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IN THE SUPREME COURT OF THE STATE OF MONTANA
CASE NO.: DA 20-0609

Ariane Wittman and Jeremy Taylen,

Plaintiffs/Appellants,

-vs-

City of Billings,

Defendant/Appellee.

MONTANA TRIAL LAWYERS ASSOCIATION'S *AMICUS CURIAE* BRIEF

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, Cause No. DV 19-1124, Hon. Michael G. Moses

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Montana Constitution

Montana Code Annotated

INTRODUCTION

This Court has often followed California Supreme Court holdings in its jurisprudence on condemnation. Montana's constitution and California's constitution share a common condemnation clause.

The California Supreme Court recently issued an important holding. *City of Oroville v. Superior Court of Butte County*, 7 Cal. 5th 1091, 446 P.3d 304 (2019) refined the analysis of inverse condemnation. The holding arose in the very context which is at issue on this appeal – a backed-up municipal sewer system.

This Court should adopt the California Court's refined standard of causation. That standard avoids negligence standards and language (including "proximate cause") which invite confusion and tacit application of negligence principles - principles this Court has long held do not control in inverse condemnation cases.

In the present case, the District Court applied negligence standards to inverse condemnation. The Court relied upon out-of-state cases implicitly applying negligence standards. Those cases conflict with longstanding Montana cases - and the California authorities on which these cases rely - holding that negligence standards do not apply.

This Court should reiterate that negligence standards do not apply to inverse condemnation. It should adopt California's *City of Oroville* test for resolving such claims. That test ("substantially caused by inherent risk") clearly states a non-

negligence analysis for inverse condemnation cases.

Montana's inverse condemnation law was reviewed intensively by District Judge Sandefur in *Evenhus v. City of Great Falls*, 8th Jud. Dist. Cause No. DDV-06-900, Order of Dec. 31, 2012.[1] The principles discussed in *Evenhus* are fully in harmony with *City of Oroville*.

Another Montana District Court case, directly on point, is presently pending. *Green v. City of Great Falls and MMIA,* 8th Jud. Dist. Cause No. BDV-14-503(c), like the present case, involves a sewage backup into a private home. Judge Kutzman noted "the tight logical relationship between Montana and California inverse condemnation law," and stated:

> Assuming, as this Court does, that the Montana Supreme Court adopts *Oroville* along with the rest of the inverse condemnation law it has borrowed from California, material fact issues [as to "inherent risk"] preclude summary judgment for either party.

Id., Order Denying Plaintiff's and City's Cross Motions for Summary Judgment on Inverse Condemnation (Dec. 6, 2019), at pp. 13, 20.[2]

This Court should adopt the *City of Oroville* refinement of inverse condemnation standards. The Court should restate and clarify inverse condemnation analysis on this appeal.

[1] Evenhus' inverse condemnation claim against the City was settled after trial.

[2] Green's inverse condemnation claim against the City was settled before trial.

ARGUMENT

MONTANA SHOULD ADOPT THE *CITY OF OROVILLE* ANALYSIS.

A. Constitutional Framework

The Fifth Amendment to the U.S. Constitution prohibits the government from "taking" private property for public use without just compensation. This provision applies to the States through the Fourteenth Amendment to the U.S. Constitution. *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001).

Some state constitutions also require compensation for private property not formally "taken," but damaged by State action. *Evenhus* observes:

> To overcome the harsh limitation of prior constitutional and common law in the absence of a categorical physical "taking" of the property, many states, including Montana, added "or damaged" language to broaden the state constitutional "just compensation" protection beyond "takings" to further guarantee compensation for uncommon *consequential* damage to un-taken private property directly or indirectly caused by a nearby public property use, improvement, or activity. [citations omitted]

Evenhus, at p. 13 (emphasis added, italics in original).

California's Constitution adds the phrase "or damaged" to its takings clause. The government thereby is obliged to pay just compensation for property not formally "taken", but damaged in connection with public improvements. See *Customer Co. v. City of Sacramento*, 895 P.2d 900, 906-7 (Cal. 1995), cited in *Buhmann v. State*, 2008 MT 465, ¶¶ 68-69, 348 Mont. 205, 201 P.3d 70, and in *Evenhus*, *15.

Montana's 1889 Constitution had a similar provision. It stated: "Private property shall not be taken or damaged for public use without just compensation having been first made to or paid into court for the owner." Mont. Const. Art. III, § 14 (1889).

Montana's 1972 Constitution retained and amplified this language. Mont. Const. Art. II, § 29 (1972) provides as follows:

> Private property shall not be taken or damaged for public use without just compensation to the full extent of the loss having been first made to or paid into court for the owner.

(emphasis added).

B. Montana Inverse Condemnation Law

Evenhus categorically summarizes Montana's inverse condemnation law. It states, in part:

> [T]he concept of "inverse condemnation" arises outside the contemplated constitutional and statutory condemnation procedure when, in violation of Article II, § 29, the government "takes or damages" private property without first affirmatively condemning and paying "just compensation" by formal judicial proceeding. [citations omitted] … When such "inverse condemnation" occurs, the legal remedy available to the private property owner to redress the government's violation of Article II, § 29 is a private claim against the government for "just compensation" for the "full extent of the loss" … A private inverse condemnation claim is thus an independent, self-executing constitutional remedy not based or dependent upon statutory provision. [citations omitted]

Evenhus, at pp. 9-11 (emphasis added).

Evenhus clearly details the nature of the "damage" that is compensable:

> Thus, as distinct from mere personal annoyance, inconvenience, or impairment of personal enjoyment or preference for a particular use that either is not uncommon to that suffered by other nearby owners or the general public or did not result in actual pecuniary loss, [citations omitted], a non-taking consequential "damaging" occurs if a public improvement or use directly or indirectly causes uncommon physical damage or impairment of a cognizable property right resulting in actual pecuniary loss. [citations omitted]

Id. at pp. 16-17 (emphasis added).

C. ***Rauser* and *Albers***

This Court's holdings on condemnation often have looked to California precedents applying similar constitutional language. This was true in the leading inverse condemnation case, *Rauser v. Toston Irrigation District*, 172 Mont. 530, 565 P.2d 632 (1977).

In *Rauser*, the plaintiffs' farmland was lower than neighboring land watered by the Irrigation District. Water percolated onto the plaintiffs' land and stagnated there. The plaintiffs claimed inverse condemnation.

The Irrigation District defended the case on negligence grounds. It argued that there was no proof of negligence or wrongful intent. More broadly, it argued that governments are liable for inverse condemnation only on facts which would allow a private party to be held liable in negligence.

Rauser rejected that contention. In doing so, it cited the California Supreme Court holding in *Albers v. County of Los Angeles*, 62 Cal.2d 250, 398 P.2d 129 (1965). That landmark case had stated as follows:

> The question is not whether in all cases, a property owner should not be permitted to recover in an inverse condemnation action if a private party would not be liable for damages similarly inflicted, but whether there is or should be a qualification or limitation of that rule to the effect that the property owner may recover in such an action where actual physical damage is proximately caused to his property by a public improvement as deliberately planned and built …"

Albers, 398 P.2d at 136, cited in *Rauser*, 565 P.2d at 638 (emphasis added).

Rauser thus rejected a negligence-type analysis and established a distinctive standard for inverse condemnation:

> Where, as here, the damages are known or knowable and are an inevitable result of the intentional undertaking of the project, there is no need to show negligent design, construction or operation. It is enough to show the damages were proximately caused by the undertaking of the project and a reasonably foreseeable consequence of the undertaking.

Rauser, 565 P.2d at 637 (emphasis added).

Rauser, however, used terms often associated with the law of negligence, including "proximate cause" and "reasonable foreseeability" - even though the decision itself did not adopt a negligence standard. See id. But because *Rauser* uses these terms, their use invites confusion, as the California Supreme Court recently has held on its parallel line of cases.

D. Post-*Rauser* Montana Case Law

This Court reiterated the basic standard of *Rauser*, citing *Albers*, in *Knight v. City of Missoula*, 252 Mont. 232, 827 P.2d 1270, 1276 (1992):

> A property owner may recover in an inverse condemnation action

> where actual physical damage is proximately caused to his property by a public improvement as deliberately planned and built.

(emphasis added).

More recently, in *Deschner v. State of Montana, Department of Highways*, 2017 MT 37, 386 Mont. 342, 390 P.3d 152, ¶ 13, this Court again applied the *Rauser* standard. *Deschner* concluded:

> The elements a plaintiff must prove in an inverse condemnation claim are (1) that the public improvement was deliberately planned and built; and (2) that, as planned and built, the public improvement proximately caused damage to the plaintiff's property.

Id. at ¶ 22 (emphasis added).

Deschner repeated *Rauser*'s holding that negligence need not be shown to prove inverse condemnation. Id., ¶ 16. But *Deschner*'s prominent use of the term "proximate cause" can lead courts and litigants to resort to negligence analysis. That danger was recognized by the California Court in *City of Oroville*.

E. *City of Oroville*

City of Oroville, like the present case, involved a blocked municipal sewer main. Sewage erupted out of sinks and toilets in the plaintiffs' building. They sued for inverse condemnation.

The case presented two causative factors. One was the blockage, caused by tree roots growing into the sewer main. The other was the plaintiffs' failure to install a backwater valve, mandated by law.

The California Court reviewed its inverse condemnation cases, going back to its benchmark decision in *Albers*. The Court observed:

> We later recognized the potential confusion presented in *Albers* by our use of the term "proximate cause." … To mitigate confusion, we restated this test to eschew the term "proximate." What we used instead was the term "'substantial' causation." (citations omitted).

City of Oroville, 446 P.3d at 311 (emphasis added).

City of Oroville refined the standards of proof for inverse condemnation. Causation is to be weighed as follows:

> What we hold is that the damage to private property must be substantially caused by an inherent risk presented by the deliberate design, construction, or maintenance of the public improvement. This approach aligns with how we have previously analyzed inverse condemnation liability cases.

Id. at 813 (emphasis added).

The concept of "inherent risk" shifts the focus away from the mental state of State actors (e.g., "deliberate design"), which is suggestive of negligence analysis. "Inherent risk" instead fixes attention upon the propensities of the public works from which the damage to property flows.[3]

"Substantial cause" avoids the negligence-law connotations of "proximate cause." In a case with multiple causes, it ensures that the governmental actions in

[3] In any event, the "deliberate" action requirement is clearly met in the present case by the City's decision to construct and service a public improvement. The City did not "accidentally" create a sewer system or accidentally connect that system to the plaintiffs' residence. Both actions were, rather, "deliberate" within the meaning of that term's normal use in inverse condemnation cases.

question are linked directly to the injury. See id., at 313-316.

The California Court showed that these terms support the balancing of values embodied in inverse condemnation. One value is equitable risk-spreading: "to pool the burden to the individual property owner and distribute throughout the community the losses resulting from the public improvement." Id. at 311. A countervailing value is "to mitigate concerns that 'compensation allowed too liberally will seriously impede, if not stop, beneficial public improvements because of the greatly increased cost.'" Id.

Those values inhere in Montana's condemnation clause, as they are in California's parallel clause. The *City of Oroville* test for inverse condemnation is a well-reasoned, well-articulated refinement of the *Albers*/*Rauser* test. This Court should adopt that refinement here.

Judge Kutzman reviewed the reasoning of *City of Oroville* and concluded that it is in harmony with Montana law. He held: "The Court finds nothing in *Oroville* that is inconsistent with *Rauser*, *Deschner*, or any other Montana authorities the parties have cited." *Green v. City of Great Falls*, at p. 20. This Court should concur, and should restate Montana law to incorporate *City of Oroville's* refinements.

F. Application to the Present Case

In *City of Oroville*, the Court denied the plaintiffs' inverse condemnation

claim. It did so because the plaintiffs had failed to install the legally-mandated valve which would have protected them from the backed-up sewer main. For that reason, although the tree-root blockage was an "inherent risk," it did not qualify as a "substantial cause" of the damage to the property. See *City of Oroville*, 446 P.3d at 314-315.

No such factor defeats the "substantial cause" analysis in the present case. The Plaintiffs did nothing to breach the chain of causation or to bring about their injury. The injury arose from an inherent risk in the City's sewer system.

As the District Court states, the evidence shows that "10-15 annual inevitable overflow events" occur in the Billings sewer system "despite the City's annual jet-cleaning program." (See Memorandum and Order in re: the Plaintiffs' Motions for Partial Summary Judgment (Sept. 29, 2020), p. 7). "Inevitable overflow events" are obviously an "inherent risk" in the sewer system as deliberately planned and operated.

The District Court reasons that sewer systems "are open systems because they allow users of the system to input the system by flushing toilets." Id., p. 8. It says "it is impossible to control flushing activities that may disrupt the system." Id. Respectfully, this reasoning is incorrect.

The distinction between "open" and "closed" systems is foreign to Montana law, which routinely permits inverse condemnations claims on "open" systems.

Further, it is difficult to imagine the framers of Montana's constitution intending such a nuanced distinction without saying so in the constitution's text. Private use of such "open" public systems often has been held to support inverse condemnation. See, e.g., *Rauser*, in which irrigation water deposited on crops resulted in the rise of the water table causing waterlogging and saline soil development on the Rauser's land which adjoined the irrigation district. See *Knight v. City of Missoula* (compensation allowed, where private vehicles using a public street impaired plaintiffs' enjoyment of their homes); *Knight v. City of Billings*, 197 Mont. 165, 642 P.2d 141 (1982) (same). These are examples of "open systems" that allow "users of the system to input into the system;" the District Court incorrectly ruled such systems could not be the subject of inverse condemnation. *Wittman* Order, pp. 7-8.[4]

This Court has rejected efforts to impose nuanced limitations on the Constitution's prohibition against "taking or damaging private property without just compensation." In *Less v. City of Butte*, 28 Mont. 27, 72 P. 140 (1903), the

[4] The District Court also found that because of their closed "nature, municipal water systems choose to avail themselves to the costs of long-term deterioration and leaks," which is a deliberate government action sufficient for supporting an inverse condemnation claim. *Wittman* Order, p. 7. Municipalities, however, fully maintain their public water systems by repair and replacement, before leaks occur. Municipalities are authorized to do so. § 7-13-4301(2), MCA. They are authorized to charge fees for this purpose. § 7-13-4304(1), MCA, *Lechner v. City of Billings*, 244 Mont. 195, 204, 797 P.2d 191, 197 (1990).

City of Butte argued it did not intend to injure plaintiff's property when it passed an ordinance changing the grade of Broadway. This Court rejected all of the city's arguments on appeal and noted: "[This Constitutional provision] is both mandatory and prohibitory. It is self-executing, and requires no legislation to rouse it from dormancy. (citations omitted) …The declarations of constitutions are placed therein to be obeyed, and are not to be 'frittered away by construction.'" Id., 28 Mont. at 27, 72 P. at 141-42.

The District Court also erred in its reasoning that "[i]nverse condemnation requires deliberate affirmative action by the municipality to take the property." (Order, p. 8 (emphasis added)); see § 1-2-101, MCA ("In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted.") It does not. The "deliberate" action identified under the *Rauser*/*Albers* test is action to build or operate an improvement, not negligence-type "affirmative" deliberate damage to property. *Rauser* says inverse condemnation applies in situations where "property owners . . . suffer direct physical damage to their properties as the proximate result of the works as **deliberately planned and carried out**." *Rauser*, 172 Mont. at 539, 565 P.2d at 638. No Montana case holds that inverse condemnation claimants are required to show that the governmental entity deliberately damaged her private property. Id.;

Deschner v. State of Montana, Dep't of Highways, 2017 MT 37, ¶ 13, 386 Mont. 342, 390 P.3d 152. Such a requirement would mandate a different holding in decades worth of Montana cases. To affirm it here would require this Court to depart from its prior case law and reverse itself.

The District Court cited out-of-state cases denying sewage-discharge claims under tests which require State actors to intend the damage. Id. at pp. 8-10; see *City of Dallas v. Jennings*, 142 S.W.2d 310, 313-14 (Tex. 2004) (rejecting "inherent risk" test and requiring that government actors know that "damage is substantially certain" to result from their action); *Henderson v. City of Columbus*, 285 Neb. 482, 827 N.W.2d 486, 493-4 (2013), citing *Jennings* and *Electro-Jet Tool Mfg. v. Albuquerque*, 114 N.M. 676, 845 P. 2d 770, 777 (1992) ("the act must at least be one in which risk of damage … is so obvious that its incurrence amounts to the deliberate infliction of harm for the purpose of carrying out the governmental projects") (emphasis added).

The District Court's holding thus imports a negligence-type assessment of governmental entities' mental state to inverse condemnation analysis. This is improper. Neither negligence, intent to harm, nor any other tort-type mental state is in issue. See *Rauser*, 565 P.2d at 636-7 (denying the contention that "to have a recovery … there must be intentional or negligent acts"); *Deschner*, ¶ 17 (negligence is not required).

This Court, accordingly, should reverse the District Court's holding. It should hold that the Plaintiffs' evidence establishes "inherent risk" and "substantial cause." It should reinstate the Plaintiffs' claim and should remand the case for trial.

G. If Adopted, Negligence Principles Will Effectively Foreclose the Possibility of Recovery for Montanans in a Typical Claim

Rauser and *Deschner's* rejection of a negligence paradigm make good sense from a public economics perspective. The damages caused by the governmental entity's operation or maintenance of the public utility are, in the vast majority of cases, not large enough claims to justify recovery through private litigation if property owners must prove negligence, contrary to the Constitution. The fixed costs of retaining an expert are simply too high to afford a meaningful recovery to Montanans with typically-sized claim.

The Green's claim serves as an example. The sewer main back up that damaged the Green's property amounted to approximately $20,000 dollars. If a negligence paradigm were the only vehicle for a property owner to seek redress, the relatively small value of this claim could not economically justify hiring a lawyer and paying the experts necessary to bring a claim. Thus, the claim likely would not be brought.

Rauser recognized that "the owner of the damaged property if uncompensated would contribute more than his proper share to the public

undertaking." *Rauser,* supra, 172 Mont. at 539, 565 P.2d at 638, *c.f. Clement v. State Reclamation Board,* 35 Cal.2d 628, 642, 220 P.2d 897, 905. For this reason, the inverse condemnation provisions of Article II, Section 29 offer the only means to assure that private property owners do not pay a disproportionate share of the costs undertaking.

The attorney fees and costs shifting provisions of Article II, Section 29 further assure that property owners do not pay a disproportionate cost of the undertaking. Property owners whose inverse condemnation cases involve relatively small costs are not dissuaded from seeking full compensation, because the costs of litigation, including attorney fees, are shifted to the public entity.

H. Adoption of the Oroville Approach Restricts the Scope of Inverse Condemnation

Inverse condemnation is not the appropriate legal standard for adjudication of every case in which a citizen's private property is damaged as a result of governmental acts, omissions, or failures.

> From underground excavation projects, to street construction, to the distinctive realm of flood control improvements, our inverse condemnation law covers the proverbial waterfront of public improvements . . . . What makes it a challenge to set the precise limits of a public entity's responsibility in practice is that multiple concerns, some arguably in tension with each other . . . . One is to pool the burden to the individual property owner and distribute throughout the community the losses resulting from the public improvement. . . . Another is to mitigate concerns that "compensation allowed too liberally will seriously impede, if not stop, beneficial public improvements because of the greatly increased cost."

Oroville, 7 Cal. 5th at 1103, 446 P.3d at 310–11 (citations omitted).

Oroville resolves this tension by applying the concept of "substantial causation" to inverse condemnation, requiring more than just a causal connection between the public improvement and the damage to private property. For inverse condemnation to apply, damage to private property must be substantially caused by an inherent risk presented by the deliberate design, construction, or maintenance of the public improvement. *City of Oroville v. Superior Ct.*, 7 Cal. 5th at 1105, 446 P.3d at 311.

This strikes a reasonable balance. For example, when a storm knocks out power to traffic signals resulting in damage to private property from vehicle collisions, inverse condemnation is not implicated. Drivers in that situation are required by statute to drive carefully and prudently. Section 61-8-302, MCA. Moreover, they have the agency to so; they are not simply bound to a public utility without power to control how it operates on them. Such drivers are in the same position as the claimant in *Oroville*, whose noncompliance with a planning code ordinance requiring a backflow valve on private service lines would have eliminated risks of sewage backup damage.

Where, however, private property owners are helpless to avoid damage from sewage backups into their property because they have no ability or responsibility to do so, i.e. where the governmental utility controls, repairs, maintains, and has

exclusive access to the utility, inverse condemnation is the appropriate and necessary legal remedy for achieving redress.

CONCLUSION

This Court should reiterate its prior holdings disapproving negligence-type assessments in inverse condemnation. The Court should adopt the *City of Oroville* refinement of the test for proving such claims. It should hold that inverse condemnation is proven where an "inherent risk" in a public improvement was a "substantial cause" of a plaintiff's damage.

Respectfully submitted this 17th day of May 2021.

/s/ Raphael Graybill
Raphael Graybill

CERTIFICATE OF COMPLAINCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that the foregoing Montana Trial Lawyers' *Amicus Curiae* Brief is printed with a proportionally spaced Times New Roman typeface of 14 point; is double spaced; and the word count calculated by Microsoft Word is 3806, exclusive of the Certificate of Compliance and Certificate of Service.

/s/ Raphael Graybill
Raphael Graybill