still remaining to bring Henshaw to trial. The trial court did not err in overruling Henshaw's motion to discharge based on speedy trial grounds.

CONCLUSION

We conclude that the district court did not err in finding that the time period from the filing of Henshaw's pro se plea in abatement on November 30, 2010, until the court's ruling on the plea in abatement filed on May 19, 2011, was an excludable period of time under the speedy trial statutes. Accordingly, the district court did not err in denying Henshaw's motion for discharge and its judgment is affirmed.

AFFIRMED.

JAMES HENDERSON AND JAMIE HENDERSON, HUSBAND AND WIFE, APPELLANTS, V. CITY OF COLUMBUS, A MUNICIPAL CORPORATION, APPELLEE.

811 N.W.2d 699

Filed April 3, 2012. No. A-11-060.

1. **Political Subdivisions Tort Claims Act: Appeal and Error.** In actions brought pursuant to the Political Subdivisions Tort Claims Act, the findings of the trial court will not be disturbed on appeal unless they are clearly wrong, and when determining the sufficiency of the evidence to sustain the verdict, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can reasonably be deduced from the evidence.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
3. **Negligence: Words and Phrases.** Ordinary negligence is defined as doing something that a reasonably careful person would not do under similar circumstances, or failing to do something that a reasonably careful person would do under similar circumstances.
4. **Political Subdivisions Tort Claims Act: Negligence.** A negligence action brought under the Political Subdivisions Tort Claims Act has the same elements as a negligence action against an individual.
5. **Negligence: Damages: Proximate Cause.** In order to prevail in a negligence action, there must be a legal duty on the part of the defendant to protect the plaintiff from injury, a failure to discharge that duty, and damage proximately caused by the failure to discharge that duty.

6. **Negligence.** In a negligence case, a defendant's conduct should be examined not in terms of whether there is a duty to perform a specific act, but, rather, whether the conduct satisfied the duty placed upon individuals to exercise such degree of care as would be exercised by a reasonable person under the circumstances.
7. ____. Foreseeable risk is an element in the determination of negligence, not legal duty.
8. ____. In order to determine whether appropriate care was exercised, the fact finder must assess the foreseeable risk at the time of the defendant's alleged negligence.
9. **Governmental Subdivisions: Property: Words and Phrases.** Inverse condemnation is shorthand for a governmental taking of or damage to a landowner's property without the benefit of condemnation proceedings.
10. **Constitutional Law: Actions: Governmental Subdivisions: Property: Damages.** The right of a landowner to seek damages from the government in the form of an inverse condemnation claim derives from article I, § 21, of the Nebraska Constitution, which provides: "The property of no person shall be taken or damaged for public use without just compensation therefor."
11. **Constitutional Law: Eminent Domain.** Nebraska's constitutional right to just compensation includes compensation for damages occasioned in the exercise of eminent domain and, therefore, is broader than the federal right, which is limited only to compensation for a taking.
12. **Constitutional Law: Eminent Domain: Damages: Words and Phrases.** The words "or damaged" in Neb. Const. art. I, § 21, include all actual damages resulting from the exercise of the right of eminent domain which diminish the market value of private property.
13. **Governmental Subdivisions: Property: Proximate Cause: Words and Phrases.** In an inverse condemnation action, the proximate cause of an injury is that which, in a natural and continuous sequence, without any efficient intervening cause, produces the injury, and without which the injury would not have occurred.
14. **Proximate Cause: Proof.** When multiple causes act to produce a single injury, any one of those acts can still qualify as a proximate cause of that harm so long as it was a substantial factor in bringing about the injury.
15. **Constitutional Law: Actions: Governmental Subdivisions: Property: Proof.** In an action based on the constitutional provision that no person's property shall be taken or damaged for public use without just compensation, proof of negligence or commission of a wrongful act is not necessary to recovery by a plaintiff.
16. **Governmental Subdivisions: Property: Negligence.** Negligence is not part of the analytical calculus in an inverse condemnation claim.
17. **Appeal and Error.** A case is not authority for any point not necessary to be passed on to decide it or not specifically raised as an issue addressed by the court.
18. **Governmental Subdivisions: Property: Proximate Cause: Proof.** The element of proximate causation for inverse condemnation is established if the plaintiff can prove a substantial cause-and-effect relationship excluding the probability that other forces alone produced the injury.
19. **Governmental Subdivisions: Property: Proximate Cause.** In an inverse condemnation case, even where an independent force contributes to the injury, a

public improvement remains a substantial concurrent cause if the injury occurred in substantial part because the improvement failed to function as it was intended.

20. **Constitutional Law: Governmental Subdivisions: Property.** The aim of the Takings Clause of the Fifth Amendment to the U.S. Constitution is to prevent the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

Appeal from the District Court for Platte County: ROBERT R. STEINKE, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

George H. Moyer, of Moyer & Moyer, for appellants.

Erik C. Klutman and Mark Sipple, of Sipple, Hansen, Emerson, Schumacher & Klutman, for appellee.

Renee Eveland, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for amici curiae Marlin G. Delimont et al.

IRWIN, SIEVERS, and MOORE, Judges.

SIEVERS, Judge.

INTRODUCTION

This appeal stems from an action for property damage which occurred on July 9, 2004, due to raw sewage flooding the home of James Henderson and Jamie Henderson and the homes of 15 other Columbus property owners who assigned to the Hendersons their rights to sue for damages. The Hendersons sued the City of Columbus, claiming that the flooding and consequent damage were caused by the malfunction of the city-run sanitary sewage disposal system. In their complaint, the Hendersons asserted as theories of recovery negligence, inverse condemnation, nuisance, and trespass. After a bifurcated bench trial in the district court for Platte County on the sole issue of liability, the court found in favor of the City of Columbus and dismissed the Hendersons' complaint with prejudice. On appeal, the Hendersons allege that the district court's judgment is contrary to the law and the evidence.

FACTUAL BACKGROUND

Because this dispute deals with the alleged breakdown of the sanitary sewer system for the City of Columbus (hereinafter

the City), a basic understanding of that system is helpful at the outset. The City's sanitary sewer system utilizes a gravity flow system whereby sewage is projected underground toward its ultimate destination, the City's wastewater treatment facility, through angled pipelines via the force of gravity. There are 19 "lift stations" positioned throughout the City which sewage flows into via the pipelines. When sewage rises to a certain predetermined level within a lift station, a switch is automatically tripped to start an electronic pump that moves the sewage to a higher elevation through a "force main," which is essentially a pipe under pressure. The sewage is then discharged back into the gravity flow system, where the cycle is repeated as the sewage makes its way to the wastewater treatment facility. This gravity flow and lift station system is necessitated by the fact that terrain where Columbus is located is essentially flat.

The City's lift stations typically have two pumps that are automatically alternated in order to equalize wear. Normally only one pump, the "lead pump," is activated at a time. However, in the event the volume of sewage within the lift station rises to a second predetermined point, the second, "lag," pump is automatically activated in order to manage the greater volume of sewage. With both pumps running, a total of 250 gallons of sewage per minute are pumped downstream, compared to 175 gallons per minute with only one pump running.

By way of directional orientation, the Hendersons' residence is located just off the corner of 26th Street and 26th Avenue in Columbus. Twenty-Sixth Street runs east to west, and 26th Avenue stretches north to south. Approximately three blocks north of the Hendersons' home, via 26th Avenue, is the 26th Avenue lift station, which is approximately 20 feet deep and 8 feet in diameter. The wastewater systems of the houses in the vicinity of the 26th Avenue lift station all feed into one main, called the 26th Avenue trunkline. With the exception of the homes of assignors Harvey and Shirdelle Mueller, Allen and Christie Stubbert, and Bill and Heather Elton, the homes of all of the assignors in this case are connected to the 26th Avenue trunkline.

Sewage enters the 26th Avenue lift station from a 12-inch-diameter gravity flow pipeline from the north. Within the lift station, sewage is then pumped to a higher elevation and pushed south through a 6-inch-diameter force main. After traveling a half block, sewage is forced into manhole 7, which is located at the intersection of 30th Street and 26th Avenue. Sewage also entered manhole 7 from the west through the residential gravity flow system. Manhole 7 is about 3.75 feet deep and 3 feet in diameter. Sewage is then forced out of manhole 7 to the south through a 6-inch-diameter force main. Although the system was modified in 2005, in 2004, at the corner of 28th Street and 26th Avenue, the 6-inch force main connected to an 8-inch-diameter pipeline and continued to flow to the south through the City's gravity flow system.

We note that in addition to the sanitary sewer system, the City maintains and operates a storm sewer system. These two systems are entirely separate. Nevertheless, the testimony was that it is impossible to avoid inflow of surface water or infiltration of ground water into the sanitary sewer system during and after a rainstorm. Inflow of surface water occurs immediately during a storm, and once the storm is over, it quickly dissipates. Infiltration is typically due to ground water's seeping into the pipes over a longer period of time after a major rainfall event. There was testimony that it is possible for ground water to enter the sanitary sewer system through pipe joints, in places where roots have forced their way into the pipes, through cracks in the pipes, or through leaking manholes.

A heavy rainstorm hit Columbus on the morning of July 9, 2004. The record reveals that the downpour began at approximately 2 a.m., with the rainfall at its heaviest between 2 and 3 a.m. The storm ceased altogether by 4:30 or 5 a.m. There was competing evidence offered on the total amount of precipitation from the storm. The Loup River Public Power District reported 2.5 inches, the Columbus Municipal Airport reported 3.09 inches, and the Columbus sanitary sewer system headquarters reported 4.17 inches.

At 6:15 a.m. on July 9, 2004, James Henderson went to his basement before work and noticed water "with mixtures of actual waste" flooding several inches above the floor and

an "overwhelming" smell of raw sewage. His testimony was that the sewage appeared to be coming out of his basement floor drain, which was connected to a residential lateral that hooked into the City's sanitary sewer system. The Hendersons' home is located three blocks downstream from the 26th Avenue lift station.

PROCEDURAL HISTORY

The Hendersons filed an amended complaint against the City on August 13, 2008. In their first cause of action, they claim that on July 9, 2004, the City's sanitary sewer system malfunctioned, causing raw, untreated sewage to back up into the pipes and conduits that were carrying sewage away from their home into the City's sanitary sewage system, resulting in flooding of their home and damages. The Hendersons assert negligence, nuisance, trespass, and inverse condemnation theories of recovery. In their 2d through 16th causes of action, the Hendersons allege that a total of 15 other households suffered similar property damage on July 9, 2004, and that all of the other property owners properly assigned their rights to sue the City for damages to the Hendersons. At trial, the parties stipulated that the Hendersons and the 15 assignors duly complied with the provisions of Nebraska's Political Subdivisions Tort Claims Act by previously filing claims for damages and costs with the City, which claims were denied or not acted upon by the City within 6 months after they were filed.

In its answer, the City denies all of the material allegations in the Hendersons' complaint and sets forth several affirmative defenses. The City alleges that the Hendersons failed to state a claim upon which relief can be granted; that the Hendersons were negligent, or comparatively negligent, to a degree sufficient to bar or reduce their recovery; and that the City is not liable for damages pursuant to Neb. Rev. Stat. § 13-910 (Reissue 2007).

At the bifurcated bench trial on the issue of liability, Charles Sliva was called by both parties to testify. Sliva was the City's utility supervisor, and in that position, he oversaw the operation of the sanitary sewer system. In the early morning of July 9, 2004, Sliva was telephoned by Herman Janssen, a City water

utilities employee since 1991, to respond to a "high alarm" at the 26th Avenue lift station (hereinafter also referenced as "lift 20"). High alarm occurs when the sewage in the lift station exceeds a certain predetermined level, alerting the City that action is needed in order to avoid an overflow.

Sliva testified that he had a service vehicle at his home, so he drove directly to lift 20 after receiving the call from Janssen. He testified that he was unable to take his normal route north up 26th Avenue due to water flooding the road, so he took 23d Avenue instead. He testified that water was curb deep by the time he got to the intersection of 17th Street and 23d Avenue. When he eventually rounded the corner onto 26th Avenue, water was up to the rocker panels on his four-wheel-drive pickup truck. At that point, Sliva was three blocks south of the Hendersons' home.

When Sliva arrived at lift 20, the alarm was sounding, the emergency light was on, and the circuit breakers were "kicked out in the off position." Sliva testified that he reset the circuit breakers, got both pumps going to handle the high volume of sewage in the lift station, tested the "amp loads" to make sure the pumps were properly pumping, and made sure there was no debris in the pumps. At that point, both pumps together were forcing 250 gallons of sewage per minute down the 6-inch force main to the south. The sewage discharged into a manhole one-half block south of lift 20, after which it continued south through the force main. Sliva's testimony was that once he reactivated the power, the pumps at the lift station were working properly and the amp loads were correct. Sliva testified that he checked the manholes upstream from lift 20 to see if there were any backup issues and that he did not find any. Sliva testified that he did not check to see if the manholes downstream from lift 20 were backed up because he feared removing the lids from the manholes would cause floodwater from the rainstorm to invade the sanitary sewer system.

Sliva testified that a computer records activity, such as when a lift system fails, "lock[s]" that data in a "control printout." The court received into evidence, at trial, a control printout covering July 8 through 10, 2004. The control printout shows that lift 20 was on high alarm at 4:05 a.m. on July 9, 2004. At

4:05 a.m., 4:17 a.m., and 4:22 a.m., also on July 9, the control printout reads "POWER.FAIL" for lift 20. The control printout reflects that the power came back on at lift 20 at 5:11 a.m., at which time it was still on high alarm.

It is not completely clear what caused the power outage at lift 20 in the early morning of July 9, 2004, but the testimony was that lightning from the heavy rainstorm was likely the cause. Sliva testified that severe lightning is bad for lift station pumps because it causes power interruptions where the power flashes on and off. He testified that lightning will cause a circuit breaker switch to "throw" in order to prevent damage to the electric motor or to the other electric components in the lift station.

The next day, July 10, 2004, Sliva was called out at 3 a.m. for another power outage at the 26th Avenue lift station. Apparently, the power went out because the pumps' impellers were clogged with large rags, which caused the circuit breakers to switch off. Sliva activated both pumps when he turned the power back on, and again, the sewerline was overloaded, i.e., more water was forced through the sewerline than the system could handle. As a result, two homeowners who reported backups the day before called in and complained of backups again.

Thereafter, Sliva conducted an investigation into the potential causes of the flooding that occurred on July 9 and 10, 2004, using smoke testing. Smoke testing is an operation where smoke is forced into the sewer system by a high-flow fan. Smoke rises to the surface in the event cracks or breaks are present in the pipeline. The "work area" identified in the list of Sliva's findings received by the trial court is from 33d Avenue to 26th Avenue and from 23d Street to 38th Street. Sliva found a cracked pipeline on 30th Street west of 26th Avenue, a manhole "leaking under sidewalk" at an unidentified location, a manhole "seeping" at 35th Street and 26th Avenue, five other manholes leaking at their rings, and a cleanout cap left off by a City contractor, all of which were the City's responsibility according to the testimony of Sliva's supervisor, Charles Thomerson. Sliva also discovered an apartment complex's surface water drains hooked directly

to the sanitary sewer system, one sump pump illegally hooked to a resident's sewer near 30th Street and 31st Avenue, and one instance of a broken or missing residential cleanout cap in the work area. The testimony was that the City would not have been responsible for those latter three items. In any event, Sliva testified that none of the problems identified in his investigation would have caused the sewage backups currently at issue.

Sliva also testified regarding the City's routine system of sewer cleaning and maintenance. He testified that the City's goal is to clean and inspect the entire sanitary sewer system once every 2 years. The City uses a high-velocity sewer jet and a closed-circuit television inspection camera, which is pulled through the sewerlines to check for any deficiencies in the pipes, such as cracks or breaks. The City began its routine maintenance of the area surrounding the 26th Avenue lift station on January 1, 2003, and such was completed by July 1.

The Hendersons' expert, Richard Walsh, is a retired professional engineer with a master's degree in sanitary engineering. He was a general civil engineer with a private firm in Columbus for about 10 years, after which he started his own firm. Walsh consulted for the City in the past with respect to the sanitary sewer system. In doing so, he visited all of the City's water and wastewater facilities and all of the lift stations. He installed the first automatic alarm system on the sewage lift stations and did a hydraulic analysis for the installation of a replacement sewer system for the City. Thereafter, he consulted for more than 10 years at another private firm that develops power plants.

Walsh testified that in formulating his opinion, he reviewed a number of depositions that are not in the record, as well as a computer-generated 76-page document prepared by the City's expert, James Condon, called a HYDRA study. A HYDRA study is a commercially available computer program that does hydraulic modeling, in this case of the City's sanitary sewer system, in order to mathematically determine what happens under a specific set of circumstances. The data entered into the HYDRA study includes the condition of the sewerline, the sewer size, the elevations, and also the number of

contributing households. The results of this study will be discussed momentarily.

Walsh opined that to a reasonable degree of scientific certainty, the sewage backups could have been avoided if Sliva had checked downstream to see the condition of the manholes before activating both pumps at the 26th Avenue lift station. Walsh testified that the effect of turning on those two high-volume pumps was to "surcharge," or overload, the sanitary sewer system, forcing raw sewage into the basements of residents' homes. He explained that the gravity flow sewer system was put under pressure by the high volume of water that was being pushed down the pipeline. He testified, "The pressure rose above the capacity of the gravity sewer system and it became, in essence, a force main that [sic] water sought the lowest point it could to escape the system, which, unfortunately, was . . . several basements." Walsh testified that he did not have any complaints with the City's cleaning and maintenance program for the sanitary sewer system, with the City's warning system to advise when lift stations are about to overflow, or with the manner in which the City maintains the sanitary sewer system.

Walsh testified that the sewage backups could have been prevented if Sliva had not activated both pumps simultaneously at the lift station. Walsh testified, "Probably if [Sliva] had only turned on one pump the backup would not have occurred." He testified that, alternatively, the City could have pumped sewage into an auxiliary tank truck or into the storm sewer system. His testimony was that none of the avenues for surface water invasion of the sanitary sewer system discovered by Sliva and identified in the list of his findings, even in the aggregate, would have been significant enough to fill the sanitary sewer with the high volume of rainwater that likely invaded the system on July 9, 2004.

The Hendersons' counsel stipulated to the expert designation of the City's engineering expert, Condon. Condon testified that in forming his opinion, he relied on personal field observations, flow rates, pipe sizes, elevations, pump lengths, pump capacities, weather data, and some affidavits not in evidence. He also relied on the results of his HYDRA study, which was marked

as an exhibit and offered into evidence at trial. The HYDRA study was not received into evidence, however, due to the great deal of information contained in the study but not testified to by Condon. The district judge stated, "I won't receive the report, but I have heard the testimony. It is in the record and I can consider and weigh it as I see accordingly."

With respect to the HYDRA study, Condon testified that the computer program is unable to factor in what happened outside the sewer system. For instance, it does not show the impact of any rainwater that may have invaded the sanitary sewer system. Condon testified that the HYDRA study essentially just shows whether there is adequate capacity in the pipeline to handle the sewage flow under given circumstances. He testified that the HYDRA model is very conservative. It uses "worst case diurnal flow patterns"—i.e., peak flow periods of sewer usage such as early morning and late afternoon, as well as conservative numbers in terms of normal household contributions—to predict flow patterns. The result of the HYRDA study was that there was inadequate capacity at manhole 7 to carry away what was being pumped into it from lift 20 and what was entering that manhole from connecting mains to the west. This result was without consideration of the rainwater from the storm of July 9, 2004. The result of the HYDRA study was also that the capacity of the sanitary sewer system from manhole 7 to manhole 16 was exceeded. Manhole 16 is located at the corner of 26th Street and 26th Avenue, one block north of the Hendersons' residence. Condon testified that such could have been a factor contributing to the backups.

Condon testified that the HYRDA modeling is unable to determine additional contributing factors with respect to the backups. However, he offered his opinion regarding such. He testified:

> [I]f you had storm water enter a house and it went into a floor drain, any kind of flooding on a lawn or something that would get into a lateral line that would be broke[n] and separated, any kind of potential entry to the sanitary system through manholes, through cleanouts, through additional sumps. Some of the information that

> was identified in the subsequent investigations. All of those contribute. Certainly, you know, manholes being flooded is a major potential contributor.

When asked for his opinion as to the cause of the sewage backups on July 9, 2004, Condon testified:

> My opinion is that excess water may have gotten into the system because of the flooding and that [the activation of] those [two] pumps [at the 26th Avenue lift station was] not a primary cause of any major backups. It was clear from the data and information that I got that those pumps work routinely together, pumping two at a time, and do not cause backups. [They h]ave — had a history of a — multiyear history, even decades of history, where they had not caused those kinds of problems.
>
> So, you know, my feeling is that the events of that night, that rainstorm, caused problems either through entering the sanitary sewer system or entering private storm water — entering private homes through possibly broken laterals or things like that.

Condon's further testimony was that the activation of both pumps was "[a]bsolutely not" the sole cause of the sewage backups because "they have shown, over a long period of time, that they function quite well without ever causing backups so there ha[ve] to be external circumstances beyond the[ir] pumping that would cause that to happen."

With respect to the power outage at lift 20, which, as stated above, was likely due to lightning, Condon testified that the City did not have lightning protection. Specifically, there was no lightning arrestor system on the lift station. Condon testified that a lightning arrestor system is similar to a lightning rod that directs lightning to the ground to prevent it from striking wires and causing an electrical problem. Condon testified that in addition to a lightning arrestor, the City also could have used an alternate power source, meaning a second available power feed from a different supplier. Condon further testified that the City had a backup generator it could have utilized in order to avoid a power outage.

Thomerson, the City's public works environmental services director and Sliva's supervisor, was called as a witness for the

City. He was asked on direct examination about the procedure for checking manholes downstream in the event of a rainstorm where water is running all over the street. He testified, "[I]f there is water and the manhole's underwater, you don't want to check it at that time, because you'll be opening up a 24-inch hole for more water [to enter the sewage system]." Thomerson testified that in a high alarm situation at a lift station, both pumps must be activated because otherwise, the upstream gravity flow system would become surcharged. Stated slightly differently, according to Thomerson, had Sliva utilized only one pump at the 26th Avenue lift station as opposed to two, it is likely there would have been flooding to the north of that lift station. His testimony was that lift station high alarms occur "a couple times a year" and that no downstream backup problems had ever occurred due to both pumps' being activated. Thomerson testified that pumping sewage into the storm sewer system, as Walsh suggested as a viable alternative to activating both pumps, had never been done during a storm because, if the storm system were full, sewage would end up on the streets and sidewalks and that would be a public health concern.

Conversely, Janssen testified that if water or sewage was too high in the lift station to handle, the City usually put a gas-powered pump in the lift station and pumped it into the storm sewer system. His testimony was that the City would not do so, however, if the storm sewer system were already full of storm water. Janssen testified that on July 9, 2004, after he attended to the first lift station high alarm in the City, he met up with Sliva at lift 20. He testified that at such time, the storm sewer system north of lift 20 did not appear to be full, though south of lift 20, it did appear to be full.

Merlin Lindahl, who was retired at the time of trial, had been the City's engineer in July 2004. He was responsible for supervising the storm sewer system. Lindahl, who was called as a witness for the Hendersons, testified that in 2005, he was asked by the City to design some changes to the sanitary sewer system. The City's counsel objected on the ground of remedial measures, and the Hendersons' counsel replied that the Hendersons would limit the offer of Lindahl's testimony

exclusively to showing feasibility and proximate cause. The Hendersons' counsel called the court's attention to a statement that the City's counsel made in his opening statement that the backups were caused by an act of God, namely the heavy rainstorm on the morning of July 9, 2004, and that such causation is shown by the fact that similar backups have not happened before or after that event. The court overruled the City's objection, and Lindahl's examination in this regard continued. We note that the admission of this testimony is not an assigned error.

Lindahl testified that he was asked to extend the force main connected to the 26th Avenue lift station for an additional block so that it would discharge into a 12-inch-diameter pipeline, as opposed to the 8-inch-diameter pipeline to which it was connected on July 9, 2004. He testified that the project was large enough that it was bid out to a private contractor, and that it was completed sometime in 2005. There was testimony from Lindahl and Sliva that extending the force main south of the 26th Avenue lift station was due to residential growth. Sliva was asked during redirect examination why the City would eliminate two lift stations if there was a growing population in the area surrounding those lift stations; counsel for the Hendersons stated that such seemed counterintuitive. Sliva's response was that the 26th Avenue lift station was designed with the ability to handle a much greater capacity. Sliva testified, "With the growth potential in that area, it made [us] able to take those [two] lift stations [upstream] offline to gravity flow them to [the] 26th [Avenue lift station]."

On the other hand, Lindahl testified that the reason the City gave him for wanting to move the force main was that a house had been affected by a sewer backup which the City thought perhaps had been caused by the existing force main's dumping into an 8-inch line, so the City wanted to connect it to a 12-inch line instead. When Lindahl was asked on cross-examination whether he remembered whether any similar major backups of sewage had occurred prior to July 9, 2004, he stated that he recalled one in 1983. The Hendersons' counsel objected to further testimony from Lindahl with respect to

this 1983 event on the ground of remoteness, and the City's counsel withdrew further questioning.

After the close of evidence, the trial court set up a briefing schedule and the matter was taken under advisement. In accordance with the briefing schedule, all briefs were received by October 7, 2010. On October 14, the case came on for further hearing on the Hendersons' motion for leave to withdraw rest filed September 13. The purpose of that motion was to offer an additional exhibit into the record. Although the court ultimately received the exhibit, it does not appear in the appellate record presently before us.

On November 10, 2010, the district court entered its memorandum opinion and order. The court rejected all theories of recovery set forth by the Hendersons and found for the City. The court dismissed the Hendersons' operative complaint with prejudice and taxed the costs of the litigation, $208.82, to the Hendersons. The court's specific findings will be discussed as needed in the context of the analysis section below.

ASSIGNMENTS OF ERROR

The essence of the Hendersons' seven assignments of error can be boiled down to two: that the trial court erred in finding for the City with respect to the claims of (1) negligence and (2) inverse condemnation.

STANDARD OF REVIEW

[1] In actions brought pursuant to the Political Subdivisions Tort Claims Act, the findings of the trial court will not be disturbed on appeal unless they are clearly wrong, and when determining the sufficiency of the evidence to sustain the verdict, it must be considered in the light most favorable to the successful party. *Desel v. City of Wood River*, 259 Neb. 1040, 614 N.W.2d 313 (2000). Every controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can reasonably be deduced from the evidence. *Id.*

[2] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of

the conclusion reached by the trial court. *Stonacek v. City of Lincoln*, 279 Neb. 869, 782 N.W.2d 900 (2010).

ANALYSIS

NEGLIGENCE

[3-5] The Hendersons allege that the trial court's decision that the City was not negligent in its maintenance and operation of the sanitary sewer system on July 9, 2004, was erroneous. Ordinary negligence is defined as doing something that a reasonably careful person would not do under similar circumstances, or failing to do something that a reasonably careful person would do under similar circumstances. *Desel, supra*. A negligence action brought under the Political Subdivisions Tort Claims Act has the same elements as a negligence action against an individual. *Id*. In order to prevail in a negligence action, there must be a legal duty on the part of the defendant to protect the plaintiff from injury, a failure to discharge that duty, and damage proximately caused by the failure to discharge that duty. *Id*.

[6-8] In a negligence case, a defendant's conduct should be examined not in terms of whether there is a duty to perform a specific act, but, rather, whether the conduct satisfied the duty placed upon individuals to exercise such degree of care as would be exercised by a reasonable person under the circumstances. See *A.W. v. Lancaster Cty. Sch. Dist. 0001*, 280 Neb. 205, 784 N.W.2d 907 (2010). Foreseeable risk is an element in the determination of negligence, not legal duty. *Id*. In order to determine whether appropriate care was exercised, the fact finder must assess the foreseeable risk at the time of the defendant's alleged negligence. *Id*. Courts should leave determinations of the extent of foreseeable risk to the trier of fact unless no reasonable person could differ on the matter. *Id*.

In the instant case, the City had a duty to maintain and operate its sanitary sewage collection and disposal system in a reasonable manner, i.e., without negligence. The issue, with respect to the Hendersons' theory of negligence, was whether the City breached that duty on the morning of July 9, 2004, by

failing to exercise the appropriate degree of care in light of the foreseeable risk then existing.

In its order, the district court found that the City did not breach its duty to the Hendersons and their assignors on July 9, 2004, because downstream flooding was not a foreseeable risk when Sliva activated both pumps at the 26th Avenue lift station. Relying on the testimony of Thomerson and Janssen, the court found that lift station high alarms had never caused the City concern for downstream backups, only upstream backups. It found that Sliva did not check the downstream manholes due to the potential for surface rainwater's invading the sanitary sewer system if he were to open the manholes' lids to check their levels. It also found that Sliva's 29 years of experience dictated that he needed to react quickly and restart both pumps in order to eliminate the potential for upstream backups, when peak sewage usage, given the time of day, was about to begin.

Accordingly, the district court found that Sliva exercised such degree of care as would be exercised by a reasonable person under the circumstances then existing when he responded to the high alarm at the 26th Avenue lift station. And, as stated above, because the district court found that downstream flooding was not a foreseeable risk, it determined that the City did not breach its duty to the Hendersons and their assignors with respect to the design, construction, maintenance, and operation of its sewage collection and disposal system and that the City was thus not negligent.

On appeal, the Hendersons argue that the district court improperly focused its negligence analysis on the knowledge of individuals such as Sliva, when it should have focused on what the City knew or should have known, namely, that manholes 7 through 16 did not have the capacity to handle the sewage being forced into them from the 26th Avenue lift station. The evidence was that this particular lift station was 20 feet deep and 8 feet in diameter, while manhole 7, into which the 26th Avenue lift station discharged through a 6-inch force main, was 3.75 feet deep and 3 feet in diameter. Thus, the 26th Avenue lift station holds 1,004.8 cubic feet of water, whereas

manhole 7 holds only 26.49 cubic feet of water—a cubic foot of water equals 7.48 gallons of water. When both lift station pumps are turned on, they are pushing 250 gallons of water per minute into manhole 7, meaning that 250 gallons of water are being pushed through a 6-inch force main per minute into a vessel that holds less than 199 gallons.

Condon's HYDRA study, which provided data suggesting the inadequate capacity of the sewage system in the area involved, attempted to replicate the conditions in the sanitary sewer system on the morning of July 9, 2004. However, Condon was unable to determine how much rainwater had entered the sewage system. So, he entered data representing normal household flows of sewage at peak usage time—though his testimony was that the July 9 backups actually occurred prior to peak usage time—so as to best simulate what happened on that morning. Condon's HYDRA study showed that the sanitary sewage system south of the 26th Avenue lift station, specifically from manholes 7 through 16, was incapable of handling the volume of sewage, thus causing sewage to be forced outside the pipelines. He testified that this did not necessarily translate into sewage backing up into residents' basements. And, neither Walsh nor Condon testified that the inadequate capacity of the manholes and pipes south of the 26th Avenue lift station, as revealed by the HYDRA study, was the cause of the backups at issue.

After weighing the evidence in the light most favorable to the City, as our standard of review dictates, we cannot say that the district court's factual findings with regard to the City's alleged negligence are clearly erroneous. Both experts testified that it was probable that rainwater invaded the sanitary sewer system downstream of the 26th Avenue lift station. The trial court accepted this testimony and found in its order that "[w]hen . . . Sliva activated both lift station pumps, it caused the already overcharged downstream system to backup and enter the laterals and basements of some homes connected to the City's sewer system." The inadequate capacity issue uncovered by the HYRDA study did not take into consideration the entry of rainwater into the system and, in any event,

according to the evidence, was at most a factor contributing, to an unknown and unspecific degree, to the residential backups. Thus, after application of our standard of review to the trial court's factual findings, we must affirm the trial court's finding of no merit to the Hendersons' theory of recovery based on negligence.

Inverse Condemnation

[9-12] Additionally, the Hendersons allege that the trial court departed from the law in its analysis of proximate causation in the context of their inverse condemnation claim. Inverse condemnation is shorthand for a governmental taking of or damage to a landowner's property without the benefit of condemnation proceedings. See *Strom v. City of Oakland*, 255 Neb. 210, 583 N.W.2d 311 (1998). The right of a landowner to seek damages from the government in the form of an inverse condemnation claim derives from article I, § 21, of the Nebraska Constitution, which provides: "The property of no person shall be taken or damaged for public use without just compensation therefor." Nebraska's constitutional right to just compensation includes compensation for damages occasioned in the exercise of eminent domain and, therefore, is broader than the federal right, which is limited only to compensation for a taking. *Strom, supra*. The words "or damaged" in Neb. Const. art. I, § 21, include all actual damages resulting from the exercise of the right of eminent domain which diminish the market value of private property. *Strom, supra*.

The trial court decided the Hendersons' inverse condemnation claim against them on the ground that they failed to meet their burden to prove that the "City's actions or inactions were the proximate cause of their damages." Specifically, the court found that the Hendersons failed to prove what caused the sanitary sewer system to be overloaded with floodwaters. On appeal, the Hendersons allege that the trial court's application of the law was incorrect with respect to proximate causation. According to our standard of review, we evaluate matters of law independently of the trial court while giving the prevailing party, in this case the City, the benefit of every reasonable

inference deducible from the evidence with respect to the trial court's factual findings.

[13,14] In an inverse condemnation action, the proximate cause of an injury is that which, in a natural and continuous sequence, without any efficient intervening cause, produces the injury, and without which the injury would not have occurred. *Steuben v. City of Lincoln*, 249 Neb. 270, 543 N.W.2d 161 (1996). When multiple causes act to produce a single injury, any one of those acts can still qualify as a proximate cause of that harm so long as it was a substantial factor in bringing about the injury. *Amanda C. v. Case*, 275 Neb. 757, 749 N.W.2d 429 (2008).

Because we think the exact wording of the trial court's order is essential in analyzing this assignment of error, we quote somewhat extensively from that section of the order:

> As noted in the discussion [of negligence] above, both the [Hendersons'] and the City's respective experts testified it was probable that rainwater from the intense storm somehow invaded the sanitary sewer system and overloaded it downstream of the 26th Avenue lift station. *When both pumps at the 26th Avenue lift station were reactivated to address the high alarm, it caused the already overloaded downstream system to back up.* Again, although evidence was offered as to possible causes for surface floodwaters entering the sanitary sewer system downstream, no definitive cause was discovered. There is no evidence to support a finding that the City was responsible through its actions or inactions for the entry of floodwaters into the sanitary sewer system. And there further exists no evidence showing that the [Hendersons] or any of their assignors have suffered property damage as a result of reoccurring, permanent, or chronic sewer backups, or that the damage suffered was intentionally caused by the City.
>
> Given the entirety of the record and the circumstances surrounding this case, the Court cannot conclude the [Hendersons] have met their burden to prove the City's actions or inactions were the proximate cause of their

> damages. That said, the Court finds for the City and against the [Hendersons] with respect to the [Hendersons'] inverse condemnation theory of recovery.

(Emphasis supplied.)

In the above-quoted portion of the trial court's order, the court clearly made a factual finding that Sliva's activation of the two pumps after the high alarms and subsequent power outage in the early morning of July 9, 2004, "caused the already overloaded downstream system to back up" into homeowners' basements. We agree with that finding, which the Hendersons urge is dispositive of the issue of causation on their theory of inverse condemnation. The trial court also found, however, that the evidence was inconclusive as to what caused the rainwater to invade the sanitary sewer system in the first place. And on that ground, the court found that there was a failure of proof of proximate causation regarding inverse condemnation. The Hendersons contend that, on these facts, the cause of the storm waters' invading the downstream sanitary sewer system should have no bearing on proximate causation in the context of inverse condemnation.

In the inverse condemnation section of its order, the trial court cited only to *Steuben v. City of Lincoln*, 249 Neb. 270, 543 N.W.2d 161 (1996). That case involved a "2-year rainfall," which the court described as a rainstorm where there is a 50-percent chance the volume of rain that fell will either occur or be exceeded every year. *Id.* at 272, 543 N.W.2d at 163. The court's opinion does not specify the amount of rainfall involved in a 2-year rainfall. However, logic dictates that a 2-year rainfall would involve considerably less rainfall than would occur, for example, in a 100-year storm. In any event, in *Steuben*, during a 2-year storm in the city of Lincoln, surface water draining behind the property of Charles and Rebecca Steuben backed up against an adjacent railroad fill, reaching a depth of almost 8 feet. The water flowed onto the Steubens' property, eventually reaching a depth of approximately 6 feet against their house. The water pressure shattered the basement windows and door of their home, and water entered the basement, causing damages in excess of $30,000. On the date of

the flood, it was discovered that one of the culverts through the railroad bed fill was clogged with debris.

The Steubens alleged that the city of Lincoln's actions and inactions constituted a taking of their property under article I, § 21, of the Nebraska Constitution. Specifically, the Steubens argued that the damage to their property was the result of the city's increasing surface water drainage and runoff, by developing residential areas and irrigating a golf course, which was adjacent to the Steubens' property, without modifying the existing storm water drainage systems to handle the increased drainage. The trial court found in favor of the city of Lincoln, and the Steubens appealed.

On appeal, the Nebraska Supreme Court found that the high water level on the Steubens' property was indeed caused by the lack of capacity in the culverts under the railroad fill. However, the court found that the culverts at issue were not owned, installed, or maintained by the city and were not within Lincoln's city limits. The opinion recites that as a result, in order to make their inverse condemnation claim actionable, the Steubens had the burden of proving that the city's approval, development, and maintenance of the plats, park, and golf course, all of which surrounded their property, were the proximate cause of their damages. The opinion recites:

> In the instant case, no evidence was adduced that the City changed or altered a natural waterway, constructed a dam or embankment, or intentionally directed water onto the Steubens' property. While the development of the plats and irrigation of the golf course may have increased surface water drainage, the Steubens did not offer any proof of what impact this increased surface water drainage had on the July 25, 1990, flood. There is no evidence to establish the origin of the surface water or to assume the City was the only property owner in the watershed dispelling surface water during the flood. Thus, we hold that the Steubens have failed to prove that the City's actions and inactions were the proximate cause of their damages. As a result, we conclude that the Steubens' property has not been taken by the City for a public purpose.

Steuben v. City of Lincoln, 249 Neb. 270, 273-74, 543 N.W.2d 161, 163-64 (1996).

During oral arguments for the immediate case, counsel for the City asserted that *Steuben* establishes that inverse condemnation requires a wrongful act on the part of the government in order to be actionable—thus necessitating, essentially, a negligence analysis. Counsel asserted that we would be effectively overruling *Steuben* if we were to find otherwise with regard to this case. Counsel pointed to the following dicta from *Steuben* in support of this argument: "In the instant case, no evidence was adduced that the City changed or altered a natural waterway, constructed a dam or embankment, or intentionally directed water onto the Steubens' property." 249 Neb. at 273-74, 543 N.W.2d at 163.

However, a careful reading of *Steuben* reveals that the Supreme Court engaged in the analysis emphasized by counsel only because the culverts that caused flooding on the Steubens' property were not owned by the city. Thus, the court implicitly found that the only way for the city to have been the proximate cause of the flooding was if its approval, development, and maintenance of the city-approved plats and the city-owned park and golf course immediately surrounding the Steubens' property proximately caused surface water to drain onto their land. The court found that the Steubens were unable to attribute drainage of surface water to the city of Lincoln, and thus, it affirmed the trial court's ruling.

The present case is clearly distinguishable from *Steuben*. There is no question that the sanitary sewer system in Columbus is owned, installed, and maintained by the City, whereas the clogged culvert in *Steuben* was owned by the railroad, not the city of Lincoln. Moreover, the sewage backups in this case, according to the trial court's factual findings, were caused when a City employee turned on both pumps at the 26th Avenue lift station on the morning of July 9, 2004, at a time when the system was already overloaded with sewage and rainwater.

[15-17] The Supreme Court has explicitly stated that in an action based on the constitutional provision that no person's property shall be taken or damaged for public use without just

compensation, proof of negligence or commission of a wrongful act is not necessary to recovery by a plaintiff. See *Quest v. East Omaha Drainage Dist.*, 155 Neb. 538, 52 N.W.2d 417 (1952), citing *Wagner v. Loup River Public Power District*, 150 Neb. 7, 33 N.W.2d 300 (1948). See, also, *Baum v. County of Scotts Bluff*, 169 Neb. 816, 822, 101 N.W.2d 455, 461 (1960) ("[n]egligence is not a necessary element to be proved in maintaining an action for [damages for inverse condemnation]"). We further emphasize that even if the dicta in *Steuben v. City of Lincoln*, 249 Neb. 270, 543 N.W.2d 161 (1996), can be read to suggest otherwise, such is not determinative in this case, in the face of the express holding in *Quest, supra.* There, the court clearly held that negligence is not part of the analytical calculus in an inverse condemnation claim. See *Blue Cross and Blue Shield v. Dailey*, 268 Neb. 733, 687 N.W.2d 689 (2004) (case is not authority for any point not necessary to be passed on to decide it or not specifically raised as issue addressed by court).

The parties do not direct us to a Nebraska inverse condemnation case where sewage backed up into a resident's home, and our research has not uncovered such a case. However, in the amicus brief filed in this case, on behalf of clients whose interest in this case is not disclosed, we have been directed to the factually analogous case *CSAA v. City of Palo Alto*, 138 Cal. App. 4th 474, 41 Cal. Rptr. 3d 503 (2006).

In *City of Palo Alto*, the homeowners' insurer, California State Automobile Association Inter-Insurance Bureau (CSAA), filed an inverse condemnation action as subrogee against the city of Palo Alto, California, for property damage that homeowners David and Suzanne McKenna suffered as a result of a backup of raw sewage into their home. The constitutional provision under which CSAA sued the city of Palo Alto is similar to Neb. Const. art. I, § 21, and provides in pertinent part: "Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner." See Cal. Const. art. I, § 19.

The first backup of raw sewage into the McKennas' home occurred on November 6, 2001. A video inspection on that

same day determined that the cause of the backup was tree root intrusion in the sewer laterals located on the McKennas' property. CSAA authorized the replacement of the existing lateral from the McKennas' home to the sidewalk (which was owned by the McKennas) and from the sidewalk to the main sewerline under the street (which was owned by the city). The replacement of the city's portion of the lateral was completed on November 20.

On December 4, 2001, the McKennas' home was again flooded with raw sewage. A video inspection conducted the next day showed that the lateral pipe replaced by CSAA was clear of debris and in "perfect" condition, but that there were tree roots intruding into the city's joint connecting the McKennas' lateral to the city's main. The video inspection also revealed that there was toilet paper clogging the city's main, that the main was half filled with standing water, and that tree roots were penetrating every 8-foot joint within the main.

Following payment of the McKennas' claims for property damage resulting from the second sewage backup, CSAA filed suit against the city of Palo Alto under theories of inverse condemnation, trespass, nuisance, and negligence. CSAA did not request reimbursement for the payments it made in regard to the November 2001 backup—its claim was only for the December 2001 backup. Both sides waived trial by jury, and the matter was tried to the court.

CSAA provided evidence of three potential causes of sewage backup: (1) tree roots invading the pipes, (2) insufficient slope in the main to carry away the sewage, and (3) the existence of standing water filling one-half of the main, as observed by video inspection the day after the December 2001 backup. The city presented evidence that its maintenance program was to "hydroflush" the sewer main once every 2 years. *CSAA v. City of Palo Alto*, 138 Cal. App. 4th 474, 478, 41 Cal. Rptr. 3d 503, 505 (2006). The sewer main at issue had been flushed 1½ years prior to the November 2001 backup and had been regularly flushed once every 2 years since 1983. The evidence was that the McKennas' home was the only home on their street that experienced sewage overflow in November and

December 2001. There was no evidence of any prior or subsequent sewer backups in the immediate area.

At the conclusion of the trial, the trial court ruled in favor of the city of Palo Alto. In its order, the California trial court found that although the sewage backup was caused by a blockage in the city's sewer main, CSAA failed to prove how or why the blockage in the city's main occurred. CSAA timely appealed, asserting on appeal that the trial court erred in its analysis of inverse condemnation, specifically by requiring it to prove fault.

[18,19] On appeal, the California Court of Appeal for the Sixth District reversed the decision of the trial court and found in favor of CSAA on its claim for damages for inverse condemnation. The court found that the only issue in dispute was proximate causation in the context of inverse condemnation. Citing to *Belair v. Riverside Cty. Flood Cont. Dist.*, 47 Cal. 3d 550, 253 Cal. Rptr. 693, 764 P.2d 1070 (1988), the court stated that the element of proximate causation for inverse condemnation is established if the plaintiff can prove a substantial cause-and-effect relationship excluding the probability that other forces alone produced the injury, and that even where an independent force contributes to the injury, the public improvement remains a substantial concurrent cause if the injury occurred in substantial part because the improvement failed to function as it was intended. The opinion recites:

> While the trial court found that neither tree roots nor inadequate slope caused the sewage backup into the McKennas' home, and that the City had a regular program of maintenance for the sewer, it also specifically found that the blockage occurred in the main owned and operated by the City. How or why the blockage occurred is irrelevant. The purpose of the sanitary sewer is to carry wastewater away from the residence. The City's sanitary sewer failed to carry wastewater away from the McKennas' residence because of a blockage in the City's main, and therefore, failed to function as intended.

CSAA v. City of Palo Alto, 138 Cal. App. 4th at 483, 41 Cal. Rptr. 3d at 509 (emphasis omitted).

In the case before us, the trial court found that the Hendersons failed to prove proximate causation in their inverse condemnation claim because there was inadequate proof of precisely how rainwater invaded the sanitary sewer system south of the 26th Avenue lift station. The main evidence on that point was the testimony of Sliva and Condon. Sliva's postflood investigation uncovered only three issues potentially contributing to the backups which were not the City's responsibility: an apartment complex's surface water drains hooked directly to the sanitary sewer system, one sump pump illegally hooked to a resident's sewer near 30th Street and 31st Avenue, and one instance of a broken or missing residential cleanout cap in the work area. The evidence was that none of these things, even combined, would have caused the system overload.

Additionally, there was testimony from the City's own expert, Condon, that flooded manholes were a "major" potential contributor. Sliva's investigation found leaks at a total of seven manholes in the designated work area around the 26th Avenue lift station. Sliva also discovered a cracked sewage pipeline and a cleanout cap left off by a City contractor. The testimony was that each of those issues was the responsibility of the City. Further, though Condon speculated that additional sump pumps (which are the responsibility of the residents, not the City) hooked directly into the City's sewer main likely contributed to the overload, Sliva's smoke testing located only one such sump pump in the area around lift 20. Condon also testified that the inadequate capacity of manholes 7 through 16, as modeled in his HYDRA study, could have contributed to the surcharge of the sewage system.

In this case, the trial court's finding that the evidence was inconclusive as to the exact cause of the overcharging of the downstream sanitary sewer system prior to the activation of the two pumps at lift 20 was not clearly erroneous. However, on these facts and under the applicable law, we find that how the overload of water and sewage in the sanitary sewer system occurred prior to Sliva's response to the high alarm at lift 20 is not the decisive factor in determining proximate cause in the context of this inverse condemnation claim. Importantly, the trial court's factual finding was that the backup occurred when

Sliva activated both pumps at lift 20, which caused the backup into the homes of the Hendersons and the affected assignors. This factual finding is well supported by the record. Using the California Court of Appeal's language: "The purpose of the sanitary sewer is to carry wastewater away from the residence. The City's sanitary sewer failed to carry wastewater away from the [Hendersons' and their assignors'] residence[s] because of a blockage in the City's main, and therefore, failed to function as intended." See *CSAA v. City of Palo Alto*, 138 Cal. App. 4th 474, 483, 41 Cal. Rptr. 3d 503, 509 (2006) (emphasis omitted). Here, under the trial court's factual finding, once Sliva turned on both pumps, sewage and water were forced into the downstream homes, and thus, the action of the City, through Sliva, has the requisite cause-and-effect relationship as articulated by the California court in *City of Palo Alto, supra.*

We do not intend to suggest that inverse condemnation is effectively a matter of strict liability, and we follow the lead of the California appellate court which made it clear that inverse condemnation is not strict liability. See *id*. Here, there was no indication that the Hendersons or the assignors were the cause of the backups, but the trial court did make a factual finding that satisfies the proper test for causation—"a substantial cause-and-effect relationship," which we adopt from *City of Palo Alto*. That cause-and-effect factual finding was that the backups were caused when both pumps at the 26th Avenue lift station were activated when the system was already full of water and sewage. The trial court's only error is one of law by applying a negligence-based view of causation to its finding of cause-in-fact: Sliva's activation of both pumps.

[20] In these circumstances, it is unfair that the Hendersons and the assignors alone bear this public burden of a malfunction in the City's sanitary sewage system. It is through inverse condemnation that the financial burden of the sewer backups is spread to the public as a whole, i.e., the citizens of Columbus. See, U.S. Const. amend. V; *Eastern Enterprises v. Apfel*, 524 U.S. 498, 118 S. Ct. 2131, 141 L. Ed. 2d 451 (1998) (aim of Takings Clause is to prevent government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by public as whole).

CONCLUSION

For the foregoing reasons, we reverse the portion of the trial court's order dealing with inverse condemnation as it pertains to the Hendersons and to the assignors with residences downstream of the 26th Avenue lift station who suffered sewage backups and flooding. However, the trial court found that the homes of two families among the homeowners, the Muellers and the Eltons, were not connected to the 26th Avenue lift station, and the Hendersons concede that two homeowner families, the Muellers and the Stubberts, are not properly in the lawsuit. After our review of the record and the briefing, it is unclear exactly which of these three homeowner families should be excluded from the damage aspect of the suit. Therefore, upon remand, the trial court should clarify this aspect of the case. We remand the cause for the appropriate proceedings on the damage aspect of all of the proper claims.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

IN RE TRUST OF O'DONNELL.
JUNE O. BEACHLER, APPELLANT, V. DEBORAH A. SANWICK, APPELLEE.

815 N.W.2d 640

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1. **Trusts: Equity: Appeal and Error.** Absent an equity question, an appellate court reviews trust administration matters for error appearing on the record; but where an equity question is presented, appellate review of that issue is de novo on the record.
2. **Equity: Reformation.** A proceeding to reform a written instrument is an equity action.
3. **Appeal and Error.** In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions concerning the matters at issue.
4. **Evidence: Words and Phrases.** Clear and convincing evidence means that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.
5. **Evidence: Proof.** Evidence may be clear and convincing despite the fact that other evidence may contradict it.