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IN THE COURT OF APPEALS OF INDIANA

Indiana Department of Natural Resources,

Appellant-Defendant,

v.

Marvin Houin, Diane Houin, Charles Houin, Houin Grain Farms, LLC, and Marvin Houin as power of attorney for Marilyn J. Ralston,

Appellee-Plaintiff.

June 14, 2022

Court of Appeals Case No. 21A-CC-1178

Appeal from the Marshall Circuit Court

The Honorable Curtis D. Palmer, Judge

Trial Court Cause No. 50C01-1702-CC-76

Mathias, Judge.

[1] The Indiana Department of Natural Resources ("DNR") appeals the Marshall Circuit Court's order awarding damages to Marvin, Diane, and Charles Houin, Houin Grain Farms, LLC, and Marvin Houin as power of attorney for Marilyn

Ralston (collectively "the Houins") after concluding that the DNR negligently operated a dam causing the Houins' farm property to flood. The trial court also concluded that the Houins proved their inverse condemnation claim against the DNR.

[2] The DNR appeals and raises several issues. Regarding the negligence judgment, we address only the following, dispositive issue: whether the DNR is immune from liability on the Houins' negligence claims. We conclude that our General Assembly has granted immunity to the DNR where damages result from its operation of a dam on a public Indiana lake.

[3] The DNR also argues that the trial court erred when it concluded that its operation of the dam, which caused the Houins' farm property to flood, constituted a taking of the Houins' property. We disagree and affirm the trial court's ruling on the Houins' inverse condemnation claim.

[4] Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.

Facts and Procedural History

[5] Marvin and Diane Houin, together, and with their son Charlie Houin, own and operate Houin Grain Farms. The farm is approximately 4,890 acres and spread out over a thirty-five-mile radius.[1] The Houins grow corn and soybeans on eight

[1] A portion of the farm is also owned by Diane's mother, Marilyn Ralston.

fields totaling 407 acres located in the Lake of the Woods watershed (hereinafter "the affected fields").

[6] Lake of the Woods is a public, freshwater lake located in Marshall County, Indiana. The lake is surrounded by residential waterfront homes. A higher water level is more advantageous for the property owners and the boating public. Because the affected fields and the Lake of the Woods are located in a relatively flat plain with little elevation change between the fields and the lake, a change in the level of the water of the lake impedes the drainage of the affected fields following a rain event. A lower lake level is thus more advantageous for the Houins' farming operation. The "tolerances for the connectivity between precipitation, infiltration, drainage, and the lake levels are very small." Appellant's App. p. 34.

[7] To address the tension between the residential property owners and the agricultural property owners, a dam was constructed in 1957 at the sole outlet of the lake. Due to continued conflict, in 1986, the Marshall Circuit Court issued an order setting the legal average lake level at 803.85 feet from May 15 to September 15. From September 15 to May 15, the legal average lake level was set at 802.85 feet. The court's order required the DNR to repair or rebuild the dam so that it could be operated by third parties at the court-ordered lake levels. When the dam is not operated to maintain a legal summer average of 803.85, the affected fields cannot be drained as designed and intended. Appellant's App. pp. 34-35. The Lake Level Order did not require DNR to operate the dam.

[8] Operation of the dam is manually controlled. The controls are locked with two padlocks, which must both be removed to raise or lower the dam. Traditionally, a representative of the agricultural community and a representative of the residential lake property owners each held a key. The representatives would meet at the same time to raise or lower the dam to achieve the legal water level. The DNR provided the locks and keys and kept a set of keys to the dam.

[9] For many years, the agricultural community and residential property owners cooperated and operated the dam and maintained the legal water level. The average water level of the lake during the summer months was maintained at 803.85 feet. As a result, the field tile system installed in the affected fields worked as designed to drain the soil allowing for crops to be planted and harvested. The affected fields were successfully row cropped through 2009.

[10] In 2005, the residential lake property owners decided they no longer wanted responsibility for opening and closing the dam. The DNR assumed their responsibilities. In 2009, the DNR posted the following notice at the dam: "Effective immediately it is the intent of the IDNR to leave the gate closed until the mandated opening date of September 15, 2009 unless the lake level elevation exceeds 804.35.' At 804.35' the gate will be opened to draw down the lake level to 803.85." Appellant's App. p. 28. The same notice was posted in 2015. *Id.* at 29. The DNR's changed operation of the dam was not compliant with the 1986 Lake Level Order.

[11] The DNR regulates access to the dam. The DNR installed a fence in its easement around the dam. The DNR also installed a chain link fence around the dam which is locked with a padlock. Therefore, to access the dam, a person needs a key to open the padlocked fence and the two keys needed to operate the dam. DNR makes and possesses the keys but also give keys to selected local residents.

[12] The Houins' fields flooded in multiple years due to the DNR's noncompliant operation of the dam. As a result of the higher lake level, the Houins' drainage tile system was no longer adequate to drain the fields within one or two days. The Houins told the DNR that the higher lake level negatively impacted their ability to farm the affected fields. The DNR told the Houins that it would keep the dam closed until the water level rose to 804.35 feet regardless of weather conditions. The DNR also stated that it would instruct the keyholders on how and when to operate the dam. "There was no benefit to this trigger level other than saving DNR staff time." Appellant's App. p. 32.

[13] On April 27, 2016, the Houins filed a Tort Claim Notice with the State claiming damages because the DNR did not operate the dam under the terms set by the Marshall Circuit Court's 1986 Lake Level Order. Specifically, the Houins alleged that the DNR kept the dam closed until the water level rose to 804.65 feet, which is approximately ten inches above the legal level set in the 1986 Order. The DNR's operation of the dam also did not account for local weather conditions.

[14] The Houins filed a complaint against DNR on February 27, 2017,[2] arguing that the DNR's operation of the dam was negligent, constituted a nuisance and a trespass, and claiming inverse condemnation.[3] In response, the DNR asserted that it was immune from liability under Indiana Code sections 34-13-3-3 and 14-27-7.5-15. During summary judgment proceedings, the trial court concluded that the DNR was not entitled to immunity for its decisions concerning how the dam was operated.

[15] After a bench trial, the trial court entered extensive findings of fact and conclusions thereon. First, the trial court concluded that the "DNR has breached their assumed duty to operate the dam in a reasonable manner (pursuant to the 1986 Lake Level Order) and the Houins have been damaged by such negligence." *Id*. at 34. In addition to the loss of their crop yields, the Houins' drainage tile silted shut because of the higher summer average lake levels between 2009 and 2016. The drainage tile was also damaged by pressure

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[2] In its findings of fact and conclusions of law, the trial court repeatedly refers to the filing date of February 17, 2017. This is a scrivener's error and does not affect the trial court's judgment. The DNR correctly points out that the complaint was filed ten days later, on February 27, 2017. Appellant's App. p. 54; Appellant's Br. at 6.

[3] Prior to filing their complaint, the Houins filed contempt proceedings against the DNR for its alleged violation of the 1986 Lake Level Order. The trial court denied the Houins' Rule to Show Cause because the 1986 Order "did not mandate any ongoing operational role for the DNR." Appellees' App. pp. 91-92. The court concluded that "[a] careful reading of the 1986 Order reveals the responsibilities of the DNR were narrowly defined as preparing plans for the repair, renovation or replacement of the control structure for Lake of the Woods and sponsoring its construction" *Id.* at 91. In addition, the trial court determined that "[a]ny allegations of breach of additional responsibilities or obligations of the DNR, above and beyond the requirements of the 1986 Order, which may be imposed by statute, common law or the contractual agreements of the parties, are beyond the scope of this contempt proceeding." *Id.* at 92.

that was created when water from the lake ran backwards into the affected fields.

[16] The trial court also concluded that the DNR's operation of the dam caused the Houins' fields to flood, which constitutes a nuisance. The court concluded that crop yield losses and damages to the drainage tile system are losses recoverable under the theory of nuisance.[4] The court also determined that the "intermittent flooding of the affected fields caused by the DNR's failure to reasonably operate the dam was a 'taking.'"[5] *Id*. at 49.

[17] Finally, the trial court rejected DNR's defense under the common enemy doctrine. Specifically, the court concluded that the doctrine was not a viable defense because the agency is not a landowner in this case.

[18] With regard to damages, the court determined that, under the Torts Claims Act, the Houins' damages were limited to a time period from August 1, 2015, to the date of trial in January 2021. And because the statute of limitations for damage to personal property is two years, the court concluded that the Houins' claims for damage "to personal property that fall outside of the tort claims notice requirements are limited to time period of February 17, 2015 to the date of trial." *Id.* at 51. And citing the six-year statute of limitations for damage to real

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[4] The trial court concluded that the Houins failed to prove their trespass claims.

[5] The court also determined that "evidence of distinct damages related to the inverse condemnation by the DNR in this action would need to be proven at a subsequent proceeding pursuant to IC 32-24-1-16." Appellants' App. p. 31.

property, the court limited damages to damage that occurred from February 17, 2015, to the date of trial. *Id.* at 52. Ultimately, the trial court awarded the Houins a judgment in the aggregate amount of $485,644.00 "excluding any distinct damages that might later be assessed for inverse condemnation" plus the costs of the action. *Id.* at 53.

[19] The DNR now appeals.

Discussion and Decision

I. Immunity

[20] The DNR argues that the trial court's judgment in favor of the Houins on their tort claims is contrary to law because the DNR had immunity. Whether governmental immunity applies is a matter of law for the courts to decide. *Gary Cmty. Sch. Corp. v. Roach–Walker*, 917 N.E.2d 1224, 1226 (Ind. 2009). The party seeking immunity bears the burden of establishing the immunity. *Id.* If the facts allow multiple reasonable conclusions as to an element triggering the immunity, then the governmental unit has failed to establish its immunity. *Id.*

[21] Immunity, whether under Indiana common law or the Indiana Torts Claims Act, assumes negligence but denies liability. *Catt v. Bd. of Comm'rs of Knox Cnty.*, 779 N.E.2d 1, 5 (Ind. 2002). Typically, it is only after determining that a governmental defendant is not immune under the Indiana Torts Claims Act that a court undertakes the analysis of whether a duty is owed. *Benton v. City of Oakland*, 721 N.E.2d 224, 232 (Ind. 1999); *see also Ellis v. City of Martinsville*, 940 N.E.2d 1197, 1206 (Ind. Ct. App. 2011) (explaining that where the

governmental agency is immune to suit, our court does not need to determine whether a duty existed). In its Appellant's Brief, the DNR does not claim immunity under the Torts Claims Act, but relies instead on Indiana Code chapter 14-27-7.5, The Dam Safety Act, to support its claim that it is not liable for any damage caused by its allegedly negligent operation of the dam.

[22] "The Dam Safety Act gives the DNR jurisdiction over dams in, on, or along the rivers, streams, and lakes of Indiana." *Moriarity v. Ind. Dep't Nat'l Res.*, 113 N.E.3d 614, 620 (Ind. 2019) (citing I.C. § 14-27-7.5-8(a)(1)). And the DNR "shall exercise care to see that the structures are maintained in a good and sufficient state of repair and operating condition to fully perform the intended purpose."[6] I.C. § 14-27-7.5-8. However, Indiana Code section 14-27-7.5-15 provides:

> this chapter does not create a liability for damages against the department or the department's officers, agents, and employees caused by or arising out of any of the following:
>
> (1) The construction, maintenance, operation, or failure of a structure.
>
> (2) The issuance and enforcement of a notice of violation or a rule issued by the department to carry out the department's duties.

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[6] In addition, Indiana Code section 14-26-4-2 provides that the DNR is permitted to seek legal action to have an average normal water level established for a natural lake in Indiana. The statute also allows DNR to "[c]onstruct or sponsor and supervise the construction of dams, spillways, and control works necessary to maintain the average normal water level."

[23] Citing chapter 14-27-7.5, DNR claims that the General Assembly has granted the DNR regulatory authority over dams to ensure that the structures are maintained and operated in a safe manner while also granting DNR immunity from its acts. The Houins argue that this statute only grants the DNR immunity for its statutory duty to "operate" a dam but not immunity for the Houins' common law negligence and nuisance claims.

[24] The DNR has a statutory obligation to ensure that the dam at issue in this case is in good repair so that it can be operated for its intended purpose. *See* Ind. Code ch. 14-27-7.5. Because the General Assembly requires the DNR to oversee dams on Indiana's rivers, streams, and lakes, it made the accompanying decision that the DNR would not be liable for damages related to the construction, maintenance, operation, or failure of a dam. *See* I.C. § 14-27-7.5-8. There is no question that the Houins' negligence and nuisance claims arose from the DNR's operation of the dam. Specifically, the Houins allege that their farm fields flooded because the DNR failed to operate the dam in accord with the 1986 Lake Level Order, which caused damage to their crops and field tile system.

[25] The Houins cannot avoid the General Assembly's decision to grant immunity to the DNR for its operation of a dam by claiming that they have presented a claim for common law negligence. *See Sprunger v. Egli*, 44 N.E.3d 690, 694 (Ind. Ct. App. 2015) (quoting *F.D. v. Ind. Dep't of Child Servs.*, 1 N.E.3d 131, 143 (Ind. 2013) (Rush, C.J., concurring in part and dissenting in part) ("[N]o matter whether plaintiffs predicate their claim upon a negligence theory or a

freestanding private right of action, a court must still determine the larger question of whether the Legislature intended to hold the defendant civilly liable.")).

[26] We agree with the Houins and the trial court that the DNR assumed a duty to operate the dam from 2009 to 2015. But chapter 14-27-7.5-8 unequivocally provides that the DNR will not be held liable for its operation of a dam. And the General Assembly enacted the Dam Safety Act to give the DNR jurisdiction over dams on Indiana's rivers, streams, and lakes. *See Moriarity*, 113 N.E.3d at 620. When the residential lake owners refused to operate the dam, the DNR had to step in to operate the dam. Because DNR is immune to suit, it is irrelevant that the DNR assumed the lake property owners' duty to operate the dam.[7] *See Ellis v. City of Martinsville*, 940 N.E.2d 1197, 1206 (Ind. Ct. App. 2011) (observing that because the City was immune to suit, our court did not need to consider whether the City had voluntarily assumed a duty).

[27] For all of these reasons, we conclude that the DNR is immune from the Houins' claims that it negligently operated the dam and that its operation of the dam created a nuisance on their farm property.

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[7] Because we conclude that the DNR is immune for any damages that resulted from its operation of the dam, we need not address the DNR's claim that the trial court erred when it concluded that the common enemy doctrine was not an available defense to the Houins' claims. We also will not address the DNR's claim that the trial court erred when it awarded the Houins' damages for claims barred by the Tort Claims Act notice period.

II. Inverse Condemnation

[28] The DNR also challenges the trial court's conclusion that the "intermittent flooding of the affected fields caused by the DNR's failure to reasonably operate the dam was a 'taking.'"[8] Appellant's App. p. 49.

> Article 1, section 21 of the Indiana Constitution provides that "No person's property shall be taken by law, without just compensation; nor, except in case of the State, without such compensation first assessed and tendered." The Fifth Amendment to the U.S. Constitution similarly provides that "nor shall private property be taken for public use, without just compensation." The Fifth Amendment's Takings Clause applies to the states through the Due Process Clause of the Fourteenth Amendment. The state and federal takings clauses are textually indistinguishable and are to be analyzed identically. An exercise of eminent domain is clearly a taking; however, other forms of governmental action are "takings" only if they meet the prevailing federal standard. That standard is: governmental action effects a taking if it deprives an owner of all or substantially all economic use of his or her property.

Boyland v. Hedge, 58 N.E.3d 928, 935 (Ind. Ct. App. 2016) (internal citations omitted).

[29] Here, the Houins alleged, and the trial court found, that the State's failure to operate the dam as required by the 1986 order caused flooding which

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[8] The court also determined that "evidence of distinct damages related to the inverse condemnation by the DNR in this action would need to be proven at a subsequent proceeding pursuant to IC 32-24-1-16." Appellant's App. p. 31.

substantially interfered with their property impairing their free use, enjoyment, and interest in the property. Indiana Code chapter 32-24-1 outlines the process by which the state is to initiate eminent domain proceedings but where the government takes property but fails to initiate proceedings, section 32–24–1–16 explicitly allows an owner of property acquired for public use to bring a suit for inverse condemnation to recover money damages. An action for inverse condemnation requires: "(1) a taking or damaging; (2) of private property; (3) for public use; (4) without just compensation being paid; and (5) by a governmental entity that has not instituted formal proceedings." *Murray v. City of Lawrenceburg*, 925 N.E.2d 728, 731 (Ind. 2010) (quoting 29A C.J.S. Eminent Domain § 560 (2007)).

[30] A taking by inverse condemnation includes any substantial interference with private property that destroys or impairs one's free use, enjoyment, or interest in the property. *Mendenhall v. City of Indianapolis*, 717 N.E.2d 1218, 1227 (Ind. Ct. App. 1999), *trans. denied*. Ordinarily, the question of whether a particular interference is substantial is a question of fact. *Id*. An action for inverse condemnation is premature until such time as the landowner can establish that his property has been deprived of all economically beneficial or productive use. *Id.* at 1227–28. If there is no public use, neither eminent domain nor inverse condemnation would apply. *Murray*, 925 N.E.2d at 733. Whether a particular use is a public use is a question of law. *Id.* (citation omitted).

[31] The DNR argues that its failure to operate the dam in accordance with the 1986 Lake Level Order did not interfere with the Houins' property rights. In

response, the Houins rely on the United States Supreme Court's decision in *Arkansas Game and Fish Commission v. U.S.*, 133 S.Ct. 511 (2012). In that case, the U.S. Army Corps of Engineers authorized flooding that extended into the peak timber growing season on forest land owned by the Arkansas Game and Fish Commission. The periodic flooding from 1993 through 2000 destroyed more than 18 million board feet of timber and disrupted the use and enjoyment of the Commission's property.

[32] The Court held that "government-induced flooding can constitute a taking of property, and because a taking need not be permanent to be compensable, . . . government-induced flooding of limited duration may be compensable." *Id.* at 519. The Court recognized the following principles to be considered in a court's determination of whether a taking has occurred: 1) "When regulation or temporary physical invasion by government interferes with private property, . . . time is indeed a factor in determining the existence *vel non* of a compensable taking"; 2) "the degree to which the invasion is intended or is the foreseeable result of authorized government action"; 3) "the character of the land at issue and the owner's 'reasonable investment-backed expectations' regarding the land's use"; and 4) the severity of the interference. *Id.* at 522 (citations omitted).

[33] The DNR argues that there is a "critical distinction" between *Arkansas Game* and this case because the government deliberately flooded the land in *Arkansas Game.* Appellant's Reply Br. at 17. The DNR characterizes the flooding in this case as isolated and an unintended interference with the Houins' farm property.

[34] Finally, the DNR analogizes the facts of this case to those in *Boyland v. Hedge*. In *Boyland*, the homeowners owned two parcels of property adjacent to a ditch and a county road. 58 N.E.3d at 930. The residences were situated at a lower elevation than the roadway. *Id.* The homeowners experienced residential flooding after periods of unusually heavy rain. *Id.* Eventually, the County Drainage Board obtained an engineering study with respect to the ditch near the homeowners' properties. *Id.* at 930-31. The 2008 report made several recommendations to the Drainage Board, but the engineer also concluded that the improvements, which could cost more than $870,000, would lessen the risk of flooding but would not eliminate the risk. *Id.* at 931. The County declined to make any of the recommended improvements. *Id.* In 2011, the homeowners' residences flooded again, and they filed tort claims notices against the County, as well as inverse condemnation claims. *Id.*

[35] The trial court granted summary judgment to the County defendants on the homeowners' inverse condemnation claims, and the homeowners appealed. *Id.* at 932. Our court distinguished the facts of *Boyland* from those in *Arkansas Game* and noted that there was no intentional invasion of the homeowners' property. *Id.* at 938. Moreover, we observed that the County defendants did not benefit from the flooding and the homeowners' property was not subjected to public use. *Id.* Because the flooding was unintended and a short-term interference with the homeowners' property, "the temporary occupation of Homeowners' property by surface water that had increased in volume during extraordinary

rainfall did not amount to a taking by the Boone County defendants for public use." *Id.*

[36] DNR observes that the Houins' property was damaged by "inadequate drainage of rainwater, not by an intentional entry onto or taking of their farmland." Reply Br. at 17. However, it was foreseeable that DNR's failure to comply with the 1986 Lake Level Order would result in flooding on the Houins' property because the higher water level in the lake prevented rainwater from draining from the Houins' farmland. The evidence presented at trial established that the Houins' affected fields and the Lake of the Woods are located in a relatively flat plain with little elevation change between the fields and the lake, and a change in the level of the water of the lake impedes the drainage of the affected fields following a rain event. The "tolerances for the connectivity between precipitation, infiltration, drainage, and the lake levels are very small." Appellant's App. p. 34. The Houins proved that the DNR knew that maintaining a lake level higher than the level established by the 1986 Lake Level Order would cause the Houins' affected fields to flood. The DNR did not deliberately release water onto the fields, but it did fail to operate the dam to prevent flooding from occurring.

[37] Moreover, interference with the Houins' property was significant, occurred over multiple years, and deprived the Houins of the farmland's economically beneficial or productive use. The continued flooding also damaged the drainage tile system, which was affixed to the property. The farmland was productive and generated income for the Houins until the DNR took over operation of the

dam. Finally, DNR's decision to maintain the higher lake level benefited the residential property owners and public's use of the lake.

[38] From 2009 to 2015, the DNR assumed the residential property owners' role after the property owners no longer wanted to participate in operating the dam. The DNR's decision to allow the lake level to exceed the legally established level resulted in foreseeable flooding to the Houins' farm property that impaired their free use, enjoyment, or interest in the property. We conclude that the DNR's failure to operate the dam as required by the 1986 Lake Level Order constituted a taking and affirm the trial court's judgment in favor of the Houins on their inverse condemnation claim.

Conclusion

[39] Our General Assembly granted immunity to the DNR for tort claims arising from its operation of dams on Indiana's rivers, streams, and lakes. We therefore reverse the trial court's judgment in favor of the Houins on their negligence and nuisance claims. However, we affirm the trial court's judgment in favor of the Houins' on their inverse condemnation claim.

[40] Affirmed in part, reversed in part and remanded for proceedings consistent with this opinion.

Bailey, J., and Altice, J., concur.