20160311
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
MAY 30, 2017
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Donald Robert Cossette, individually, and Donald Robert Cossette and Marjorie Cossette as Co-Trustees of the Angela R. Cossette Revocable Living Trust Dated November 21, 2002, Appellants, vs. Cass County Joint Water Resource District, Appellee.	Supreme Court No. 20160311 District Court No. 09-2016-CV-01391

Appeal from Memorandum Opinion and Order of the District Court Entered on July 22, 2016

County of Cass, East Central Judicial District
Honorable Steven L. Marquart, Presiding

PETITION FOR REHEARING

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STATEMENT OF THE ISSUES

[¶1] Whether the Court overlooked its prior decisions and North Dakota statutes by concluding the Cossettes were aggrieved persons.

[¶2] Whether the far-reaching implications of the Court's decision warrant granting the petition for rehearing.

STATEMENT OF THE CASE

[¶3] On May 18, 2016, the Cass County Joint Water Resource District (the "District") determined it was necessary to acquire the Cossettes' property for a flood control project. APP 250-261. The determination was memorialized in the form of a resolution of necessity (the "Resolution"). Id.

[¶4] On May 20, 2016, the Cossettes filed a combined declaratory judgment action and appeal with the district court. On July 22, 2016, the court granted the District's Motion to Dismiss. APP 556-558.

[¶5] The Cossettes appealed to this Court on September 19, 2016. APP 559-562. On May 16, 2017, the Court issued its decision in Cossette v. Cass County Joint Water Resource District, 2017 ND 120, _ N.W.2d _, which affirmed the dismissal of the Cossettes' declaratory judgment action. Id. at ¶ 9. However, in a three-to-two decision, the Court reversed and remanded the dismissal of the appeal. Id. at ¶ 15.

ARGUMENT

I. Legal Standard

[¶6] Under N.D.R.App.P. 40, a petition for rehearing may be filed when the petitioner believes the Court overlooked or misapprehended a point of law or fact. The Court has granted petitions for rehearing after reexamining relevant legal

authority or to reconsider the effect of a decision of significant importance. See, e.g., Farstveet v. Rudolph ex rel. Eileen Rudolph Estate, 2000 ND 189, ¶ 28, 630 N.W.2d 24; Miller v. Norton, 132 N.W. 1080, 1092 (N.D. 1911).

II. Whether the Court overlooked its prior decisions and North Dakota statutes by concluding the Cossettes were aggrieved persons

A. The district court found the Cossettes are not factually aggrieved

[¶7] "An appeal may be taken to the district court from any order or decision of the water resource board by any person aggrieved." N.D.C.C. § 61-16.1-54. North Dakota employs a "factually aggrieved" standard. Vickery v. N.D. Workers Comp. Bureau, 545 N.W.2d 781, 783 (N.D. 1996). As the appellant, the Cossettes bear the burden of proving they are factually aggrieved. Hagerott v. Morton County Bd. of Comm'rs, 2010 ND 32, ¶ 9, 778 N.W.2d 813; Shark v. U.S. West Commc'ns. Inc., 545 N.W.2d 194, 199 (N.D. 1996).

[¶8] The first question that must be answered is what standard of review applies to the district court's determination of whether the Cossettes are "aggrieved"? In the Appellee's Brief, the District distinguished the district court's legal and factual determinations in assessing the appropriate standard of review. Appellee's Br. at ¶¶ 23-24. The district court's legal conclusion — only aggrieved persons may appeal — is reviewed de novo, while the factual determination — the Cossettes are not aggrieved — is reviewed for clear error. Id. The Cossettes stated "[n]o apparent controversy exists" on this standard of review. Appellant's Reply Br. at ¶ 10.

[¶9] While this Court's opinion discusses the standard for reviewing the dismissal of the declaratory judgment Complaint, it is silent as to the standard

regarding factual aggrievement applicable to the administrative appeal. Cossette, 2017 ND 120, ¶ 6. Nor does the Court give any deference to the district court's finding the Cossettes were not aggrieved. Applying a clear error standard of review, the Court should affirm the district court's finding.

[¶10] Even if the Cossettes' allegations are accepted as true, the notice of appeal fails to allege the Cossettes were aggrieved. APP 20-21. Therefore, the district court's determination, whether reviewed de novo or for clear error, should be affirmed.

B. The Cossettes failed to prove they are aggrieved

[¶11] This Court held the Cossettes became aggrieved upon the District's passage of the Resolution, which indicated the District intended to acquire the Cossettes' property. This holding overlooks North Dakota's well-established case law and eminent domain statutes.

1. The Cossettes are not aggrieved under prior case law

[¶12] "An aggrieved person is one who has more than a nominal, formal, or technical interest." Burleigh County Water Res. Dist. v. Burleigh County, 510 N.W.2d 624, 627 (N.D. 1994). "The party must have some legal interest that may be enlarged or diminished by the decision," or, "[i]n other words, such party must be injuriously affected by the decision." Id. (internal quotation marks and citation omitted); see also Vickery, 545 N.W.2d at 783 ("[A] party must be injured in some manner to have standing, and a nominal, formal, or technical interest in the action will not suffice.") (internal quotation marks and citation omitted). "The party's interest must be immediately, directly, and adversely affected, and an effect that is contingent

or indirect, or that results merely in some possible, remote consequence, is insufficient." Treiber v. Citizens State Bank, 1999 ND 130, ¶ 5, 598 N.W.2d 96; see also King v. Stark County, 10 N.W.2d 877, 878 (N.D. 1943) ("Only a party who is directly and adversely affected by a judgment or order is aggrieved thereby.").

[¶13] "A party thus may be interested in an action but fail to be factually aggrieved." Washburn Pub. Sch. Dist. No. 4 of McLean County v. State Bd. of Pub. Sch. Educ., 338 N.W.2d 664, 667 (N.D. 1983). "Not every adverse decision signifies that a party is aggrieved in fact." Id.

[¶14] For instance, in Washburn Pub. Sch. Dist. No. 4, 338 N.W.2d at 668, the Court concluded a decision to approve or deny a petition for annexation did not, in itself, indicate a school district was aggrieved. Rather, the Court examined the effect of the decision. Id. The Court upheld "the district court's observation that [the district] neither gained nor lost anything" by the decision. Id. Thus, while the district "was directly interested" in the decision and participated in the administrative hearings, it still did not qualify as an aggrieved party. Id.; see also Treiber, 1999 ND 130, ¶ 6 (noting there may be no adverse effect on a bank, which "still has its mortgage against [the property], just as it did before the action was brought"); Shark, 545 N.W.2d at 199 (dismissing an appeal where the appellant would not gain or lose anything).

[¶15] Here, the Court noted the Resolution "provides the legal description of the Cossettes' property and states the property 'is necessary for the construction, operation, and maintenance of the . . . Diversion Project.'" Cossette, 2017 ND 120, ¶ 15. This is true, but simply providing the legal description and stating the property

is necessary does not directly and immediately harm the Cossettes. Under the statute, the property must be "*affected adversely* by the order or decision appealed from[.]" N.D.C.C. § 61-16.1-54 (emphasis added). The legal description contained in the Resolution does not, in itself, adversely affect the property.

[¶16] Like Washburn Pub. Sch. Dist. No 4 and Shark, the Cossettes failed to demonstrate they gained or lost anything. The Cossettes still own the property, just as they did before the Resolution was passed, similar to the mortgage owned by the bank in Treiber. Simply put, nothing has changed with respect to the property.

[¶17] At worst, the Resolution poses a contingent and indirect threat of future eminent domain proceedings. While the Cossettes have the "potential to be aggrieved" in the future, this "is not the equivalent of being aggrieved in fact." Vickery, 545 N.W.2d at 783; see also King, 10 N.W.2d at 878. By concluding the Cossettes became aggrieved, this Court overlooked its well-established decisions, which unequivocally hold a person must be immediately and directly injured to be aggrieved.

2. The appeal conflicts with the eminent domain statutes

[¶18] The district court dismissed the appeal in part because the Resolution "'is only one of the steps taken toward eminent domain.'" Cossette, 2016 ND 120, ¶ 14. While the Court recognized N.D.C.C. § 61-16.1-54 allows an aggrieved person to appeal from any decision, it overlooked the broader issue underlying the district court's holding.

[¶19] The North Dakota Legislature established a statutory framework for eminent domain proceedings. Only property that is necessary for a public use may be

acquired through eminent domain. N.D.C.C. §§ 32-15-01(1), 61-16.1-09(2). Accordingly, the district court properly held the Cossettes may challenge necessity as part of future eminent domain proceedings.

[¶20] The resolution itself contemplates these future proceedings, as it notes the District "'will proceed with the requisite legal proceedings as necessary'" under N.D.C.C. §§ 61-16.1-09(2) and Chapter 32-15. Cossette, 2017 ND 120, ¶ 15. Since the District stated it "will proceed with the requisite legal proceedings" to acquire the property, the Resolution itself aggrieves no one. If and when the District commences eminent domain proceedings, the Cossettes may challenge the issue of necessity. See Petition of Ecklund, 270 N.W. 347, 348 (N.D. 1936) ("So long as the decree complained of does not conclude him from asserting or defending his interests or claims, then he is not affected thereby [to be considered aggrieved]"). Thus, by allowing the Cossettes to challenge necessity in this appeal, the Court overlooked the framework established by the Legislature. See Gowan v. Ward County Comm'n, 2009 ND 72, ¶ 11, 764 N.W.2d 425 (holding the appellant could not turn an administrative appeal into an inverse condemnation action).

[¶21] In effect, the Court's decision requires the district court to issue an advisory opinion because the property may never actually be taken if eminent domain proceedings are not later commenced. For instance, if funding is jeopardized, the District may decide not to take the property. See, e.g., Square Butte Elec. Co-op v. Dohn, 219 N.W.2d 877, 883 (N.D. 1974) (holding the condemnor was "not required to prove that at that stage of the proceedings [when surveys were conducted] eminent domain was proper, justified, and necessary" because it may "result in a useless act

in the event that after survey and testing a decision were made not to traverse this land").

[¶22] The district court dismissed the Cossettes' appeal for this very reason, as separate eminent domain proceedings were commenced after the appeal was filed. Accordingly, even assuming the Cossettes could show they were aggrieved, the administrative appeal has since been rendered moot by the eminent domain proceedings. See Holkesvig v. Grove, 2014 ND 57, ¶ 16, 844 N.W.2d 557 (recognizing proceedings on collateral matters may render an appeal moot); St. Onge v. Elkin, 376 N.W.2d 41, 43 (N.D. 1985) ("It is well settled that this Court will not issue advisory opinions, and an appeal will be dismissed if the issues therein become moot or academic, leaving no actual controversy to be determined.").

III. Whether the far-reaching implications of the Court's decision warrant granting the petition for rehearing

[¶23] The Court should further consider the far-reaching effects of its decision. The decision will undoubtedly result in multiple appeals to the district court — and to this Court — in the same related matter. For instance, the Cossettes can now proceed on their appeal of the Resolution at the same time the district court presides over the eminent domain case. It bears noting separate judges are assigned to hear the appeal and the eminent domain case, which could result in conflicting decisions on the same issue. In any event, the Cossettes may then file separate appeals to this Court from each proceeding. Given the scope of the underlying project, there will unquestionably be numerous additional appeals generated by this duplicative approach.

[¶24] On a more fundamental level, the decision will weaken the quick take authority authorized by the Legislature. By appealing the Resolution, the Cossettes hoped to stop or delay the District's taking of their property. As discussed above, the Legislature established the process to be followed when property is taken by eminent domain. By green-lighting a separate means of challenging necessity outside this statutory framework, landowners may frustrate the Legislature's intended process through multiple appeals aimed at slowing down or eliminating a condemning authority's eminent domain power. Surely these consequences were not intended by the Court's decision.

CONCLUSION

[¶25] The District respectfully requests the Court grant its petition for rehearing to consider whether the district court properly dismissed the Cossettes' appeal.

Dated: May 30, 2017.

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CERTIFICATE OF COMPLIANCE

The undersigned attorney for the Appellee in the above-entitled matter hereby certifies, in compliance with Rule 40(b)(1), N.D.R.App.P., that the above Petition for Rehearing contains 1,977 words (excluding words contained in **(1)** the table of contents, **(2)** the table of authorities, and **(3)** this certificate), which is within the limit of 2,000 words.

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Donald Robert Cossette, individually, and Donald Robert Cossette and Marjorie Cossette as Co-Trustees of the Angela R. Cossette Revocable Living Trust Dated November 21, 2002,	)	Supreme Court No. 20160311
Appellants,	)	District Court No. 09-2016-CV-01391
vs.	)	
Cass County Joint Water Resource District,	)	
Appellee.	)	

CERTIFICATE OF SERVICE

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF CASS)

I hereby certify that on May 30, 2017, I caused to be electronically filed the **Petition for Rehearing** with the Clerk of the North Dakota Supreme Court (at **supclerkofcourt@ndcourts.gov**) and served the same electronically as follows:

By e-mail:

Jonathan T. Garaas . . . . . garaaslawfirm@ideaone.net

Dated: May 30, 2017.

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