IN THE SUPREME COURT OF IOWA

NO. 24-1701

STATE OF IOWA, EX REL, IOWA DEPARTMENT OF TRANSPORTATION

Plaintiff-Appellee/Cross-Appellant,

vs.

HONEY CREEK DRAINAGE DISTRICT NO. 6 BOARD OF TRUSTEES, ROBERT D. HANSEN, MASON J. HANSEN, and RICHARD J. HANSEN in their capacities as members of the Board of Trustees of Honey Creek Drainage District No. 6; PIGEON CREEK DRAINAGE DISTRICT NO. 2 SUBDRAINAGE DISTRICT NO. 3 BOARD OF TRUSTEES, MICHAEL P. SCHROPP, DALE D. RIEF, AND FRANK J. MORAN, in their capacities as members of the Board of Trustees of Pigeon Creek Drainage District No. 2 Subdrainage District No. 3, and BOARD OF SUPERVISORS OF POTTAWATTAMIE COUNTY, ex rel., Honey Creek District No. 6 and Pigeon Creek Drainage District No. 2 Subdrainage District No. 3,

Defendants-Appellants/Cross-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT FOR POTTAWATTAMIE COUNTY THE HONORABLE JUSTIN R. WYATT, JUDGE

APPELLEE'S/CROSS-APPELLANT'S REPLY BRIEF

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Fulton v. Sherman, 238 N.W.2d 90 (Iowa 1931)
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ARGUMENT
(Cross-Appellant's Reply Brief)

It Was An Error At Law For The District Court To Conclude Plaintiff Was Not Entitled To Summary Judgment Where It Is Undisputed The Reclassifications Were Based Upon An Assessment Of Alleged Benefits To Motorists On State-Owned Highway Property (i.e., Non-Owner Users) Rather Than Benefits To The Actual Property Or Its Owner.

Argument

The fighting issue in this cross-appeal by the State of Iowa (plaintiff below) is whether it is fair, just and equitable under Iowa law for a drainage district to assess state-owned highway property based upon subjectively-derived benefits alleged to have been realized by motorists traveling on the highway (i.e., non-owner users) rather than objective benefits realized by the actual property or its owner.

The Defendants/Appellants/Cross-Appellees do not dispute that the methodology adopted by the drainage districts was based on alleged benefits to motorists on the highway. Nor can they since they put it in writing in their interrogatory responses and the documents incorporated by reference into those responses. D0041, App. of Exhibits in Support of M. for Summary Judgment, Defendants' answer to interrogatory No. 7 at p. APP033 (7/3/2024), and D0041, Amendment 4 to Reclassification Report at p. APP018-APP019 (7/3/2024), which is incorporated by reference in D0041,

Defendants' answer to interrogatory No. 6 at p. APP032 (7/3/2024). *See also* Cross-Appellee Brief, pp. 24-26.

In fact, on page 25 of their cross-appellee brief, the Defendants cite some of these damning written admissions in the record from their own engineer, such as:

> A public roadway is different from a railroad in that the owner does not earn a profit from operating the road, and so does not have a direct loss to the owner. However, as a public entity their specific task is to provide that safe roadway for access to the traveling public who pays the budget and salary of the staff operating that road. The same argument would be very quickly understood if this were a private toll road; those losses are obvious and clear. Because the road is not directly paid for by tolls, but is instead generally paid for by taxes, ***we must get to the underlying impacts to those traveling on the public road, and the overall impact to the economy of the region as a whole, to find the actual cost to the IDOT tasked with limiting those impacts.***" D0041 App. Exh. 5 at APP033 (07-03-2024).

Cross-Appellee Brief at p. 25. (Emphasis added.)

Clearly, the focus of the assessment of the state-owned highway property was on the users of the highway and not the highway property or its owner. Where is the legal support for such an indirectly derived assessment? Are there no limits on the assessment methodologies adopted by drainage districts? In addition, what qualifies a drainage district engineer and the drainage districts themselves to consider "the overall impact to the economy of the region as a whole"? Are they economists, too? Did they perform a

detailed economic study or analysis? If so, why didn't they provide one as part of these proceedings? These admissions by the Defendants demonstrate the highly vague and subjective bases for the assessments adopted by the drainage districts in this case.

The Defendants even go on to admit that the alleged connection between motorists losing access to those portions of a highway that are flooded and the "actual impact" of those floods is "theoretical." Cross-Appellee Brief at p. 26. Based on this "theoretical connection", Defendants justify using Federal Highway Administration (FHWA) Work Zone User Cost calculations as the basis for their assessment of highway property. *Id*. The district court reviewed these admissions and concluded this assessment methodology was improper because the Defendants subjectively determined which FHWA factors to consider in making their User Cost calculations and which to disregard. *See* Order at pp. 5-6. The court also pointed out this methodology could be manipulated to be virtually limitless by considering unquantifiable factors like noise. *Id*. at p. 6.

The Defendants also admit that FHWA Work Zone Road User Cost calculations were developed by the FHWA, "as a method for calculation of Liquidated Damages (LDs) for construction contracts." Cross-Appellee Brief at 26. Where is the legal authority for a drainage district to hijack

FHWA LDs for the district's benefits assessments? On what lawful basis can a drainage district ***unilaterally*** impose benefits assessments derived from LD calculations that are typically ***voluntarily entered into*** by a contracting authority and its contractor ***by mutual agreement***?

The Defendants briefly veer into the truth when they state, "There is a difference and distinction between private railroad property and public highway property." Cross-Appellee Brief at p. 27. Unfortunately, following that statement, they veer back into their lane of untruth by claiming that railroad loss of revenue from flooding is known, but public highway loss of revenue is unknown because it is not a toll road. *Id*. There is no support in the record for this faulty claim. The record actually demonstrates the opposite is true. Specifically, the Iowa DOT District 4 Engineer gave a sworn statement that the cost of highway recovery in the two drainage districts after a flood event, based on actual clean-up costs, is conservatively estimated to be $304,658.48 per flood event. D0040, Schram Aff. at ¶ 8 (7/3/2024). This amount was determined by averaging the Iowa DOT's costs of responding to the three (3) flood events occurring in 2019. *Id*. Using the elevations of the existing and proposed levees along with the most recent flood frequency curves (2023), the District 4 Engineer concluded the annual benefit of the proposed levee to be only $8,462.74. *Id*. at ¶ 9.

Thus, the DOT determined it was more cost-effective, and therefore a more responsible use of the Iowa taxpayers' limited primary road fund, to invest in resiliency measures at specific highway locations prone to damage from flooding. D0040, Schram Aff. at ¶ 6 (7/3/2024). Those measures include armoring (i.e., paving) highway shoulders to prevent erosion, rerouting traffic to alternative roadways for the duration of a flood event, and removing debris and sediment from the highway after the flood waters recede. *Id*.

From the District 4 Engineer's sworn statement, the real differences between the railroad and public highway property become clear, namely: 1) the DOT can easily reroute highway traffic around flooded stretches of highway (as it has for decades); and 2) the costs of post-flood clean-up are minimal. D0040, Schram Aff. at ¶¶ 6-9 (7/3/2024) ("These interstates have existed and served motorists ***for decades*** with little benefit from the existing levee.") (Emphasis added.).

It is worth briefly noting that the Defendants continue to claim without any evidentiary support that the proposed levee improvement project was proposed by the DOT. Cross-Appellee Brief at p. 24 ("It is significant that this matter arises from IDOT's proposed improvement project presented to the Trustees of DD2 and DD6. It is not a proposal of the landowners in

the drainage district who have farm ground."). That claim is demonstrably false based upon the sworn statement of the District 4 Engineer, the one person charged with oversight of all DOT projects in District 4, which includes the subject drainage districts in Pottawattamie County. D0040, Schram Aff. at ¶¶ 1-4 (7/3/2024). He specifically says, "[T]he DOT did not authorize or agree to fund such a project." *Id.* at ¶ 4. The Defendants offer no credible or competent evidence to the contrary. It merits repeating that although the burden lies with the moving party, the nonmoving party "may not rest upon the mere allegations or denials in the pleadings. . . ." Iowa R. Civ. P. 1.981(5). Rather, in order to support a prima facie claim, the nonmoving party ***must set forth specific facts constituting competent evidence in the resistance***. *Hoefer v. Wisconsin Educ. Ass'n Ins. Trust*, 470 N.W.2d 336, 339 (Iowa 1991) (Emphasis added).

As explained above regarding the District 4 Engineer's sworn statement, the DOT has already invested in proactive measures to mitigate flood damage and has calculated the average annual cleanup cost at $8,462.74. D0040, Schram Aff. at ¶¶ 6-9 (7/3/2024). Given the Defendants' inequitable assessment of benefits for the proposed levee improvement project which saddles the State of Iowa with $9,813,969.69 (i.e., 75% of $12,962,851.01), it would take a whopping ***1,160 years*** (i.e., $9,813,969.69

divided by $8,462.74 per year) for the State of Iowa to recoup its investment. Appellant Brief at p. 17, *citing* D0047, Rosengren Aff. at 3 (07-17-2024). Clearly, it would be fiscally irresponsible to pursue such a project where a suitable, lower cost alternative is already in place and the highways in those drainage districts have served Iowa motorists for decades without the proposed levee improvement project. D0040, Schram Aff. at ¶¶ 6-9 (7/3/2024).

The Defendants' insistence that the State of Iowa is pushing for this project is equally incredible given that the State of Iowa filed this lawsuit seeking redress in the courts to avoid the project altogether. Moreover, the Defendants actually admit they will not pursue the project if the reclassifications are set aside. D0047, Resistance at p. 4 (7/17/2024) ("The Trustees have no intent to proceed with IDOT's requested levee improvement projects unless and until the Reclassification assessments are finalized, and are acceptable to the agricultural landowners.").

The Defendants argue once again that there is a strong presumption that the commissioners' reclassification reports are correct. Cross-Appellee Brief at pp. 27-28. However, the assessments may nonetheless be set aside for fraud, prejudice, gross error, or evident mistake. *Martin v. Board of Sup'rs of Polk County*, 100 N.W.2d 652, 655 (Iowa 1960). In this case, it is

undisputed that the method of assessing state-owned highway property in the drainage districts was based upon alleged benefits to users of the property rather than to the actual property itself or its owners. Such a method is a novel formulation of the Defendants and has no precedent under Iowa law. In short, the assessments are based on gross error and evident mistake.

The Defendants also rehash their previous arguments based upon the *Fulton v. Sherman* and *Union Pac. R.R. Co. v. Drainage Dist. 67 Bd. of Trs.* decisions. Cross-Appellee Brief at pp. 27 and 28. Since the State of Iowa previous addressed those arguments at length in its prior brief, they won't be addressed again here. Appellant Brief at pp. 38-42 and 64-68, respectively.

Finally, the Defendants argue the State of Iowa is trying to force local farmers to fund the state's levee improvement project. This is blatantly false. The DOT engineer responsible for all projects in the area has stated under oath that a new levee project is too expensive and the DOT does not want it. D0040, Schram Aff. at ¶¶ 1-9 (7/3/2024). He also said the DOT has not approved a levee improvement project in these two drainage districts because there are cheaper, more practical alternatives to protect the highway from occasional flooding that better serve Iowa motorists. *Id*.

If the method of assessing alleged benefits against users of property (i.e., non-owners) instead of the property itself or its owners is not struck

down by this Court as an overreach of drainage district authority, it is feared this practice may continue. The State of Iowa will be relegated to constantly playing defense, monitoring the assessment activities of 3,700 drainage districts throughout Iowa to avoid highly skewed and inequitable assessments slipping by unnoticed. The net effect of what the drainage districts attempt to achieve in this case with their inequitable assessment methods is to shift the true costs of property ownership from local landowners to Iowa taxpayers throughout the state – the equivalent of a permanent subsidy from the State of Iowa and its taxpayers. This Court must not allow it.

Conclusion

For the reasons set forth above in this reply brief and in Plaintiff's/Appellee's/Cross-Appellant's main brief, the State of Iowa respectfully requests that the portion of the district court's ruling denying the second part of the State of Iowa's motion for summary judgment, which argues the assessment of benefits against users of property (i.e., non-owners) is contrary to Iowa law, be reversed and remanded for entry of summary judgment in favor of the State of Iowa.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

This Brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(i)(1) because this Brief contains 2,016 words, excluding the parts of the Brief exempted by Iowa R. App. p. 6.903(1)(i)(1).

This Brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(g) and the type-style requirements of Iowa R. App. P. 6.903(1)(h) because this Brief has been prepared in a proportionally spaced typeface using Microsoft Word in size 14 Times New Roman.

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CERTIFICATE OF FILING AND CERTIFICATE OF SERVICE

We, Matthew S. Rousseau and Shean D. Fletchall, hereby certify that on February 14, 2025, a copy of Appellee's/Cross-Appellant's Reply Brief was filed electronically with the Clerk of the Iowa Supreme Court through the EDMS system, and which system further will provide access and service to the brief to:

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