UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

RICHARD & WENDY DEVILLIER, et al.,	§	Civil Action No. 3:20-cv-00223
Plaintiffs,	§	
v.	§	Jury Trial Demanded
THE STATE OF TEXAS,	§	
Defendant.	§	

PLAINTIFFS' NOTICE OF SUPPLEMENTAL AUTHORITY

Plaintiffs Richard Devillier, et al. file this notice of supplemental authority to call the Court's attention to the recent opinion of the Texas Supreme Court in *Texas Dep't. of Transp. v. Self*, 690 S.W.3D 12 (Tex. 2024). A copy of the *Self* decision is submitted as Exhibit A hereto.

In *Self*, the plaintiffs filed an inverse condemnation action after employees of a Texas Department of Transportation ("TxDOT") subcontractor cut down trees on the Selfs' property outside the boundaries of the State's right-of-way easement. Exhibit A at *17. TxDOT asserted that, while it had acted with intentionality in respect of cutting down the trees, its actions could not constitute a taking under Texas law because TxDOT had not subjectively intended to take the Selfs' specific property. Exhibit A at *29 ("In TxDOT's view, no compensation is owed because the Selfs cannot show it "knew that the trees at issue were ... [not] in the right of way."). The trial court denied TxDOT's plea to the jurisdiction on the inverse condemnation claim but the court of appeals reversed that decision holding "there was no evidence that TxDOT intentionally destroyed the Selfs' property." Exhibit A at *19.

In reversing the court of appeals, the Texas Supreme Court provided an extensive

discussion of the intent required to maintain an inverse condemnation claim under Art. I § 17 of the Texas constitution. Exhibit A at *26-32. Significant to this case, in *Self* the Court laid to rest the State's assertion that an Art. I § 17 claim requires proof that the State must have had a subjective intent to cause harm to, or know that a specific harm to, a specific property was substantially certain to occur from the act which caused the alleged taking. *Compare* Exhibit A at *30 ("The words of our Takings Clause do not remotely suggest that a property owner must prove the government had a particular "impetus" or mindset regarding whether its intentional taking of property for public use was permissible."), *with* ECF 134, *Defendant the State of Texas's Motion to Dismiss for Lack of Subject Matter Jurisdiction, for Judgment on the Pleadings, and Motion for Summary Judgment* at 19 (filed Apr. 27, 2023) (asserting intent requirement requires a showing "The government must know that 'a specific act is causing identifiable harm' or know that 'specific property damage is substantially certain to result from an authorized government action.'") (emphasis added). The opinion in *Self* confirms Plaintiffs' reading of the dual standards of intent announced in *City of Dallas v. Jennings*, 142 S.W.3d 310 (Tex. 2004), and that both are met in this case.

1. The First Standard: TxDOT Intended To Damage Plaintiffs' Properties.

Justice Busby, writing for a unanimous Court, noted the dual nature of the intent standard and that the Selfs' claim satisfied the first measure of intent because "TxDOT directed the trees' destruction as part of exercising its authority to maintain the highway right-of-way for public use. That is all the plain text of Article I, Section 17 and our precedents require to maintain a constitutional claim of compensation for inverse condemnation." Exhibit A at *27.

So too here. In August 2017, Tropical Storm Harvey brought rainwater that ran off from the surrounding floodplain. That water got detained by the state's Project, intentionally built by TxDOT, exactly in the manner TxDOT knew it would. And extensive flooding resulted by the detention of water. In September 2019, when Tropical Storm Imelda struck, the State had continued its construction of the improvements to Interstate Highway 10 after seeing the prediction of its own hydraulic engineers had come true during Tropical Storm Harvey a mere 24 months earlier.

The State's intentional use of the "VAST natural detention" north of the highway—properties owned by Plaintiffs—to store rainfall runoff retained by its Project in order to protect properties downstream from flooding was therefore a known and intended taking in Harvey and, without debate, by the time of Imelda. *See* ECF 109, *Plaintiff's Motion For Partial Summary Judgment*, Exhibit C (Expert Report of Dr. Michael Slattery) at 28. The intentional use of Plaintiffs' upstream properties for storage of rainfall runoff to protect properties downstream of its project meets the first test articulated in both *Jennings* and *Self*.

2. The Second Standard: TxDOT Knew Harm Was Substantially Certain To Occur.

Justice Busby also discussed the second standard for finding the requisite intent, noting it includes:

> "cases in which the government's intentional conduct is not itself a physical taking, damaging, or destruction of property but the conduct initiates a chain of events that 'eventually contributes to' such harm. In that context, the property owner must show that the government (1) engaged in an affirmative act or course of conduct that resulted in the physical taking, damaging, destruction, or application of property; and (2) did so with the necessary intent under the second *Jennings* standard—that is, with knowledge that either the conduct was causing identifiable harm or specific property damage was substantially certain to result."

Exhibit A at 28 (citations omitted).

That the *Jennings* standard does not require subjective intent to take, damage, or destroy a specific piece of property—but rather (as *Jennings* itself states) to cause a specific type of harm), is further confirmed by the Supreme Court's rejection of that very argument TxDOT asserted in *Self*, which TxDOT asserts here:

> [T]he court of appeals held the Selfs were required to prove "that TxDOT intended to cut down those of the Selfs' trees beyond the right-of-way" and they failed to do so, as TxDOT simply "assumed trees on the road side of the fence were in the right-of-way." Focusing on what it called the "impetus of" TxDOT's intentional act, the court saw "no evidence that TxDOT had any inkling that it was damaging the Selfs' trees when the area up to their fence was cleared." TxDOT doubles down on this position in our Court, arguing that it believed its instruction to clear trees between the fences would ensure those trees were within its right-of-way easement. In TxDOT's view, no compensation is owed because the Selfs cannot show it "knew that the trees at issue were . . . [not] in the right of way."

Exhibit A at 29 (emphasis added).

Drawing on prior decisions from both Texas and federal courts, the Supreme Court rejected the assertion that the second *Jennings* standard required proof that the State acted with "subjective awareness" it would take, damage, or destroy a specific parcel of property; the only proof needed is that "the property owner prove intentional government conduct that either is a taking itself or that the government knows is substantially certain to result in a taking."[1] As the Court explained, the second *Jennings* standard ensured "that when there is a causal chain

[1] In the opinion, the Court equated the second *Jennings* standard with that applied by federal courts considering claims under the federal Takings Clause of the Fifth Amendment. E.g. Exhibit A at *30, n.27 (quoting *Labruzzo v. United States*, 144 Fed. Cl. 456, 474 n.13 (2019) ("Under either an intentional taking or intentional conduct substantially certain to result in a taking, the focus is on the nature of the government's invasion, not the government's mindset about the permissibility of its invasion.") (cleaned up).

linking the intentional government conduct to the eventual property damage, that damage occurred for 'public use' because the government was aware harm was substantially certain 'and yet determined that the benefit to the public outweighed' it." *Id.* at 28 (cleaned up, emphasis added, citations omitted).

That is precisely what happened here.[2] And, in *Self*, the Texas Supreme Court has rejected TxDOT's twisting of precedent to excuse its actions.

Dated: August 8, 2024

Respectfully submitted,

/s/ Daniel H. Charest

Daniel H. Charest (SBN: 24057803)
E. Lawrence (Larry) Vincent
(SBN: 20585590)
BURNS CHAREST LLP
900 Jackson Street, Suite 500
Dallas, Texas 75202
Telephone: (469) 904-4550
Facsimile: (469) 444-5002
dcharest@burnscharest.com
lvincent@burnscharest.com

Charles Irvine (SBN: 24055716)
IRVINE & CONNER, PLLC
4709 Austin Street
Houston, Texas 77004
Telephone: (713) 533-1704
Facsimile: (713) 524-5165
charles@irvineconner.com

[2] As discussed in greater detail in Plaintiffs' Motion for Partial Summary Judgment, during the design phase of the Project, the State was told by its hydraulic engineers that because the Project would prevent the natural north-to-south flow of rainfall runoff, additional drainage capacity was required to prevent the flooding of private property on the north (upstream) side of the highway by that detained water. But instead of trying to ameliorate this result, the State instead chose to use Plaintiffs' private property upstream of the Project as a "natural detention area" to protect properties south (downstream) of the highway from flooding. *See* ECF 109 at 8-9, n.13.

Lawrence G. Dunbar (SBN: 06209450)
DUNBAR LAW FIRM, PLLC
13121 Louetta Road, #1240
Cypress, Texas 77429
Telephone: (281) 868-7456
Facsimile: (281) 868-7463
ldunbar@dunbarlawtx.com

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I certify that that on August 8, 2024, this document was filed electronically via the Court's CM/ECF system, causing electronic service upon all counsel of record.

/s/ Daniel H. Charest
Daniel H. Charest