20090301

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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Al Skogen and Mike Skogen and Jason Bonde, Plaintiffs and Appellants, vs. Hemen Township Board of Township Supervisors, Defendant and Appellee, vs. Torin Swartout and Kevin Swartout, Appellees and Interveners.	**SUPREME COURT NO. 20090301**

APPEAL FROM ORDER AND JUDGMENT DATED AUGUST 24, 2009 AND ORDER DENYING MOTION TO RECONSIDER DATED SEPTEMBER 15, 2009
STATE OF NORTH DAKOTA
DISTRICT COURT OF THE SOUTHEAST JUDICIAL DISTRICT
THE HONORABLE RICHARD W. GROSZ, PRESIDING
BARNES COUNTY DISTRICT COURT NO. 08-C-0254

APPELLEES AND INTERVENERS BRIEF

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STATEMENT OF FACTS

1. Appellant Mike Skogen ("Skogen") has drained wetlands on his property over the years, causing water to run to an impoundment next to a Hemen Township ("Township") road. With increased drainage, the impoundment has increased in size and depth over the years.

2. While both Skogen and the Township outlined the procedural history of the instant case, neither addressed the factual or procedural history of the companion legal proceeding, which is both factually and procedurally relevant to the instant case, as it provides part of the rationale for Judge Grosz's decision in the instant case. Skogen requested that the Township install a culvert in the road so the Skogen impoundment water could drain through the Township road. The practical result of installing a culvert would allow much of Skogen's water to cross the road and flood a large portion of adjacent property, owned by Interveners Torin and Kevin Swartout ("Swartouts"). (See Twp. App. 50[1].) After a duly noticed hearing where both Skogen and Swartout provided testimony, the Township denied the request to install a culvert by order dated December 19, 2007. (Int. App. 1.) Skogen appealed that decision to the District Court on January 15, 2008. (Id.)

3. On March 4, 2008, Skogen signed a stipulation to allow Swartout to intervene in the appeal of the Township order denying culvert installation, wherein Skogen specifically admitted:

> "The Swartout property is directly across the road from the Skogen property and **would be impacted by the**

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[1] Intervener's Appendix is referred to as "Int. App." Appellant's Appendix is referred to as "App." The Township's Appendix is referred to as "Twp. App."

> **installation of any culvert in the Town Road**. As such, all parties agree that the Swartout Estate has an interest in the outcome of the instant appeal. All parties stipulate that the Swartout Estate can be added as an Intervener-Defendant party in this matter…"

(Int. App. 1.)

4. Immediately after allowing Swartout to intervene in the appeal, on March 6, 2008, Skogen also served the Township with a Summons & Complaint in the instant case, followed by a May 1, 2008 Amended Summons and Complaint, which sought money damages for flooded crop loss and reiterated its demand to have a culvert placed in the roadway so the Skogen water impoundment could be relieved by flooding the property across the road owned by Swartout. (App. 20-24.) Despite Skogen's admission in the March 4, 2009 Stipulation that Swartout's have an interest in any culvert being installed on this property, Skogen would not stipulate to allowing Swartout to intervene in the Complaint for damages action, so Swartout filed a motion to intervene in the lawsuit and submitted an Answer which raised a number of affirmative and jurisdictional defenses. (App. 15.) The motion to intervene was granted on July 29, 2009, at which time the Court discussed various affirmative defenses and jurisdictional defects in Skogen's case, many of which were raised by Swartout in their Answer Affirmative Defenses. (App. 7-9.)

5. In an August 27, 2009 Memorandum, the District Court raised various jurisdictional issues and other potentially dispositive issues, requesting briefing by the parties, a few of which had been raised by Swartout in their Answer. (App. 4.) All parties briefed the relevant issues and the District Court ultimately held that (1) a money judgment cannot be granted against the Township pursuant to N.D.C.C. § 32-12.1-03(3)(c); and (2) the District Court lacked jurisdiction to consider Skogen's demand to

have a culvert installed since the appropriate legal remedy regarding the culvert would have been to pursue the appeal of the Township board's order denying the culvert installation. (App. 4.)

6. Since Skogen had voluntarily dismissed his original appeal of the Township order denying Skogen's request to install a culvert, which was the appropriate remedy to challenge the culvert denial, Skogen was foreclosed from bringing the same claim in the instant lawsuit and the District Court was without jurisdiction to consider the instant claim. Skogen's instant appeal does not specifically challenge the District Court's dismissal of Skogen's demand for injunctive relief, yet the briefing repeatedly refers to obligations of the Township to install a culvert to allow water to pass. Even though the culvert installation demand does not appear to be an identified issue on appeal, Swartouts will include arguments relating to that issue, given implications raised by Skogen's briefing and in an effort to paint a clear picture of the facts and law considered by Judge Grosz. That said, the question of whether a culvert should be installed in the road has not been raised as an 'Issue on Appeal' or otherwise been briefed in Swartout's brief to raise this as an issue on appeal. The instant appeal is solely limited to the availability of money damages from the Township for crop loss by Skogen, and whether the District Court abused its discretion in granting Swartout's Motion to Intervene

7. Defendant Interveners Torin and Kevin Swartout ("Swartout") ask the Supreme Court to affirm the August 19, 2009 Order and Judgment by Judge Grosz.

LAW AND ARGUMENT

A. Any Demand for Culvert Installation Would be a Collateral Attack on a Final Judgment

8. Since there has been a full and final adjudication of Skogen's demand for culvert installation through the District Courts appeal action, the Township's denial of Plaintiffs' request to install a culvert in the township road cannot be collaterally attacked through the instant or any other action. The District Court recited this Court's well-established North Dakota law that "installation of the culvert is a matter solely for the Township." (App. 7), citing Kadlec v. Greendale Tp. Bd. of Tp. Sup'rs, 1998 ND 165, ¶15, 16. With the voluntary execution of a Stipulation to Dismiss[2] in the appeal action, signed as a formal judgment by Barnes County District Judge Paulson, there is a full and final adjudication of the merits of the appeal action. The District Court was not allowed to now second guess the propriety of the Township's December 2007 decision denying the installation of a culvert. No jury would be allowed to second guess the Township's decision regarding the culvert placement. Nor can the State Water Commission or the Barnes County Water Resource Board order the Township to install the culvert. The matter has been decided, challenged and put to rest.

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[2] Skogen suggested to the District Court that the reason for the voluntary dismissal was the difficulty in obtaining a transcript of the board hearing audio. (Twp. App. 24.) Yet, Swartouts' advised that they never received any written letter or oral communication in connection with the stipulation to dismiss suggesting that the lack of audio was the basis for the stipulation. (Int. App. 3.) In fact, had Skogen wanted to pursue the appeal, there would be ample remedies available pursuant to N.D.C.C. 28-34-01, specifically subdivision 3, to recreate a record, such as submission of affidavits of pertinent testimony, the creation of supplemental meeting minutes, a stipulation of relevance facts, or holding a limited hearing for the purpose of recreating the record. Instead, Skogen simply voluntarily dismissed his appeal of the Town Board order and chose to pursue the underlying action instead.

9. As was raised in Swartout's Affirmative Defenses, the District Court lacks jurisdiction to consider any collateral attack on the decision of the Township. Olson v. Cass County, 253 N.W.2d 179, 182-183 (N.D. 1977). Olson is directly on-point legal authority. In Olson, the plaintiffs (adjacent landowners) failed to pursue an appeal within 30 days, and instead pursued a direct cause of action against Cass County based upon its decision to install a culvert at a flood-ridden intersection. The North Dakota Supreme Court reiterated that the "statutory remedy of appeal was held, as long ago as 1875, to be a 'plain, simple, sensible, cheap, and adequate remedy.'" Id. at 182, *citing* Wood v. Bangs, 1 Dak. 179, 196, 46 N.W. 586, 589 (1875).

10. If the grievance of the person challenging a board's decision is of a type that could have been fairly litigated on appeal, then that statutory appeal is an adequate legal remedy, and no separate, later suit for injunction will lie as a substitute. In Olson, the plaintiffs failed to appeal the County's decision within 30 days. In the instant case, Plaintiffs pursued, but ultimately dismissed their appeal, thereby extinguishing their appeal rights. This Court's finding in Olson is instructive, whereby this Court found that "plaintiffs are barred from seeking an injunction because they had an adequate legal remedy which they failed to pursue." Id. There was simply a lack of jurisdiction for the District Court to reconsider what was or could have been brought through the statutory appeal.

11. Skogen advised the District Court that the appeal action was voluntarily dismissed due to the Township's inaudible tape-recording of the hearing. (App. 12.) Such an excuse does not preserve jurisdiction in the district court to later seek the same relief through a separate action brought after the 30 day statutory appeal period. Further,

clearly there are numerous other mechanisms to recreate a record, short of a dismissal, so Skogen's argument was unavailing.

12. Skogen appears to take issue with Judge Grosz's rather unconventional procedure of advising parties of his view of the applicable law and inviting briefing on the issue, rather than waiting for the parties to initiate dispositive motions. Judge Grosz's manner of quickly addressing the dispositive issues is not a basis to allege error. In fact, Swartouts raised and briefly discussed the dispositive issues in its Answer, which was attached to its motion to intervene. It was Swartouts intention to move for dismissal once it was granted the status of an intervener. (See Swartout Answer, App. at 17-18.) There is no legal significance to the fact that Judge Grosz requested briefing on the jurisdictional issues at the same time he granted Swartouts' Motion to Intervene. Frankly, it's simply an efficient use of judicial resources and caseload management to address jurisdictional issues immediately.

B. Swartouts Had A Right To Intervene.

13. Rule 24(a) of the North Dakota Rules of Civil Procedure provides:

> (a) Upon timely application anyone must be permitted to intervene in an action if....
>
> (ii) the applicant claims an interest relating to the property or transaction that is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

14. This Court has explained that Rule 24 allows intervention of right to protect an interest in the subject of an action. Fetch v. Quam, 530 N.W.2d 337, 339 (N.D. 1995). In this case, Swartout is so situated that Skogen's request for a culvert in the road will cause permanent damage as a result of flooding and soil degradation on

Swartouts' property. Any decision regarding culvert installation would, as a practical matter, impair or impede Swartouts' ability to protect its interests. Swartouts' interests are not adequately being protected by Hemen Township. There is no privity between the Township and Swartout and no common basis of interest.

15. In the even this Court does not conclude that intervention is appropriate as a matter of right pursuant to ND Rule of Civil Procedure Rule 24(a), permissive intervention should be allowed pursuant to Rule 24(b), which provides:

> Upon timely application anyone may be permitted to intervention an action:....(2) when an applicant's claim or defense and the main action have a question of law or fact in common....when exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

16. If Swartouts were omitted from the culvert installation proceedings and a culvert was decided to be installed, Swartouts would have their own cause of action to address in future legal proceedings, thus causing excessive litigation. As a matter of public policy, it's a much better use of judicial resources to have all parties at the table in one lawsuit when addressing the respective property rights of all of them.

17. The motion for intervention was made at the beginning of the legal proceedings, before any discovery was initiated and before the Court set a case schedule, so there was no argument of prejudice.

18. Despite Skogen's claims in the instant appeal that Swartouts do not have an adequate right to intervene, Skogen has already admitted that Swartouts have a property right that justifies their intervention in any matter involving a request to install a culvert. In the Stipulation, executed on March 4, 2008, Skogen specifically admitted:

> The Swartout property is directly across the road from the Skogen property and **would be impacted by the installation of any culvert in the Town Road**. As such,

> all parties agree that the Swartout Estate has an interest in the outcome of the instant appeal. All parties stipulate that the Swartout Estate can be added as an Intervener-Defendant party in this matter…"

(Int. App. 1.) Skogen's position in the instant litigation is completely contrary to the facts he stipulated to in the related case in March 2008. Skogen should be estopped from taking an entirely contrary position in this litigation, given Skogen's very blatant admission in the Township order appeal proceedings.

19. In reviewing whether a party may intervene as a matter of right, the findings of fact made by the trial court are to be reviewed under the clearly erroneous standard of review. The ultimate question of whether a party has a right to intervene in an action is a question of law that is fully reviewable on appeal. Fisher v. Fisher, 546 N.W.2d 354 (1996). The premise for Swartout's intervention is that, if the Township placed a culvert in its road allowing the water to follow the natural terrain of the area, his land would be flooded. Swartouts further stated that their interest could not be protected by the Township and Swartouts would otherwise be precluded as a practical matter from protecting their interest.

20. Skogen tries to shift the focus away from the potential flooding of Swartouts' land, and instead focuses on other remedies that might be available to Swartout against Skogen or the Township. Skogen suggests that if Swartout has a problem with Skogen's drainage practices, Swartout is welcome to bring a complaint to the water board. The mere availability of other legal recourses does not prohibit Swartouts involvement in the instant case, and does not diminish the real property interest that Swartouts have at stake in the underlying proceeding.

21. If Skogen solely sought money damages from the Township for lost crops, Swartouts' right to intervene would be subject to question, as no direct property interest of Swartout would be implicated. Yet, part of the Complaint includes a demand for the District Court to order the installation of a culvert. The installation of a culvert is precisely the same issue that was litigated in the Skogen appeal of the Township Order to District Court, in which Skogen admitted that Swartout "would be impacted by the installation of any culvert.....and that all parties agree that the Swartout Estate has an interest in the outcome of the instant appeal." (Int. App. 1.) There was no legal requirement, request or need for an evidentiary hearing on the intervention motion given this clear evidence that would justify intervention.

22. Skogen goes to great pains to suggest that Swartouts have a remedy with a local water board if they want to complain about illegal drainage. This case is not about Swartout's complaint about illegal drainage or a requirement for Swartout to pursue other administrative remedies rather than intervene in this lawsuit. Frankly, so long as there is no culvert in the road, and that Skogen's questionable drainage practices only affect Skogen, there is no reason for Swartout to raise any complaints about Skogen's drainage practices to the water board or anyone else. Yet, Swartouts had every reason to intervene in this lawsuit to protect their private property rights that would be damaged if a culvert is placed in the roadway as Skogen has demanded.

23. Finally, Skogen's argument that Swartouts were wrongfully allowed to intervene is largely moot at this point. Swartouts intervened to protect their property interest and to interpose legal objections outlining why the District Court lacked jurisdiction to consider the installation of the culvert in the underlying action. Simply

put, Swartout questioned whether the Township was zealously advocating its position and it was apparent to Swartouts that they should intervene to protect their property interests. Skogen clearly did not appreciate Swartouts' advocacy of the dispositive legal bases to uphold the Town Board decision, and as such, Skogen refused to stipulate to Swartout's intervention in the underlying litigation. That said, the precise issue that Skogen raises on appeal against the Township is specifically limited to the question of whether money damages are available as a remedy against the Township. That issue has nothing to do with Swartouts. Swartouts did not extensively brief that issue in the District Court and similarly refrains from doing so herein. Skogen does not raise an issue regarding the appropriateness of the District Court's finding that there was no jurisdiction to consider a claim for injunctive relief, to install the culvert in the roadway. As such, Skogens have accepted the District Court's order that they have no legal basis on which to demand culvert installation through the underlying action and instant appeal. If that issue is not on appeal, there is really no legal significance to Skogen raising an issue in the instant appeal regarding the District Court's order allowing Swartout to intervene. The claim that Swartouts were primarily interested in has already been resolved to a final conclusion by the District Court and has not been appealed. So long as the Township does not disturb that decision in settlement negotiations on remand, Swartouts would have no interest in further involvement in this lawsuit if there were remand proceedings regarding the availability of a monetary remedy against the Township.

C. Money Damage Suit is Unavailable

24. The question of whether money damages would be available to Plaintiffs is a question that does not implicate any rights of Swartouts, and as such, Swartouts will defer to the briefing of the Township on that issue. That said, even an elementary review

of N.D.C.C. § 32-12.1-03(3)(c) prohibits a cause of action seeking money damages against a political subdivision based upon the town board's decision. The only time a political subdivision will be liable for money damages is where the action of the Township is the proximate cause of the injury. The Township did not have any mandatory duty to place a culvert upon Skogen's request, and the Township's decision was not the proximate cause of the flooding. While Skogen continuously refers to a mandatory duty of the Township to install a culvert in the roadway, frankly, that issue was raised at the Township meeting, was appealed to District Court and now there is a full and final judgment on that issue. As much as Skogen likes to refer to a mandatory duty, no such mandatory duty was found by any appropriate court on appeal. As such, Skogen's arguments for monetary compensation as a result of the Township's alleged failure to comply with a mandatory, non-discretionary duty are entirely misplaced. The District Court's decision should be upheld.

CONCLUSION

25. Plaintiffs availed themselves of an appeal and consciously chose to dismiss that appeal, so they should not be indulged in their argument that a culvert is mandatory through the Township road. That was Plaintiffs sole remedy through which to challenge the Township's decision not to install a culvert in the roadway. Any request for equitable and injunctive relief from this Court is inappropriate, since it would result in a collateral attack on the Town Board's decision. The decision of Judge Grosz should be affirmed.

Respectfully submitted this 23rd of December, 2009.

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