

STATE OF VERMONT  
WASHINGTON COUNTY, SS.

FILED  
2000 JAN 10 A 8:00

Alan Graham and Emily Graham )  
v. )  
Town of Duxbury )

Washington Superior Court  
Docket No. 181-4-98 Wncv  
SUPERIOR COURT  
WASHINGTON DISTRICT

MEMORANDUM OF DECISION

and

ORDER

This matter came before the court for a hearing on the merits on September 28, 1999. The Plaintiffs seek recovery from the Town for the cost of an erosion control structure they installed following a washout on their land. Plaintiffs are represented by Paul Gillies, Esq. The Defendant is represented by Philip H. White, Esq. Based on consideration of the evidence admitted at the hearing and the memoranda of law and arguments of counsel, the court makes the following findings, conclusions, and order.

Findings of Fact

1. The Plaintiffs' property is located on Morse Road in the Town of Duxbury. It consists of an acre, more or less, of land on which their residence is located.
2. In the 1980's, Clyde Morse owned the land as part of a significantly larger parcel he owned. The Plaintiffs' lot is below approximately 50 acres of steep slopes and shallow soils that drain into the former Morse land where the Plaintiffs' land is now located. The soils are sandy

and gravelly and unstable. Mr. Morse formerly operated a gravel pit on the site, from which he extracted sand and gravel. He was also a member of the Selectboard for many years. He allowed the Town to store materials on his property.

3. In 1989, Mr. Morse created a subdivision on his land, of which Plaintiffs' property is lot 6. The subdivision consisted of several lots served by a new road he constructed called Morse Road. The road runs from a cul-de-sac at its north and high end downhill in a southeasterly direction to the point where it joins Town Highway 22. The road was constructed as a private road. There was an agreement between Mr. Morse and the Selectboard that as soon as all permits were obtained, the Town would take over the road. The fact that the Town would take over the road was a foregone conclusion; the only requirement was that the permits be granted.

4. As the developer, Mr. Morse was responsible for the design and layout of the road and lots. As designed and constructed, there was a ditch on the southerly side of Morse Road toward its high end that led to a culvert that crossed Morse Road and emerged on the northerly or lower side of Morse Road on lot 6, the second highest lot on the northerly side of Morse Road. There are several other lots further down Morse road. Where the culvert emerged, a swale was constructed, lined with rip rap, that ran back away from Morse Road and down to the north on lot 6 to an embankment with a steep drop off where a stream is located at the bottom of the bank. This was clearly the measure taken to address drainage of water from the high lands to the south and west of Morse Road, and prevent it from crossing Morse Road by diverting it to the stream located to the north behind lot 6. Where the ditch ends on the south side of Morse Road, leading into the culvert that crosses the road in front of lot 6, any water flowing down the ditch would take a 90° turn in order to run through the culvert under the road and into the swale on lot 6.

5. This layout was reviewed by officials from the State of Vermont Agency of Transportation and was approved with no discussion, and the Town took over Morse Road from Mr. Morse. It became a Class 3 town road. The Town maintains the ditch and the culvert as part of its general road maintenance program. It has done no maintenance work on the swale and rip rap on lot 6. The Town has made no changes to the design or layout of the ditch or culvert since the time it acquired the road.

6. At some point the Grahams, the Plaintiffs, purchased lot 6 from Ray Brewer, who was a successor to Clyde Morse as owner of lot 6. When they purchased it, the fact that the rip rap lined swale was present on the property, leading from the culvert at the road to the drop off at the rear of the property, was visible. It was also observable that the soils at the rear of the property where the swale dropped off were gravelly and unstable. By visual inspection, a soil conservationist could tell that erosion was potentially a problem because of the nature of the soils and the 40% drop off at the end of the swale. A lay person would probably not be as alert to the potential problem.

7. The Grahams lived on the property for some unspecified period of time prior to August of 1997. They made no changes to the ditch or culvert or swale or rip rap. Emily Graham did not see any indication of water traveling down the ditch, through the culvert, and through the swale to the stream.

8. In early August of 1997, there were several rainstorms in the Town of Duxbury with unusual and localized heavy downpour. Parts of Morse Road were washed out. There was no washout at the site of the culvert in front of lot 6. The volume of water at that location came from the 50 acre drainage area above the site, and generally drained downhill in the direction of

Morse Road. Without the presence of the road and culvert, it would have drained downhill toward the stream behind lot 6. With the road and culvert, it drained in the same direction, but the water above the culvert was directed by the ditch and culvert to run through the culvert to the swale on its way to the stream. The culvert, if it became plugged, was insufficient to carry the volume of water draining from the heavy downpour. There was no testimony that anyone saw water running over the road toward the swale at the site of the culvert during the heavy rains of August 1997.

9. On August 7, 1997, Emily Graham was notified by a neighbor that there was a chasm in her backyard. At the site where the swale dropped off into the stream, a large chunk of the bank had eroded away, leaving a canyon-like gully on the Grahams' property. The gully emanated from the rip rapped swale. The exposed sides of the gully show the sandy, gravelly character of the soil. (Plaintiffs' Exhibit 3D.)

10. Emily Graham telephoned the Town Clerk, who advised her to call the Chair of the Selectboard, Robert McGee. Mr. McGee returned her call, and said he would arrange for the culvert to be cleared out and he would come by to inspect the problem, which he did.

11. The next day, the Town cleared out the culvert, which was plugged with sand. It is not clear that the fact that the culvert was plugged is what caused the erosion that resulted in the chasm.

12. The Town declined to assume immediate responsibility for the chasm on the Grahams' property. The Grahams contacted the U.S. Department of Agriculture, and soil conservation specialist Bruce Chapple came to inspect the property, help analyze the situation, and develop recommendations to handle the physical aspects of repair and future erosion control.

Repair and erosion measures were needed. If the Grahams did nothing, the process of erosion at the site would have continued, eating away more of the bank and threatening to erode the neighbors' land as well as the Grahams', and creating a risk of damage to the neighbors' well. Mr. Chapple testified, and the court so finds, that if left unattended, the erosion would have continued to advance along the swale all the way back to Morse Road.

13. The Grahams contacted two engineering firms, and were advised of a number of options for addressing the problem. Selectboard Chair Robert McGee had several discussions with the Grahams, Mr. Chapple, and the Grahams' attorney Mr. Gillies to review the options. One of the choices was to change the flow of the drainage so that it proceeded along a ditch down the side of Morse Road instead of through the Grahams' lot. This solution would have involved action on the part of the Town. The reason that the Town did not want to do this was that any water running downhill would have picked up speed and power and created a significant potential for washout downhill, thereby impacting downhill owners. Furthermore, the Town did not have legal authority or room to dissipate the speed and energy of the downhill water by diverting it elsewhere. Although the Town participated in considering possible options, it declined to act, leaving the problem to the Grahams.

14. On November 21, 1997, the Grahams entered into a contract with the engineering firm of Provan and Lorber, Inc. to design and install a structure "to handle the stormwater which is now flowing through the gully." (Plaintiffs' Exhibit 1.) Three contractors bid on the project, and the Grahams chose the lowest bidder, which was Kingsbury Construction Co., Inc. The project was to install a large drain and catch basin and a pipe designed to direct the flow of water from the swale down to the stream in a manner that avoided the steep drop off, thereby

minimizing the erosion risk.

15. The work was completed. The Grahams spent \$789 on engineering work by Provan and Lorber and \$13,500 on construction work by Kingsbury Construction for a total of \$14,289. This is a reasonable expense for work reasonably designed to prevent future erosion to the Grahams' own property, the neighboring property, and the Town road. There has been no further erosion since the structure was installed.

16. Since first calling upon the Town Clerk on August 7, 1997, the Grahams have consistently sought to have the Town assume responsibility for the problem and/or pay the costs they have incurred in doing it themselves.

17. The Town has no liability insurance to cover this type of claim.

18. The Selectboard Chair participated in several discussions concerning this claim over time beginning on August 8, 1997. The Town did not receive formal written notice of a claim within 20 days of the Grahams' discovery of the problem.

#### Conclusions of Law

In their Complaint, the Plaintiffs requested "damages for the cost of the installation and other expenses associated with the harm caused to their property by the town's failure to control the water and other damages as the Court sees fit." The legal theory on which relief was sought was not specifically identified. In its Answer, Defendant claimed sovereign immunity. Plaintiffs filed a Motion for Partial Summary Judgment on November 18, 1998, in which they claimed negligence as grounds for relief based on Clyde Morse's breach of duty through faulty design which was passed to the Town with the conveyance of the road to the Town. Defendant moved

for Summary Judgment on the basis of sovereign immunity. Both motions were denied. The case proceeded to trial. Defendant moved for a directed verdict at the close of the Plaintiffs' case, and ruling was reserved. At oral argument, Plaintiff's counsel argued that the case is really a "taking" case, and relied nonetheless on the same case first cited in the Motion for Partial Summary Judgment, *Capital Candy Co., v. Montpelier*, 127 Vt. 357 (1969). In that memo, he argued that the case was grounded in negligence. Defendant argued that it was too late to rely on a taking theory, since the case had previously been framed as a negligence case.

It is difficult to unravel the principles underlying the cases pertaining to governmental liability to landowners for problems caused by water. After review of the arguments of counsel and the cases relied on by them and consideration of the cases themselves, the court has attempted to sort out the application of the various theories from prior case law to the facts of this case.

Starting with the theory of negligence, Defendant claims that the Town's protection of roads from water and snow runoff is a governmental function and the Town is immune from suit based on the doctrine of sovereign immunity. It concedes that there are four possible exceptions to the application of sovereign immunity, but argues that none are applicable here. They are (1) negligence liability under certain circumstances as defined in prior case law; (2) negligence in the conduct of a proprietary responsibility, such as operation of a municipal sewage treatment system; (3) statutory responsibility pursuant to 19 V.S.A. §985(a); and (4) waiver of immunity through the purchase of insurance pursuant to 29 V.S.A. §1403.

The court agrees that none of the last three exceptions apply. No proprietary activity is involved. Statutory liability under 19 V.S.A. §985(a) is limited to damages from "want of repair of a bridge or culvert which the town is liable to keep in repair" and appears to apply to damage to

vehicles from travelling over the road. The facts do not support a claim of damages resulting from a failure to keep the culvert on Morse Road in repair. Furthermore, Plaintiffs did not plead statutory liability as the basis of their claim. Finally, the Town has not waived sovereign immunity through the purchase of insurance.

The issue is whether Plaintiffs have a common law negligence claim not barred by sovereign immunity based on the principles of prior case law. There are two strands of cases, the “water” cases, and other cases, some of which are founded on a governmental taking without compensation, but there is crossover between them.

In *Haynes v. Town of Burlington*, 38 Vt. 350 (1865), the Court allowed a negligence claim where a culvert that was located under a highway to direct the flow of a natural stream was allowed by the Town to become clogged. The Town had been given notice, but it failed to remedy the situation over time, resulting in damages to private property. The Court held that the Town could not claim sovereign immunity in a suit by a private landowner for damages.

In *Sanborn v. Village of Enosburg Falls*, 87 Vt. 479 (1914), the Village had laid tiles to direct surface water so as to protect public sidewalks. The drains were clogged and neglected, and notice of the problem had been given to the Village, but it had failed to make repairs. The Court stated in dictum that such a system must be built in a prudent manner so as to avoid doing unnecessary damage to adjoining landowners, and that permanent deprivation from flooding could constitute a “taking.” It dismissed Plaintiff’s claim for damage to property on the grounds that the village was acting in a public and governmental capacity.

In a more recent case, *Sargent v. Cornwall*, 130 Vt. 323 (1972), the Plaintiff owned a farm adjacent to a Town road. Three culverts ran under the road, one of which accommodated a

diverted stream. The Town allowed the culvert to become clogged, resulting in diversion of the stream and water overflow on the Plaintiff's land. The Town was notified in the winter and early spring of 1970, but did nothing until May of 1970. Due to the Town's inaction, the water flow over the Plaintiff's land continued. The trial court directed a verdict for the Town, but the Supreme Court reversed. In addressing the apparent discrepancy between *Haynes* and *Sanborn*, it found a distinction in the fact that a natural watercourse was involved in *Haynes*, whereas surface runoff was involved in *Sanborn*. This provided a rationale that supported the *Sargent* case, which involved a diverted stream. Defendant in this case relies on that distinction, and claims therefore that since the ditch, culvert, and swale involved here do not divert water from a natural streambed but are intended to accommodate surface runoff from rainstorms and snowmelt, *Sanborn* applies to bar the claim.

The court disagrees. First of all, the distinction is questionable, as the drainage of rainwater in Duxbury in August of 1997 is natural water flow in the same manner that water flowing through a streambed as a result of rain or melting snow is natural water flow. It is hard to understand how physical diversion of the flow in the one instance should have different legal consequences from diversion of the flow in the other. Indeed, some streams have irregular flow based on varying weather conditions, so the distinction seems an artificial one, not worthy of perpetuation. The more salient point is that the Court in *Sargent* reversed the trial court's dismissal of the complaint, and upheld the plaintiff's claim for recovery of damages based on negligence.

In *Capital Candy Company v. City of Montpelier*, 127 Vt. 357 (1969), the Court held that the City was not immune from a suit for damages to merchandise resulting from the flooding of

private lands in order to operate a municipal storm sewage system. The case was tried as a negligence case, and the Court treated it as such. It is not clear why Plaintiffs rely on this case in support of their claim for recovery based on a taking of property interest without compensation. Defendant claims that it does not apply because it involves the “proprietary function” exception to the doctrine of sovereign immunity.

The Plaintiffs rely on cases in which the Court has determined that a Town cannot be immune on the basis of sovereign immunity when its conduct has permanently deprived an owner of the use of property. In *Griswold v. Town School District of Weathersfield*, 117 Vt. 224 (1952), the Plaintiff owned the right to take water from a spring on the Town’s land. The water flowed through a channel to Plaintiff’s land. Defendant Town was seeking a water supply for its school on its own land, and used dynamite. The blasting destroyed the spring and channel and “thereby diverted the stream of water that had flowed into the spring so that it became practically dry and useless thereafter.” Plaintiff sued and the Town claimed sovereign immunity because providing water to the school was a governmental function for which it claimed immunity from suit. The Court disagreed on the grounds that the Town had permanently destroyed the Plaintiff’s property interest, which amounted to a taking, for which a government entity must compensate the owner.

In *Timms v. State*, 139 Vt. 342 (1981), the State’s use of road salt destroyed the Plaintiff’s well. The State claimed sovereign immunity based on the governmental function of maintaining the roads. The Court declined to permit the State to avoid responsibility on the grounds that there is no immunity for governmental deprivation of private property. The Court held that the Plaintiff could recover without a showing of negligence since the cause of action was

based on a taking of private property without compensation, citing *Griswold*.

The essential principle that the court extracts is that if a Town has notice that its conduct in carrying out its governmental function of protecting public roads is causing harm or threatens harm to private landowners, and it fails to cure the problem or prevent the harm after notice and a reasonable opportunity to act, then the Town cannot rely on sovereign immunity to shield it from liability for negligence for inaction thereafter. If private property is damaged or threatened, the Plaintiff may sue on grounds of negligence. If the property is destroyed or rendered useless, the Plaintiff may also claim that the State has engaged in a taking without payment of compensation. Sovereign immunity will not shield the government from liability in either circumstance.

This is sound public policy in that the government is not exposed to liability for harm to private property when it exercises a governmental function as long as it has no notice of threatened or potential harm to private property, or it does not destroy a private property interest. Once it has notice of threatened damage to private property, it acquires a duty of care to avoid the harm. If damage is so extensive that the property interest is virtually destroyed, then compensation is required as it is in any circumstance when private property is taken by the government for the benefit of the public as a whole.

Applying this principle to the case at bar, the first question is whether Plaintiffs have proved that as of August 7, 1997, the Town had notice that the design and layout of the ditch, culvert, and swale was faulty and would cause damage to private landowners during strong water runoff if unattended. The Plaintiffs have not proved this claim. The Town had no reason to know of any design defect at this date, if indeed there is one. The road as constructed had been approved by the State Agency of Transportation without any such issue having been raised, and

the road had been in place for a period of years without any problem. Emily Graham had never even observed any running water in the ditch, culvert, or swale. No notice of a potential problem had been given to the Town. Thus, as of that date, Plaintiffs cannot prove a breach of duty constituting negligence on the part of the Town, and the claim for resulting damages fails.

The court declines to adopt Plaintiffs' counsel's argument that the Town acquired any liability that Mr. Morse, as the developer responsible for the design, might have to the Plaintiffs. By acceptance of a road as a public road after review and approval of State highway officials, the Town did not become an insurer of all possible damage to landowners resulting from project design. Plaintiffs must still prove negligence on the part of the Town through its own acts, and they have not done so with respect to negligent design. They have not proved that the Town knew of any design problems when it acquired Morse Road, or even that it had any reason to know that there were any design problems.

The analysis does not end there, however. The facts establish that on August 8, 1997, the Plaintiffs gave the Town specific notice of an erosion problem at the swale. The swale was an integral part of the Town's system of protecting Morse Road from drainage water. In the ensuing weeks, through conversations that the Selectboard Chair had with Mr. Chapple, a government soil conservation expert contacted by the Grahams, and the Grahams and their agents, the Town was on clear notice that its method of disposing of runoff water along Morse road threatened further harm to the Grahams' property, to their neighbors' property, and to Morse Road itself. The Town was on notice of not only a claim for past damage to the Plaintiffs' property, but of threatened future damage to the Plaintiffs' and other lands.

The Town considered the options identified by the Grahams and Mr. Chapple for changing

the manner of disposing of stormwater. The reason that the Town decided against running such water down a ditch alongside Morse Road was not that it had no responsibility to dispose of the stormwater after it reached the culvert, but that it wished to avoid impacting downhill owners, and it had no lands to which it could divert the water as it headed downhill. Therefore it left the problem in the hands of the Grahams.

This raises the question of whether the Town had the right or responsibility to use the Grahams' land for the purpose of disposing of drainage water from the opposite side of Morse Road. The facts do not show that Mr. Morse granted the Town a written easement to maintain the swale on lot 6. The court infers that he did not. Nonetheless, his design for the road required diversion of stormwater runoff into the culvert and through the swale to the stream. Although the design did not change the general direction of the runoff of surface water, it changed its course and channeled its flow. Once it passed through the culvert, there was nowhere for it to go but through the rip rapped swale that was constructed to coordinate with the culvert. When the road was conveyed to the Town, the Town should also have acquired an easement over the swale so that it could maintain the system by which it protected Morse Road from seasonal water and snow runoff and periodic drainage of surface water. Certainly a Town could not start fresh to dispose of drainage water flowing toward a road by simply constructing a ditch and culvert under a road, and let the water flow across a private owner's adjoining land, leaving the landowner to deal with its consequences.

Mr. Morse had constructed a system for diverting drainage water that would otherwise have run over Morse Road. That system included the swale and rip rap across lot 6 as an integral part of its operation to divert the drainage water. When he conveyed the road to the Town, he

apparently did not clearly convey a maintenance easement on lot 6, but one must be implied as a matter of law. Otherwise, Mr. Morse himself, when he owned the road, and the Town, as successor owner to the road, would hold the responsibility to maintain the ditch and culvert, but would have no ability to maintain the swale into which the water flowed from the ditch and culvert. It is unreasonable that the responsibility for maintaining the swale for the benefit of the Town would fall on the owner of lot 6. The implied easement is necessary because the Town clearly has the responsibility for protection of the Town road from drainage runoff, and it cannot perform that function fully without an easement to maintain the swale. Therefore, the court concludes that when Mr. Morse conveyed the road to the Town, he conveyed with it an implied easement for maintaining the ditch and culvert *and* swale system on lot 6, and when he conveyed lot 6 to the first grantee, that grantee and his or her successors, including the Grahams, took lot 6 subject subject to the implied easement for maintenance of the swale. It is noteworthy that the swale and rip rap are visibly connected to the ditch and culvert, and were at the time of the sale to the Grahams.

Thus, the Town had not only the right but the responsibility to maintain the swale as part of its obligation to protect Morse Road from water runoff. Once the Grahams notified the Town in the fall of 1997 that failure to attend to the gully on their property emanating from the swale threatened future harm to their property, neighboring property, and Morse Road itself, the Town had the obligation to undertake repairs and maintenance to prevent such damage. This arose from its obligation under *Haynes* and *Sargent* to act after notice to prevent damage to private property adjoining diverted water, and from its obligation to prevent harm directly to Morse Road itself. By failing to act after this notice to prevent future harm, the Town became negligent, even though

it was not negligent up to that point. Furthermore, the Town cannot claim sovereign immunity with respect to such negligence, according to the fundamental principle underlying *Haynes* and *Sargent* as described above. The *Sanborn* case is not controlling for the reasons previously described.

The Grahams undertook to prevent future harm when the Town would not. They did so by installing and paying for a reasonable erosion control measure. They have been damaged by the Town's negligence by the amount they paid on the Town's behalf to exercise the Town's responsibility. Although the work also benefitted their own property in that the gully was repaired, the basis for recovery is not the initial damage to their property, but the costs they incurred to prevent future harm when the Town negligently failed to do so on its own. The fact that the same work restored their own property does not relieve the Town of its responsibility.

The court would not normally allow a landowner to exercise a governmental function, and then claim the cost for it from the Town. In this case, the Grahams did not contract to have the work done until November 21, 1997, which was three and one-half months after the Grahams gave notice to the Town to act, and after the Grahams had done considerable work to help the Town analyze the best solution. The work was not done until the following month. This is approximately the same period of time as the Town's inaction in *Sargent*, which the Court deemed to constitute a sufficient length of time to make inaction actionable against the Town as negligence. It is reasonable for the Grahams to have gone ahead to have the work done after it was clear that the Town was not going to do so, since by proceeding they were able to mitigate damages by preventing greater harm. It was also reasonable for them to have proceeded to have the work completed prior to winter, since snowmelt could have made the threatened harm actual.

For the reasons described above, Plaintiffs are entitled to recovery of the cost of installation of erosion control measures associated with the Town's failure to take action to prevent harm to their property and the property of others arising from the Town's function of protecting Morse road from water runoff.

The court declines to adopt Plaintiffs' theory of "taking" as the basis for liability in this case. A taking is a permanent physical damage to property to the point of depriving its owner of its beneficial use. *Griswold*, 117 Vt. at 226. In *Griswold*, the Plaintiff's only property interest, a water supply, was destroyed. In *Timms*, the Plaintiff's well was destroyed by road salt. The Town did not permanently deprive the Grahams of the use of the property they had purchased. Part of the bank on the property was lost to erosion, and the condition of the swale was such that further erosion was likely. The Town failed to take measures to prevent further harm once the Grahams had given them notice of the necessity of doing so. Thus, the Town lost its immunity from suit based on the doctrine of sovereign immunity, and became liable to the Grahams for the cost of installation incurred by the Grahams as a result of that negligence.

Although the amount spent by the Grahams was readily ascertainable, the Town's liability was not readily apparent in the fall of 1997. The claim is not based on a breach of contract. The case law on government liability for negligence in relation to water diversion was confusing and difficult to apply to the facts of this case in order to determine the nature and extent of the Town's liability. Therefore, the court deems that prejudgment interest should not be at the statutory rate of 12%. Nonetheless, the Grahams are entitled to reasonable interest for the expenditure they made on behalf of the Town two years ago. The court exercises its discretion to award interest from December 31, 1997 to December 31, 1999 at the annual rate of 6%.

Therefore, the Plaintiffs are entitled to interest of \$1,714.68. Any interest that accrues after December 31, 1999 will be at the statutory rate of 12%:

ORDER

Based on the foregoing reasons,

Defendant's Motion for a Directed Verdict is DENIED; and

Judgment is entered for the Plaintiff in the amount of \$16,003.68.

Dated this 3rd day of January 2000.

Mary Miles Teachout  
Hon. Mary Miles Teachout  
Superior Judge, presiding