

# Inverse Condemnation/Municipal Drainage Pipe Approval: Arkansas Court of Appeals Addresses Taking Claim



**Walter Wright, Jr.**  
wwright@mwlaw.com  
(501) 688.8839

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The Arkansas Court of Appeals (“Court of Appeals”) addressed in a February 15th Opinion issues arising out of an inverse condemnation claim. See *City of Sherwood v. Clint Bearden*, 2023 Ark. App. 67.

The inverse condemnation claim involved the City of Sherwood, Arkansas’s, appeal of a drainage pipe system.

Becky and Dwight McPherson (collectively, “McPhersons”) filed a Complaint for Inverse Condemnation against the City of Sherwood (“Sherwood”) in 2018. They alleged that Sherwood placed drainage pipes under their property.

The Complaint alleged:

- The Sherwood pipes were not sufficient in size to handle rainwater in the area
- The failure to place properly sized pipes near the McPhersons’ property caused repeated flooding

As a result, the McPhersons alleged that Sherwood’s actions had:

... resulted in a “taking” due to the “continuous and systematic trespass of water’ onto their property.

Sherwood denied any wrongdoing and asserted affirmative defenses that include statutory immunity.

Sherwood subsequently filed a Motion for Summary Judgment arguing immunity from liability pursuant to the tort-immunity statute (i.e., because of an argument that the inverse-condemnation claim actually sounded in tort) and that it did not install the drainage pipes.

The McPhersons responded that they had timely and sufficiently alleged a claim for inverse condemnation that contained evidence that Sherwood had created the flooding problem through:

- Approval of the drainage system
- Failure to fix the problem despite a duty to maintain the drainage system
- A valuation service letter valuing their dwelling with unrepaired damages at zero

The Circuit Court denied Sherwood’s Motion for Summary Judgment holding that the Complaint was not barred by statutory immunity. The basis for the holding was that the plaintiffs had met their burden of proof on the issue of inverse condemnation and that there is a material fact on the statute of limitation issue.

On appeal Sherwood again argued that the McPhersons alleged a tort claim from which the City is immune.

The Appellate Court recites Ark. Code Ann. § 21-9-301(a) which states:

[i]t is declared to be the public policy of the State of Arkansas that all counties, municipal corporations, school districts, public charter schools, special improvement districts, and all other political subdivisions of the state and any of their boards, commissions, agencies, authorities, or other governing bodies shall be immune from liability and from suit for damages except to the extent that they may be covered by liability insurance.

In detailing the elements of the cause of action of inverse condemnation, the Appellate Court notes:

- The value of the property taken must not be through eminent-domain procedures
- Fault has nothing to do with eminent domain
- Trespass or negligence alone will not result in inverse condemnation

Sherwood argued there was no evidence that it invaded or trespassed the McPhersons' property because there was no evidence it installed the pipes leading to the flooding. It did acknowledge that it likely approved the drainage plans for the subdivision. However, Sherwood cited deposition testimony that such plans did not match the drainage that was ultimately installed and allegedly caused the flooding.

Consequently, the Appellate Court agreed that the McPhersons failed to offer any proof that Sherwood "placed" the pipes. Mere approval of the developer's plans was deemed insufficient evidence of governmental action that could constitute a taking. In addition, even though Sherwood had maintained the drainage system, there was no allegation that improper maintenance caused the McPhersons damages.

The Appellate Court also stated that the McPhersons did not offer proof of intentional conduct which is necessary to establish a taking. There was deemed to be no evidence that Sherwood knew the plans approved were substantially certain to lead to flooding. This was insufficient proof of affirmative government activity causing the McPhersons damages and therefore would not constitute an intentional taking.

A copy of the Opinion can be downloaded [here](#).