed that their injuries were peculiar and not of a kind suffered by the public as a whole by introducing their individual and expert affidavits showing that the flood caused by Highway 115 and its culverts did not affect all of Plaintiffs' neighbors or Plaintiffs' community in general. Affidavit of Andrew Kangas ¶ 16; Affidavit of Plaintiff Denise Zimmerman ¶ 13.

10. The Circuit Court correctly held the case should go to trial because Plaintiffs established disputed material facts pursuant to the required elements of their inverse condemnation claims.

B. Defendant Did Not Establish Its Affirmative Defenses.

11. Defendant also presents in the Petition, as it did in its Motion to the Circuit Court, its Act of God defense. Petition at pg. 1 and pg. 3 (referring to unseasonable rains and DOT activity in the state on March 13, 2019). Defendant has the burden of proof on this affirmative defense.

12. Defendant presented no evidence proving that it was undisputed that the blocked culverts and Plaintiffs' damages were caused "directly and exclusively to natural causes without human intervention, which by no amount of foresight, pains, or care, reasonably to have been expected, could have been prevented." *N.W. Bell Tele Co. v. Henry Carlson Co.*, 165 N.W.2d 346, 349 (S.D. 1969). Defendant did not offer competing expert opinions to those offered by Plaintiffs, nor did Defendant request additional time to depose Plaintiffs' experts. Instead, Defendant misrepresented 48 paragraphs of the Affidavit of Matthew Bunkers and 41 paragraphs of the Affidavit of Kangas in a manner inconsistent with Plaintiffs' experts' opinions and Circuit Court's understanding thereof in which Defendant argues the facts of the matter are undisputed. Defendant did not prove that weather alone was the cause of the blocked culverts and flood.

C. The Cases Cited by Defendant Are Not Applicable and Are Not Precedent.

13. Defendant cites — as "threshold issues" — two inappropriate cases to support its argument that this Court should reverse the Circuit Court's Order. Petition pg. 9 (citing *see Howard v. Bennett*, 2017 S.D. 17; and *Sjoland v. Carter*, 2003 S.D. 66).

14. In *Howard*, a car accident and negligence case, the circuit court decided the legal question of whether a third-party was the superseding cause of plaintiff's injury. The Court on

appeal held that, although proximate cause is an issue of fact, in car accident cases, proximate cause is a matter of law where certain facts are undisputed. The *Howard* Court reversed the circuit court and issued summary judgment because “present under the undisputed facts of this case” were those facts that turned proximate cause into an issue of law. *Id.* at ¶ 11.

15. *Sjoland* concerned “statutory construction and interpretation.” *Sjoland v. Carter*, 2003 S.D. 66, ¶ 8. *Sjoland* did not address foreseeability or proximate cause. *See id.* *Sjoland* addressed a statute that required a “mistake ... [in] the identity of the proper party[.]” *Id.* The *Sjoland* Court held that summary judgment was appropriate there because the undisputed facts showed that plaintiff “knew [the proper party] after receiving the answers to ... interrogatories[.]” *Id.*

16. In the case at bar, the Circuit Court made no substantive rulings of law, which is contrary to the *Howard* case. Further, contrary to the *Howard* and *Sjoland* cases, the Circuit Court concluded that there were disputed material facts under the legal standards at bar. The Circuit Court correctly ruled that there were questions of fact warranting a trial and left open for adjudication the legal question of whether state conduct proximately caused the flood and a damaging. The cases cited by Defendant are not applicable to this matter.

D. Plaintiffs’ Claims Do Not Sound in Tort.

17. The Petition also raises the notion that Plaintiffs’ claims sound in tort. *See* Petition ¶ 5-6.

18. Plaintiffs’ Amended Complaint alleges “Defendant’s construction and maintenance of State Highway 115 ... was the proximate and legal cause of flooding to Plaintiffs’ real properties.” Amended Complaint ¶ 21. The construction and maintenance of Highway 115 and its culverts is within Defendant’s eminent domain authority. *See* SDLRC 31-19-19 (“Whenever any land, easement ... or material is necessary for right-of-way ... for ... constructing,

reconstructing, maintaining, or repairing any portion of the state trunk highway ... the State ..., through and by its Department of Transportation ... shall acquire and pay for the same”).

19. The Circuit Court rejected Defendant’s argument that Plaintiffs’ claims were in tort following the legal rule that “[t]his Court provided in *Rupert*[,] that when a condemnor validly exercises its [eminent domain] authority, the condemnor’s ‘actions cannot be deemed ‘tortious’ or in violation of any ‘duty’ that is necessary to support a tort.’” Oct. 30 Letter Decision at pg. 8 (citing 2013 S.D. 13, ¶ 44). This honorable Court should also reject Defendant’s argument.

E. Justice is Not Served if the Court Grants the Petition.

20. Under SDCL § 15-26A-3(6), an appeal of an intermediate order is “not a matter of right but of sound judicial discretion, and [is] to be allowed by the Supreme Court ... only when the court considers that the ends of justice will be served ... without awaiting the final determination of the action or proceeding[.]” *See also South Dakota Dept. of Transp. v. Freeman*, 378 NW 2d 241, at 243 (1985) (“SDCL 15-26A-3(6) provides for appeals from intermediate orders upon petition, pursuant to SDCL 15-26A-13” and the two statutes are interpreted together).

21. According to Petitioner, “[n]o further factual development is necessary or appropriate.” Petition pg. 9. Defendant makes a conclusory argument about the development of the case. Petitioner has not met its burden on whether this Court should take jurisdiction. Defendant has not shown how the “ends of justice” will be served by this Court’s adjudication of this matter now. *Id.* This court has consistently held that the right to appeal is statutory and no appeal may be taken unless a statute clearly authorizes one. E.g., *Freeman*, 378 N.W. 2d 241, 241.

22. Defendant concluded that it “benefits the parties and the circuit court” for this Court to resolve the legal issue of “whether a taking and or damaging occurred” “now.” Petition at pg. 7.

The issue of whether a taking or damaging occurred was not decided by the Circuit Court. This Court has repeatedly held that this Court will not decide an issue until the trial court has had an opportunity to pass upon it. E.g., *Hawkins v. Peterson*, 474 N.W.2d 90, 95 (S.D.1991) (“We will not consider issues raised for the first time on appeal.”) (citations omitted). The Circuit Court by its interlocutory Order denying Defendant’s Motion for a dismissal did not make a final determination applying legal issues to facts that the Court would find at a trial on the merits in the normal course of litigation. The ends of justice are not served where another court, the Circuit Court in the pending action, may exercise jurisdiction over the issues raised by the Petition but has not yet heard the case and the issues on the merits.

23. In asserting no more factual development is “necessary,” Defendant omits that it incompletely responded to Plaintiffs’ First and Second Set of Discovery requests. On March 18, 2020, Plaintiffs served their First Set of Discovery on Defendant, which included a request for communications between South Dakota DOT employees for the time around the flood event, among other relevant evidence. In response, Defendant produced very limited communications from two DOT employees,² although the event involved eight or more known DOT employees. Based on the lack of disclosed communications, which still exist,³ and because of other missing

² Defendant produced two series of texts (one starting at 7:26pm on March 13 after the flood, and series of texts over a week later), one email (at 6:03 pm on March 13, after the flood), one cell phone record (with no relevant evidence) and one office phone record (showing a call about the culverts at about 8:00 am, March 12, 2019, a day before the flood). *See* Notice of Motion and Motion to Compel, at ¶ 15, filed Sept. 16, 2020 (addressing the foregoing limited communications). The office phone record was disclosed in response to the Motion.

³ Defendant’s Petition on pg. 2 states “Dressen had dispatched a DOT maintenance crew to the culverts at issue on the morning of the day of the flood.” There is no evidence in the record reflecting that Dressen dispatched DOT employees to the culvert on the morning of the 13th and even if he did there is no evidence DOT employees were at the culverts the morning of the 13th.

discovery responses, Plaintiffs filed a Motion to Compel. In Defendant's Reply to the Plaintiffs' Motion to Compel, on page 6, Defendant admitted it was "continuing to investigate [for] additional e-mails or text messages, and intends to supplement its answer[.]" As of the date of this filing, Plaintiffs' Motion to Compel is under advisement by the Circuit Court and Defendant has produced no additional communications. Defendant does not want an informative record.

24. Plaintiffs also served a Second Set of Discovery on November 11, 2020, in part asking for evidence of the construction of Highway 115 and its culverts, which is relevant under both majority and dissenting opinions in *Long*. *Long* ¶ 28 (The "circuit court appropriately considered ... circumstances from ... the flooding ... back to the time the State constructed"); *id.* ¶ 63 (The focus is "at the time the State constructed[.]"). Defendant has yet to produce the requested evidence. Defendant is wrongfully trying to shut the door on Plaintiffs' case.

CONCLUSION

25. The Circuit Court correctly held that Plaintiffs presented disputed material facts that Defendant's construction and maintenance of Highway 115, including its removal of the box culvert and installation of arch-pipe culverts, was state action that caused the flood to Plaintiffs' properties. In addition, Defendant has not yet fully responded to Plaintiffs discovery requests and the legal issues raised in the Petition are live. The Petition respectfully should be denied.

Dated this 23rd of November 2020.

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