IN THE SUPREME COURT OF THE STATE OF MONTANA

Cause No. DA 20-0609

ARIANE WITTMAN and JEREMY TAYLEN,

Plaintiffs/Appellants,

-vs-

CITY OF BILLINGS,

Defendant/Appellee.

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

BRIEF OF APPELLEE

APPEARANCES:

Gerry P. Fagan
Afton E. Ball
MOULTON BELLINGHAM PC
27 North 27th Street, Suite 1900
P. O. Box 2559
Billings, MT 59103-2559
406-248-7731
Gerry.Fagan@moultonbellingham.com
Afton.Ball@moultonbellingham.com

**Attorneys for Appellee
City of Billings**

Tucker P. Gannett
Amanda Beckers Sowden
GANNETT SOWDEN LAW, PLLC
3936 Avenue B, Suite A
Billings, MT 59102
406-294-2000
tucker@hgvlawfirm.com
amanda@hgvlawfirm.com

**Attorneys for Appellants
Ariane Wittman and Jeremy Taylen**

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STATEMENT OF THE ISSUE

Whether the District Court correctly denied Appellants' motion for partial summary judgment and dismissed their claim alleging that a temporary, inadvertent sewer backup constituted inverse condemnation by the City of Billings because the District Court determined that there was no deliberate decision or action by the City that caused the damage to Appellants' property.

STATEMENT OF THE CASE

This case involves a sewer backup into the basement of the house owned by Appellants Ariane Wittman and Jeremy Taylen. Appellants sued the City of Billings for inverse condemnation. Appellants chose to not assert other causes of action.

Appellants filed a Motion for Partial Summary Judgment. (*See* Docket No. 13) Appellants argued they were entitled to judgment as a matter of law on liability. They argued that the City's sewer system constituted a "public use or improvement as deliberately planned and built." (*Id.*, p. 1) They further argued that the City "has taken or damaged the Plaintiffs' private property for public use as a matter of law. (*Id.*, pp. 2-3)

Addressing Appellants' Motion for Partial Summary Judgment, the District Court determined that an inadvertent sewer backup did not constitute an actionable claim for inverse condemnation because there was no deliberate exercise of the

City's right of eminent domain that took or damaged Appellants' property. (*See* Memorandum & Order, 9/29/20, p. 10, Docket No. 32) The District Court denied Appellants' Motion and ordered that their inverse condemnation claim be dismissed. (*Id.*)

Appellants subsequently filed a Rule 60(b) Motion for Relief from the Court's Order. (*See* Docket No. 34) The District Court denied Appellants Motion. (*See* Docket No. 38) Appellants subsequently filed their appeal. (*See* Docket No. 41)

STATEMENT OF THE FACTS

This case arose from a backup of sewer water into the basement of Appellant's house located in Billings in June of 2019. (Order, p. 3, Docket No. 32 (citations omitted)) The backup deposited an estimated 1.5 inches of sewer water into the basement. (Order at p. 3, *citing* Aff. of Emerick, ¶ 3 & Depo. Exh. 7) After Appellants reported it, the City relieved the backup within two hours by jet-cleaning the line. (*Id.*)

The backup into Appellants' house was caused by grease buildup in the sewer line. (*Id., citing* Aff. of Emerick, ¶ 9, & Aff. of John Alston, attached as Exh. 2 to City's Response Brf., ¶ 5) Unknown residents had caused the buildup by injecting grease illegally into the sewer. (*Id., citing* Aff. of Emerick, ¶ 19, & Aff. of Alston, ¶ 6) The City did not cause this buildup and could not reasonably have prevented it.

(*Id.*) If the resident or residents who illegally discharged grease had complied with the law, this backup would not have happened. (*Id.*)

The City of Billings' sewer line system is vast. The City owns and maintains over 500 miles of sewer lines in Billings. (*See* City's Response Brf., Docket No. 15, p. 2 (citation omitted)) The City has over 32,000 separate accounts that connect to the sewer system. (*Id.* (citation omitted)) The sewer line that services Appellants' house is relatively new, having been installed in either 2007 or 2009. (*Id.* (citation omitted))

The City of Billings' annual sewer line maintenance program is unmatched in Montana. The City jet-cleans all 500-plus miles of sewer lines every year. (*Id.*, *citing* Aff. of Emerick, ¶ 6) Jet-cleaning involves the insertion of hoses into the sewer line to flush out and clean the line with powerful jets of water. (*Id.*) The City spends $1.6 million annually to maintain its sewer lines. (*See* Order, (citation omitted)) That comes out to an expenditure of about $3,200 per mile of sewer line, every year.

The City's annual cleaning of its sewer lines exceeds the jet-cleaning done by every other municipality in Montana. (*See* City's Response Brf., Docket No. 15, p. 2 (citation omitted)) For example, Missoula and Great Falls jet-clean their sewer lines every two years and Bozeman jet-cleans its lines every three years. (*Id.*, ¶ 4) No other municipality in Montana annually jet-cleans their sewer lines. (*Id.*, ¶ 3)

Appellants have admitted the City's maintenance plan for its sewer system is a "robust" one. (*See* Plaintiffs' Reply Brief in Support of Motion for Partial Summary Judgment, Docket No. 18, pp. 9-10)

The City has virtually no sewer backups given the size of its system and the number of connections. A few backups still occur because the City cannot control what people discharge into the sewer system. (*Id.*, *citing* Emerick Depo. excerpts, p. 36:15-19) The City averages from ten to fifteen wastewater backups into homes and businesses annually. (*Id.*, pp. 54:9-55:5) That is approximately 0.04687[1] of all accounts (or less than 1/16th of one percent).

Following its maintenance plan, the City jet-cleaned the sewer line servicing Appellants' home annually, including on June 3, 2015; October 4, 2016; October 30, 2017; and September 24, 2018. (*See Id.*, p. 2 (citations omitted)) The backup at issue occurred in June of 2019.

Appellants chose to only assert a claim for inverse condemnation. (*See* Complaint, Docket No. 1) Appellants alleged the City's wastewater system constituted a public improvement that substantially damaged Appellants' home. (*Id.* at ¶ 8) Appellants further alleged the backup constituted a "taking and/or damaging of private property for public use without just compensation in violation" of the

[1] 15 annual backups on average divided by 32,000 connections = 0.0004687.

Montana Constitution. (*Id.*, ¶ 9) Appellants sought compensatory damages as well as attorney fees pursuant to their inverse condemnation claim. (*Id.*)

STANDARD OF REVIEW

The District Court's ruling on summary judgment is reviewed de novo, and the same standard under M. R. Civ. P. 56 is applied. *See Krajacich v. Great Falls Clinic, LLP*, 2012 MT 82, ¶ 8, 364 Mont. 455, 276 P.3d 922 (internal citations omitted). The District Court's decision pertaining to summary judgment is a conclusion of law which this Court reviews for correctness. *Id.* A District Court's decision is also presumed to be correct. *See Hawkins v. Harney*, 2003 MT 58, ¶ 35, 314 Mont. 384, 66 P.3d 305 (citations omitted). The appellant bears the burden of establishing error below and supporting his or her arguments with citations to relevant authorities. *See Rolison v. Bozeman Deaconess Health System, Inc.*, 2005 MT 95, ¶ 20, 326 Mont. 491, 111 P.3d 202 (internal citations omitted).

SUMMARY OF ARGUMENT

The District Court correctly applied Montana law on inverse condemnation and correctly denied Appellants' Motion for Partial Summary Judgment and dismissed their inverse condemnation claim. Appellants offered no evidence to establish the City made any choice or decision in deliberately planning, building, or maintaining the City sewer system which caused the backup into Appellants'

basement. The evidence in the record established that the backup was caused by third parties illegally discharging grease into the sewer line rather than any act or decision of the City's. Moreover, simply the fact that a backup occurred on the system does not constitute inverse condemnation under Montana law. The City has a robust maintenance plan for its system and has a tiny number of backups annually. In addition, Appellants' argument that the holding in a California Supreme Court decision, *City of Oroville v. Superior Court*, 446 P.3d 304 (CA 2019), should be adopted and applied in this case was never argued to the District Court and cannot be considered now on appeal. Even if *Oroville* was adopted, its holding would not change the outcome in this case.

In the end, Appellants' inverse condemnation claim is only a negligent tort repackaged as inverse condemnation to attempt to recover the attorney fees that a successful inverse condemnation claimant may seek. The District Court properly determined it failed.

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR IN APPLYING THE LAW ON INVERSE CONDEMNATION.

Based upon their argument that there is no requirement that City have acted in a deliberate or intentional manner to be held liable under an inverse condemnation theory, and, indeed, can allegedly be liable for an "inadvertent" or "passive taking,"

Appellants argued that the District Court erred in applying Montana law on inverse condemnation. They argued the District Court erred in several ways.

First, they argued the District Court "blurred the lines" between the power of eminent domain and an inverse condemnation claim. (Appl. Brf., p. 6) Appellants argued about the source of the eminent domain power and attempted to discern "subtle" differences between the power of eminent domain and inverse condemnation claims. (Appl. Brf., pp. 8-16) As part of what they called their framework for an inverse condemnation claim, Appellants purported to examine inverse condemnation cases over a 120-year period. (*Id.*, pp. 11-14)

Appellants' effort to discern differences to separate their inverse condemnation claim from the power of eminent domain is little more than splitting hairs. There is no debate what the elements for an inverse condemnation claim are, with or without "subtle" differences in the law; this Court set the elements several years ago in *Deschner v. State of Montana, Dep't of Highways*, 2017 MT 37, ¶ 17, 386 Mont. 342, 390 P.3d 152.

Furthermore, there is little debate that an inverse condemnation claim is derived from and based upon the Eminent Domain provision in the Constitution. The Constitutional provision that an inverse condemnation claim is based upon, Article II, Section 29 is literally entitled Eminent Domain. *See* Montana Constitution, Art.

II, Section 29. This Court has recognized on at least several occasions that an inverse condemnation claim is derived from the Eminent Domain provision. For example, in *Buhmann v. State*, 2008 MT 465, ¶ 69, 348 Mont. 205, 201 P.3d 70, this Court held that "the 'or damaged' language of Article II, Section 29 is intended to apply to damage to real and private property occasioned by a taking of real property for public use." In *Deschner*, this Court specifically held "that the test for inverse condemnation must be evaluated within the context of Article II, Section 29 of the Montana Constitution, which our subsequent case law provides." *See Deschner, supra*, at ¶ 17. This Court also ruled it was improper to require an inverse condemnation claimant "to prove elements to their inverse condemnation claim beyond that which Article II, Section 29 of the Montana Constitution and our case law subsequent to *Rauser* require." *Id.* at ¶ 21. Even some of the caselaw cited by Appellants, including the decision Appellants called the "foundation stone" of Montana law on inverse condemnation, recognized that an inverse condemnation claim was tied to the exercise of the eminent domain power. *See e.g., Less v. City of Butte*, 28 Mont. 27, 72 P. 140, 141 (1903) ("It seems very clear to us that this section[2]

[2] *Citing* what was then Section 14, Art. 3 of the 1889 Montana Constitution: "Private property shall not be taken or damaged for public use without just compensation having first been made to or paid into court for the owner." *Less*, at 141.

was drafted in the broad language stated for the express purpose of preventing an unjust or arbitrary exercise of the power of eminent domain."); *see also Wohl v. City of Missoula*, 2013 MT 46, ¶ 55, 369 Mont. 108, 300 P.3d 1119 (an "owner's right to bring [an inverse condemnation] suit derives from the self-executing character of the constitutional provision with respect to condemnation" through eminent domain).

In addition, Appellants' argument that it is not contending the City exercised its power of eminent domain is potentially fatal to their inverse condemnation claim. If indeed they are not arguing the City exercised its power of eminent domain – and they affirmatively admitted that at page 15 of their Brief -- then they may potentially not recover damages for inverse condemnation. This Court has previously held that if the alleged damage was caused not be the exercise of the power of eminent domain but instead was caused by the proper exercise of the police power that "is directly connected with matters of public health, safety and welfare, a reasonable burden may be imposed upon private property **without compensation**." *See State, By & Through Dep't of Highways v. City of Helena*, 193 Mont. 441, 445–46, 632 P.2d 332, 335 (1981) (internal citations omitted) (emphasis added).

There is no debate in this case that the installation of City' sewage utilities "is directly connected with matters of public health, safety and welfare." So, if the City

did not exercise its power of eminent domain, as Appellants argued, Appellants are potentially not entitled to compensation under Article II, Section 29.

Second, Appellants argued the District Court erred by holding that an inverse condemnation claimant must show the government performed some type of "deliberate affirmative action" which caused the private property damage at issue. (Appl. Brf., p. 7) Appellants argued Montana law allowed for inverse condemnation that was caused "inadvertently" or "passively" by a government and does not require a showing of a deliberate action by the government. (*Id.*, pp. 9, 10, 13 & 15) Appellants further argued that the District Court improperly "injects" an "intent to damage" element into a compensable inverse condemnation claim. (*Id.* at p. 15)

Appellants' argument on "inadvertent" or "passive" inverse condemnation presented the crux of their appeal: whether a governmental entity may passively or inadvertently take or damage private property in a manner that constitutes inverse condemnation pursuant to the Eminent Domain provision in the Montana Constitution. That provision provides:

> 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.

See Article II, Section 29. As noted above, it is settled law in Montana that an inverse condemnation claim is derived from this provision. As a sidenote, an inverse

condemnation claim is termed "inverse" because the affected property owner brings the suit, instead of a governmental entity seeking to condemn property pursuant to the power of eminent domain. *See Wohl, supra*, at ¶ 55. The plaintiff in an inverse condemnation proceeding bears the burden of proving a taking occurred. *See Kafka v. Montana Dept. of Fish, Wildlife & Parks*, ¶ 37, 348 Mont. 80, 201 P.3d 8 (2008). If successful on an inverse condemnation claim, the plaintiff is entitled to payment of his or her attorney fees. *See* Mont. Const. art. II, Section 29.

There is no authority to support Appellants' argument that this Court has previously held that "inadvertently" or "passively" damaged property by a governmental entity can constitute inverse condemnation. In particular, Appellants' depiction of the decision in the *Less* case in 1903 – their "foundation stone" of Montana law -- as holding that the "homeowner could thus recover for the City "inadvertently" damaging his property by dropping the grade of the street," is troubling. (App. Brf., p. 13 (quotation marks around inadvertently placed by Appellants)) The Court in *Less* did not use the word "inadvertently" or anything similar. In addition, we cannot locate any Montana decision on inverse condemnation where the Court used, ruled, or decided that "passive" actions or "passively" damaged property can constitute inverse condemnation.

The Montana case law actually establishes that a government must have acted deliberately with at least the knowledge that the governmental project would likely cause the damage at issue in order to have taken or damaged private property for public use. The holding in *Rauser v. Toston Irr. Dist.*, 172 Mont. 530, 537, 565 P.2d 632, 637 (1977), is relevant here since it involved water seepage that was somewhat analogous to the circumstances in this case and *Rauser* considered the deliberate nature of the necessary act to support an inverse condemnation claim.

In *Rauser*, this Court considered whether water seepage from an irrigation project onto the adjoining landowner's property could constitute a compensable inverse condemnation claim. The Court decided it could if certain factual circumstances were met. Crucially, however, the Court did not decide the government was liable for inverse condemnation simply because it built a project that caused property damage. Instead, the government was liable because there was evidence in the record to show that the government knew or should have known that constructing the project would damage the plaintiffs' neighboring property and made a decision to do it anyway.

In *Rauser*, an irrigation system was built by the United States for the use of the Toston Irrigation District in irrigating land. *Id.* at 533, 565 P.2d at 635. The plaintiffs' land adjoined the project on one side and was at a lower elevation than

the project. *Id.* The plaintiffs' land was flooded almost from the beginning of the irrigation. *Id.* at 534, 565 P.2d at 635-36. A United States Geological Survey had predicted that flooding would occur in the area if the land would be irrigated. *Id.* at 534, 565 P.2d 635. This Court noted that the flooding damage to the adjoining land "was foreseeable and foreseen" and was "an inevitable result of the intentional undertaking of the project." *Id.* at 538, 565 P.2d at 637.

In considering the plaintiff's burden to support their inverse condemnation claim, this Court ruled that where the damages were "an inevitable result of the intentional undertaking of the project," it was necessary to "show the damages were proximately caused by the undertaking of the project and a reasonable (sic) foreseeable consequence of the undertaking." *Id.* at 538, 565 P.2d at 637. The Court further held that where:

> 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 reasonable foreseeable consequence of the undertaking.

Id. at 538, 565 P.2d at 637. Accordingly, this Court decided that water seepage could constitute inverse condemnation if damage had been caused to the plaintiff's property "by a public improvement as deliberately planned and built." *Id.* at 539, 565 P.2d at 638.

In addition, while Appellants argued that *Rauser* eliminated the need to prove negligence or other tortious conduct by the government in an inverse condemnation claim (*see* Appl. Brf., p. 7), it is worth noting that the *Rauser* Court placed a limitation on that holding which Appellants failed to acknowledge or set forth. The *Rauser* Court specifically held that "Montana's case law does not require a showing of negligence or a theory of negligence when faced with deliberate or intentional acts." *Id.* at 537, 565 P.2d at 637 (emphasis added).

Appellants argued for an expansive reading of *Rauser* to allow an inverse condemnation claim anytime a governmental project is "deliberately designed and built" and later caused damage. (*See* Appl. Brf., p. 7) In Appellants' view, it is the deliberate nature of simply designing and building the improvement that causes inverse condemnation liability. Appellants' *Rauser* argument essentially presented a strict liability situation anytime an entity "deliberately designed and built" an improvement.

The *Rauser* holding is not nearly that broad or sweeping (nor is other Montana law). *Rauser* applies when a government constructs a project with the knowledge that the "public improvement as deliberately planned and built" will "inevitably" cause damage which is "known or knowable" and "foreseeable and foreseen." *Id.* at 538-39, 565 P.2d at 637-638. In *Rauser*, the very damage to plaintiff's land at issue

was foreseen before the government ever decided to build the project. That was critical to the decision by this Court. This Court recognized in those circumstances that resulting damage to the plaintiff's land by the project at issue could be a compensable inverse condemnation claim because the damage was "an inevitable result of the intentional undertaking of the project." *Id.* at 538, 565 P.2d at 637. In effect, when an entity chose to construct a project in a particular manner, knowing it likely would damage private property, the entity is properly liable in inverse condemnation for that damage because it deliberately chose to create the risk of that damage; but the entity is clearly not liable merely because it built the project and it later damaged property.

In this case, there is no such evidence that damage to Appellants' property was foreseen by the City before constructing the system. Nor is there evidence that damage to their property was inevitable. Contrary to what occurred in *Rauser*, there is no evidence that the City was warned about or knew that designing or constructing the system in a particular way would "inevitably" cause damage to Appellants and decided to do it anyway. In addition, other state courts have addressed that very same issue, as detailed in the next section of this Brief, and determined that it is not enough to sustain an inverse condemnation claim merely to have constructed a sewer system that ended up causing damage.

Moreover, to the extent Appellants relied upon a California appellate decision, *Pacific Bell v. City of San Diego*, 81 Cal.App.4th 96, Cal.Rptr.2d 897 (Cal.Ct.App. 2000), to bolster their expansive reading of *Rauser*, as well as the 2012 Montana District Court decision entitled *Evenhus v. City of Great Falls*, 2012 WL 10702891, it bears emphasis that both of those decisions are distinguishable from this case. *Evenhus* and *Pacific Bell* are distinguishable because neither of those decisions concerned a sewer line system or a sewer line back up. Both cases concerned a water service line that connected city drinking water utilities to homes and businesses. *See Evenhus*, 2012 WL 10702891, at 7; *Pacific Bell*, 81 Cal.App.4th at 599-60. That distinction may initially sound small, but it is in fact significant because governmental utilities normally perform no maintenance at all on water service lines at issue but often do maintain sewage systems. *Pacific Bell* stressed the lack of maintenance to water service lines in its analysis, noting the defendant had elected to save short-term maintenance costs in exchange for long-term deterioration and breakage of buried water service line pipes. *See Pacific Bell*, at 608.

In this case, the City has a very strong maintenance program, so strong that even Appellants acknowledged it is a "robust" plan. (*See* Docket No. 18, pp. 9-10) The City clearly did not elect to skip maintaining its sewer lines in order to save money and instead accept the inevitable long-term deterioration of its underground

pipes. This fact alone makes the decisions in *Pacific Bell* and *Evenhus* distinguishable and of no use in this case.

The District Court properly looked past Appellants' expansive view of *Rauser* and other Montana decisions, such as *Less*, and applied the facts in evidence to this Court's two-element test to establish a viable inverse condemnation claim set forth in *Deschner*. Those elements are:

> 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.

See Id. at ¶ 22. The District Court properly recognized that Appellants lacked any evidence in the record to show that the City made any deliberate choice or decision in planning, building, or maintaining the sewer system which caused damage to the plaintiff's property. In fact, the evidence in the record shows that the damage was caused by third parties illegally discharging grease into the system. That was the only evidence in the record before the District Court. The District Court properly concluded Appellants had failed to establish that a deliberate choice or decision by the City in planning, building, or maintaining the sewer system had caused the Appellants' backup. The evidence in the record established that the City's public improvement, as planned and built, did not proximately cause damage to the

plaintiff's property; third parties illegally discharging grease caused it. *See Deschner*, 2017 MT 37 at ¶ 22.

In the end, much or virtually all of Appellants' argument comes down to their simple plea that the backup of sewer water into their basement was an "inherent" or "inevitable" risk caused by the City's sewer system, so "inherent" or "inevitable" that the City knew or should have known when it constructed the sewer system that it would cause a backup into Appellants' house. Appellants argued repeatedly that the 10-15 backup events the City averages annually on its more than 500 miles of sewer lines with over 32,000 separate hookups to the system makes it "inevitable" that their backup occurred. In their hands, the scant number of annual backups – please recall, the number of annual backups constitutes less than 1/16th of one percent of all accounts hooked into the City's system – became an inevitable consequence, a planned and deliberate decision by the City to cause a backup onto their property.

Appellants' "inevitable" argument is meritless. While it may be correct that the City's system has a tiny number of backup events annually, in no way is it correct to say that Appellants' backup was "inevitable" when less than 1/16th of one percent of all users will incur a backup. Indeed, it is extremely unlikely that any City user ever incurs a backup in the City, given the robust maintenance plan and the tiny

number of backups annually. The District Court was correct that the evidence in the record established that the backup at issue was not "inevitable" or an "inherent" risk of the city's sewer system.

In addition, the City would be remiss not to address an important potential policy implication presented by Appellants' argument about the interpretation of Montana law on inverse condemnation. If Appellants' argument that governmental entities must be liable for damage inadvertently caused by inherent risks presented by an improvement simply because the improvement is deliberately planned and built, is accepted -- which the argument should not be -- the implication would be that any damage attributable to any improvement "as deliberately planned and built" from what a party could claim was an inherent risk would be subject to inverse condemnation. Given that governments deliberately plan and build such things as roads, bridges, and sidewalks, all of which present inherent risks of accidents and collisions, there well could be a cottage industry of inverse condemnation claims seeking property damage for such events as car accidents, all of which would carry the award of attorney fees for successful claimants. This would be an extraordinarily poor policy outcome and would turn inverse condemnation on its head. It highlights the fallacy of Appellants' argument over what they claim is the proper interpretation of the *Deschner* elements.

Third, and finally, Appellants argued the District Court erred by relying upon other jurisdictions' law to conclude that there must a showing that a governmental entity acted with a deliberate action to effectuate a compensable taking and that a government cannot assert the eminent domain power "accidentally, inadvertently, or erroneously." (Appl. Brf., p. 14) While the District Court did consider case law decisions from other jurisdictions that are right on point, there was nothing in any way improper with doing so. Appellants themselves urged this Court in their Brief in Support of their Appeal to consider and apply California precedent. The decisions, as shown in the next section, are directly on-point and instructive.

II. AT LEAST EIGHT STATE COURTS HAVE REJECTED INVERSE CONDEMNATION CLAIMS UNDER SIMILAR CIRCUMSTANCES AS IN THIS CASE.

While this Court has never addressed whether an unintended or inadvertent escape of sewage could constitute a viable inverse condemnation claim, many other state Supreme Courts have considered that very issue. Most of these other state Supreme Court rulings have determined that an unintended or inadvertent escape of sewage does not constitute inverse condemnation because the public entity had not committed any affirmative action to "take or damage" private property for "public use." These courts have ruled that a governmental entity must have made some intentional or deliberate decision, choice, or act which inevitably, directly, or

naturally caused the damage in order to constitute inverse condemnation; inadvertent, erroneous, or negligent acts do not constitute inverse condemnation.

We have determined that at least six state Supreme Courts have specifically ruled that an inadvertent sewage backup does not constitute a "taking" of property to support an inverse condemnation claim. For example, the Nebraska Supreme Court considered in 2013 the question presented by Appellant's inverse condemnation claim: whether the flooding of a basement by raw sewage could constitute a viable inverse condemnation claim against the city which operated the sewage system. *See Henderson v. City of Columbus,* 827 N.W.2d 486 (Neb. 2013). The plaintiffs alleged the city of Columbus, Nebraska, was responsible for the backup into their basement because the city's sewage disposal system had malfunctioned. *Id.* at 489-90.

The court focused its analysis of the inverse condemnation claim on the takings clause in the Nebraska Constitution. *Id.* at 487, *citing* Neb. Const. art. I, section 21. This clause is very similar to Montana's Eminent Domain clause.[3] The

[3] *Compare* Neb. Const. art. I, § 21 ("The property of no person shall be taken or damaged for public use without just compensation therefor.") to Mont. Const. art. II, Section 29 ("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."

court recognized that the constitutional takings provision "is not a source of compensation for every action or inaction by a governmental entity that causes damage to property." *Id.* at 494.

The court also analyzed federal taking cases that addressed this issue. The court recognized those cases supported the ruling that a compensable taking only occurs when the government intended to invade a protected property interest, or when the asserted invasion to the property was the "direct, natural, or a probable result of an authorized activity and not the incidental or consequential injury inflicted by the action." *Id.* at 494-95, *quoting Ridgeline Inc. v. United States,* 346 F.3d 1346, 1355 (Fed.Cir. 2003). The court further found that other courts required a plaintiff to meet its initial threshold in an inverse condemnation case of proving that property has been taken or damaged for public use by showing "that there is an invasion of property rights that was intended or was a foreseeable result of authorized governmental action." *Id.* at 495.

The court ruled that the Hendersons did not have a viable inverse condemnation case because there was no evidence that the city of Columbus knew damage would occur or could have foreseen that its actions or inactions would cause damage to private property. *Id.* at 496. As a result, the Nebraska Supreme Court ruled that the Hendersons had not established that the city had exercised any right of

eminent domain by taking action that it knew or could foresee would result in the damaging of the Hendersons' private property. *Id.* at 496-97.

The Oregon Supreme Court also analyzed the same issue in 2014. It articulated the reasoning underlying the requirement that an inverse condemnation claim must be based upon something more than mere inadvertence or negligence by a governmental entity. In *Dunn v. City of Milwaukee*, 328 P.3d 1261 (Or. 2014), the Oregon Supreme Court considered whether an inadvertent or negligent sewage backup could constitute inverse condemnation by a city. Both the trial court and the Oregon Court of Appeals had found in favor of the plaintiff on her inverse condemnation claim. The court reversed and dismissed the claim.

The court concentrated on what type of governmental acts amount to a taking. *Id.* at 1267. The court understood that this was the central question because the plaintiff's inverse condemnation claim arose from the government's power of eminent domain. *Id.* at 1270. The court recognized the power of eminent domain is "affirmative in nature," and is exercised for a particular purpose: to benefit the public. *Id.* The court further recognized that the argument that a government entity could exercise its eminent domain power "through error, accident, or inadvertence, is at odds with the nature of the power itself." *Id*.

Consequently, inadvertent, and unintended acts could not give rise to inverse condemnation liability as a taking. Instead, if there was liability, the court recognized that it arose as an ordinary tort, not a taking. *Id.* Therefore, to prove that a taking had occurred, it was necessary to show the governmental entity had intended to invade the property owner's interest. *Id.* at 1272. A plaintiff could prove this by showing that the entity intentionally acted to damage the property, or that the damage to an owner's interest was the "necessary, substantially certain, or inevitable consequence" of an act by the entity. *Id.*

The plaintiff in *Dunn* did not have this necessary evidence. The court ruled that the plaintiff had no evidence that the sewage backup "was the necessary, certain, predictable or inevitable result" of city conduct in maintaining its sewage system. *Id.* at 1274. Instead, the plaintiff could only potentially show that the city had acted negligently. Therefore, the court reversed the lower court and ordered the inverse condemnation claim dismissed. *Id.* at 1275. The court also pointed out that its ruling still left an injured party with the potential for tort claims. *Id.*

Less than three years ago, the Vermont Supreme Court in *Lorman v. City of Rutland*, 2018 VT 64, ¶ 37, 193 A.3d 1174, rejected the viability of an inverse condemnation claim for sewage backups on several plaintiffs' properties that were "intermittent, limited, and transient." The three plaintiffs had all incurred a sewer

backup during a rainstorm in 2014. They also alleged they had respectively incurred several previous backups scattered over a number of years. *Id.* The court recognized that "[w]hen the intrusion is limited and transient in nature and occurs for legitimate governmental reasons, it does not amount to a taking." *Id.* at ¶ 36 (internal citation omitted). The court therefore affirmed summary judgment to the defendant City, holding that while "no backup is insignificant, the backups occurred intermittently over a long period of time, and we conclude that this does not suffice to show a taking under the law." *Id.* at ¶ 37.

In *City of Dallas v. Jennings*, 142 S.W.3d 310 (Tex. 2004), the Texas Supreme Court also considered whether a sewage backup constituted inverse condemnation. The Texas Supreme Court concentrated on whether a negligent or accidental act that caused property damage could constitute taking or damaging property for public use. *Id.* at 313-14. The court adopted a rule that provided a governmental entity could be liable for an unconstitutional taking only if it were shown the governmental entity had the proper intent to cause the consequences of its act. *Id.* at 314 (citations omitted). The court ruled that the governmental entity must know that either a specific act is causing the identifiable harm or knows that the specific property damage is substantially certain to result from an authorized governmental action. *Id.* The court further ruled that "[w]hen damage is merely the accidental result of the

government's act, there is no public benefit and the property cannot be said to be "taken or damaged for public use." *Id.* at 313. The court recognized that this standard for an unconstitutional taking comported with the takings jurisprudence of various other states with similar constitutional provisions to that in Texas.[4] *See Id.* (citations omitted).

Consequently, the Texas Supreme Court ruled that it was proper to dismiss the Jennings' unconstitutional takings claim because there was no evidence the city had acted with the necessary intent to take the plaintiff's property. The court ruled there was no evidence the city knew any flooding would occur or that it was substantially certain after it unclogged the sewer line. *Id.* at 315.

At least two other state Supreme Courts have also rejected inverse condemnation claims involving sewage backups. *See Edwards v. Hallsdale-Powell Util. Dist. Knox Cty., Tenn.*, 115 S.W.3d 461, 463 (Tenn. 2003) (reversing appellate court to reject inverse condemnation claim involving multiple sewage backups because governmental defendant had not performed "a purposeful or intentional act for a taking to exist"); and *AGCS Marine Ins. Co. v. Arlington Cty.*, 800 S.E.2d 159,

[4] Texas' takings provision is similar to Montana's, providing that "[n]o person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made…" *See* Tex. Const. art. I, § 17

166 (2017 Va.) (requiring showing for viable inverse condemnation claim that damage resulted from "purposeful act or omission" of government; negligence or inadvertence not enough).

In addition to rulings from state Supreme courts across the nation, there are also rulings from at least two state Appellate courts rejecting inverse condemnation claims involving an inadvertent sewer backup. *See Rolandi v. City of Spartanburg*, 363 S.E.2d 385, 387 (S.C. Ct. App. 1987) (affirming summary judgment to city on inverse condemnation claim because there was no showing of "affirmative, aggressive, or positive act" by governmental entity to support a takings claim); *Christ v. Metropolitan St. Louis Sewer Dist.*, 287 S.W.3d 709, 713 (Mo. Ct. App. 2009) (takings claim failed in party because there was no showing of affirmative act by governmental entity that caused backup at issue). All told, we have found at least eight states that have specifically rejected inverse condemnation claims for inadvertent or negligent sewer backups.

Further, while not dealing specifically with sewage backups, there are other analogous state Supreme Court rulings dismissing inverse condemnation claims for the same reasons based upon temporary, inadvertent leaks or backups of fluids. These cases include *Knutson v. City of Fargo*, 714 N.W.2d 44, 49-50 (N.D. 2006) (water main leak did not constitute inverse condemnation because there was no

evidence to show municipality had undertaken deliberate act to take or damage plaintiffs' property); *Electro-Jet Tool Mfg. Co. v. City of Albuquerque*, 845 P.2d 770, 779 (N.M. 1992) (plaintiff in inverse condemnation claim claiming damage from drainage ditch leakage required to prove municipality deliberately took calculated risk so that damage at issue can be said to have occurred for public use); and *Chavez v. City of Laramie*, 389 P.2d 23, 25 (Wyo. 1965) (water main leak did not constitute inverse condemnation because not every destruction of property or injury is covered by constitutional takings guaranty and where injury involves a tort, being caused by alleged negligence, it cannot be said property is taken or damaged for public use).

Appellants ignored entirely the applicable case law from other jurisdictions. Amicus curiae, the Montana Trial Lawyers Association ("MTLA"), did address the case law, albeit briefly, in a sentence or two. Amicus curiae attempted to sweep it away by arguing the case law all required governmental entities to "intend the damage." (MTLA Brf., p. 13) (emphasis by MTLA) Amicus curiae did not accurately portray that caselaw.

While the caselaw does generally discuss the intention of the governmental actors, the case law does so in terms of whether there was evidence that the various actors intended to or did take deliberate actions or make deliberate decisions which led to the damage at issue in the various cases. For example, in Nebraska, it is

necessary to show the asserted invasion to the property was the "direct, natural, or a probable result of an authorized activity and not the incidental or consequential injury inflicted by the action." *See Henderson*, *supra*, 827 N.W.2d at 494-95 (citation omitted). Similarly, in Texas, it is necessary to show a governmental entity knew the specific property damage was substantially certain to result from an authorized governmental action and took that action anyway. *See City of Dallas*, *supra*, 142 S.W.3d at 314. In North Dakota, it is necessary to show the damage was caused by "by some deliberate act" of a governmental entity. *See Knutson*, *supra*, 714 N.W.2d at 49. In Oregon, it is necessary to prove the governmental entity had intended to invade the property owner's interest by showing the property damage to an owner's interest was the "necessary, substantially certain, or inevitable consequence" of an act by the entity. *See Dunn*, *supra*, 328 P.2d at 1272-73.

In short, the caselaw from other jurisdictions on sewage backup cases stands for the proposition that there must be a showing that the governmental actors took deliberate or intentional steps or made deliberate choices to design, construct, or operate governmental sewage systems in a manner which caused the property damage at issue. It is simply not accurate to depict the caselaw as holding that an actor must have acted with an intent to damage.

And in actuality, these decisions are very similar to what this Court has previously required in *Rauser* and *Deschner*. In *Rauser*, this Court held it is necessary to show the property damage was "an inevitable result of the intentional undertaking of the project," and was caused "by a public improvement as deliberately planned and built." *Rauser*, *supra*, 172 Mont. at 539, 565 P.2d at 638. In *Deschner*, this Court held it is necessary to show that the governmental actor deliberately planned and built a public improvement that, as planned and built, proximately caused damage to the plaintiff's property. *See Deschner*, 2017 MT 37 at ¶ 22. Therefore, under Montana law, it is necessary to show that the governmental actor intended to plan and build a project in a manner which caused the damage at issue. The cases from other jurisdictions have similar requirements for inverse condemnation and their rulings on sewage backup cases are instructive and persuasive here.

III. *OROVILLE* SHOULD NOT BE ADOPTED AND WOULD NOT CHANGE THE OUTCOME OF THIS CASE ANYWAY.

Both Appellants and the amicus curiae presented the California Supreme Court's decision in *City of Oroville v. Superior Court*, 446 P.3d 304 (CA 2019), as a type of panacea for Appellants' claim in this case. Amicus curiae spun the decision repeatedly as a simple and needed "refinement" of the Montana law on inverse condemnation law intended to root out the application of purported negligence

standards to inverse condemnation claims. (*See* MTLA Brief, pp. 1, 2, 8 & 9) Both parties urged its adoption and declared the decision as being easily met in this case by Appellants, curing all the alleged ills by the District Court's ruling in this case.

There are multiple reasons that Appellants' and amicus curiae's arguments about the adoption of *Oroville* fail and must be rejected.

First, Appellants never presented or argued for the adoption and application of the *Oroville* decision to the District Court, despite the fact the decision had been issued some nine to ten months before Appellants filed their final dispositive briefing to the District Court. Appellants' and amicus curiae's arguments about the adoption and application of *Oroville* constitute a new legal theory or argument and cannot therefore be considered by this Court.

As a rule, this Court will not consider new issues, new arguments, or new legal theories raised for the first time on appeal.[5] *See Masters Grp. Int'l, Inc. v. Comerica Bank*, 2015 MT 192, ¶ 40, 380 Mont. 1, 352 P.3d 1101 (citation omitted); *Hanley v. Dep't of Revenue*, 207 Mont. 302, 306, 673 P.2d 1257, 1259 (1983) ("It

[5] There are a few exceptions to the rule, but they are limited and typically apply only to criminal cases and, even then, are only allowed when constitutional or substantial rights of the parties are at issue. *See Renner v. Nemitz*, 2001 MT 202, ¶ 15, 306 Mont. 292, 33 P.3d 255 (citation omitted). There is no exception for new issues that involve undisputed facts and raise only questions of law. *See Unified Indus., Inc. v. Easley*, 1998 MT 145, ¶¶ 16-17, 289 Mont. 255, 961 P.2d 100.

has long been the rule in Montana that a legal theory raised for the first time on appeal will not be considered by this Court."). To preserve an issue for appeal, an appellant must first raise that specific issue in the district court. *See In re T.E.*, 2002 MT 195, ¶ 20, 311 Mont. 148, 54 P.3d 38; *Ginn v. Smurfit Stone Container Enterprises, Inc.*, 2015 MT 81, ¶ 35, 378 Mont. 378, 344 P.3d 972 (citations omitted). The Court has adopted this rule "because it is fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider." *See In re Marriage of Solem*, 2020 MT 141, ¶ 14, 400 Mont. 186, 464 P.3d 981 (citation omitted). In short, a "party complaining of error must stand or fall on the grounds relied upon in the trial court." *See Hanley*, *supra*, at 307, 673 P.2d at 1259.

The rule applies to preclude any type of new argument, including new arguments about the law. *See e.g.*, *Farm Credit Bank of Spokane v. Hill*, 266 Mont. 258, 263, 879 P.2d 1158, 1161 (1993) ("[w]hen a party argues for the application of a statute for the first time on appeal, the party raises a new set of questions that were not presented to the district court."); *Hares v. Nelson*, 195 Mont. 463, 466, 637 P.2d 19, 21 (1981) (refusing to apply statute on appeal where appellant made no claim to district court that statute was controlling); *Hanley*, *supra*, 207 Mont. at 307, 310, 673 P.2d at 1259, 1261 (refusing to consider new arguments on application of

administrative rule and on administrative agency's legal authority over other entities); *Unified Indus., Inc. v. Easley*, 1998 MT 145, ¶¶ 21-24, 289 Mont. 255, 961 P.2d 100 (appellant's reliance on one subsection of statute in trial court did not preserve for appeal new argument under different subsection of same statute that presented different set of legal questions and new theory of recovery).

Appellants' and amicus curiae's arguments urging this Court to adopt and apply the holding in *Oroville* is clearly a new argument that was never presented to the District Court. Appellants never asserted their *Oroville* argument to the District Court, including through any of their three substantive briefs filed on the issue of inverse condemnation. (*See* Doc. Nos. 14, 18 & 35) The *Oroville* decision was issued in August 2019, more than a half year before Appellants filed their first arguments to the District Court beginning in March of 2020. (*See* Doc. No. 13)

On appeal, however, they argued this Court should adopt the holding in *Oroville*, apply the holding, and rule in Appellants' favor because of the holding (Appl. Brf., pp. 19-20 & 24-26); the *Oroville* argument is the linchpin of their appellate argument. To now consider the merits of Appellants' *Oroville* argument would violate this Court's established rule precluding new arguments and new legal theories. *See Masters Grp.*, 2015 MT 192, at ¶ 40; *Hanley, supra*. It would also be "fundamentally unfair to fault the trial court for failing to rule correctly on an issue

it was never given the opportunity to consider." *See In re Solem*, 2020 MT 141, at ¶ 14. Therefore, the Court must decline to address, consider, adopt, or apply the new *Oroville* argument or theory.

The same rule applies to prevent consideration of the argument about a District Court decision *Green v. City of Great Falls*. (*See* Appl. Brf., p. 17) This Order was issued over three months prior to Appellants presenting their first arguments to the District Court, yet Appellants never presented it in any of their three dispositive briefs to the District Court spanning about six months. It too must be precluded from consideration in this case.

Second, and even if assuming Appellants had actually argued the merits and application of *Oroville* in the first place to the District Court, the adoption of *Oroville* as the applicable law on inverse condemnation claims in Montana would necessitate overruling this Court's decision four years ago in *Deschner*. Although neither Appellants nor MTLA could come out and actually state it, it is clear that they are both requesting that the Court overrule its recent decision in *Deschner* in order to adopt the holding from *Oroville*; the decisions are not compatible together. However, there is no justified reason to overrule the Court's ruling in *Deschner* stating the elements of an inverse condemnation claim in order to adopt the *Oroville* ruling. The Court's ruling in *Deschner* was only four years ago. *Deschner* obviously

remains good law. This Court should not overrule it simply because Appellants belatedly found a decision from another state which they think is more beneficial to their claim than the existing decision of this Court.

Perhaps more importantly, neither Appellants nor amicus curiae stated a justified reason to overturn *Deschner* and adopt *Oroville*. For their part, Appellants never did state their reasons why *Oroville* should be adopted or *Deschner* overruled, other than they believe *Oroville* is a good decision for their claim and is "satisfied" here. (Appl. Brf., p. 19) Amicus curiae argued that *Deschner* is improper because it allegedly featured the "prominent" use of the term "proximate cause," which it argued could lead to a negligence analysis for an inverse condemnation claim. (MTLA Brf., p. 7) However, amicus curiae also acknowledged that the *Rauser* and *Deschner* decisions had already rejected a "negligence paradigm" (which they also argued made "good sense"), so its argument about the risk of a negligence analysis pursuant to *Deschner* is at the very least inconsistent. (*Id.*, p. 14) Furthermore, *Deschner* specifically recognized that it was not necessary for a claimant to prove negligence to bring an inverse condemnation claim, so any actually grounded fear of negligence being imputed into an inverse condemnation is not supported and has already been precluded by this Court. *See Deschner*, 2017 MT 37, at ¶ 17.

Amicus curiae also argued *Oroville* is a "well-reasoned, well-articulated refinement of the *Albers/Rauser* test." (*Id.*, p. 9) However, *Deschner* itself refined the "*Albers/Rauser* test." That was the very purpose of this Court's decision four years ago in *Deschner*. *See Deschner*, at ¶¶ 17 & 22. After this Court's ruling in *Deschner*, whether amicus curiae agree with it or not, the "*Albers/Rauser*" test has already been refined by this Court. *See Id.* at ¶ 17 (holding that *Albers* factors should not be applied as elements to inverse condemnation claim). This Court does not need the California Supreme Court to look over its shoulder to refine what this Court has already refined.

Third, the adoption of *Oroville* and its application to the facts in this case would not change the outcome in this case, even if Appellants were allowed to argue it belatedly. At the outset, it bears emphasis that the California Supreme Court in *Oroville* decided the case in favor of the City of Oroville. *See City of Oroville v. Superior Ct.*, 446 P.3d 304, 316 (CA 2019) (reversing court of appeal and holding that City is not liable in inverse condemnation). Furthermore, the *Oroville* decision does not in any way support Appellants' argument that damage caused "inadvertently" by a public sewer system is compensable under an inverse condemnation claim; *Oroville* in fact imposes a careful scrutiny of the causal

relationship between the public improvement and the private property damage to make sure that inadvertent damage claims are not viable.

In *Oroville*, the California Supreme Court considered a case involving the backup of sewage into the offices of a dental practice. The backup at issue was most likely caused by roots intruding into the system. *Id.* at 308. In addition, the previous owners of the offices had evidently built the offices without complying with a city ordinance which required that the owners install a backwater valve that was intended to prevent sewage from entering the building in the event of a sewer main backup. *Id.* at 307. The trial court ruled in favor of the owners, ruling the city was responsible for inverse condemnation because the primary cause of the blockage was the root intrusion into the main. *Id.* at 308. The Court of Appeals subsequently reviewed the decision. It, too, ruled in favor of the owners, primarily because it found that the city's sewer system, as deliberately designed, caused damage to the building by a sewer blockage and the blockage was an inherent risk of the sewer system. *Id.* at 309. The Court of Appeals also rejected, as a "sort of contributory negligence theory from tort law," the city's contention that the owners were responsible for the backup because their building failed to have the backwater valve installed. *Id.*

The California Supreme Court reversed. It held that the appellate court had erred by failing to address what it termed the fundamental question on an inverse

condemnation claim: whether the inherent risks associated with the sewer system as deliberately designed, constructed, or maintained were the substantial cause of the damage to the plaintiffs' property. *Id.* at 307. The California court concentrated on the "substantial causation" concept and the causal relationship. It recognized that California courts in considering inverse condemnation claims were traditionally concerned with the deliberate design, construction, and maintenance of a public improvement, as well as the nature of the causal relationship between the public work and private property damages. *Id.* at 312. The court favorably reviewed decisions holding that a claim could be established if the injury was the result of dangers "*inherent in the construction of the public improvement* as distinguished from dangers *arising from the negligent operation of the improvement*" and holding that a showing that a public improvement "as planned and installed by defendant, would necessarily or probably" cause the property damage. *Id.* at 311-312 (citations omitted) (emphasis in original).

The *Oroville* court also carefully considered the interplay between "inherent risk" and "substantial causation." It noted how it is important that a court review whether the damage arose from the "the inherent dangers of the public improvement as deliberately designed, constructed, or maintained." *Id.* at 313 (citation omitted). This review is important because it can protect public entities from "open-ended

liability" for damage which is arguably connected to the improvement but not a result of its inherent risks. *Id.* As part of this review, it is important to recognize that the damage at issue "must be the '*necessary* or *probable* result of the improvement" or the "*immediate, direct, and necessary effect*" of it. *Id.* at 314 (citations omitted) (emphasis in original). The *Oroville* court declared the "core" of the causation test is the "requirement that -- even in the case of multiple concurrent causes -- the injury to private property is an 'inescapable or unavoidable consequence' of the public improvement as planned and constructed." *Id.*

In addition, the *Oroville* court also discussed the inherent risks concept and provided several examples to illustrate how it is considered. The court noted how an entity could choose a lower cost plan in creating a public improvement that saved money but also posed certain risks to private property because the entity did not expend additional funds to prevent those risks. *Id.* 313. In that type of case, a private property owner should be compensated on an inverse condemnation claim for damage caused by the entity's deliberate decision to construct the improvement at a lower cost while presenting some inherent risks caused by that decision. *Id.* A second example provided by the court considered when an entity might construct a public improvement but decide that, in order to save money, to not maintain it, perhaps adopting a "wait until it breaks" plan. *Id.* The court noted it makes sense under this

circumstance to hold the entity liable in inverse condemnation for any property damage caused by its decision to forego maintenance. This is the type of circumstance discussed in the *Pacific Bell* decision, as well as the *Evenhus* decision.

If we assumed *arguendo* that Appellants had properly presented the *Oroville* argument to the District Court, its holding and its reasoning would not change the outcome in this case. Appellants' claim would still fail as a matter of law. Appellants would have to show their damage was "substantially caused" by "an inherent risk presented by the deliberate design, construction, or maintenance" of the City's sewer system. *See Id.* at 312. Appellants must therefore show pursuant to *Oroville* that a deliberate decision or choice made by the City in designing, constructing, or maintaining the sewer system "substantially caused" their damage. This they could not do, even if it was the proper test in this case. Appellants have no evidence set forth in the record to show that any design or construction decision the City made or chose "substantially caused" their damage. That is, they have set forth no evidence that the City made a design decision or choice, or made a construction decision or choice, that "substantially caused" the backup at issue. Similarly, they have no evidence that any maintenance decision or choice by the City caused the backup either; indeed, they admit the City's maintenance plan is a "robust" one. Without that type of evidence, Appellants' claim fails as a matter of law under *Oroville*, too.

Furthermore, the evidence in the record established that the backup at issue was not caused by any decision or choice by the City. The evidence in the record shows the backup was caused by third parties injecting grease into the system and doing so illegally. Appellants have set forth zero evidence to show that there was any other causation than the illegal injection by third parties of grease into the lines. That lack of causation evidence against the City is fatal to their claim under an *Oroville* analysis. The *Oroville* court rejected the plaintiffs inverse condemnation claim because they could not prove the "causal relationship" between their backup and the "deliberate design, construction, or maintenance" decisions by the city. *See Id*. at 312, 315-16. This is the same evidentiary failing Appellants have in this case. They have no evidence in the record to show that the City made any "deliberate design, construction, or maintenance" decision that substantially caused their backup.

In the end, all Appellants have in the record is a showing that they unfortunately incurred a backup which arose from their use of the City's sewer system. However, as the *Oroville* court recognized, that is clearly not sufficient to constitute inverse condemnation. At best, Appellants could only assert that their backup was tied to or arose from the operation of the system rather than establish that the backup was substantially caused by an inherent risk which arose due to a

deliberate choice or decision made in the system's construction or design, or by a maintenance choice or decision. This is plainly insufficient under *Oroville*. *See Id.* at 311 (must show damage substantially caused by dangers inherent in the construction of the public improvement rather than from dangers arising from the negligent operation of the improvement).

CONCLUSION

The District Court correctly determined under the facts and arguments presented to it that Appellants' inverse condemnation claim failed as a matter of law. The District Court properly denied Appellants' Motion for Summary Judgment and properly dismissed their claim. This Court should affirm the Order of the District Court.

RESPECTFULLY SUBMITTED this 16th day of June, 2021.

MOULTON BELLINGHAM PC

By: /s/ Gerry P. Fagan
GERRY P. FAGAN
AFTON BALL

ATTORNEYS FOR APPELLEE
CITY OF BILLINGS

CERTIFICATE OF COMPLIANCE

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/s/ Gerry P. Fagan
GERRY P. FAGAN

CERTIFICATE OF SERVICE

I, Gerry P. Fagan, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 06-16-2021:

Afton Eva Ball (Attorney)
Moulton Bellingham PC
P O Box 2559
27 North 27th Street, Suite 1900
Billings MT 59103
Representing: Billings, City of
Service Method: eService

Tucker Patrick Gannett (Attorney)
3936 Avenue B, Suite A
Billings MT 59102
Representing: Jeremy Taylen, Ariane Wittman
Service Method: eService

Raphael Jeffrey Carlisle Graybill (Attorney)
300 4th Street North
PO Box 3586
Great Falls MT 59403
Representing: Montana Trial Lawyers Association
Service Method: eService

Amanda Beckers Sowden (Attorney)
3936 Avenue B, Suite A
Billings MT 59102
Representing: Jeremy Taylen, Ariane Wittman
Service Method: E-mail Delivery

Electronically Signed By: Gerry P. Fagan
Dated: 06-16-2021