STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1065

Frank E. Dusenka, et al.,
Appellants,

Debra A. Dusenka, et al.,
Plaintiffs,

vs.

Chisago County,
Respondent.

Filed December 28, 2010
Affirmed in part, reversed in part, and remanded
Huspeni, Judge[*]

Chisago County District Court
File No. 13-CV-09-701

J. Vincent Stevens, Thomas F. Miller, Miller Law Office, P.A., Wyoming, Minnesota (for appellants)

Paul D. Reuvers, Stephanie A. Angolkar, Iverson Reuvers, Bloomington, Minnesota (for respondent)

Considered and decided by Stauber, Presiding Judge; Kalitowski, Judge; and Huspeni, Judge.

[*]Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

HUSPENI, Judge

Appellants allege that the district court erred by granting respondent's motion for summary judgment. Because we discern no question of material fact regarding tort claims raised by appellants, we affirm the award of summary judgment on those claims; because there is a question of material fact raised in appellants' inverse condemnation claim, we reverse and remand as to that claim.

FACTS

In the mid-1980s, Chisago County lakeshore-property owners experienced severe flooding due to high lake elevations. By 1986, over six hundred homeowners were experiencing problems due to high lake levels. On June 12, 1986, the county board passed a resolution authorizing the Lake Improvement District (LID) to move forward with the Chisago Lakes Outlet Project (project). This project was meant to stabilize lake levels and involved an outlet from Green Lake to Lake Ellen, a connection between Chisago and Green Lakes, and improvement of the channel between Chisago and Wallmark Lakes.

Appellants Frank and Debra Dusenka own property in Chisago County. In March 1987, the Dusenkas notified the county board of flooding to their property as a result of the project. They sought compensation for the loss of 30 acres of their property, which was inundated with one to three feet of water, and the loss of access to another 40 acres. The county board directed the county engineer to meet with the Dusenkas regarding their concerns. The Dusenkas and the county engineer were unable to reach a resolution, and

on January 4, 1988, the county attorney offered final settlement to the Dusenkas for their claims against the project. The Dusenkas rejected this settlement offer and, instead, on August 30, they commenced a civil action against the county.

The 1988 complaint asserted that the project had caused "severe and permanent damage" to the Dusenkas' property. The alleged damage included 30 acres that were rendered useless and impassable due to the flooding and other portions of the property that were rendered inaccessible. The parties agreed to settle the claims for $7,750. Pursuant to that settlement, the Dusenkas signed a general release on November 6, 1989. The matter was then dismissed with prejudice.

On April 8, 2009, the Dusenkas filed a complaint in district court asserting claims for inverse condemnation, negligent design and construction, nuisance, trespass, and negligent maintenance and operation. The district court granted the county's motion for summary judgment. This appeal follows.

D E C I S I O N

The Dusenkas argue that the district court erred by granting the county's motion for summary judgment. "On an appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district] court[] erred in [its] application of the law." *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). "We review de novo whether a genuine issue of material fact exists" and "whether the district court erred in its application of the law." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002).

In granting the county's motion for summary judgment, the district court concluded that the general release signed in 1989 precluded both the inverse condemnation and the tort claims. That document releases the county

> from any and all claims, actions, causes of action, demands, rights, damages, costs, loss of service, expenses and compensation whatsoever, which the undersigned now have on account of or in any way growing out of any and all known and unknown injuries and damages and the consequences thereof resulting from the project commonly referred to as the "lake improvement" or "lake stabilization" project relating to Lake Ellen and the other lakes and swamp lands in and about the County of Chisago, including, but not limited to, all injuries and damages and the consequences thereof resulting from the construction of certain culverts, drainage ditches, roadways, etc. in and about the real property owned by the plaintiffs.

The release further states: "It is expressly understood and agreed that the undersigned hereby release and dismiss, with prejudice and on the merits, all claims and causes of action which are or could have been made in the lawsuit . . . ."

Settlement agreements are contracts. *State ex rel. Humphrey v. Philip Morris USA, Inc.*, 713 N.W.2d 350, 355 (Minn. 2006). "Unambiguous language in the settlement agreement is to be given its plain and ordinary meaning." *Id.* "The determination of whether a contract is unambiguous depends on the meaning assigned to the words and phrases in accordance with the apparent purpose of the contract as a whole." *Halla Nursery, Inc. v. City of Chanhassen*, 781 N.W.2d 880, 884 (Minn. 2010).

Inverse Condemnation Claim

The Dusenkas argue that "the inverse condemnation claim was improperly dismissed because it could not [have been] made in the earlier lawsuit and it was not

released by the Release of Claims." The county asserts that the release precluded the inverse condemnation claim.

"[T]he Minnesota Constitution requires that the government pay just compensation to the landowner for actions that take, destroy, or damage private property." *Vern Reynolds Const., Inc. v. City of Champlin*, 539 N.W.2d 614, 616 (Minn. App. 1995) (citing Minn. Const. art. I, § 13). "A cause of action for inverse condemnation arises when a government entity has appropriated the land without attempting formal exercise of the power of eminent domain." *Id.* (quotation omitted). "Thus, the taking precedes the formal condemnation proceeding upon which payment is made." *Id.* (quotation omitted).

The release states that the county is released from "any claims . . . that the undersigned *now have*." (Emphasis added.) It further clarifies that "the undersigned hereby release and dismiss . . . all claims and causes of action which are or could have been made in [this] lawsuit." Therefore, the plain language of the settlement agreement releases the county from any claims that the Dusenkas could have brought in 1988.[1] The Dusenkas allege that because there had not yet been a taking, they could not have asserted an inverse condemnation claim in 1988. Accordingly, they argue, the release could not have barred that claim. But the district court concluded that an inverse condemnation claim could have been brought in 1988. We conclude that in making this determination, the district court resolved a genuine issue of material fact.

[1] It is undisputed that the Dusenkas did not assert an inverse condemnation claim in 1988.

The inverse condemnation claim arises from the physical damage to the Dusenkas' property caused by the flooding. This flooding was first observed in 1987. The Dusenkas' original complaint stated "[t]hat as a result of the careless and negligent acts, errors and omissions of the county . . . approximately 30 acres of [our] property has been rendered useless and impassable, and rendered other portions of [our] property inaccessible." This language does seem to indicate that a taking had occurred, giving rise to an inverse condemnation claim.

The Dusenkas assert, however, that an assurance made by the county engineer in 1987 precluded the flooding from becoming a taking because he said the current flows were expected to be temporary. The Dusenkas claim that they "were repeatedly assured that the flooding problem was only temporary and that the County was working on possible resolutions." They further contend that "the record establishes that the County continuously undertook efforts to abate the flooding problem and all parties viewed the flooding as temporary." According to the Dusenkas, the taking actually occurred in 2004 "when the LID decided to abandon the Swamp Lake Channel Project and re-establish new high water levels for affected properties."

The Minnesota Supreme Court has stated that whether "occasional flooding is of such frequency, regularity, and permanency as to constitute a *taking* and not merely a temporary invasion for which the landowner should be left only to a possible recovery of damages is a question of degree, and each case must stand on its own peculiar facts." *Nelson v. Wilson*, 239 Minn. 164, 172, 58 N.W.2d 330, 335 (1953). The supreme court has further stated that "[p]ermanent in this context refers to a servitude of indefinite

duration even if intermittent." *Spaeth v. City of Plymouth*, 344 N.W.2d 815, 822 (Minn. 1984) (quotation omitted). Our review of the case law and of the facts of this matter convinces us that any question as to the permanency of the flooding, and thus the time at which the taking actually occurred, presents a genuine issue of material fact. And "[o]n appeal, the reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). Because there is a genuine issue of material fact regarding when the taking the Dusenkas allege occurred, summary judgment was inappropriately granted.

We note further that there appears to be an internal inconsistency in the district court order from which the summary judgment resulted. The Dusenkas commenced this action together with Marcus and Theresa Clay, who purchased their property in 1993. The district court granted the county's motion for summary judgment with regard to the Clays' tort claims, but denied the motion as to their inverse condemnation claim, finding that "there remains a question of fact as to when the 'taking' took place." Our review of the record does not reveal a basis upon which a material fact was determined to be present in the Clays' action but not in the Dusenkas'.

Finally, regarding the inverse condemnation claim, we are aware that "when parties reduce their agreement to writing, parol evidence is ordinarily inadmissible to vary, contradict, or alter the written agreement." *Hruska v. Chandler Assocs., Inc.*, 372 N.W.2d 709, 713 (Minn. 1985). We conclude, however, that examination of parol evidence in this case supports the interpretation of the written language of the release signed by the Dusenkas in 1989. The language originally in the release covered claims

"which may hereafter accrue" or "unforeseen injuries" or future damages "to result from the project." This quoted language was deleted in the revised release the Dusenkas signed. A reasonable inference may be drawn that the county was aware of the potential for later-accruing claims.

Tort Claims

The Dusenkas argue that the tort claims for nuisance, trespass, and negligence "were improperly dismissed because the Release of Claims was revised specifically to preserve future claims." The county contends that the plain and unambiguous language of the release necessitated summary judgment on those claims. We agree with the county.

As noted above, "[u]nambiguous language in the settlement agreement is to be given its plain and ordinary meaning." *State ex rel. Humphrey*, 713 N.W.2d at 355. The Minnesota Supreme Court has "consistently stated that when a contractual provision is clear and unambiguous, courts should not rewrite, modify, or limit its effect by a strained construction." *Travertine Corp. v. Lexington-Silverwood*, 683 N.W.2d 267, 271 (Minn. 2004).

The language in the settlement agreement released the county "from any and all claims, actions, causes of action . . . which the undersigned now have on account of or in any way growing out of any and all known and unknown injuries and damages and the consequences thereof resulting from" the project. The Dusenkas do not argue that they were unable to bring their nuisance, trespass, and negligence claims in 1988. Indeed, the argument that saves the Dusenkas' inverse condemnation claim—their alleged inability to

bring that action in 1988—is fatally flawed when raised in connection with their tort claims. The plain language of the release precludes bringing them now.

Nor is the Dusenkas' attempt to present parol evidence to demonstrate that they did not intend to release the county from tort claims a valid one. The language in the settlement agreement addressing all claims that the Dusenkas "now have" is unambiguous. Furthermore, the settlement agreement contains a merger clause. "A merger clause establishes that the parties intended the writing to be an integration of their agreement." *Alpha Real Estate Co. of Rochester v. Delta Dental Plan of Minnesota*, 664 N.W.2d 303, 312 (Minn. 2003). The agreement stated that "[t]he undersigned further declare and represent that no promise, inducement or agreement not herein expressed has been made to the undersigned, and that this Release contains the entire agreement between the parties hereto." The district court properly granted the county's motion for summary judgment with regard to the Dusenkas' trespass, negligence, and nuisance claims.

Statute of Limitations/Equitable Estoppel

Finally, the Dusenkas argue that the statute of limitations was tolled under a theory of equitable estoppel. But the district court did not address the applicability of the statute of limitations. Determination as to whether the statute of limitations is applicable to the inverse condemnation claim, and if so, whether the doctrine of equitable estoppel tolled the limitations period, is best left to the discretion of the district court on remand. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that generally, an appellate court will not consider matters not argued to and considered by the district court); *Drake*

v. Reile's Transfer & Delivery, Inc., 613 N.W.2d 428, 434 (Minn. App. 2000) ("The application of equitable estoppel ordinarily presents a question of fact unless only one inference can be drawn from the facts."). And any applicability of the statute of limitations to the tort claims is irrelevant because they were properly resolved by the award of summary judgment.

We affirm the grant of summary judgment on the tort claims brought by the Dusenkas; we reverse and remand the grant of summary judgment on their inverse condemnation claim.

Affirmed in part, reversed in part, and remanded.