COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-14-00299-CV

TEXAS DEPARTMENT OF TRANSPORTATION — APPELLANT

V.

BOB HANKINS — APPELLEE

FROM THE 97TH DISTRICT COURT OF MONTAGUE COUNTY
TRIAL COURT NO. 2010-0388M-CV

MEMORANDUM OPINION[1]

A jury found in favor of Appellee Bob Hankins on his inverse condemnation claim against Appellant Texas Department of Transportation (TXDOT) and awarded Hankins $34,000 in damages. The trial court entered judgment on the jury's verdict, and TXDOT has appealed. Because we have determined on our

[1]*See* Tex. R. App. P. 47.4.

own motion that Hankins lacked standing to bring this suit, we reverse the trial court's judgment and render judgment dismissing the case.

Background

Hankins is the current owner of a piece of real property located at 301 Decatur Street, Bowie, Texas (the property). On March 17, 1955, Nannie Trout conveyed a right-of-way easement across the property to the State of Texas. The conveyance document was filed and recorded in the Montague County property records shortly thereafter. Later that same year, the Texas Highway Department installed an underground drainage pipe in the easement.

When Hankins purchased the property in the early 1980s, there was a building on the property that was being used as a convenience store, gas station, and office. The convenience store closed in the late 1980s or early 1990s, and the building fell into disrepair. In March 2009, the City of Bowie sent a letter to Hankins notifying him that the building violated the city code because it was an unsafe structure. Hankins decided to demolish the building. A demolition contractor alerted Hankins to the existence of the drainage pipe.

In October 2010, Hankins sued TXDOT for inverse condemnation, alleging that he had no knowledge or notice of the drainage pipe when he purchased the property, that the construction of the pipe was unauthorized and undocumented, that no right-of-way or other conveyance authorizing the construction of the pipe was on file in the Montague County property records, and that the pipe was not open and obvious. Hankins further alleged that the pipe had collapsed, causing

irrevocable damage to the building, and that the continued existence of the pipe rendered his property "virtually worthless."

An affidavit attached in support of one of TXDOT's pleas to the jurisdiction revealed that an employee from the City of Bowie had crawled through the entire length of the drainage pipe in November 2010 and observed that the pipe had not collapsed and that "there was nothing wrong with [it]." TXDOT also attached a copy of the right-of-way easement executed by Nannie Trout that was filed and recorded in the Montague County property records.

In his live pleading at the time of trial, Hankins maintained that the pipe collapsed and thereby damaged the building, but he acknowledged the existence of the 1955 conveyance. He alleged that Nannie Trout was only a co-tenant at the time of the conveyance and that "[a]n easement from a co-tenant does not bind the interest of other co-tenants, and in this case[,] the Plaintiff's fee simple ownership of the Property in its entirety was only burdened by the partial interest easement set forth above." Hankins further alleged that the construction and subsequent collapse of the pipe constituted a taking, damaging, or destroying of his property for public use without adequate compensation. In addition to "[j]udgment against Defendant for an amount to compensate [for] the taking (including the reverse condemnation)," Hankins pled for damages for the "reduced market value because of the unlawful and improper existence of the co-tenant easement and the construction of the pipeline."

At trial, Hankins abandoned his claim for damage to the building and sought damages only for the loss of market value to the property. Hankins, a professional land surveyor, the owner of a local title company, and a local real estate broker testified. Both Hankins and the real estate broker testified as to the property's value.

Hankins also testified that when he purchased the property, he did not know about the easement and the presence of the drainage pipe. Hankins thought that a title search was done at the time, and he did not purchase title insurance. According to Hankins, he cannot develop the property because of the drainage pipe underneath it. Hankins testified that he can do "[v]irtually nothing" with the property, not even tear down the building. Because the property cannot be developed, Hankins thought selling it would be difficult.

Patrick Walters, a land surveyor, located the 1955 conveyance in the property records and created a plat delineating the location of the easement on the property.[2] He stated that "[n]ot just anyone" could locate the easement in the deed records and that it takes "a lot of training and practice to find that." He further testified that the drainage pipe was not visible from the surface, and the only thing visible regarding drainage was a four foot by four foot drainage inlet adjacent to the property. As a surveyor, the inlet would have made him want to investigate whether there was something under the property.

[2]The plat was entered into evidence.

Carla Swofford, the owner of a title company in Bowie, testified that her company keeps a copy of all Montague County real property records dating back to 1893 organized by property description. Swofford created a "certified run sheet" that listed all instruments concerning the property filed of record since February 7, 1927. Swofford stated that her research revealed that the property was conveyed to J.P. Trout in 1927 and that Nannie Trout conveyed a right-of-way easement to the State of Texas in 1955.[3] Nannie Trout died in 1961, and the inventory and appraisement filed in her probate proceedings listed the property as owned jointly by Nannie Trout and the heirs of J.P. Trout, with Nannie Trout and the heirs each owning a one-half interest. In 1962, the heirs of J.P. Trout and the heirs of Nannie Trout conveyed the property to a third party. Swofford admitted that she did not know for certain what interest Nannie Trout had in the property when she conveyed the easement in 1955.

Swofford further testified that the conveyance document executed by Nannie Trout in 1955 was filed in the Montague County property records, but it would have been very difficult for a layperson to find it there. She further testified that she had difficulty locating it in the title company's records.

The jury found by a preponderance of the evidence that TXDOT "took actions with regard to the construction of the storm water drainage pipe without consent and with knowledge that those actions were causing identifiable harm or

[3]Swofford speculated that J.P. Trout and Nannie Trout were married.

with knowledge that a specific property damage was substantially certain to result" and that "the actions of [TXDOT] . . . in regard to the storm water drainage pipe proximately caused a damaging of Plaintiff's property for public use."[4] The jury further found that the difference between the market value[5] of Hankins's property immediately before and immediately after the "damaging of [Hankins's] property" was $34,000.

The trial court entered judgment on the jury's verdict, and TXDOT appealed. After this case was submitted on briefs, this court asked the parties to submit supplemental briefing on the issue of Hankins's standing to bring his inverse condemnation claim. Hankins and TXDOT each submitted a supplemental brief.

Applicable Law

Standing is a component of subject matter jurisdiction that cannot be waived and may be raised for the first time on appeal by the parties or by the court. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 445–46 (Tex. 1993). We consider Hankins's standing under the same standard by which we review subject matter jurisdiction generally, which "requires the pleader to allege

[4]The jury also responded "no" in response to the question, "Has [TXDOT] shown by a preponderance of the evidence that [it] cultivated, used, or enjoyed in an open and obvious matter the property in which the storm water drainage pipe is located for a period of at least ten years beginning in 1955?"

[5]The charge defined "market value" as "the amount that would be paid in cash by a willing buyer who desires to buy, but is not required to buy, to a willing seller who desires to sell, but is under no necessity of selling."

facts that affirmatively demonstrate the court's jurisdiction to hear the cause." *Id.* at 446 (citing *Richardson v. First Nat'l Life Ins. Co.*, 419 S.W.2d 836, 839 (Tex. 1967)). When an "appellate court reviews the standing of a party sua sponte, it must construe the petition in favor of the party, and if necessary, review the entire record to determine if any evidence supports standing." *Id.*

An inverse condemnation occurs when a governmental entity appropriates or invades the property or when it unreasonably interferes with the landowner's right to use and enjoy the property, such as by restricting access or denying a permit for development. *Westgate, Ltd. v. State*, 843 S.W.2d 448, 452 (Tex. 1992) (op. on reh'g). To maintain a cause of action for inverse condemnation, the plaintiff must prove (1) an intentional governmental act, (2) resulting in the taking, damaging, or destruction of the plaintiff's property, (3) for public use. *Wilbert Family Ltd. P'ship v. Dallas Area Rapid Transit*, 371 S.W.3d 506, 510 (Tex. App.—Dallas 2012, pet. dism'd) (citing *Sw. Bell Tel., L.P. v. Harris Cty. Toll Rd. Auth.*, 282 S.W.3d 59, 61 (Tex. 2009)).

In order to have standing to sue for inverse condemnation, a party must have a vested property interest in the subject property at the time of the alleged taking. *Hollywood Park Humane Soc'y v. Town of Hollywood Park*, 261 S.W.3d 135, 140 (Tex. App.—San Antonio 2008, no pet.); *Tex. S. Univ. v. State St. Bank & Trust Co.*, 212 S.W.3d 893, 903 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (op. on reh'g); *see Allodial Ltd. P'ship v. N. Tex. Tollway Auth.*, 176 S.W.3d 680, 683 (Tex. App.—Dallas 2005, pet. denied) ("Generally, a claim

for damage to property belongs to the entity who owns the property at the time of the injury." (citing *Abbott v. City of Princeton*, 721 S.W.2d 872, 875 (Tex. App.—Dallas 1986, writ ref'd n.r.e.), *disapproved of on other grounds by Schneider Nat'l Carriers, Inc. v. Bates*, 147 S.W.3d 264, 281 & n.79 (Tex. 2004))). A vested property right is one that has been fixed by a court's final judgment or that has some definitive, rather than merely potential existence. *Hollywood Park*, 261 S.W.3d at 140; *Tex. S. Univ.*, 212 S.W.3d at 903.

Hankins's Standing

Hankins alleged in his pleadings that the intentional governmental act that resulted in the taking, damaging, or destruction of his property for public use was the State's installation of the pipe in 1955, which was approximately thirty years before he acquired the property. In his supplemental brief, Hankins posits that "[a] plaintiff has standing to bring an inverse condemnation claim for the taking of and damage to property when the taking occurred prior to plaintiff's purchase of the property if the taking was not known to any prior owner in the chain of title and was discovered by the plaintiff subsequent to purchase." He asserts that because the pipe was unknown to any prior owner in the chain of title and to him at the time he purchased the property, there was no injury, i.e. diminution in market value, until after the discovery of the pipe. Hankins argues that because he was the owner of the property at the time of the injury—the diminution in market value that resulted from the installation of the pipe—he has standing. He relies on two United States Supreme Court cases, *Palazzolo v. Rhode Island*,

533 U.S. 606, 121 S. Ct. 2448 (2001), and *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 107 S. Ct. 3141 (1987), and a case from the Oklahoma supreme court, *Cox Enters., Ltd. v. Phillips Petroleum Co.*, 550 P.2d 1324 (Okla. 1976), to support this contention.

Palazzolo involved a parcel of coastal property purchased in 1959 by a corporation in which Palazzolo was a shareholder. 533 U.S. at 613, 121 S. Ct. at 2455. Palazzolo then bought out the other shareholders and became the sole shareholder. *Id.* at 613, 121 S. Ct. at 2455. In 1971, Rhode Island passed legislation creating the Rhode Island Coastal Resources Management Council (the Council), an agency charged with protecting Rhode Island's coastal properties. *Id.* at 614, 121 S. Ct. at 2456. The Council promulgated regulations that designated the salt marshes on the property as protected coastal wetlands, which had the effect of limiting development of the property. *Id.* at 614, 121 S. Ct. at 2456.

In 1978, the corporation's charter was revoked, and title to the property passed to Palazzolo. *Id.* at 614, 121 S. Ct. at 2456. Palazzolo filed applications to develop the property, which the Council rejected. *Id.* at 614–15, 121 S. Ct. at 2456. He filed an inverse condemnation claim, asserting that Rhode Island's wetland regulations, as applied by the Council to his property, amounted to a taking without compensation. *Id.* at 615, 121 S. Ct. at 2456.

The Rhode Island supreme court determined that Palazzolo had "no right to challenge regulations predating 1978, when he succeeded to legal ownership

of the property." *Id.* at 616, 121 S. Ct. at 2457. In addressing this issue, the Supreme Court stated,

> When the Council promulgated its wetlands regulations, the disputed parcel was owned not by petitioner but by the corporation of which he was sole shareholder. When title was transferred to petitioner by operation of law, the wetlands regulations were in force. The state court held the postregulation acquisition of title was fatal to the claim for deprivation of all economic use and to the *Penn Central* claim. While the first holding was couched in terms of background principles of state property law, and the second in terms of petitioner's reasonable investment-backed expectations, the two holdings together amount to a single, sweeping, rule: A purchaser or a successive title holder like petitioner is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking.
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> . . . Were we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.

Id. at 626–27, 121 S. Ct. at 2462–63 (citations omitted). But the Court then went on to explain why a regulatory takings claim should be treated differently than a physical takings claim:

> Direct condemnation, by invocation of the State's power of eminent domain, presents different considerations from cases alleging a taking based on a burdensome regulation. <u>In a direct condemnation action, or when a State has physically invaded the property without filing suit, the fact and extent of the taking are known. In such an instance, it is a general rule of the law of eminent domain that any award goes to the owner at the time of the taking, and that the right to compensation is not passed to a subsequent purchaser.</u> A challenge to the application of a land-use regulation,

> by contrast, does not mature until ripeness requirements have been satisfied, under principles we have discussed; until this point an inverse condemnation claim alleging a regulatory taking cannot be maintained. It would be illogical, and unfair, to bar a regulatory takings claim because of the post-enactment transfer of ownership where the steps necessary to make the claim ripe were not taken, or could not have been taken, by a previous owner.

Id. at 628, 121 S. Ct. at 2463 (emphasis added) (citations omitted).

In *Nollan*, the Supreme Court considered whether it was consistent with the Takings Clause for a state regulatory agency to require oceanfront landowners to provide lateral beach access to the public as a condition for a development permit. 483 U.S. at 827–29, 107 S. Ct. at 3143–44. One of the dissenting opinions pointed out that it was the California Coastal Commission's policy to require the condition and that the Nollans, who purchased the property after the policy was in effect, were "on notice that new developments would be approved only if provisions were made for lateral beach access." *Id.* at 859–60, 107 S. Ct. at 3160 (Brennan, J., dissenting). But the majority rejected this proposition:

> Nor are the Nollans' rights altered because they acquired the land well after the Commission had begun to implement its policy. So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot.

Id. at 833 n.2, 107 S. Ct. at 3147 n.2.

In *Cox Enterprises*, the Oklahoma Corporation Commission determined in 1932 that Independent Pipeline Company was entitled to exercise the right of eminent domain in Oklahoma. 550 P.2d at 1325–26. Independent Pipeline

Company was not required to file a plat of its proposed oil pipelines. *Id.* at 1326. In September 1971, Cox Enterprises purchased a piece of real property beneath which Independent Pipeline Company had buried a pipeline in 1932. *Id.* at 1325. Cox Enterprises discovered the pipeline after it had purchased the property and learned that OKC Pipeline, Inc. (OKC) was using the pipeline to transport oil. *Id.* Cox Enterprises sued OKC for trespass and inverse condemnation. *Id.*

OKC argued that Cox Enterprises could not bring an inverse condemnation proceeding because it was not the owner of the property at "the time of the appropriation." *Id.* The court stated that generally, "the owner of the property at the time the pipeline is placed thereon is the only one who has a cause of action for damages in inverse condemnation." *Id.* at 1326 (citing *Rogers v. Oklahoma City*, 120 P.2d 997, 998 (Okla. 1942), *overruled on other grounds by Allen v. Transok Pipe Line Co.*, 552 P.2d 375, 379 (Okla. 1976)). The court explained that an exception to the general rule exists where the pipeline was buried, the property owner had no knowledge of the pipeline's existence when he purchased the property, there was no indication that he paid less because of the existence of the pipeline, and there was no evidence that the former owner had consented to the laying of the pipeline or had any knowledge thereof. *Id.* (citing *St. Louis & San Francisco R.R. Co. v. Mann*, 192 P. 231, 233 (Okla. 1920)). The court found Cox Enterprises stated a cause of action for inverse condemnation under the exception because neither it nor its predecessors in title were aware of the existence of the pipeline until after it purchased the property. *See id.* at 1326–27.

We do not find the Supreme Court's holdings in *Palazzolo* and *Nollan* controlling here because each of those cases involved a regulatory taking as opposed to a physical taking by the government. Nor do we find the Oklahoma supreme court's decision in *Cox Enterprises* determinative in this case. Here, Nannie Trout granted the State a right-of-way easement, and there is no pleading or proof that no prior owner in the chain of title knew about the pipe. At the very least, Nannie Trout knew because she conveyed the right of way to the State. Moreover, there is no dispute and the evidence shows that the conveyance instrument was properly recorded in the Montague County property records, which is notice to all persons of the existence of the instrument. *See* Tex. Prop. Code Ann. § 13.002 (West 2014) ("An instrument that is properly recorded in the proper county is: (1) notice to all persons of the existence of the instrument; and (2) subject to inspection by the public.").

Neither party cites nor have we found a Texas case with a fact pattern similar to this case. However, we find *Allodial* to be persuasive. In that case, access to the subject property from an access road was cut off due to the North Texas Tollway Authority's (NTTA) construction of a retaining wall and changing of the access road's elevation as part of a tollway project. 176 S.W.3d at 682. The owner of the property at the time knew that a retaining wall "would damage the property." *Id.* Allodial purchased the property sometime after the retaining wall was complete and sued NTTA for inverse condemnation. *Id.* The trial court

granted summary judgment for NTTA because Allodial lacked standing to sue and because the statute of limitations had expired. *Id.*

In analyzing Allodial's standing, the court of appeals focused on whether the "exchange agreement" between the prior owner and Allodial assigned the inverse condemnation cause of action to Allodial. *See id.* at 683. But its analysis was based on the principle that a "claim for damage to property belongs to the entity who owns the property at the time of the injury." *Id.* (citing *Abbott*, 721 S.W.2d at 875).

In this case, the alleged damage occurred when the drainage pipe was constructed in 1955, not when Hankins discovered its existence. *Cf. Waddy v. City of Houston*, 834 S.W.2d 97, 103 (Tex. App.—Houston [1st Dist.] 1992, writ denied) ("The cause of action against one who enters upon land under an adverse claim accrues, and the limitations period begins to run, when the entry upon the land is made."); *Allen v. City of Texas City*, 775 S.W.2d 863, 866 (Tex. App—Houston [1st Dist.] 1989, writ denied) (stating that "[a] cause of action for damaging land does not lie for anticipated future damages that have not yet occurred, but accrues at the time the land is actually damaged"). Because Hankins did not own the property when the State constructed the pipe, he lacks standing to bring an inverse condemnation claim. *See Hollywood Park*, 261 S.W.3d at 140; *Tex. S. Univ.*, 212 S.W.3d at 903.

Conclusion

Because Hankins lacks standing to bring his inverse condemnation claim, we reverse the trial court's judgment and render judgment dismissing this case for lack of jurisdiction. *See* Tex. R. App. P. 43.2(c), 43.3.

/s/ Anne Gardner
ANNE GARDNER
JUSTICE

PANEL: GARDNER and SUDDERTH, JJ.; and CHARLES BLEIL (Senior Justice, Retired, Sitting by Assignment).

DELIVERED: August 31, 2016